

63438-1

63438-1

NO. 63438-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

LYNETTE KATARE,

Respondent,

v.

BRAJESH KATARE,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT
Hon. Mary Roberts

OPENING BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

CARNEY BADLEY SPELLMAN P.S.

Gregory M. Miller, WSBA No. 14459
Dorice A. Eaton, WSBA No. 38897
Attorneys for Appellants

701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

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A CD disk is attached containing a PDF for the full merit briefs from the two prior appeals, No. 53231-6-I and 59061-8-I. Adobe Acrobat 8 was used to create the PDF and each brief has been bookmarked in chronological order for ease in jumping to the first page of each brief. (See attached PDF snapshots demonstrating opening the Bookmarks panel in the navigation pane)

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I. INTRODUCTION.

For the third time, Appellant Brajesh Katare is forced to ask this Court to vacate the trial court's improper new order under RCW 26.09.191(3)(g) which restricts his two children from all international travel with him until they are adults and also requires he relinquish his passport prior to each visitation. The April 6, 2009 "Findings of Fact and Conclusions of Law on Second Remand" ("2nd Remand Order" or "Order", App. A) following the January, 2009 remand hearing kept the restrictions despite the fact the new evidence showed only a lessening of the already inadequate basis for restrictions which existed at the 2003 dissolution and relocation trial; despite the fact there is no finding Brajesh would probably abduct if the restrictions were now lifted after over six years; and despite the fact the trial court failed to vacate its 2003 finding that Brajesh "appears to present no serious threat to abduct the children."

The trial court thus kept the same "ambiguity" in its latest order that has already required *two* reversals and *two* remands. It is time to stop this circular process which frustrates resolution and fidelity to the law.

This Court must vacate the restrictions because there is still an inadequate factual basis to support them. Since it is anticipated Lynette will petition for Supreme Court review to delay the decision and stretch out the process that has already extended six and a half years, the decision should make the vacation immediate, subject only to entry within 60 days of safeguards for international travel of the children which apply equally to each parent. It should further hold that, absent agreement of the parties,

those safeguards must be entered by remanding to a different trial judge.

The Order also states a conclusion tantamount to a finding of an abusive use of conflict by Brajesh even though based on a partial record of Brajesh's and Lynette's *mutual* bickering via email over the past six years, and despite the lack of any need for dispute resolution in the courts or by mediation caused by Brajesh. In fact, the only post-trial dispute resolution resulted in Judge Roberts granting Brajesh the requested relief of allowing "back to back" monthly visits (last three days followed by first three days) because of the cost and time of the travel from Redmond and India to Florida. Lynette had refused this request, forcing Brajesh to go to court. X RP, pp. 96-97.

This bickering reflects why they are divorced. They do not get along. But the Order makes this conclusion only as to Brajesh even though any such negative conclusion applies equally to Lynette on a fair reading of the evidence. Moreover, this conclusion is wholly inconsistent with the trial court's 2003 findings of *no* such abusive conduct by Brajesh (Findings 2.20.4 & 20.20.5 and Parenting Plan ¶¶ 2.2 and 3.11, Apps. C & D respectively), which was sustained over Lynette's cross-appeal in *Katara I*,¹ creating another inconsistency or "ambiguity" which also requires reversal, since those findings were not changed.

The 2nd Remand Order also makes a new fatal error of law in its findings, a mistake that vitiates the factual basis for the conclusion that

¹ *Katara I*, *infra*, 125 Wn. App. at 829 n.15.

there is an unquantified risk of abduction that allows a ban on international travel by the children with their father until they are adults, despite lack of a finding Brajesh is now likely to abduct. The trial court explicitly relied on inadmissible hearsay related by an expert as substantive, corroborating evidence which, six years after trial, supposedly transformed Lynette's accusation in the 2003 trial that Brajesh threatened in 2002 to abduct the children into evidence of a credible threat of abduction, even though it was not before. Order, p. 2, third bullet; CP 153. The flaw is fatal because under long-settled law, such hearsay statements relied on by experts are *per se* inadmissible to establish the facts related (here that Brajesh threatened abduction, which he denied) and can *only* be used to support the *expert's* opinion. *Group Health Co-Op. v. Dep't. of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986).

By stripping away the Order's only basis to find Brajesh made a genuine threat to abduct back in 2002, and recalling that Brajesh has *never* taken or removed the children without permission from Lynette or the court, the case as a whole is revealed for what it is, and for what it must be characterized as: a false accusation case, not a threat to abduct case. As a false accusation case, it should be recognized that the party seeking relief, Lynette, failed to meet her burden to show Brajesh is a likely or probable threat to abduct and overcome the constitutional presumption that, as a fit parent, he will continue to obey the law and the parenting plan and return the children after each visit, as he has continually since 2003 with over 41 transcontinental or intercontinental visits. CP 29-30.

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Despite Brajesh's testimony about the current status of his work, family, and home situation, it appears that was not taken into account either by Lynette's expert Mr. Berry nor by Judge Roberts in the Order. Mr. Berry claimed to "apply" only the facts he was given to the "profiles" and "red flags" which he used to address the possibility of abduction. Because the information he was given was both old and limited, consisting of only the 2003 parenting evaluator's report and selected emails (including recent ones), his testimony was most remarkable for what he did *not* know and did not take into account when he was making his generalizations about who Brajesh was and what category he supposedly fit into, especially as of 2009.

Thus, Mr. Berry did not know or take into account that Brajesh, though born a Hindu in India, is an atheist and not a practicing Hindu. He did not know or take into account Brajesh does not play Indian sports, but rather golf. He did not know or take into account that Brajesh and Lynette were married in a Methodist church. He did not know or take into account that although Brajesh is vegetarian, he feeds his children chicken, meat and hamburgers, taking them to their beloved McDonald's. Although he thought Brajesh was a rootless international businessman, he did not know Brajesh is based in Redmond, has been at Microsoft ten years, and that his daughter in late 2007 helped choose the home he bought in Sammamish or that her bedroom is decorated in her choice of pink in a "Barbie" motif. Nor did Mr. Berry know or take into account Brajesh's dedication to his visits with the children in over 20 trips from India as well as the long

transcontinental trips from Seattle. Mr. Berry also did not know or take into account Brajesh's increasing responsibility at Microsoft where he is now a general manager and responsible for hundreds of people and is based in Redmond. The Order also does not reflect this updated information about Brajesh and the children. Rather, it makes Brajesh's Indian heritage and culture a liability rather than a proud asset by failing to recognize the balance he has with his simultaneous embrace of the American Dream he is otherwise living. Thus the Order focused on the supposed profiles and red flags described by Mr. Berry and the limited emails and parenting evaluation report he used.

The sad fact is that Judge Roberts adhered to her position she promised in July 2003 not to change, no matter what the new evidence: that despite the fact she found as a matter of fact that Brajesh is *not* a serious threat to abduct, the travel restrictions and passport controls were imposed under her personal "no risk" standard, "*in case I am wrong.*" That rationale was inadequate to support the restrictions in 2003, was determined to be inadequate in both appeals, and continues to be inadequate after formal receipt of new evidence which shows any risk that may have existed has disappeared given the monthly visits and an 8-year history of Brajesh's *total compliance* with all court orders and requirements, no matter how onerous or improper, until they were vacated or reversed, such as the original two-county restriction on visitations. Since Judge Roberts explicitly stated that she would "not [be] willing" to

ever lift the restrictions, VII RP, p. 31:18-23, the case must be remanded to a different judge to assure an appearance of fairness.

II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL.

A. Assignments of Error.²

1. The trial court erred in entering the Findings of Fact and Conclusions of Law on Second Remand.

2. The trial court erred in concluding “There is a sufficient risk of abduction to warrant a geographical limitation on the father’s residential time with the children.” CP 153, ¶ 2 under “Findings.”

3. The trial court erred in finding “the mother’s testimony that the father made threats was credible” because it was based on inadmissible and incompetent corroboration. CP 153, bullet 3.

4. The trial court erred in keeping in place international travel restrictions imposed on the children and Brajesh under RCW 26.09.191(3)(g). CP 157.

5. The trial court erred in denying Brajesh’s motion in limine to exclude Mr. Berry, and in using the expert witness testimony proffered by Respondent.

6. The trial court erred in continuing to require Brajesh to surrender his passport before any visits with his children. CP 157.

7. The trial court erred in failing to rule on Lynette’s attorney fee application within the 90 days required by the Constitution and by statute.

B. Statement of Issues.

1. Must the trial court’s new finding that Brajesh made a credible threat of abduction in 2002 be vacated where it is expressly premised on the alleged corroboration of the mother’s 2003 testimony when that alleged corroboration was double hearsay evidence received via an expert who “obtained” it third-hand from the 2003 trial parenting evaluator and such hearsay is, as a matter of well-settled law, only admissible for the purpose of the being used in the expert’s opinion and

² Appellant complies with RAP 10.4(c) by attaching a copy of the challenged Findings as Appendix A.

not to prove underlying facts?

2. Must the 2nd Remand Order be vacated because there is not an adequate evidentiary basis to find there currently exists a reasonable, genuine, substantial risk that Brajesh will abduct the children, *i.e.*, that it is likely or probable Brajesh will violate court orders and abduct his children?

3. Must the 2nd Remand Order be vacated as manifestly unreasonable and contrary to the evidence where there is no systematic application of the actual facts to accepted criteria which demonstrate the required nexus between the actual behavior by Brajesh and the alleged future behavior by Brajesh, abduction, and which establishes that the asserted harm is likely or probable?

4. Must the 2nd Remand Order be vacated because it is explicitly based on profiling and criteria which are premised on national origin, or which are generalized and are not specific to Brajesh?

5. Where the trial court has twice failed to eliminate on remand “ambiguities” and findings which did not support the restrictions placed on Brajesh and the children, and where the trial court’s statements in 2003 and 2009 could appear to an objective observer to show the judge is determined to continue placing travel restrictions on Brajesh and the children in the face of any remand which gives it any discretion no matter what the evidence and thus without an open mind, and where the most recent, long-delayed order on attorney’s fees indicates a possible adverse pre-judgment of Brajesh in the event of any future proceedings, must remand be to a different judge to insure the appearance of fairness and fairness in fact?

III. STATEMENT OF THE CASE.³

This appeal is a continuation of the earlier two appeals. The issue remains tied to the restrictions in the initial parenting plan entered in 2003

³ References to transcripts are chronological following the convention from the two prior appeals, beginning with the trial transcripts: I RP: June 16, 2003 (Trial); II RP: June 17, 2003 (Trial); III RP: June 18, 2003 (Trial); IV RP: June 19, 2003 (Trial); V RP: June 23, 2003 (Trial); VI RP July 7, 2003 (Oral Decision), excerpts in App. B hereto; VII RP: July 30, 2003 (Post-trial hearing). These transcripts have been transferred to this record.

The four volumes of transcript from the second remand hearing are referenced as VIII RP: Jan. 14, 2009 #1; IX RP: Jan 14, 2009 #2; X RP: Jan. 15, 2009 #1; and XI RP: Jan. 15, 2009 #2.

and now to their continued application in the current circumstances. Thus, the merits briefing from the earlier stages of the appeal are included in Appendix H in electronic form, as PDF files on a CD. Background facts and procedure from the earlier appeals are related through references to the two appellate decisions and the prior appellate briefing.⁴

A. The Parties, Their Relationship, and the Children.

Brajesh's and Lynette's daughter, AK, is now 9½ and their son, RK, is almost 8½. The children live with their mother in Clearwater, Florida and, since September 2006, have been able to have visits with Brajesh in Seattle. Since the divorce was finalized in 2003, Brajesh has advanced in his career at Microsoft where he is now into his 11th year. X RP, pp. 71-78; CP 23, 28-30. Once the divorce was final and the relocation permitted, Brajesh accepted a two-year position in Hyderabad, India to help establish that facility, which now has over 3,000 employees. *Id.* Despite the fact that he was for that period of time based in India, he nevertheless made his regular monthly visitations to see the children in Florida. *Id.* Brajesh has advanced in his career and is now a general manager in charge of several hundred people. *Id.* He is based in Redmond and his responsibilities continue to require him to travel around the world, though he spends most of his time here.

In the fall of 2008 Brajesh decided to buy a house so that each of

⁴ The prior two decisions are attached as App. F (*Katara I*) and App. G (*Katara II*). The merits briefs from the prior appeals are in App. H in PDF format on a CD. The CD's contents and operating instructions are set out in App. H.

the children could have their own room when they came to visit. X RP, pp. 70, 81-84. AK helped to choose the house when they were deciding between several options. *Id.* The children chose their own rooms and their decoration colors and schemes, blue and Disney for RK, and pink and Barbie for AK. *Id.* Brajesh related their normal development including use of computers which he has available in his home for the children as well as their excellent progress in their schooling, which Brajesh keeps up with. X RP pp. 70-71, 68. In fact, it was he who suggested that AK attend private school even though he would be paying the majority of the tuition (a 65-35% split), but Lynette refused to agree and he eventually acceded to her wishes. X RP, pp. 103-106.

Brajesh acknowledged that Lynette has done a good job raising the children. X RP, pp. 67-69. He described them as caring, well mannered, bright. *Id.* His 2009 testimony included descriptions of holidays and other visits with the children, identifying various photos of Christmases, birthdays, decorating their rooms at his house, having meat dishes, and creating a home-like environment in Florida by staying at the same hotel and same suite of rooms for virtually all the visits. X RP pp. 81-90; 94-103. He credited Lynette with keeping him informed about the children by sending copies of their school reports as well as more general reports of their activities. X RP p. 68.

Brajesh testified that while he takes pride in his Indian heritage, he has no desire to move back but plans to stay in Washington. XI RP, pp. 14-17; CP 29. He further testified the children would be “absolutely

devastated” if they went without seeing their mother for six months. XI RP, pp. 12-13. He would be in both contempt of court and criminally liable if he did not return them at the end of a scheduled visit and would be fired from Microsoft. XI RP, 13-14. Abduction would be horrendous for both the children and for him. *Id.*

While Lynette is unable to overcome her animus toward Brajesh, *she never accused him of being a bad parent*. She acknowledged that he provides a home in Seattle and the children return from visits in a timely fashion. She cannot point to any behavior by Brajesh that harmed the children. During her 2009 testimony, Lynette made no reference to Brajesh’s relationship with his children, focusing solely on his relationship with her. Despite her protestations that Brajesh is a bad person, she has not tried to keep the children from normal visits with him. The core issue for Lynette is her conviction that Brajesh’s motive is to get back at her; that his supposedly overwhelming desire to get revenge on her is the reason for her belief that he would abduct the children. VIII RP, pp. 97-102; IX RP pp. 8-9.

B. Trial Proceedings, the Two Prior Appeals Reversing the Trial Court’s Travel Restrictions, and the Remand Instructions.

1. The 2003 trial and original ruling.

A five-day trial was held in June, 2003 on property division, the requested relocation by Lynette to Florida with the infant children, and the terms of the parenting plan. Lynette sought a draconian, highly restrictive

parenting plan including findings restricting visitation under RCW 26.09.191. See App. H, *Katara I* Opening Brief pp. 14-17, App H, pp. 25-28. Although she did not get supervised visitation, Lynette got a highly restrictive parenting plan that forbade any international travel by Brajesh with the children until they are adults and required he surrender his passport on each visitation.

Although Lynette argued Brajesh would abduct the children, perhaps because of the fact there was no live testimony subject to cross-examination other than Lynette's that Brajesh threatened to abduct the children, in 2003 the trial court roundly rejected those allegations in no uncertain terms: "I'm not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katara presents a serious threat of abducting the children." VI RP 10; App. B-3. As this Court noted later, "The court then said, 'I'm going to impose some restrictions in the parenting plan that will be designed to address this issue [of possible abduction].'" *Katara II*, 2007 WL 282331 (2007), *2, App. G-2.

2. First appeal: reversal based on Brajesh's challenge to the travel restrictions, denial of Lynette's cross-appeal that §191 findings were required.

This Court reversed in the first appeal and remanded because,

Although the trial court stated Brajesh "appears to present no serious threat of abducting the children," it addressed concerns about the risk of abduction and imposed limitations to prevent abduction. Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of

the risk of abduction, the findings it made and the limitations it imposed. Except for the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply, the court's findings support restrictions under RCW 26.09.191(3)(g). Rather than speculate, we remand for the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.FN22⁵

In re Marriage of Katare, 125 Wn. App. 813, 831, 105 P.3d 44 (2004), *rev. den.*, 155 Wn.2d 1005 (2005) (“*Katare I*”).

3. Second appeal: reversal based on Brajesh’s challenge to the first remand order which still “failed to explain the reasons for the limitations under RCW 26.09.191(3)(g).”

The first remand resulted in a hearing on the papers in which Judge Roberts refused to consider new evidence and ultimately made no material changes to the parenting plan’s findings, consistent with her statement in 2003 she would not change her mind in the future. *See* VII RP, p. 31:18-

⁵ The text of footnote 22 reads in relevant part:

FN22. Lynette cites out of state cases *In re the Marriage of Long v. Ardestani*, 241 Wis.2d 498, 624 N.W.2d 405 (2001), *Abou-zahr v. Matera-Abouzahr*, 361 N.J.Super. 135, 824 A.2d 268 (2003), *Soltanieh v. King*, 826 P.2d 1076 (Utah App.1992), and *Bergstrom v. Bergstrom*, 320 N.W.2d 119 (N.D.1982), as examples of cases that have held the best interests of the child governs whether conditions should be placed on a parent's residential time where there is a risk of abduction to a non-Hague Convention country. In all four cases the dispositive factor was the trial court's factual finding about the basis for imposing the restrictions. Where the likelihood of abduction was greater, based on the factual circumstances in the case, the courts imposed restrictions to prevent abduction. *See, e.g., Soltanieh and Bergstrom*. Where abduction was unlikely, the courts declined to impose preventive measures. *See, e.g., Abouzahr and Long*.

This Court thus recognized in the first appeal the need to demonstrate the *likelihood* of abduction by Brajesh in order to impose restrictions. Since there is no express finding here that Brajesh is *likely* to abduct, Brajesh re-asserts that these cases and *Katare I* support striking the restrictions rather than remand.

23. This Court reversed and remanded in *Katara II* as follows:

By basically restating its earlier findings as the justification for imposing limitations on Brajesh's residential time with the children under RCW 26.09.191(3)(g), the trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3). The amended parenting plan still states that "the husband appears to present no serious threat of abducting the children," and again, without express findings to justify the limitations, the court imposed restrictions, apparently based on an implicit risk of abduction. In addition, the court also does not expressly address the best interests of the children. Because these findings do not comply with the mandate to explain the reasons for the limitations under RCW 26.09.191(3), we remand. [Citations omitted] **Given the passage of time, the trial court should also examine current relevant information concerning any limitations under RCW 26.09.191(3).**

In re Marriage of Katara, 2007 WL 282331 (2007), *rev. den.*, 163 Wn.2d 1051 (2008) ("*Katara II*"), *3 (emphasis added) (App. G hereto).

C. Proceedings on the Second Remand.

The hearing was ultimately scheduled for January, 2009 following denial of review by the Supreme Court and preparation by the parties. Two days of testimony were taken on January 14 and 15 2009, and the matter was argued February 5, but not reported.

D. The April 6, 2009, Ruling.

Two months later on April 6, 2009, Judge Roberts' written ruling was filed keeping the restrictions in place. 2nd Remand Order. CP 152-157, App. A.

E. Lynette's Fee Application.

In July 2009, three months after the decision on remand, Lynette moved for an award of attorney's fees, which Brajesh resisted. Briefing

was complete before the noted hearing date of July 28, 2009. CP 178-179. Four months later on November 24, 2009, the trial court entered a two-page order denying fees but which warned Brajesh the court might use the conduct Lynette complained about to impose fees in the future. CP 180-182, App. E (“Fee Order”). The Fee Order stated that while Brajesh’s post-decision conduct did “not demonstrate intransigence of the sort that will support as award of fees and costs at this juncture[,] [i]t is possible that this most recent conduct could support a finding of intransigence in the future.” Judge Roberts’ Fee Order gives no further explanation for why conduct which did not provide a basis for an award of fees at the time it occurred (and which was after the trial court proceedings in question) might nevertheless at some future time justify an award of fees -- unless it meant that if Brajesh proceeds with the appeal and returns to Judge Roberts’ court yet again, he would be assessed fees against him.

IV. ARGUMENT.

A. Standard of Review.

Conclusions of law must be supported by findings of fact, and the findings, in turn, must be supported by substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003); *In re Disciplinary Proceedings Against Poole*, 156 Wn.2d 196, 209, n.2, 152 P.3d 954 (2006). A trial court’s findings are reviewed for substantial evidence, which is defined as “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Group Health Co-Op. v. Dep’t. of Revenue*, 106 Wn.2d 391, 397, 722 P.2d 787 (1986).

Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

Parenting plan provisions are reviewed for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *Katara I*, 125 Wn. App. at 822. A discretionary ruling thus must be founded on principle and reason; it must be grounded in both the correct legal rules and the actual facts, or it is an abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d 554 (1990). A court abuses its discretion when it issues a manifestly unreasonable decision or bases its decision on untenable grounds or untenable reasons. *Littlefield*, 133 Wn.2d at 46-47. Abuse of discretion is reviewed under the three-part analytical test:

A court's decision is manifestly unreasonable if it is [1] outside the range of acceptable choices, given the facts and the applicable legal standard; [2] it is based on untenable grounds if the factual findings are unsupported by the record; [or 3] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Littlefield, 133 Wn.2d at 47 (emphasized numbers added) (reversing because the test was not met). *Accord, In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (reversing for abuse of discretion in parenting plan case); *In re Marriage of Wicklund*, 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996), reversing the trial court and vacating improper parenting plan restrictions.

The trial court's ruling also must be sufficiently specific to permit review. In *Katara I*, this Court remanded for clarification because the

written findings in the parenting plan were inconsistent and contradictory, frustrating review. *Katara I*, 125 Wn. App. at 816. *See also In re Marriage of Horner*, 151 Wn.2d 884, 893-95, 93 P.3d 124 (2004) (necessary findings must be articulated; “conclusory” findings are inadequate to sustain a decision).

B. The Trial Court Finding Of A Credible Threat By Brajesh Must Be Vacated Because It Is Explicitly Premised on Unsworn, Inadmissible Evidence.

The trial court never made a finding after the 2003 trial that Brajesh threatened to abduct the children, despite Lynette’s testimony that he made such threats. Lynette was the only person with knowledge who testified on the issue. The parenting evaluator, Ms. Waldroup, related the hearsay statements of two friends of Lynette who claimed they heard Brajesh make threats to abduct while surreptitiously listening to him talk to Lynette on the phone. Lynette’s friends neither came to trial nor were ever subject to cross-examination. This “evidence” appeared in the second remand hearing when Lynette’s purported expert, Mr. Berry, related that he had read Waldroup’s report and relied on her report to conclude Lynette’s accusation against Brajesh was credible. X RP, pp. 17:24 – 18:5; 41:18-42:1.⁶ But since it was admitted through a succession of two experts and thus was double hearsay, it was not admissible evidence to establish the alleged underlying fact, there the claimed threat by Brajesh. *Group Health Co-Op. v. Dep’t. of Revenue*,

⁶ *See also* IX RP, pp. 76, 83, 85; X RP, pp. 35-36.

106 Wn.2d 391, 399-400, 722 P.2d 787 (1986); *State v. Wineberg*, 74 Wn.2d 372, 381-382, 444 P.2d 787 (1968). Nevertheless, the trial court entered a finding that Lynette's testimony had then become, some six years after the trial, "credible when viewed in conjunction with the testimony of others." CP 153, bullet 3.

Thus, the trial court found that the predicate fact for its claim of "sufficient risk" by Brajesh -- his alleged threat to abduct the children made in 2002 -- was only credible when viewed in light of the testimony of the double-hearsay statements of Lynette's two friends when Mr. Berry related what the parenting evaluator related she had been told in 2002.

The extra layer of expert participation hardly cures inadmissible, unsworn hearsay. The Supreme Court has not changed its basic rule in *Wineberg* and *Group Health* that any otherwise inadmissible evidence relied on by an expert, such as the third party unsworn statements here, comes in only for the limited purpose of supporting the opinion given. The rule is that such statement cannot be independently used as evidence by the fact finder, here Judge Roberts. The basic principles stated by the Supreme Court in *Group Health* are important not just as to this point, but as to Mr. Barry's testimony as well.

The trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion. *State v. Wineberg*, 74 Wn.2d 372, 384, 444 P.2d 787 (1968). **The admission of these facts, however, is not proof of them.**

[I]f an expert states the ground upon which his opinion is based, **his explanation is not proof of the facts which he says he took into consideration**: WIGMORE ON EVIDENCE, 3rd ed., §

655. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only.

Wineberg, at 382, 444 P.2d 787 (quoting *State Hwy. Comm'n v. Parker*, 225 Ore. 143, 160, 357 P.2d 548 (1960)). See also 5A K. TEGLAND, WASH.PRAC. § 312 (1982 & 1985 Supp.). *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940), reversed a judgment in favor of the plaintiff. Regarding the sufficiency of plaintiff's testimony the court stated at 164:

[Plaintiff's] case rests ultimately upon expert opinion. But the opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.

Group Health Co-Op. v. Dep't. of Revenue, 106 Wn.2d at 399-400 (bold added). *Accord, Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 579-582, 157 P.3d 406 (2007), *rev. den.*, 162 Wn.2d 1022 (2008).

Judge Roberts committed clear legal error by relying on the hearsay statements received via an expert who himself was relating the hearsay from another expert to “corroborate” Lynette’s claim that Brajesh made a threat to abduct the children in 2002. *Group Health Co-op; Winberg; Allen*. Without that corroborating unsworn, un-cross-examined, inadmissible hearsay “testimony”, the finding must be stricken of its own terms. And once that “finding” of a credible threat by Brajesh is removed, all the other claimed bases for finding him a risk to abduct collapse, because they are all premised on, at minimum, a credible threat to abduct. The Order thus must be vacated as an abuse of discretion. *Littlefield; Wicklund; Coggle v. Snow*.

C. Brajesh's Arguments From the First Two Appeals Are Reasserted, Including Constitutional Claims Not Reached in the Prior Appeals.

1. Issues and rulings in the prior appeals.

Brajesh raised core constitutional issues in the first two appeals which by and large were not directly addressed in the prior appeals. For instance, Brajesh argued in *Katara I* that his fundamental rights as a parent were interfered with by the travel restrictions and passport controls.⁷ This Court side-stepped the issue by holding that “a parenting plan that complies with the statutory requirements to promote the best interests of the children” does not violate those fundamental rights. *Katara I*, 125 Wn. App. at 823, App. F, pp F-6 to F-7. The *Katara II* decision stated that reaching the constitutional issue was premature because relief for Brajesh was granted on the basis the findings did not support the restrictions.⁸

The rulings in both appeals thus avoided the point of Brajesh's underlying argument, which he re-states here: the original parenting plan, the first amended parenting plan, and now the 2nd Remand Order all fail the *Katara I* test required to avoid state and federal constitutional violations precisely because none have met or now meet the statutory

⁷ See *Katara I Opening Brief*, pp 19-22 & 37-40, App. H pp. 30-33 & 48-51. These arguments were also raised in *Katara II*. See *Katara II*, Opening Brief, pp. 10-17, App. H, pp. 366-372.

⁸ The Court stated in footnote 5 of *Katara II* that because it granted relief to Brajesh on the basis that “the trial court's findings do not support the limitations under RCW 26,09.191(3), . . . Brajesh's alternative constitutional challenge is premature.” *Katara II*, *4, App. G-4.

requirements. The orders in place since July 2003 have therefore all been unlawful, frustrating any notion of justice or the rule of law.

In fact, both *Katara I* and *Katara II* reversed **because** the parenting plan failed to meet the statutory requirement that the restrictions be supported by adequate findings; rather, this Court held the findings were “ambiguous” and “inconsistent” with the restrictions. *Katara I*, 125 Wn. App. at 830-31;⁹ *Katara II*, *3, App. G-3.¹⁰ The second appeal was more explicit. It stated that “**the trial court’s findings do not support the limitations** under RCW 26.09.191(3)” and remanded to comply with the mandate to explain the reasons for the limitations under RCW 26.09.191(3). *Katara II*, *4 n.5, App. G-4 (emphasis added). The emphasized language is simply another way of stating that the trial court’s findings did not support the judgment, which necessarily means in the normal course that the judgment is not valid, and should be stricken.

As noted in the Introduction, the 2nd Remand Order suffers from the same problem, minimally because neither the earlier findings on the inapplicability of Section 191, nor the finding that Brajesh is not a substantial risk to abduct have been vacated. The arguments about

⁹ This Court held that “The trial court entered inconsistent and contradictory findings regarding its concern about the risks of abduction.” 125 Wn. App. at 816 and “the [trial] court’s finding in the parenting plan that there is no basis to impose restrictions under RCW 26.09.191 creates an ambiguity” with the restrictions under RCW 26.09.191(3)(g). *Id.* at 830, and noted that “the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply” required reversal and remand. *Id.* at 831.

¹⁰ It held “Because these findings do not comply with the mandate to explain the reasons for the limitations under RCW 26.09.191(3), we remand.” *Katara II*, * 3, App. G-3.

Brajesh's fundamental constitutional rights are still at issue and are reiterated with reference to the earlier briefing. The national origin arguments are heightened given the bald reliance on Brajesh's so-called "cultural affiliation"¹¹ -- his national origin -- including the fact his country of origin has not adopted the Hague treaty, which he could not control.

2. A Parent's National Origin Is an Improper Basis to Totally Prohibit the Parent's Travel Outside the U.S. With His or Her Children Until They Are 18.

Brajesh is an India-born, law-abiding U.S. citizen with family members living in his country of origin that is among the majority of nations that have not adopted the 1980 Hague Abduction Convention. *See Katare II Opening Brief*, pp. 22-24 & App E thereto, at App. H, pp. 237-239, 281-287. Using his national origin as the basis for restricting travel with the children violates fundamental provisions of the federal and state law when there is no finding, nor any proof that could support such a finding, that he is likely to or probably will violate court orders and abduct the children. U.S. Const. Amend. XIV¹²; RCW 49.60.010.¹³ *See id.*

¹¹ It was undisputed in the 2003 trial that the parenting evaluator established it is in the best interest of AK and RK as mixed-culture children (it "is pretty vital to their knowledge of themselves") to know at a deep level the Indian side of their extended family as their personal awareness and sense of self develops after age five. *See II RP 153-154 and Katare I Opening Brief*, p. 16, App. H, p. 27; and *Katare II*, Opening Brief, pp. 39-41, App. H, pp. 254-256, quoting Waldroup.

¹² "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

¹³ "The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state (*footnote continued on next page*)

3. Brajesh's Fundamental Rights Under the Constitutions and Statutes To Raise His Children and Travel Are Wrongfully Infringed Where There Is No Evidence of Current Harm or Threat or of Probability of Current Harm or Threat to the Children.

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” *U.S. Const., Amend. 14*. The interest of a parent in the care, custody, and control of his or her child is “perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Our Supreme Court has likewise recognized the constitutional protection afforded a parent’s right to raise his or her child:

The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a societal institution. A parent’s constitutionally protected right to rear his or her children without state interference has been recognized as a fundamental “liberty” interest protected by the Fourteenth Amendment and also a fundamental right derived from the privacy rights inherent in the constitution.

In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff’d sub nom Troxel v. Granville, supra* (“Smith”). *Accord, In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005); *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001).

This bundle of parents’ fundamental rights includes the right to make decisions concerning the care, custody, and control of their

concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.”

children;¹⁴ the right to the companionship, care, custody, and management of their children;¹⁵ the right to the nurture and upbringing of their children;¹⁶ and the right to direct the education and upbringing of their children.¹⁷ This is reflected in the constitutional presumption that a fit parent will act in the child's best interests. *Parentage of C.A.M.A.*, 154 Wn.2d at 61-63; *Smith*, 137 Wn.2d at 17-20; *Troxel*, 530 U.S. at 69-70.

A parent's fundamental right to raise his or her child is accorded the highest constitutional protection and may be restricted or interfered with under only the narrowest of circumstances. State interference when a fundamental right is involved is justified "**only** if the state can show that it has a compelling interest **and** that **any interference is narrowly drawn to meet only the compelling state interest involved.**" *Smith, supra*, 137 Wn.2d at 15 (emphasis added). *Accord, Parentage of C.A.M.A., supra*, 154 Wn.2d at 57, 60-61. Additionally, a state may interfere with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child under the state's *parens patriae* power, but only if a child has been harmed or a threat of harm exists. *Smith, supra*, 137 Wn.2d at 16; *Parentage of C.A.M.A.* 154 Wn.2d at 64, 66. Thus, the State (including through the courts) may interfere with the constitutional right of a fit parent to rear one's child **only** if it appears that parental

¹⁴ *Troxel v. Granville, supra*, 530 U.S. at 66.

¹⁵ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

¹⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

decisions *will* jeopardize the health or safety of the child. *Smith*, 137 Wn.2d at 15-20.

Smith discusses at length the State's authority to restrict parents under its police and its *parens patriae* powers, and the requirements for proper exercise under both state and federal decisions. 137 Wn.2d at 13 – 21. What is strikingly different between the decisions discussed in *Smith* and this case is that in those cases the child in question had been harmed or was recently and genuinely threatened with the harm for which protection was sought, unlike the case here. There was no dispute about whether the conduct either had happened or would occur.

For instance, in *Stanley v. Illinois*, “the Court required an individualized finding of parental neglect before stripping an unwed father of his parental rights.” *Smith*, 137 Wn.2d at 18. Brajesh contends that the requirement of an “individualize finding” that Brajesh Katare will probably abduct the children is what is required here before he and the children may be stripped of the right to visit and socialize with their extended family in India: a nexus between a genuine, probable harm and the restrictions. *See Katare I*, 125 Wn. App. at 826; *Wicklund*.

In *Wisconsin v. Yoder*, 406 U.S. at 234 (1972), the Court held that the Amish were entitled to educate their children according to their customs and schooling after 8th grade because the Amish children would not be harmed by receiving an Amish education rather than a public school education. There is no harm here to the Katare children visiting their relations in India and learning about that part of their family. And in

Meyer v. Nebraska, 262 U.S. 390, 399, 402-03 (1923), the Supreme Court held “the state’s desire ‘to foster a homogeneous people with American ideals’ was insufficient justification for forbidding foreign language instruction” because “‘proficiency in a foreign language . . . is not injurious to the health, morals, or understanding of the ordinary child.’” *Smith*, 137 Wn.2d at 17-18, quoting *Meyer*. There is no evidence in this record that visits to India to get to know the other half of their extended family would be injurious to the “health, morals, or understanding” of AK and RK. The only evidence in the record is to the contrary – the undisputed Waldroup testimony that it is vital to the children’s self-identity to know well the Indian part of their heritage. II RP 153-54.

A particularly salient point from these federal decisions is stated by the *Smith* court at page 18: the federal cases require proof “that some harm threatens the child’s welfare before the state may constitutionally interfere with a parent’s right to rear his or her child.” 137 Wn.2d at 18. This means a genuine, actual, present threat, not a speculative accusation based on an irrational belief that the accused ex-spouse wants to “get back” at the accuser. This is especially important here because “getting back” means to Brajesh “devastating” the children by removing them from their mother whom they love and who Brajesh testified does a good job raising them, loss of his job and Microsoft career, loss of his citizenship, and facing criminal prosecution. There is no evidence Brajesh seeks to “get back” at Lynette via the children and would sacrifice them and himself to do it.

Thus the most important question where children and their care is concerned: is there a genuine risk at this time? Are restrictions required now to protect the children? That means determining currently, right now, it is **probable** that Brajesh Katare will violate a court order to return the children at the end of a scheduled visitation and abduct his children when that means severely harming them and destroying all he has built for himself and them?

Only a finding of a probable abduction by Brajesh would be both “adverse to the best interest of the child[ren]” under RCW 26.09.191(3)(g) and have the required nexus specified in *Katare I*¹⁸ to justify the international travel restrictions.¹⁹ But no such finding can be supported by substantial evidence on this record. There is no evidence specific to the accused, here Brajesh, he is likely to abduct. Since there is no possible factual support for such a necessary finding, the restrictions must be stricken, as in *Wicklund*.

4. The Parenting Act Requires Express Findings That the Restricted Conduct Would Endanger the Child.

[The court’s] discretion must be exercised [under the Parenting Act] according to the guidelines set forth in RCW 26.09.187(3). This section, in turn must be read in conjunction with RCW 26.09.184 (setting forth the objectives and required contents of the permanent parenting plan), RCW 26.09.002 (stating the policy of

¹⁸ “. . . any limitations or restrictions or imposed [under RCW 26.09.191] must be reasonably calculated to address the identified harm.” *Katare I*, 125 Wn. App. at 326.

¹⁹ Brajesh contends that even if that finding were made, it does not justify the passport controls on him, which are demeaning each and every month by expressly telling Brajesh: you are not trusted.

the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with the child).

Littlefield, 133 Wn.2d at 51-52. The careful language chosen in *Littlefield* and embodied in the Parenting Act is not just an elaborate way of saying trial courts may do whatever they want as long as they somewhere reference or invoke the child's best interests. Were that true the entire statutory structure of the Act would be meaningless. Rather, the Parenting Act creates genuine guidelines and, at the same time, sets real limits on trial courts' exercise of their discretion, beyond the constitutional floor.

In this case the issue is, where there are no § 191 restrictions, what is the factual and legal basis under which a trial court may lawfully restrict Brajesh's – or any fit parent's – fundamental and statutory rights in raising his or her children during the periods of visitation or custody? At what point may the court step in and say, “no, your children may not visit their cousins and grandparents, because those people are in India”? Under RCW 26.09.191(3)(g), that “no” requires express findings of harmful conduct by the accused parent, a nexus between that proven conduct and the restrictions imposed, and that they be the least restrictive possible. *Katara I*, 125 Wn. App. at 825-26. *See Smith, supra*.

Marriage of Wicklund is instructive. The essence of *Wicklund* is that a presumptively fit, non-custodial parent may not have his or her residential activities with the children restricted or impinged absent a finding the proposed parental activity involving or affecting the child would be “adverse to the best interests of the child” because it “*would*

endanger the child’s physical, mental, or emotional health.” *Id.*, 84 Wn. App. at 770-771. In other words, the custodial parent may not, via the court, control or interfere with the other parent’s activities with the children and with whom they associate during visitation times – including vacations – absent known, actual conduct harmful to the child that was occurring or that the accused parent admitted he was engaged in.

. . . Thus, parental conduct [of the non-custodial parent during scheduled visitations] may only be restricted if the conduct would endanger the child’s physical, mental, or emotional health. (Quotation marks omitted)

. . . The trial court could only order a restriction if it “expressly [found]” that the parent’s conduct was “adverse to the best interests of the child.” No such situation is presented here.

Wicklund, 84 Wn. App. at 770-771.

Nor is any such harmful situation presented in Brajesh’s case. Brajesh is not engaged in abduction, has testified he has no plan or interest in returning to India or to live. X RP, pp. 113-115. There is no evidence of any inappropriate behavior by Brajesh towards the children since the divorce, and a lack of evidence of harm to the children from Brajesh’s (or Lynette’s) conduct. There is no finding or evidence that international travel by AK or RK would be harmful to them. There is thus no basis to restrict their travel, be that to Canada or India. *Wicklund* properly ruled that where there was a similar lack of harm by the parent’s actions, the improper restrictions must be stricken from the parenting plan by the appellate court. 84 Wn. App. at 771, 772. Brajesh requests the same here,

especially on a third appeal. Further remand without specific direction to a new trial judge that international travel is permitted would be pointless.

This statutory analysis is consistent with the constitutional requirements discussed *supra*. Both start from the presumption the fit, non-custodial parent will act in their child's best interest, has full freedom when the children are in his or her care for scheduled visitations and vacations, and restrictions may not lightly be imposed. *Wicklund*. And when restrictions are imposed, they must be based on explicit findings by the trial court which are supported by the evidence. *Katara I*. There is otherwise no lawful basis for restricting the non-custodial parent's activities with his or her child during the scheduled visitations.

Absent such findings, and absent a nexus between the restriction imposed and the substantiated harm to be prevented, any impingement or restriction of the parent's fundamental right to unrestricted visitation is contrary to the statute and the Constitutions and must be stricken.

Katara I dismissed Brajesh's arguments that clear and convincing evidence is required to impose such restrictions on the basis no case so holds. 125 Wn. App. at 823, n. 8. This too begs the question since some case has to be the first and the cases cited were cited by analogy. *See, e.g., Katara I Opening Brief*, pp. 30-32, App. H 48-49. These arguments were strongly re-asserted in the second set of briefing with citation to stringent standards adopted in other states, such as Oregon's O.R.S. § 109.35 which requires proof by clear and convincing evidence (*see Katara II Opening Brief*, pp. 29-36, 41-43, App. H, pp. 244-251, 256-258) and to the

proposed uniform act. *See Katare II* Opening Brief, pp. 36-41, App. H, pp. 251-256.

Brajesh renews those arguments, especially in the context here where the alleged criteria proffered and used are based on his national origin, a *per se* suspect class for equal protection analysis which requires strict scrutiny of the action taken,²⁰ in this context translating to a heightened burden of proof and specific application to Brajesh personally.

D. Judge Roberts Erred By Denying Brajesh’s Motion in Limine to Exclude “Profile” and “Red Flag” Evidence That Purportedly Demonstrates Brajesh Is a Danger to Abduct Because of His National Origin.

Brajesh moved *in limine* to exclude the testimony of Lynette’s purported expert, Mr. Michael C. Berry, on the use of certain “profiling” or “red flag” criteria to predict Brajesh Katare was likely to abduct his children. *See* Motion in Limine, CP 87-94. The issue was deferred until trial and foundation testimony, when Judge Roberts allowed the testimony. IX RP, pp. 77-83.

Brajesh’s counsel moved “to bar any testimony from this witness on the issue of profiling or red flags or applying research to predict the future behavior o[f] Brajesh Katare.” *Id.*, p. 77. Brajesh’s counsel made three central arguments: 1) the proffered evidence is profiling evidence which, as specified in the written motion, is not admissible in Washington;

²⁰ *See, e.g., Fusato v. Wa. Interscholastic Activities Ass’n*, 93 Wn. App. 762, 767-768, 970 P.2d 774 (1999); *Anderson v. King County*, 158 Wn.2d 1, 65 ¶ 152, 138 P.3d 963 (2006).

2) Mr. Berry placed unreasonable reliance on information received from Lynette from the 2003 trial where the trial court found Brajesh to be the more credible witness; and 3) Mr. Berry was “not qualified to testify as an expert by training or skill or experience on the issues before this Court.”

Id. The essence of the profiling objection was as follows:

... if what a witness is going to do is look at the list of factors, traits or characteristics on one side, and say whether the person before the Court is within the group that would be so characterized, that is profiling.

The behavior that we are talking about [child abduction] is criminal in nature. The stakes couldn't be higher for Mr. Katare.

IX RP, p. 79.

Judge Roberts denied the motion under ER 701, 702, and 703 on the basis that the proffered testimony “will assist me in understanding the status of the literature on these topics. He will be allowed to testify as to the risk factors and red flags that are established in the literature.” IX RP, p. 81. She did not address ER 403. Although Judge Roberts stated that she did “not want to hear much detail in the way of actual application by this witness of the various factors,” in fact the majority of Mr. Berry’s testimony did precisely that.

1. The Profiling Testimony Was Improper Because it Did Not Establish the Probable Future Actions of Brajesh Katare.

In Washington, the general rule is that “testimony of criminal profiles is highly undesirable as substantive evidence because it is of low probability and inherently prejudicial.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426 (1994) (quoting *U.S. v. Gillespie*, 852

F.2d 475, 480 (9th Cir. 1988)). Part of the reason profiles are not permissible is because:

Profile testimony that does nothing more than identify a person as a member of group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.

State v. Braham, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). *Accord*, *State v. Avendano-Lopez*, 79 Wn. App. 706, 710-711, 904 P.2d 324 (1995). Thus, our courts exclude testimony which attempts to link the alleged perpetrator to a specified crime because they belong to a particular group. *In re Detention of Thorell*, 149 Wn.2d 724, 756-58, 72 P.3d 708 (2003), *cert. den.*, 541 U.S. 990 (2004).²¹

As Brajesh pointed out in his written motion and in argument, the activity he is accused of is future criminal action, even though he has never been convicted of or charged with any crime, let alone the same or related crime. Moreover, the profiling is based on a suspect classification, Brajesh's national origin, which subjects the use of any such profiles to a strict scrutiny analysis.

Thorell reinforces by way of contrast how inappropriate use of the profiling and red flag "criteria" are when nothing has been said about any

²¹ See, e.g., *State v. Clafin*, 38 Wn. App. 847, 852, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985) (proffered testimony that 43% of child molestation cases "were reported" to have been committed by "father figures" was inadmissible under ER 403); *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983) (expert improperly testified that "the majority" of child sexual abuse cases 'a male parent-figure); *State v. Steward*, 34 Wn. App. 221, 224, 660 P.2d 273 (1983) (expert improperly testified in murder prosecution of a babysitter's boyfriend that "serious injuries to children are often inflicted by either live-in or babysitting boyfriends.").

such supposed standards by the legislature. *Thorell* involved proof of future dangerousness in the context of statutory commitment proceedings under Ch. 71.09 RCW, providing for commitment of sexually violent predators. The Supreme Court summarized its profiling jurisprudence and did not retreat from the bottom line of those cases, which is that “we have defined and excluded inadmissible profile testimony as evidence that merely identifies a person as a member of a group *likely* to commit a crime.” *Thorell, supra*, 149 Wn.2nd at 756-757, emphasis added. This impermissible standard is more probative than Mr. Berry’s testimony sought to do here: identify Brajesh as a member of a group that could *possibly* commit the crime of abduction. The Court restated the analysis that profile testimony is rejected not only under the rules for expert testimony, but also under ER 403 which provides for the exclusion of evidence that may otherwise be relevant where its “probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues, . . .” ER 403.

What is strikingly different about *Thorell* and the case at bar is that *Thorell* was admitting evidence which was focused on the individual in question, *i.e.*, whether a particular individual is likely to commit future violent acts. Thus, testimony of that person’s prior criminal activity was admitted to predict future dangerousness based on the expert testimony. But it was the prior criminal activity of that individual, not of some class of people, much less where the accused person had never engaged in the behavior associated with the group. Moreover, the legislature by statute

set out what the criteria were and the areas that had to be proved before a person could be committed under a proper burden of proof of beyond a reasonable doubt. A sexually violent person was one who 1) had already been convicted of or charged with a crime and 2) suffers from a mental abnormality or personality disorder “which makes the person *likely* to engage in predatory acts . . . if not confined in a secure facility.” RCW 71.09.020(16) (emphasis added), quoted in *Thorell*, 149 Wn.2d at 733, n.2.

Thus, in *Thorell*, the trial courts were addressing clearly specified, statutory criteria and evaluations which were specific to the person in the dock, and that the accused was *likely* to commit the specified crime. A person charged with potential future dangerousness had already been convicted or charged based on probable cause with the crime and also had to suffer from “a mental abnormality or personality disorder” which makes the person “*likely*” to engage in future acts unless restrained. Nowhere in this case has there been a finding that Brajesh Katare is likely to engage in abduction of his children. Thus, on the most basic, substantive level, Mr. Berry’s testimony is not relevant because it does not even purport to address whether Brajesh is *likely* to abduct. It also is also inadmissible under *Thorell* because it constitutes improper, illegal profiling by use of Brajesh’s “cultural group” -- his national origin -- and does not specify likely future conduct by Brajesh.

2. The “Profiling” and “Red Flag” Evidence Should Have Been Excluded Under ER 402 Because it Did Not Speak to Brajesh.

ER 402 states “[e]vidence which is not relevant is not admissible.” Mr. Berry’s proffered “red flag” and “profile” evidence is not relevant because it does not speak to Brajesh Katare and therefore was improperly admitted under ER 402. Reversal is required since the trial court explicitly relied on that evidence.

It also is not relevant and could not have spoken to Brajesh because it was grotesquely incomplete as it was based solely on limited information provided by Lynette with the 2003 parenting evaluation of Margo Waldroup and a series of selected emails provided to Mr. Berry in Exhibit 15. To the extent that Mr. Berry was offering expert information or opinions, it was *per se* irrelevant unless it was in the form of a hypothetical which conformed to the facts in this case, since otherwise it is speculation. *Group Health Co-Op, supra*, 106 Wn.2d at 399-400.

Mr. Berry admitted he had very little actual information as to Brajesh or the two parties, and then only a very skewed view. He was not aware of the parties’ backgrounds including their marriage in a Methodist church in Florida; or the fact that Brajesh had renounced his Indian citizenship and was a U.S. citizen as of 2000; or that Brajesh is an atheist and not a practicing Hindu; or that Brajesh’s current work or housing situation with a home purchased in Sammamish, Washington near Redmond where his Microsoft career is based.²² Mr. Berry also testified

²² See IX RP, p. 49.

he does not know how Indian law operates, could not document his assertion Indian law favors Hindus and Indian citizens, and has never been to India or had any legal case involving India.²³

The point of Mr. Berry's testimony about the red flags and profiles was to show that abduction by Brajesh "may" happen, that it would be a mere possibility. Mr. Berry testified the purpose of the body of literature on the "red flags" and "profile" was "so courts can get an indication that [abduction] *may* happen." X RP, p. 23 (emphasis added). But if the courts are not convinced by the red flags and profiles that restrictions must be imposed, Mr. Berry testified, their purpose then becomes to "protect the children":

It's not to inhibit the father or the mother, but it's to protect the children because of the danger to the children should they be taken, and the difficulty of returning children from a country that does not have the same legal concepts, that will allow cooperation with an existing order.

X RP, p. 23. In other words, the purpose of the testimony morphs from any pretense of even showing the *possibility* of abduction (and admittedly begs the question of even attempting to show a *likelihood* or *probability* of abduction) to showing the *consequences* of abduction to a foreign country on the *assumption* that abduction will occur. All that is needed is fear of the consequences, the same standard this Court rejected in *Katara I* when it held that the original rationale (fear of the consequences) was inadequate to support the restrictions under RW 26.09.191(3)(g), *i.e.*, that

²³ See IX RP pp. 47-48, X RP, pp. 8-16, 61.

“in case I’m wrong” in determining Brajesh is not a serious risk of abduction because the consequences are so great.

Mr. Berry’s factors do not indicate a person is *likely* to abduct. Mr. Berry’s testimony and this record do not cure the problem that if the American-born parent raises the specter of abduction, that ends the discussion because so long as the American-born parent asserts abduction is a possibility, the consequences if it were to occur require restrictions even though there is no proof or finding the asserted abduction is likely or probable. And since once raised the accused parent cannot disprove a negative and establish their innocence, at a functional level the case is over and a law-abiding person like Brajesh is “convicted” of “possible” future abduction without any showing or finding that he is likely to or probably will abduct. That is why *Katara I* pointed to the need to show likelihood of abduction in other state cases. *Katara I*, 125 Wn.App. at 831, n. 22. *See* footnote 5, *supra*. The supposedly expert testimony that it might be “possible” Brajesh might abduct thus is too attenuated from the issue before the Court and, for that reason alone, was improperly admitted and used by Judge Roberts. *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 641-44, 806 P.2d 766, *rev. den.*, 117 Wn.2d 1015 (1991). Its admission and use require reversal. *Id.*

If these rules are not applied here, the falsely accusing parent can win her case against the accused parent even where, as here, the real reason for alleging the possibility is completely irrational, i.e., he will abduct to get back at me even if it is not in the best interest of the children,

and would destroy his career and the life he has built; he would destroy himself and his children to get back at me. *See* VIII RP, pp. 97-102; IX RP, pp. 8-9; XI RP, pp. 12-14. This rationale also goes against the totality of the evidence of the past seven years of conduct with Brajesh's 28 visits of the children in Florida through September 2006 (including 21 while on assignment to India, a much longer "commute"), and the 13 visits of the children to Redmond for visitation since September 2006 (CP 24, 30-31), the lack of even one claimed violation of the court's orders or any contempt proceeding against Brajesh in this lengthy case, and Brajesh's increasing responsibility within Microsoft where he is now a general manager responsible for hundreds of people. *See* X RP pp. 71 – 78; CP 23-29.

In short, an irrational fear of one parent which leads to the accusation of the possibility of abduction without any foundation will, nevertheless, be deemed by the court as sufficient to impose restrictions. This cannot comport with due process or normal operation of law because it means that, like the original parenting plan, there is a final order (the travel restrictions and Brajesh's passport control) which is not based on findings of fact which in turn are based on substantial, admissible evidence, but on irrational fears and rank speculation. This has never been sufficient to support an order, much less one that effectively convicts the accused parent of criminal intent. Since the law has not changed, this inadequate basis means the restrictions must be vacated because, for the third time, they are not supported by adequate findings.

A sad example of the impermissible national origin profiling is at X RP, pp. 46-50. Mr. Berry was questioned on subgroup 3 of profile number 6 from Exhibit 26. The subgroup was “parents who belong to certain ethnic, religious, or cultural groups . . . may hold views about child rearing that are contrary to prevailing custody laws.” X RP, p. 46. When asked whether he had “reached the conclusion that Brajesh Katare does, in fact, hold views about child rearing that are contrary to the prevailing custody laws of this jurisdiction,” Mr. Berry testified, “No, I didn’t get into that.” Rather, he testified that his analysis included “my interpretation of his e-mails and *his cultural affiliation*.” X RP, p. 47:5-11 (emphasis added). Although Mr. Berry testified he did not “know” whether Brajesh fit into subgroup 3, he testified “I think he fits in subgroup 3.” *Id.*, p. 47, 16-19. It is clear throughout this testimony that it is Brajesh’s “affiliation” with his place of birth that makes him a risk factor:

A. It [subgroup 3] says [“]or cultural groups may hold views about child rearing that are contrary[”] or [“]cultural groups may hold views[”]. From my interpretation of his e-mails, he has a decided opinion about the parenting skills of Ms. Katare and he is concerned about that and that was very evident in the e-mails. Therefore, *because of his cultural affiliations*, he clicked into profile 6.

Q: So, again, it’s just criticizing her as a parent is your interpretation?

A. And his *cultural affiliations*.

X RP, p. 48: 2-13 (emphasis added). Mr. Berry also testified that based on information that he received from Lynette Katare, it was “my

understanding that [Brajesh's] primary social interactions are with people of the Indian culture here in Washington." X RP, p. 48:18-23.²⁴ Yet the cross-examination revealed he had no idea how Brajesh's house is decorated, who his friends actually are, what kind of recreational activities or food he enjoys, or whether any or a substantial part of that was "of Indian culture." X RP, pp. 48-50.²⁵ In short, Mr. Berry tarred Brajesh with the accusation of a "possible" abductor because of his "cultural affiliation" even though he could not say that Brajesh personally fits into the category, and even though he would not say Brajesh was likely to or probably would abduct. Only Brajesh's membership in the particular group, that of his Indian national origin, puts him there. There could be no clearer demonstration of the use of national origin to falsely accuse a person and deny them fundamental rights. The testimony should never have been admitted.

²⁴ This testimony (even though erroneous) raises the additional issue of Brajesh's freedom of association under the First Amendment no less than the situation in *In re Marriage of Wicklund* in which the accusing parent sought to restrain the accused parent from association with his homosexual partner when the child was visiting. As in this case, in *Wicklund* the trial court imposed restrictions which had no proper factual foundation that the challenged conduct was detrimental to the child, and which also involved rank discrimination, and this Court had to reverse, as it has twice here.

²⁵ Thus he did not know Brajesh plays golf, not cricket; is an atheist, not a practicing Hindu; that AK helped choose Brajesh's new house in late 2007; that her bedroom is both pink and decorated in a "Barbie" motif and that Brajesh, though a vegetarian, regularly feed the children the chicken, meat, and hamburgers they love. *See* X RP 79, 82-88, 100-102; XI RP pp.8.

3. The Claimed “Expert Information” of the “Profiles” and “Red Flags” Was Inadmissible Because Those Criteria and Their Use to Predict Likely Abduction Is Not Supported Internally and Is Also Not Supported by Generally Accepted Scientific Principles.

Expert testimony is limited to that which “will assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702. The efficacy of expert testimony depends on whether the witness qualifies as an expert and whether the opinion would be helpful to the trier of fact. *Queen City Farms, Inc. v. Central National Ins. Co.*, 126 Wn.2d 50, 882 P.2d 703 (1994). *Accord, Group Health Co-op v. Dept. of Revenue*, *supra*. Being helpful necessarily means being relevant, so that opinion testimony about the “possible” relationship of the evidence to the fact at issue is inadequate as a matter of law. *Garcia v. Providence Med. Ctr.*, *supra*, 60 Wn. App. at 642-644. Washington follows the *Frye* standard where expert and scientific evidence means the opinion must concern a scientific principle which has gained acceptance in the broader scientific community or it is not admissible. *State v. Cassidy*, 90 Wn.2d 808, 812-14, 585 P.2d 1185 (1978).

The fact at issue here is whether Brajesh Katare is likely to or probably will abduct the children despite the court’s order in the parenting plan to return them at the end of scheduled visitation. An understanding of the evidence must, therefore, be focused on and have a nexus to this fact at issue since it is otherwise irrelevant. *Group Health Co-op; Garcia*.

Even assuming for the sake of argument that Mr. Berry was qualified to offer evidence of the “red flags” and “profiles” of past

abductors, neither he nor any of the materials that he submitted (which only included people who had abducted in the underlying surveys) even pretended to claim they could predict whether someone would be likely to abduct, much less that they could predict someone who had never abducted would be likely to or probably abduct. Since the only genuine issue is whether it is likely or probable that Brajesh Katare will abduct his two children, any expert evidence, or any other evidence brought in by the expert, is only relevant to the extent that it shows he is *likely* to abduct on a more probable than not basis. *Garcia*, 60 Wn. App. at 644.

The lack of relevance was also shown in the next portion of cross-examination where Mr. Berry was confronted with Exhibit 33, the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention Bulletin of January 2001. X RP, pp. 51-55. The report incorporated and summarized the authors on whom Mr. Berry had relied for the opinions and criteria that he offered to the court. Mr. Berry agreed with the following statements from the report as “particularly well stated”:

Mr. Wilson’s commentary is in the third paragraph down, where he says it should be kept in mind that these profiles neither predict the probability that a parental abduction will occur in a specific situation, e.g., when a particular family situation meets one or more of the characteristics, nor imply that there is a danger of such abduction, when no common characteristics exist. Rather, the profiles provide information which, along with the facts of a given case, may indicate that preventive indications should be considered.

X RP, p. 54. The admission of Mr. Berry’s testimony was reversible error.

Garcia.

E. The Proffered “Risk Factor Analysis” Fails to Support the Conclusion Brajesh is a Genuine, Substantial Threat to Abduct His Children When Applied to the Record.

Mr. Berry testified he based his opinions entirely on the parenting evaluation from Ms. Waldroup and the emails submitted by Lynette. IX RP p. 76:11-21; X RP pp. 41:18-42. Mr. Berry never interviewed Brajesh nor did he take into account the testimony or evidence submitted by Brajesh at the Second Remand Hearing. He thus did not have the full set of facts of this case for purposes of his testimony so that, under the basic rule of *Group Health* and *Prentice Packing & Storage Co.* quoted *supra* that “the opinions of expert witnesses are of no weight unless founded upon facts in the case,” his testimony and opinions are irrelevant as a matter of law.

However, even if those risk factors were valid (which Brajesh does not concede), those “criteria” do not establish Brajesh is or was likely to abduct his children, especially when the actual facts in the record are applied. While technically not necessary to address given the dispositive principles of expert testimony and the lack of a genuine finding that Brajesh made a threat to abduct, it helps illustrate why the restrictions should be stricken immediately and why this matter must be remanded to a different judge for any further proceedings to assure the appearance of fairness to Brajesh.

Mr. Berry claimed to apply to Brajesh the risk factors set forth in Exhibit 28. *See* II RP pp. 76, 83-88. According to Mr. Berry, in order for a person to be considered some unquantified level of an abduction risk, he

stated that “some” of the factors must be met. II RP p. 67. Though he did not specify further, linguistically this means at least three since it means more than one and is not as limiting as “a couple.” As the following chart shows, when all the evidence before the trial court is considered, especially the current evidence from 2009, there is no evidence to support a finding that Brajesh is likely to abduct using Dr. Berry’s own criteria. Mr. Berry’s analysis of the risk factors as applied to Brajesh is summarized as follows in the left column while the right-sided column shows the evidence which shows the finding of risk is incorrect. Most of the factors implicate race or national origin and thus must withstand strict scrutiny to be valid.

Risk Factor as Presented	Testimony by Mr. Berry	Actual Evidence Presented
“The first factor is whether there has been a prior threat of or actual abduction.” IX RP p. 83.	“Yes, The parenting plan references, in the conclusion section, that there were statements made by Mr. Katare that he was going to take the children, and there were two corroborating witnesses and it was a confirming statement made by the parenting evaluator.” ²⁶ IX RP, p.83.	Judge Roberts stated: “I will, of course, be making the ultimate determination as to whether I think this continues to be or has been established, since I did find before that I did not believe that a serious risk of abduction had been proved.” IX RP, p.81.
“The next item is whether a parent suspects or believes	“The concern of risk that has been put forward by Mr. Katare in regards to the maternal grandfather and whether or not the	Any concern was from 2002 and was cured by the court. Lynette’s father is barred from spending time alone with the children by the parenting plan. CP, p.259.

²⁶ The statements from the “corroborating witnesses” are inadmissible for any of Judge Roberts’ purposes as she ruled that she would not rely on Mr. Berry’s opinions.

abuse has occurred and friends and family support these concerns." IX RP, p.83.	children are safe....Also consistent criticism of her ability to care for the children, in his e-mails." IX RP, pp.83-84.	There is no evidence that Brajesh now fears for the children's safety. In e-mail exchanges both parties criticize the other's parenting but there is no evidence that Brajesh believes Lyn is abusive to the children. There is no evidence that any of Brajesh's family or friends support an opinion that Lyn is abusive. In his testimony Brajesh stated "Lyn is raising them very, very well." RP, p. 69.
"Item three is whether parent is paranoid and delusional?" IX RP, p.84.	NA	NA
"Item four is whether a parent is severely sociopathic?" IX RP, p.84.	NA	NA
"Item five is whether a parent, who is a citizen of another country, ends a mixed-culture marriage?" IX RP: p.84.	"Certainly under these circumstances, this is what could be called a mixed-culture marriage." IX RP, p. 85.	Brajesh is an American citizen of Indian descent, not a citizen of another country. XI RP p.34. It was Lynette who ended the mixed culture marriage, not Brajesh.
"And then item six is whether parents feel alienated from the legal system	"Yes. Information from e-mails indicates a disenfranchised thought pattern from the legal system by Mr. Katare." IX RP, p.85.	While Brajesh does reasonably complain that the legal system has favored Lyn, he continues to rely on legal recourse in this matter rather than self help. Ex. 15, 09/15/2003. ²⁷ There is no

²⁷ Brajesh stated "I will never violate a court order by calling before or after the allotted time." Brajesh continues to rely on the legal system to resolve the matter at hand and has never violated a court order or been in contempt.

and have family slash, social support in another country." IX RP, p. 85.		evidence that Brajesh receives any "social support" in India. His parents and other relatives live in India.
"The second is no strong ties to the child's home state." IX RP, p.86.	"To a lesser degree, it does apply. There is a – Mr. Katare is a very experienced traveler. He has no significant ties, I would think, to any particular location. So having resided in the United States and resided in India, I would say that that also applies... There are also indications in the parenting plan that the cultural aspects of India are very important to Mr. Katare." IX RP, p. 86.	Brajesh has lived and worked in Washington state since 1999 and has a strong social network here. He is in a successful position that is financially satisfying. He does have emotional ties to his family in India however he is not a practicing Hindu. XI RP: p. 8. His home is decorated in a contemporary fashion and he encourages his children in their preference for American fashions, including AK's "Barbie" motif bedroom. X RP, pp.83,85; XI RP, pp.44-45
"The fourth item, friends or family living out of state or abroad." IX RP, p. 86.	"Yes. The family living abroad certainly, his family in India makes that a clear indicator." IX RP, p. 86.	Brajesh's family live in India. His fiancée and friends live in Washington. XI RP, pp.9, 45.
"And number five, has a strong support network." IX RP, p. 86.	"That would mean whether or not the father was participating in perhaps a father's advocacy rights organization...I'm not aware of his involvement in any of those." IX RP, p. 87.	NA
"Sixth is no financial reason to stay in area, e.g., parent is unemployed, able to work anywhere or	"Yes. Mr. Katare is a very skilled gentleman, a very well-educated gentleman. His ability to work in India would probably be considered excellent and his ability to financially support	Brajesh holds a lucrative position at Microsoft and has expectations of advancement in the future. XI RP, p. 7. There is no evidence that he could obtain a comparable job in India and no evidence that he is looking for such a

<p>is financially independent.” IX RP, p. 87.</p>	<p>himself there would probably be considered excellent.” IX RP, p.87.</p>	<p>position. Mr. Barry has never visited India and gave no basis for his opinion that Brajesh’s ability to work or support himself financially in India would “probably” be excellent other than pure speculation.</p>
<p>“Number seven is engaged in planning activities, e.g., quit a job, sold a home, terminated a lease, closed a bank account or liquidated other assets, hidden or destroyed documents, applied for a passport, birth certificate, school or medical records.” IX RP, p. 87.</p>	<p>“Back at the time of the initial divorce, it was my understanding that there was an attempt to liquidate assets, for example, selling the car.” IX RP, p. 88.</p>	<p>Brajesh purchased a home in Sammamish in 2008. X RP, p. 81. There is no evidence of any type of planning activity that would indicate Brajesh currently plans to leave the country. Brajesh liquidated assets at the time of the divorce because of the divorce and the need for money for the legal proceedings and the two households.</p>
<p>“And the eighth is a history of marital instability, a lack of parental cooperation, domestic violence or child abuse.”</p>	<p>“Yes. The lack of parental cooperation, I think, just screams out in the e-mails. That is extremely obvious. And domestic violence was referenced in the parenting plan.” IX RP, p. 88.</p>	<p>While the emails show animosity between Brajesh and Lyn (and thus confirm the need for the divorce), there evidence is that they ultimately cooperate when it comes to the children and visitation.²⁸ XI RP, pp.107-112. They have not had to rely on mediation or the court to resolve any</p>

²⁸ Arrangements for visitations, information about children’s schooling and financial issues are the main topics of the e-mails in Exhibit 15.

IX RP, p.88.		parenting issues beyond one occasion where Brajesh went to the court to ask if he could combine his visitations in Florida at the first and last on the month to accommodate his work schedule, which was granted. XI RP, p.96. There is no evidence of domestic violence by either party. The original parenting plan did not have any findings of domestic violence and called for joint decision-making. Lyn's cross-appeal in the first appeal seeking §191 restrictions against Brajesh was rejected by the Court of Appeals, following the rejection by the trial court.
"And the ninth of these is a prior criminal record." IX RP, p.88.	"No, it does not [apply]. I'm not aware of any criminal record of Mr. Katare." IX RP, p. 88.	NA

F. The Trial Court's 2nd Remand Order is Manifestly Unreasonable. The Trial Court's "No Risk" Standard Is Contrary to the Statute, Violates Due Process, and Current Facts Were Ignored.

The disparity and disagreement among the "profiles" and "red flags" used below demonstrates a lack of agreement in this highly speculative area of trying to predict when a person is likely to abduct his or her own children. Judge Roberts imposed her own standard: if she determines there is *any* amount of risk (which is never quantified) -- as opposed to a reasonable, genuine and substantial risk based on facts about the accused parent, *i.e.*, that he is likely to, or will probably abduct -- then the court can put any restrictions on the accused parent's contact with the

child up to age 18. This can include supervised visitation and refusing any degree of travel, whether that be across county lines (as Judge Roberts did in the 2003 order), or across state lines, or outside the country. There thus is no standard at all and the trial judge can -- and here did -- impose onerous requirements which will never be lifted no matter what the evidence (*see* VII RP p. 31:18-23), restrictions harsher than those imposed on a *convicted* sex offender under RCW 26.09.191(2).

The unreasonableness of the 2nd Remand Order is illustrated by reviewing the provisions of RCW 26.09.191(2) which is applicable to parents convicted of sex offenses against children. The statute eliminates the usual presumption in favor of a parent-child relationship and establishes a rebuttable presumption that a parent convicted of a sex offense against a child “poses a present danger to a child” and contact with the parent’s child is precluded unless the parent rebuts the presumption. RCW 26.09.191(2)(d). The presumption is rebutted if the court finds that contact is “appropriate and poses minimal risk to the child” and if the parent’s sex offender treatment provider supports such a finding. RCW 26.09.191(2)(f)(i).²⁹ If the presumption is rebutted, the court may order supervised visitation. RCW 26.09.191(2)(h). After two years of supervised visitation with no further arrests or convictions of sex offenses involving children, the court may order unsupervised contact if it finds

²⁹ An additional requirement applies if the victim was the parent’s child: if the child has been in therapy, the child’s counselor must believe contact “is in the child’s best interest.” RCW 26.09.191(f)(ii).

that such contact is “appropriate and poses *minimal* risk to the child.” RCW 26.09.191(2)(k) (emphasis added). Note that the Legislature did *not* decree that, for convicted offenders for whom the presumption of proper action with the child is reversed, future unsupervised contact is only permitted if there is *no* risk.

The trial court here thus held that Brajesh, who has never been convicted of any crime or held in contempt in this (or any) case, to a far higher standard than a parent who has been *convicted* of a sex offense against a child and who has by statute lost the presumption he will behave properly. Based on Lynette’s accusation, the trial court imposed a presumption against Brajesh that he might abduct the children, even though finding he was “not a serious risk” to abduct. But as Judge Roberts said on July 30, 2003, that presumption meant she would never be willing to lift the restrictions to test its correctness and intended to keep the restrictions in place until the children became adults. VII RP, p. 31. Thus, while under the Parenting Act convicted sex offenders can have *unsupervised residential time with a presumptively at risk child* even if there is still some, albeit minimal, risk to the child, Judge Roberts now has ruled three times that, for law-abiding, Microsoft executive Brajesh Katare, a higher standard applies even though there is no genuine evidence that Brajesh is likely to abduct. Brajesh stands convicted and sentenced with no right to parole, apparently because he is from India and still has family there.

Finally, as demonstrated in the chart *supra*, review of these

proffered unconstitutional factors demonstrates that the trial court erred and was manifestly unreasonable because the trial court did not in fact apply the criteria to the facts of this case and the facts in this case do not meet the criteria stated in the sources for those “profiles” or “red flags.”

For example, at page five of the 2nd Remand Order, CP 156, the third bullet point refers to “red flags” and risk factors for abductions set forth in Exhibits 26, 28, 30 and 31. But there is no application of any of them to the facts of this case by the trial court. Close review demonstrates this. For example in Exhibit 26, Hoff, “Parental Kidnapping: Prevention and Remedies,” identifies nine “red flags” at page 12, and six “profiles” at p. 13 that identify the likelihood that an international abduction “*may be increased*” without specifying what it is increased from or to, and without specifying whether meeting one or more of those “red flags” meant a person was, in fact, a danger to abduct. Substantively, that the evidence failed to demonstrate that Brajesh fit those criteria is seen in the chart, *supra*, where some of the criteria were addressed with the relevant evidence. And, again, the analyses all begin with a “credible threat of abduction” which, as demonstrated *supra*, simply does not exist on this record.

As another example, Exhibit 28, “Early Identification of Risk Factors for Parental Abduction,” is based on a study done in California from 1987 and 1990 and identifies 17 risk factors (pp. 4 – 5), in addition to citing to the six profiles from Huff including five “subgroups” of the

profiles. Ex. 28, pp. 2-3.³⁰ Even a quick review of those criteria show that Brajesh does not fit the economic, social, or even the gender and racial profiles.³¹ It is even more important to look at what the article itself says was done when families were identified with “one or more of the risk profiles for abduction”: such families were not severely restricted by court orders, but rather were given brief interventions that “involved a brief 10-hour intervention that primarily involved diagnostic and referral services or a longer, 40-hour intervention that included *more extensive counseling and mediation*”. Ex. 28, p. 4, preamble to “Findings of the First Three Studies,” emphasis added. Consistent with this non-emergent approach to families which fit several of the “criteria,” the article categorically excluded from “abductors” those who, like Brajesh and Lynette, were “custody-litigating families.” In other words, the fact of litigating custody and visitation issues presumptively *removed* families from the abduction category.

This makes perfect sense. Abduction is ignoring the law or taking it into one’s own hands. Litigating custody or visitation disputes is following the law which, by its very nature, demonstrates an absence of risk for abduction. In the emotionally charged issue of access to one’s

³⁰ Exhibit 30 and 31 each have their own criteria to measure risk as well, adding to the conversation but not to a consensus on the criteria or their meaning.

³¹ For instance, the risk factors include finding that abducting parents “were in their midtwenties or midthirties” and over half abducting parents were “poor, unemployed, unskilled or semiskilled, and poorly educated.” The studies were summarized in the article as reporting that “[w]ith the exception of the Caucasian group, fathers were more likely than mothers to abduct.” Ex. 28, pp. 4-5.

children, a person like Brajesh who is committed to litigating over the long term, as this case amply shows, simply is not an abductor. If emotions control, snatching would occur soon after the first adverse ruling. Why spend all that time, money, and emotional energy if you are going to take the law in to your own hands anyway? Abductors do not worry about lack of passports or other legal niceties, they merely find ways around them. In this case, Brajesh never has taken the children without telling Lynette, and never will.

While the trial court identified several sources of risk factors in those exhibits, it did not state anywhere which, if any, specific factors actually applied to Brajesh. No one set of criteria was identified as completely authoritative by the trial court. There was a wide variation in the criteria set forth, but no indication that any one of these various sets of factors was applied to the facts of this case. Nor did the trial court identify any specific parts of these exhibits that unequivocally identify Brajesh as enough of a threat to the best interests of his children to warrant restrictions on his parental rights. All the Order does is state a conclusion in bullet 4 of page 5 that certain parts of the record meet unspecified criteria for even “several” unspecified “profiles and ‘red flags’ which indicate a risk of abduction by the father.” CP 156, App. A-5. Nowhere does the trial court support its formulation of this conclusion as based on any specific criteria. It is so conclusory that it prevents meaningful analysis to determine if it has a proper basis. It is in reality, “*ipse dixit*,” which is not the rule of law.

If one analogizes those “criteria” to rules of law, one must, first, still apply the facts -- the actual admissible facts in the record – to the criteria to determine whether specific “profiles” or “red flags” were met. But that is not all. After determining which (if any) of the “profiles” or “red flags” were met, one must then look at the entire picture under the analysis invoking those “profiles” or “red flags” see whether the specific combination of any that were met under the facts of this case in combination with those that were not gives a clear conclusion that the person evaluated is likely to abduct. *None* of the sources claim that if only an unspecified few of their “profiles” or “red flags” were met it could properly be determined the person being evaluated was likely to abduct. Even the trial court summarized the sources to the effect that “the risk of abduction is [only] probably increased.” CP 156, bullet 3. This still fails to find abduction by Brajesh is likely. It is a grossly insufficient basis under which to infringe fundamental constitutional rights; or to compromise the best interests of the children by denying them contact with half their extended family; or to overcome the constitutional and statutory presumption the father will act in the children’s best interests, which includes maintaining their relationship with their mother; or the presumption Brajesh will continue to obey the law and the requirements of the parenting plan, buttressed in this case by *seven continuous years* of Brajesh always complying and never violating any court order or the parenting plan.

Finally, the manifest unreasonableness of the 2nd Remand Order is

also demonstrated by the trial court's new determination that Lynette's 2003 allegation that Brajesh made threats in 2002 was credible *only* "when viewed in conjunction with the testimony of others" -- and the double hearsay supportive "testimony" appeared through an expert witness and is, as a matter of law, inadmissible for the substantive evidentiary purpose for which the trial court used it. The trial court's entire analysis falls without that fundamental building block of evidence of a credible threat.

G. The Full Record of the Ex. 15 Emails Shows Bickering Between Both Parents, Not That Brajesh Will Probably Abduct.

The trial court relied on the emails in Ex. 15 to find Brajesh addressed Lynette in a condescending and humiliating manner which supposedly shows a heightened risk of abduction. The Order also has findings stating Brajesh has contempt for the legal system which is also supposed to be evidence that Brajesh is an abduction risk. However, there is no evidence showing the required nexus: that the tone of the emails in fact establishes Brajesh is likely to abduct the children; or that his justified frustration with the slow legal system that has not given him full relief despite winning two appeals establishes that Brajesh is likely to abduct when he continues to "play by the rules" in court, under the law. There is no nexus between this evidence and likely or probable abduction by Brajesh.

The exchanges and name calling in Ex. 15 are hardly one sided. Rather, a review of the emails shows a predictable exchange between two

people who, despite their dislike for one another, must interact to arrange visits for their children. For example, the issue of phone calls to the children creates ongoing tension. Based on this record, Lynette appears to make no real effort to encourage the children to speak to their father when he calls. She repeatedly claims she never got the call or the children were busy and didn't want to come to the phone. Ex 15, pp.79, 109:10/17/05; 07/03/06. Brajesh counters that he can produce his phone records to show she is lying. At one point Lynette's mother hangs up on Brajesh twice when he attempts to call. Ex. 15, p.121:09/07/06. Lynette denies any wrongdoing and counters by complaining that when Brajesh has the children, he doesn't answer her calls either. Ex. 15: 04/01/07. Such exchanges are laced throughout the exhibit and yet visitations occurred regularly, within the parameters of the Parenting Plan, and always on time. *See X RP, p. 99.*

Moreover, there is plenty of evidence of Brajesh attempting to get beyond his frustration. In March 23, 2007, he stated "I still recommend ironing these things out between us otherwise next 16 years will be bad for the children as they will discover each and everything and the extent of your hostility. Time to put issues behind us and move on." In June of 2007 he stated "Bottom line, it is about time both need to start getting civil with each other. This nastiness will only cause further pain to the children. As far as I'm concerned, feel free to call [the children] at will. I will let you speak above and beyond the scheduled times."

Ironically, the emails in Ex. 15 show that Brajesh often made an

effort to make visitation easier for the children, not that he was threatening to abduct them. For example, once the children begin to travel to Seattle, he suggested that, rather than allow them to travel alone, he and Lynette each travel one way with them. Ex. 15, 02/14/06. He also suggested that for Thanksgiving, rather than keep the two-day visitation every year, they extend it to four days and take it every other year. Ex 15 p. 91:02/17/06. Lynette's typically inflexible response to this friendly overture was that his four days had to be Monday through Thursday, with the children returning to her by 8PM on Thanksgiving Day. Ex 15, p.110:7/25/06.

It is plain that Brajesh and Lynette have a fractious relationship as evidenced by their exchange of angry emails and phone calls, not to mention the continuing legal contest over the children's travel with Brajesh outside the U.S. Many divorced couples are hostile to each other, but that has no bearing on their ability to parent and does not necessarily make them likely to abduct. In this case there is ample evidence within the emails and beyond, that both Lynette and Brajesh are good parents, caring for their children despite their own differences. The fact is that without express actions by Brajesh that indicate he is a flight risk, email diatribes between him and Lynette are simply immaterial. There is no nexus to probable abduction.

H. Any Remand Should Be to a Different Judge to Insure the Appearance of a Fair Hearing and Impartial Decision-Maker.

Impartiality is the cornerstone of judicial behavior. *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 17-18, 52 Pac. 317 (1898).

Not only must a judge act without prejudice, she must in all ways give the appearance of fairness and of being impartial. *State v. Romano*, 34 Wn. App. 567, 662 P. 2d 406 (1983). *Accord, In re Custody of R*, 88 Wn. App. 746, 754, 947 P.2d 745 (1997); *Brister v. Council of City of Tacoma*, 27 Wn. App. 474, 487, 619 P.2d 982 (1980). That includes being open-minded to the case before you, even if returning on remand. *Id.* Our courts have remanded to a different judge to assure preservation of the appearance of fairness. *Id.*; *In re Marriage of Muhammed*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005). In order to determine whether a proceeding is fair, the court must view the actions of the judge against what a reasonable and disinterested person would find was fair. *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999).

The Ninth Circuit's standards for remanding to a different judge include the presence of either of two factors as "unusual circumstances." *D'Lil v. Best Western*, 538 F.3d 1031, 1040-41 (9th Cir. 2008); *Hunt v. Pliler*, 336 F.3d 839, 847-48 (9th Cir. 2003). The first factor is whether the original judge would reasonably be expected on remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected. *Id.* This applies here. The second is when reassignment is advisable to preserve the appearance of justice, which also applies here. *Id.* In *United Nat'l Ins. Co. v. R&D Latex Corp.*, 141 F.3d 916, 920 (9th Cir. 1998), the appellate court remanded to a different judge under the first factor where the trial judge had twice failed to give a required explanation

for exercising discretionary jurisdiction. Although Ninth Circuit decisions are not binding, they employ similar analysis in terms of appearance of fairness of the trial courts and may be helpful in evaluating this issue.

In this case, Judge Roberts has already been reversed twice for the same error (one more reversal than the federal judge in *United Nat'l Ins. Co.*), imposing restrictions on Brajesh's constitutionally protected right to raise his children without an adequate factual basis for those restrictions. The second remand explicitly directed her to take new evidence to consider the current situation of the parties. Nevertheless, Judge Roberts did not focus on the current status of the children and Brajesh. She focused on the events of 2002 and Brajesh's bickering with Lynette and his apparent gripes with the legal system – *i.e.*, with her. There thus could be an appearance that Judge Roberts took those comments personally and let it affect her judgment.

Moreover, Judge Roberts has made statements throughout this case which could indicate to disinterested observers that she is not open-minded. At the entry of final orders on July 30, 2003, Brajesh's trial counsel asked Judge Roberts to put in sunset provisions for some of the restrictions, particularly for the passport controls arguing "this is excessive to say that he has to have a passport controlled for the next 15 years. I don't know that you feel that. I think there should be a sunset." VII RP, p. 31:5-8. Judge Roberts responded as follows:

I am going to leave it because I don't know as time goes by I will feel less concerned about that. There is no particular reason at this point in time to think as time goes by that this concern will be lessened. *The only way to find out* is to test it by not having the

restrictions, *and I am not willing to do that.*

VII RP, p. 31:18-23.

There were no transcripts from the first remand hearing, which consisted of an unreported hearing on the papers. At the second remand hearing, however, Judge Roberts made statements which a reasonable and disinterested person could believe confirmed what she said in 2003 that she was not willing to change her mind on any of the restrictions, no matter what the facts seemed to be. At the outset of the second remand hearing, Judge Roberts made it very clear that, despite the fact that the trial had been nearly six years earlier, “I would like to start out by letting everybody know that I have a very clear memory in this case, . . . it’s the second remand. I don’t need to hear the evidence that we heard at the first trial.” VIII RP, p. 4. Later that day, when ruling on the motion *in limine* to exclude Mr. Berry’s testimony, Judge Roberts stated as follows:

I think I have been given the authority by the court of appeals to essentially reconsider that opinion based on new evidence as opposed to simply changing my mind, *which I won’t be doing.*

I’m happy to hear this kind of expert testimony to assist me in making that determination which I, and I alone, will be making.

IX RP, p. 82:2-10. Finally, the Order on Petitioner’s Request for Fees and Costs (“Fee Order”) entered November 24, 2009, states in part:

While the father’s conduct following this court’s ruling is of serious concern, it does not demonstrate intransigence of the sort that will support an award of fees and costs *at this juncture*. It is possible that this most recent conduct *could support a finding of intransigence in the future.*

Fee Order, CP 181, App. E-2.

Where a judge’s impartiality might reasonably be questioned by an

objective outside observer, recusal (or, here, remand to a different judge) is required. See *In re Discipline of Sanders*, 159 Wn.2d 517, 524-25, 145 P.3d 1208 (2006); *Sherman v. State*, 128 Wn.2d 164, 2-5-06, 905 P.2d 355 (1995). The Supreme Court explained the analysis in *Sherman* relying on federal law since the recusal requirement is tied to a party's due process right to not only a fair trial, but one that appears to be fair:

. . . in deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that ***where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating.*** The CJC provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." CJC Canon 3(D)(1) (1995). The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988) (emphasis omitted), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989); see also *United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir.1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

Sherman v. State, 128 Wn.2d at 205-06.

The Supreme Court directed that the remand go to a different judge in *Sherman* because a reasonable person might question the judge's impartiality given all the facts. Brajesh respectfully submits the same is true in this case as to Judge Roberts if that objective observer had all the facts. These include Judge Roberts' assertions she would not "change her mind," the two reversals to date, and the gratuitous surplussage in the very late Fee Order. In addition to those facts is the unlawful delay by Judge Roberts of four months for the Fee Order, an order that was not

complicated.³²

V. CONCLUSION.

The Court must reverse the trial court's latest order restricting Brajesh's constitutional rights to parent his children because there is no evidence he is likely to violate any court order or parenting plan provision and not return the children to the mother at the end of his scheduled visits. There simply are no facts which support a finding that Brajesh will engage in any conduct adverse to the best interests of his two children and thus no factual basis for restrictions under RCW 26.09.191(3)(g). Since Judge Roberts could appear to an objective outside observer to be determined to keep imposing these restrictions no matter what the facts actually are, and even though there is not a factual basis for the legal requirement she repeatedly imposed, the appellate court should vacate the restriction and remand to a different judge who can establish safeguards for international travel which apply equally to each parent. Given the length of this litigation which began in 2002 and was tried in June, 2003, the decision should formally stay the trial court's travel restrictions and the passport controls of Brajesh beginning 60 days after the decision is filed.

³² Article IV, §20 of the constitution and RCW 2.08.240 require that a superior court judge render a decision within 90 days. There is a longstanding assumption the judge will be liable for the delay in some fashion. See *Demaris v. Barker*, 33 Wn. 200, 202-03, 74 P. 362 (1903). Under the statute a judge who fails to render a decision within 90 days "shall be deemed to have forfeited his office." RCW 2.08.240. Brajesh suggests an appropriate application of the statute here should refer to the "office" of presiding over the case in any future proceedings.

Respectfully submitted this 11th day of December, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By: 
Gregory M. Miller, WSBA No. 14459
Dorice A. Eaton, WSBA No. 38897
Attorneys for Appellants

NO. 63438-1-I
WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Marriage of:

LYNETTE KATARE,

Respondent,

vs.

BRAJESH KATARE,

Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of the *OPENING BRIEF*, and this *Certificate of Service* by causing a true copy thereof to be served to counsel of record on December 11, 2009 as follows:

Gordon W. Wilcox 1191 2 nd Ave., 18 th fl. Seattle, WA 98101-2996 P: (206) 233-9300 F: (206) 233-9194 Email: gwilcox@gwwinc.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email
Catherine Wright Smith Edwards Sieh Smith & Goodfriend PS 1109 First Avenue, Suite 500 Seattle, WA 98101-2988 P: (206) 233-9300 F: (206) 233-9194 Email: cate4appeals@washingtonappeals.com or cate@washingtonappeals.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email

DATED this 11 day of December, 2009.


Catherine A. Norgaard

2009 DEC 11 PM 11:14
STATE OF WASHINGTON
COURT OF APPEALS

APPENDIX A

FILED
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KIM C. PHIPPS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Marriage of:

LYNETTE KATARE,

Petitioner,

and

BRAJESH KATARE,

Respondent.

NO. 02-3-05316-9 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ON SECOND REMAND

I. BASIS FOR FINDINGS

This matter came before the court upon the parties' requests for a hearing to address the issues presented upon (the second) remand from the court of appeals. The court held a hearing on January 14 and 15, 2009. Both the petitioner and the respondent attended the hearing, along with their attorneys, Gordon Wilcox for the petitioner, and Katy Banahan and Christopher Rao for the respondent. The court then heard argument from counsel on February 5, 2009.

The court of appeals directed this court on remand to (1) expressly address whether the evidence supports limitations under RCW 26.09.191(3), and (2) expressly address the best interest of the children. The court of appeals also directed this court to examine current

1 relevant information concerning any limitations under RCW 26.09.191(3), given the passage of
2 time since the original trial in 2003. The specific limitations at issue in this case are the
3 passport and foreign travel restrictions in the parenting plan. The new evidence presented at
4 the hearing allowed the court to make new findings based on the current circumstances. It also
5 shed light on some of the court's earlier findings.
6

7 II. FINDINGS

8 Upon the basis of the court record, the court FINDS:

9
10 The risk of abduction by the father and the best interests of the children justify
11 limitations under RCW 26.09.191(3)(g). In finding that there is a sufficient risk of abduction
12 to warrant a geographical limitation on the father's residential time with the children, the Court
13 considered the following evidence, which was brought forth during the June 2003 dissolution
14 trial:

- 15 • The father was born and raised in India, where his immediate family still remain.
16 Other than the parties' children, the father has no family ties to the United States.
17 (He is now engaged to marry an Indian woman who lives and works in the Seattle
18 area and has applied for a green card).
- 19 • Even after the mother expressed her disagreement in moving the family to India,
20 the father nevertheless pursued the family's relocation to India.
- 21 • In the months leading up to the mother filing a petition for dissolution of their
22 marriage, the father threatened to take the children to India without the mother.
23 Third parties interviewed by the parenting evaluator stated that they heard the
24 father make similar threats. The trial court finds that the mother's testimony that
25 the father made threats was credible, when viewed in conjunction with the
testimony of others.
- The father sought information for the children in discovery, which would have
allowed him to obtain documents (Indian PIO cards) which would assist in

1 removing the children from the country. The information requested included:
2 copies of the applications for the children's passports and Indian tourist visas,
3 copies of passport pages and Indian tourist visas from their passports, and copies of
4 the children's immunization records.

- 5 • The mother found an application for an Indian PIO card (similar to a U.S. "green
6 card") on the father's computer.
- 7 • The father has the means and potential to relocate to India for employment.
- 8 • The children were too young to seek help if the father improperly retained them in
9 India.
- 10 • The consequences of abduction to India are incredibly serious and irreversible.
- 11 • The risk of abduction was sufficient to warrant limitations on the father's time with
12 the children.
- 13 • It was in the best interests of the children to have their residential time with their
14 father in the United States given the above findings; it was in their best interest to
15 limit their travel outside the United States as well, given the risks.

16 In addition to the above findings based on the 2003 trial, the trial court makes the
17 following additional findings based on the evidence presented on remand, some of which are
18 new, and some of which serve to bolster the findings based on evidence from the original trial:

- 19 • The risk of abduction has not abated, and based on evidence presented at the
20 hearing on remand, is seen more clearly to have been strong at the time of the
21 original trial, and perhaps to have now increased. From the emails between the
22 parties after the first trial, it is evident that the father still harbors resentment
23 against the mother, which could manifest itself by an abduction of the children.
24 The father's emails demonstrate extreme anger, abuse, unreasonableness, and poor
25 judgment. This is of particular concern given that he knew that the e-mails would
likely be presented in court. He addressed the mother in a condescending and
humiliating manner, indicating utter disdain for the mother. This continuing
conduct, especially when the father is aware of the court's involvement, heightens
the risk to the children.
- The father demonstrated his willingness to punish the children in response to the
parenting plan, and to continue to taunt the mother. Exhibit 37 is an email from
November 1, 2005, in which the father wrote:

1 Convey my love and wishes to A and R as today is Diwali. Tell them I love
2 them and they will have their diwali gifts whenever they visit their daddy's
3 home. They are stored in their play room. Tell them that I will explain what
4 diwali and its significance is when they grow up.

5 This e-mail was described by the father as an example of his "civil," approach
6 to dealing with the mother. He does not see that the tone is condescending and
7 sarcastic, and that he has chosen to punish the children by storing their gifts and
8 delaying his teaching to them about an important celebration. He implies that the
9 mother and the court have made it impossible for him to provide the gifts and to
10 explain the significance of the celebration, simply because he was required to visit the
11 children in Florida rather than bring them to his home in Washington state while they
12 were young.

- 13 • The father, in his correspondence, expressed his contempt for the legal system, e.g.,
14 referring to the court's order allowing the mother to relocate to Florida with the
15 children as, "legal abduction."
- 16 • Contrary to his representations at the previous trial, the father has spent significant
17 time in India since that trial. He lived and worked there for at least two years. The
18 court recognizes that the father nonetheless kept to the visitation schedule with his
19 children while he worked in India.
- 20 • The children, now ages 8 and 7, are too young to seek assistance in the event that
21 they are improperly retained by their father or otherwise unable to return to their
22 mother. This is especially true if the children are taken to a foreign country such as
23 India. The court did not consider the mother's testimony about the conditions in
24 India, which testimony was without foundation. Nor did the court place weight on
25 the mother's attempts to paint her children, who are in gifted programs at school, as
incapable of making phone calls or dealing with money. Her portrayal of the
vulnerability of the children was unconvincing to the court, and reminiscent of her
testimony in the 2003 trial, which was also often overly dramatic and not credible.
Nonetheless, it is not in the best interest of the children to allow them to travel with
their father outside the United States such that they might be put in a position of
being kept from returning to the United States. The father's testimony and conduct
alone leads the court to this conclusion, regardless of the mother's testimony.
- Exhibit 11, at 6.11(3) and Exhibit 25 at p. 113 show the legal impediments to
obtaining the return of an improperly retained child through the court in India.
Exhibit 32, p. 8, shows that child abduction is not a crime in India. This
information was persuasive and helpful to the court, but not necessary to its other
findings and conclusions.

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- It is in the best interests of the children to have their residential time with their father in the United States. The father's time with the children is not now limited to Florida, and his concerns about not being able to expose the children to his culture have been ameliorated by the elimination of other restrictions on his time with the children.
 - Exhibit 11 shows that India is not a signator to the Hague Convention on International Child Abduction. Exhibit 11, 6.11(4), *Foreign Orders*, shows that India has its own laws giving it broad authority to rewrite parenting orders of other states. Exhibit 11, 6.11(1), shows that there is no guarantee of enforcing a U.S. parenting order in India. Exhibit 25, p. 113, shows that proceedings in India do not include summary proceedings. Exhibit 11, 6.11(3), shows that such proceedings can take from six months to a year.
 - Exhibit 25, p. 114, shows that the custody order of a foreign state is only one of the factors which will be taken into consideration by a court of law in India. Exhibit 28 sets out early identifications of risk factors for parental abduction. Exhibit 33 identifies profiles (factors) for family abductors: descriptive profiles and preventive interventions. There is a different set of "common red flags" in Exhibit 26, some of which are not included in the factors above. Exhibits 30 and 31 show research regarding risk factors for abduction and refer to "red flags." The Patricia Huff article at Exhibit 26 refers to the same or similar "red flags." Exhibit 28, pp. 2-3, shows risks based on the profiles described in the gray boxes. Exhibit 28 at p. 6, shows that the literature suggests that to the extent that families meet the criteria for more than one profile, the risk for abduction is probably increased.
 - Respondent's behavior, including his behavior in 2002 as shown in Exhibits 39 and 40 and his emails in Exhibit 15, his bitterness towards Petitioner and the lack of resolution of difficulties between the parties show that he meets the criteria for several Profiles and "red flags" which indicate a risk of abduction by the father, which is against the best interests of the children.
 - The respondent's conduct as described above is adverse to the best interests of the children. His pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tools to continue this conduct. The passport and travel restrictions set forth in the parenting plan are reasonably calculated to address this identified harm.

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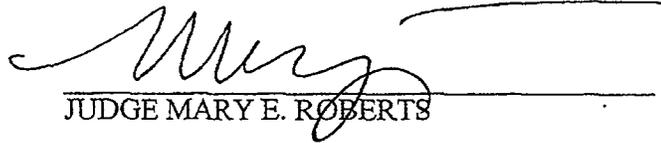
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III. CONCLUSIONS

1 Based on the above findings of fact, the court concludes that the restrictions in the
2 parenting plan are appropriate.

3 At argument, counsel requested the opportunity to address any award of attorneys fees
4 following the issuance of this decision. The court will consider any such request.
5

6 DATED this 4th day of April, 2009.
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10 JUDGE MARY E. ROBERTS
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APPENDIX B

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

In re the Marriage of:) VERBATIM REPORT OF
 LYNETTE KATARE,) THE PROCEEDINGS
 Petitioner,)
 vs.) Cause No. 02-3-05316-9SEA
 BRAJESH KATARE,)
 Respondent.)

COPY

TRANSCRIPT

of the proceedings had in the above-entitled cause
 before the HONORABLE Mary E. Roberts, Superior
 Court Judge, on the 7th day of July, 2003,
 reported by Kimberly H. Girgus, Certified Court
 Reporter.

APPEARANCES:

FOR THE PETITIONER: GORDON WILCOX
 Attorney at Law

FOR THE RESPONDENT: GEORGE W. SCHOONMAKER
 Attorney at Law

1 The tenth factor from the statute is the
2 financial impact and logistics of the relocation
3 or its prevention. The financial impact of the
4 relocation will likely be positive for both
5 parties in this situation but for the cost of
6 transportation. The cost of transportation for
7 the father, until the children are old enough to
8 travel, is mitigated by the fact that his business
9 travel allows him frequent flyer miles to visit
10 the children. So financial impact will mitigate
11 the favor of the relocation.

12 Based on all of that I will be allowing the
13 relocation. As I said, Mrs. Katare has asked this
14 Court to make a finding under RCW 26.09.191 that
15 Mr. Katare has engaged in a pattern of emotional
16 abuse of the child or the abusive use of conflict
17 which creates the danger of serious damage to the
18 children's psychological development. First, I
19 find that Mr. Katare's agreement the Temporary
20 Parenting Plan of August 13th, 2002, does not
21 constitute an admission that he engaged in such
22 conduct.

23 Second, based on the evidence presented in
24 this trial, I do not find that he has engaged in
25 such conduct. Nor is there any evidence of

1 long-term emotional impairment which interferes
2 with Mr. Katare's performance of parenting
3 functions.

4 I gave a long and careful consideration to
5 the issue of the risk of abduction and confess
6 today being concerned about this. I'm not
7 persuaded, based on all the evidence presented,
8 including that of the expert witnesses who were
9 called to testify, that Mr. Katare presents a
10 serious threat of abducting the children.

11 Nonetheless, if I'm wrong on this the consequences
12 are incredibly serious and I'm mindful about that.

13 I'm going to impose some restrictions in the
14 parenting plan that will be designed to address
15 this issue, and I hope that everything that has
16 been brought to this Court, which I think
17 indicates that, there is not a serious risk of
18 abduction turns out to be the truth.

19 With regard to child support. The current
20 level of child support will continue until
21 relocation. Upon relocation, which I assume will
22 happen fairly soon, the child support shall be set
23 as set forth in the order of child support
24 submitted by Ms. Katare. Except that with regards
25 to transportation expenses for residential time

1 with the father following Rohan's fifth birthday,
2 parties share this 35/65 expense, which is the
3 percentage that relates to their income.

4 With regard to maintenance. Maintenance
5 shall continue at the current rate until
6 relocation and at which time cease.

7 With regards to property division. First,
8 I find that any funds sent to India during the
9 marriage or prior to the separation were community
10 funds gifted or transferred by both parties. I
11 find that Mrs. Katare acquiesced in such gifts or
12 transfers of funds, and that Mr. Katare did not
13 waste those community funds by making those
14 transfers or gifts. Hence, I will not order
15 reimbursement to the community for such payments.

16 Having said that, there is very little
17 property to divide, as far as I can tell.

18 Frankly, the evidence of what assets remain was
19 vague. I'm going to do my best to go through
20 those and divide them among the parties. I spent
21 quite a bit of time trying to sort through that,
22 and find that I still am not completely certain of
23 the status of the various assets, and I think that
24 the reason to that is because in regard to some of
25 them no evidence was actually offered.

APPENDIX C

FILED

KING COUNTY WASHINGTON

JUL 30 2003

SUPERIOR COURT CLERK
BY LAMEANIA M. BRIDGES
DEPUTY

HON. MARY ROBERTS

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:

LYNETTE KATARE

Petitioner,

and

BRAJESH KATARE

Respondent.

NO. 02-3-05316-9 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(FNFCL)

I. BASIS FOR FINDINGS

The findings are based on trial held on June 16 – 20 and June 23rd, 2003. The following people attended: Petitioner, Petitioner's Lawyer, Respondent, and Respondent's Lawyer.

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

2.1 RESIDENCY OF PETITIONER. The petitioner is a resident of the state of Washington.

2.2 NOTICE TO THE RESPONDENT. The respondent appeared and responded to the petition.

2.3 BASIS OF PERSONAL JURISDICTION OVER THE RESPONDENT. The court has jurisdiction over the Respondent because the following facts establish personal jurisdiction: The respondent is presently residing in Washington; the parties lived in Washington during their marriage and the petitioner continues to reside in this state; and, the parties have conceived children while within Washington.

2.4 DATE AND PLACE OF MARRIAGE. The parties were married on November 25, 1995 at Clearwater, Pinellas County, Florida.

FINDINGS OF FACT AND CONCL OF LAW (FNFCL) –
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
.070 (3)– Page 1

LAW OFFICES
Gordon W. Wilcox, Inc. P.S.
1201 THIRD AVENUE • SUITE 5160
SEATTLE, WASHINGTON 98101
(206)233-9300 • Fax (206) 233-9194

ORIGINAL page 165

1
2 2.5 STATUS OF THE PARTIES. Husband and wife separated on July 12, 2002.

3 2.6 STATUS OF THE MARRIAGE. The marriage is irretrievably broken and at least 90 days have
4 elapsed since the date the petition was filed and since the date the summons was served or the
5 respondent joined.

6 2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT. There is no written
7 separation contract or prenuptial agreement.

8 2.8 COMMUNITY PROPERTY. The parties have the following real or personal community
9 property:

- 10 (a) Residence located at 24027 SE 12th Place, Sammamish, Washington;
- 11 (b) Fidelity IRA in wife's name;
- 12 (c) Fidelity IRA in husband's name;
- 13 (d) Microsoft 401(k);
- 14 (e) Microsoft Employee Stock Purchase Plan
- 15 (f) Microsoft stock options;
- 16 (g) Fidelity Acct. No. -899;
- 17 (h) Fidelity Acct. No. -351
- 18 (i) First Tech Credit Union Acct. No. -854;
- 19 (j) American Express IDS life insurance policy covering wife's life;
- 20 (k) American Express IDS life insurance policy covering husband's life;
- 21 (l) Indian jewelry;
- 22 (m) Nissan Quest;
- 23 (n) Honda Civic;
- 24 (o) Air miles;
- 25 (p) Household furnishings; and
- (q) Personal property.

26 2.9 SEPARATE PROPERTY. The husband has the following real or personal separate property:
27 All personal property acquired after the date of separation with earnings. The wife has the following
28 real or personal separate property: Her interest in the DeGuzman Family Partnership and all personal
29 property acquired after the date of separation.

30 2.10 COMMUNITY LIABILITIES. The parties have incurred the following community liabilities:

<u>Creditor</u>	<u>Amount</u>
Mortgage on Sammamish house	Approx. \$260,000
Valenti Loan for house down payment	\$25,320
Unpaid property taxes (incl. interest, penalties)	\$4,736
Loan 1 on Microsoft 401(k)	Approx. \$18,000
First USA credit card	Approx. \$5,000
United Airlines credit card	Approx. \$5,000

*FINDINGS OF FACT AND CONCL OF LAW (FNFL) –
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
.070 (3)– Page 2*

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SEATTLE, WASHINGTON 98101
(206)233-9300 • Fax (206) 233-9194*

1
2 2.11 SEPARATE LIABILITIES. The husband has incurred the following separate liabilities: Any
3 and all debt incurred after the date of separation, including, but not limited to "Loan 2" on Microsoft
4 401(k), credit cards, and attorneys fees and costs. The wife has incurred the following separate
liabilities: Any and all debt incurred after the date of separation, including, but not limited to personal
loans from her parents.

5 2.12 MAINTENANCE. Maintenance should be ordered because: The wife has been a stay-at-home
6 mom and has not worked in four years by agreement of the parties. The wife is in need of maintenance
7 until the wife relocates to Florida and the husband has the ability to pay. Maintenance should cease
upon the wife's relocation.

8 2.13 CONTINUING RESTRAINING ORDER. Does not apply.

9 2.14 FEES AND COSTS. There is no award of fees or costs because neither party has the ability to
pay the other's fees.

10 2.15 PREGNANCY. The wife is not pregnant.

11 2.16 DEPENDENT CHILDREN. The children listed below are dependent upon either or both
12 spouses.

<u>Name of Child</u>	<u>Age</u>	<u>Mother's Name</u>	<u>Father's Name</u>
Annika Katare	3 years	Lynette Katare	Brajesh Katare
Rohan Katare	22 months	Lynette Katare	Brajesh Katare

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15
16 2.17 JURISDICTION OVER THE CHILDREN. This court has jurisdiction over the children for the
17 following reasons: This court has exclusive continuing jurisdiction. The court has previously made a
18 child custody, parenting plan, residential schedule or visitation determination in this matter and retains
19 jurisdiction under RCW 26.27.211; This state is the home state of the children because the children lived
in Washington with a parent or a person acting as a parent for at least six consecutive months
immediately preceding the commencement of this proceeding.

20 2.18 PARENTING PLAN. The parenting plan signed by the court on this date is approved and
incorporated as part of these findings.

21 2.19 CHILD SUPPORT. There are children in need of support and child support should be set
22 pursuant to the Washington State Child Support Schedule. The Order of Child Support signed by the
23 court on this date and the child support worksheet, which has been approved by the court, are
incorporated by reference in these findings.

24
25
*FINDINGS OF FACT AND CONCLUSION OF LAW (FNFL) –
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
.070 (3)– Page 3*

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Gordon W. Wilcox, Inc. P.S.
1201 THIRD AVENUE • SUITE 5160
SEATTLE, WASHINGTON 98101
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1 2.20 OTHER.

2 2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

3
4 2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband
5 appears to present no serious threat of abducting the children. Nonetheless, under the
6 circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their
7 families and communities, and history of parenting, the consequences of such an abduction are
8 so irreversible as to warrant limitations on the husband's residential time with the children,
including: location of exercise of residential time, surrender of his passport, notification of any
change of his citizenship status, and prohibition of his holding or obtaining certain documents
(i.e. passports, birth certificates) for the children. The mother shall retain the children's
passports.

9 2.20.3 The husband's agreement to the Temporary Parenting Plan of August 13, 2002, does
10 not constitute an admission that he engaged in the conduct alleged therein under RCW
26.09.191.

11 2.20.4 The husband has not engaged in a pattern of emotional abuse of a child or the
12 abusive use of conflict which creates the danger of serious damage to the children's
psychological development under RCW 26.09.191.

13 2.20.5 Based on the evidence, the husband has no long-term emotional impairment that
14 interferes with his performance of parenting functions.

15 2.20.6 Limitations on the parents' residential time with the children to a particular location
16 is also justified by the age of the children.

17 2.20.7 The children each have a Fidelity UTMA account. The husband shall be the sole
custodian of each of these accounts.

18 2.20.8 While relying on RCW 26.09.184 and RCW 26.09.187 in making residential
19 provisions for the children as set forth in the Parenting Plan, the court also relies upon and
20 incorporates the findings contained in the Order on Objection to Relocation entered at the same
time as these findings.

21 2.20.9 Nicolas Valenti, maternal grandfather of the children, was accused of engaging in
22 sexual misconduct with patients in his medical practice and surrendered permanently his right to
23 practice as a physician as part of resolving the administrative process arising from these actions.
Nicolas Valenti is to be with the children only if there is a third party adult also present.

24 2.20.10 Regarding property held by the parties at the time of marriage, there was such a
25 degree of commingling and there was a failure to trace such funds that the separate identity of
those funds was lost and all of the property is community property. There was also a lack of

1 proof in some instances that assets held prior to marriage were ever transferred to the community
2 or were utilized for community purposes.

3 2.20.11 Regarding gifts from the parents, there was no proof that such gifts were not made to
4 the community.

5 2.20.12 Regarding community funds sent to India to the family of the husband prior to the
6 date of separation, these funds were community funds gifted or transferred by both parties and it
7 is specifically found that the wife acquiesced in such gifts or transfer of funds and that Mr.
Katare did not waste those community funds by making those transfers or gifts, and
reimbursements to the community regarding those funds is not warranted.

8 III. CONCLUSIONS OF LAW

9 The court makes the following conclusions of law from the foregoing findings of fact:

10 3.1 JURISDICTION. The court has jurisdiction to enter a decree in this matter.

11 3.2 GRANTING OF A DECREE. The parties should be granted a decree.

12 3.3 DISPOSITION. The court should determine the marital status of the parties, make provision for
13 a parenting plan for any minor children of the marriage, make provision for the support of any minor
14 child of the marriage entitled to support, consider or approve provision for the maintenance of either
15 spouse, make provision for the disposition of property and liabilities of the parties, make provision for
the allocation of the children as federal tax exemptions, make provision for any necessary continuing
restraining orders, and make provision for the change of name of any party. The distribution of property
and liabilities as set forth in the decree is fair and equitable.

16 3.4 CONTINUING RESTRAINING ORDER. Does not apply.

17 3.5 ATTORNEY'S FEES AND COSTS. Each party should pay their own attorney's fees and costs.

18 3.6 OTHER. Does not apply.
19

20
21 Dated: July 30, 2003

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23 _____
24 JUDGE MARY E. ROBERTS
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Presented by:

Approved for entry:

GORDON W. WILCOX, INC. P.S.

HARRIS, MERICLE & WAKAYAMA, PLLC

By _____

By _____

Gordon W. Wilcox
Attorney for Petitioner
WSBA No. 75

George W. Schoonmaker
Attorney for Respondent
WSBA No. 624

APPENDIX D

FILED

2003 SEP 22 PM 2:50
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

HON. MARY ROBERTS

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:

LYNETTE KATARE

Petitioner,

And

BRAJESH KATARE

Respondent.

NO. 02-3-05316-9 SEA

PARENTING PLAN
FINAL ORDER (PP)

This parenting plan is the final parenting plan signed by the court pursuant to a decree of dissolution entered on this date.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. GENERAL INFORMATION

This parenting plan applies to the following children:	<u>Name</u>	<u>Age</u>
	Annika Katare	3 years
	Rohan Katare	23 months

II. BASIS FOR RESTRICTIONS

Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the children and the right to make decisions for the children.

2.1 PARENTAL CONDUCT (RCW 26.09.191(1), (2)). Does not apply.

2.2 OTHER FACTORS (RCW 26.09.191(3)). Does not apply.

III. RESIDENTIAL SCHEDULE

The residential schedule must set forth where the children shall reside each day of the year, including provisions for holidays, birthdays of family members, vacations, and other

PARENTING PLAN (PPP, PPT, PP) - WPF DR 01.0400
(9/2001) - RCW 26.09.181; .187; .194 - Page 1

LAW OFFICES
Gordon W. Wilcox, Inc. P.S.
1201 THIRD AVENUE • SUITE 5160
SEATTLE, WASHINGTON 98101
(206)233-9300 • Fax (206) 233-9194

ORIGINAL
Page 171

1 *special occasions, and what contact the children shall have with each parent. Parents are*
2 *encouraged to create a residential schedule that meets the developmental needs of the children*
3 *and individual needs of their family. Paragraphs 3.1 through 3.9 are one way to write your*
4 *residential schedule. If you do not use these paragraphs, write in your own schedule in*
5 *Paragraph 3.13.*

6 3.1 SCHEDULE FOR CHILDREN UNDER SCHOOL AGE. Prior to enrollment in school,
7 the children shall reside with the mother, except for the following days and times when the
8 children will reside with or be with the other parent: Three consecutive days each month,
9 including overnights, from 10:00 a.m. to 8:00 p.m., in Florida only, and subject to the provisions
10 in ¶ VI. Three-day holiday weekends will be used whenever possible so that travel causes the
11 least disruption to the parents' work schedule. The Hindu holidays (Diwali, Holi, Dushera, Rakhi
12 and Ganesh Chaturhi) shall be considered when scheduling the weekend time. The father shall
13 give the mother written notice of his intended monthly visitation dates by the 15th of the
14 preceding month.

15 3.2 SCHOOL SCHEDULE. Upon enrollment in school, the children shall reside with the
16 mother, except for the following days and times when the children will reside with or be with the
17 other parent: Same as schedule in ¶ 3.1, except that the residential time may be outside of
18 Florida when Rohan is five. The school schedule for both children will start when Annika enters
19 kindergarten.

20 3.3 SCHEDULE FOR WINTER VACATION. The children shall reside with the mother
21 during winter vacation, except for the following days and times when the children will reside
22 with or be with the other parent: During odd-numbered years, from 2:00 p.m. December 25 to
23 8:00 p.m. December 31st; during even-numbered years, from 2:00 p.m. December 26 to 8:00 p.m.
24 January 1. The father shall give the mother written notice of his intent to exercise his residential
25 time by November 15th of each year. The father's residential time with the children shall be in
Florida until Rohan reaches age five. Thereafter the children may travel to visit the father, but
only if that is within the United States. The winter vacation schedule is in lieu of the monthly
weekend time per ¶ 3.2 for December.

3.4 SCHEDULE FOR SPRING VACATION. The children shall reside with the mother
during spring vacation, except for the following days and times when the children will reside
with or be with the other parent: For seven consecutive days of spring vacation, beginning at
10:00 a.m. and ending at 8:00 p.m., excluding Easter Sunday. The father shall give the mother
written notice of his intent to exercise his residential time by February 15th of each year. The
father's residential time with the children shall be in Florida until Rohan is five. Thereafter the
children may travel to visit the father, but only if that is within the United States. The spring
vacation schedule is in lieu of the monthly weekend time per ¶ 3.2 for the month in which the
spring vacation occurs.

3.5 SUMMER SCHEDULE. Upon completion of the school year, the children shall reside
with the mother, except for the following days and times when the children will reside with or be

1 with the other parent: Three nonconsecutive weeks each summer, beginning at 10:00 a.m. and
 2 ending at 8:00 p.m. When Rohan reaches age 8, the three weeks may be consecutive. The father
 3 shall give the mother written notice of his intended summer visit dates by April 1st each year.
 4 The father's residential time with the children shall be in Florida until Rohan reaches age five.
 Thereafter the children may travel to visit the father, but only if that is within the United States.
 The summer schedule is in lieu of the monthly weekend time per ¶ 3.2 for June and July.

5 3.6 VACATION WITH PARENTS. The mother shall have two weeks vacation with the
 6 children each year and shall notify the father of those weeks by May 1st each year. The father's
 vacation time with the children shall occur as per ¶¶ 3.3 – 3.5.

7 3.7 SCHEDULE FOR HOLIDAYS. The residential schedule for the children for the holidays
 8 listed below is as follows:

	<u>With Mother</u>	<u>With Father</u>
New Year's Eve/Day	Even	Odd
Martin Luther King Day	Every*	In Florida w/notice until Rohan is 5
Presidents' Day	Every*	In Florida w/notice until Rohan is 5
Easter	Every	
Memorial Day	Every*	In Florida w/notice until Rohan is 5
July 4th	Every	
Labor Day	Every*	In Florida w/notice until Rohan is 5
Diwali**	Every	
Veterans' Day	Every*	In Florida w/notice until Rohan is 5
Thanksgiving Day	Thursday and Friday	Saturday and Sunday
Christmas Eve	Every	
Christmas Day	Until 2:00 p.m.	Beginning at 2:00 p.m.

16 * The father shall have priority to visit the children on these holidays per ¶¶ 3.1 and 3.2 provided
 he gives written notice of his intent to do so by the 15th of the month preceding the holiday.

17 ** Diwali is not set. It takes place anytime between mid-October through mid-November. The
 18 father shall give written notice of his intent to visit the children by the 15th of the month
 preceding the holiday.

19 The father's holiday time with the children shall be (in Florida only until Rohan is five) from
 20 10:00 a.m. to 8:00 p.m., unless included as part of a monthly weekend visit per ¶ 3.2.

21 3.8 SCHEDULE FOR SPECIAL OCCASIONS. The residential schedule for the children for
 22 the following special occasions (for example, birthdays) is as follows:

<u>Special Occasion</u>	<u>With Mother</u>	<u>With Father</u>
Mother's Day/Birthday	Every	
Father's Day/Birthday		Every
Annika's Birthday	Even	Odd
Rohan's Birthday	Odd	Even

1 The father's special occasion time with the children shall be (in Florida only until Rohan is 5)
2 from 10:00 a.m. to 8:00 p.m., unless included as part of a monthly weekend visit per ¶ 3.2. The
3 father shall give the mother written notice of his intent to visit the children on special occasions
by the 15th of the month preceding the occasion.

4 3.9 PRIORITIES UNDER THE RESIDENTIAL SCHEDULE. If the residential schedule,
5 paragraphs 3.1 - 3.8, results in a conflict where the children are scheduled to be with both parents
6 at the same time, the conflict shall be resolved by priority being given as follows: Rank the order
7 of priority, with 1 being given the highest priority: 1. Vacation with parents (3.6); 2. Holidays
(3.7); 3. Special occasions (3.8); 4. Winter vacation (3.3); 5. Spring vacation (3.4); 6. Summer
schedule (3.5); 7. School schedule (3.1, 3.2).

8 3.10 RESTRICTIONS. Does not apply because there are no limiting factors in ¶¶ 2.1 or 2.2.

9 3.11 TRANSPORTATION ARRANGEMENTS. Transportation costs are included in the
10 Child Support Worksheets and/or the Order of Child Support and should not be included here.
11 Transportation arrangements for the children, between parents shall be as follows: The mother or
her designee shall transport the children to and from their visits with the father. The parties shall
exchange the children at the sheriff/police department closest to the mother's home.

12 3.12 DESIGNATION OF CUSTODIAN. The children named in this parenting plan are
13 scheduled to reside the majority of the time with the mother. This parent is designated the
14 custodian of the children solely for purposes of all other state and federal statutes which require a
designation or determination of custody. This designation shall not affect either parent's rights
and responsibilities under this parenting plan.

15 The mother is designated as legal custodian of the children for purposes of the Hague Convention
16 and the Jay Treaty, and any other convention, treaty or law affecting the custody of children.

17 3.13 OTHER. Does not apply.

18 3.14 SUMMARY OF RCW 26.09.430 - .480, REGARDING RELOCATION OF A CHILD.

19 This is a summary only. For the full text, please see RCW 26.09.430 through 26.09.480.

20 If the person with whom the child resides a majority of the time plans to move, that person shall
give notice to every person entitled to court ordered time with the child.

21 If the move is outside the child's school district, the relocating person must give notice by
22 personal service or by mail requiring a return receipt. This notice must be at least 60 days before the
intended move. If the relocating person could not have known about the move in time to give 60 days'
23 notice, that person must give notice within 5 days after learning of the move. The notice must contain
the information required in RCW 26.09.440. See also form DRPSCU 07.0500, (Notice of Intended
Relocation of A Child).

24 If the move is within the same school district, the relocating person must provide actual notice by
25 any reasonable means. A person entitled to time with the child may not object to the move but may ask

1 for modification under RCW 26.09.260.

2 Notice may be delayed for 21 days if the relocating person is entering a domestic violence shelter
3 or is moving to avoid a clear, immediate and unreasonable risk to health and safety.

4 If information is protected under a court order or the address confidentiality program, it may be
5 withheld from the notice.

6 A relocating person may ask the court to waive any notice requirements that may put the health
7 and safety of a person or a child at risk.

8 Failure to give the required notice may be grounds for sanctions, including contempt.

9 **If no objection is filed within 30 days after service of the notice of intended relocation, the
10 relocation will be permitted and the proposed revised residential schedule may be confirmed.**

11 A person entitled to time with a child under a court order can file an objection to the child's
12 relocation whether or not he or she received proper notice.

13 An objection may be filed by using the mandatory pattern form WPF DRPSCU 07.0700,
14 (Objection to Relocation/Petition for Modification of Custody Decree/Parenting Plan/Residential
15 Schedule). The objection must be served on all persons entitled to time with the child.

16 The relocating person shall not move the child during the time for objection unless: (a) the
17 delayed notice provisions apply; or (b) a court order allows the move.

18 If the objecting person schedules a hearing for a date within 15 days of timely service of the
19 objection, the relocating person shall not move the child before the hearing unless there is a clear,
20 immediate and unreasonable risk to the health or safety of a person or a child.

21 IV. DECISION MAKING

22 4.1 DAY-TO-DAY DECISIONS. Each parent shall make decisions regarding the day-to-day
23 care and control of each child while the child is residing with that parent. Regardless of the
24 allocation of decision-making in this parenting plan, either parent may make emergency
25 decisions affecting the health or safety of the children.

4.2 MAJOR DECISIONS. Major decisions regarding each child shall be made as follows:
Education, non-emergency health care and religious upbringing, mental health care, and
children's activities: joint.

4.3 RESTRICTIONS IN DECISION MAKING. Does not apply because there are no
limiting factors in paragraphs 2.1 and 2.2 above.

V. DISPUTE RESOLUTION

*The purpose of this dispute resolution process is to resolve disagreements about carrying
out this parenting plan. This dispute resolution process may, and under some local court rules
or the provisions of this plan must, be used before filing a petition to modify the plan or a motion
for contempt for failing to follow the plan.*

1
2 No dispute resolution process, except court action is ordered, unless the parties agree in
3 writing to mediation or arbitration. The mediator/arbitrator shall determine the allocation of
4 costs of the mediation or arbitration.

5 VI. OTHER PROVISIONS

6 There are the following other provisions:

7 (a) Location. The father's residential time with the children is restricted to Pinellas and
8 Hillsborough Counties, Florida, until Rohan reaches age five. Thereafter the children may travel
9 to visit the father, but only if that is within the United States.

10 (b) Contact Information. The father shall give the mother good contact information: the address
11 and local telephone number where he is staying during visits in Florida. The father shall give the
12 mother a cell phone number where he may be reached when he is with the children and shall
13 keep the phone on at all times while he has the children.

14 (c) Surrender of Passport. The father shall surrender his passport to a mutually-agreed party or
15 one selected by the Court in the Pinellas/Hillsborough County area before he has any contact
16 with the children per §§ 3.1 – 3.8, which shall be returned to him after he has delivered the
17 children back to their mother. The individual holding the passport shall notify the mother by e-
18 mail or fax within five minutes of receiving or returning it.

19 (d) Removal of the Children. Prior to Rohan's 5th birthday, the father or anyone acting under his
20 direction or control or as his designee shall not remove the children from Pinellas and
21 Hillsborough Counties, Florida. After Rohan reaches age 5, the children may travel to visit their
22 father, provided that is within the United States. The father or anyone acting under his direction
23 or control or as his designee shall not remove the children from the United States.

24 (e) Children's Passports/Birth Certificates. The father or anyone acting under his direction or
25 control or as his designee is not authorized to have or request new passports, visas, Indian PIO
cards or birth certificates for the children (U.S. or any other country's). The mother shall retain
the children's passports.

(f) Father's Citizenship. The father shall notify the mother and the court having jurisdiction over
the children of any changes to his citizenship status, including regaining Indian citizenship,
getting dual citizenship, or renouncing U.S. citizenship.

(g) Telephone contact. The father may contact the children by telephone three times each week
on Mondays, Thursdays and Sundays between the hours of 7:30 p.m. to 8:30 p.m. Eastern Time.
The mother may contact the children by telephone three times each week on Mondays, Thursdays
and Sundays between the hours of 7:30 p.m. to 8:30 p.m. Eastern Time when the children are
with the father. The calls may be up to ten minutes in duration until each child is four, and
thereafter may be up to 20 minutes. The children shall have complete access to make phone calls
to either parent if they so desire.

1 (h) Contact with Maternal Grandfather. The mother shall not allow the children to be with
2 Nicolas Valenti unless a third party adult is present.

3
4 VII. DECLARATION FOR PROPOSED PARENTING PLAN

5 Does not apply.

6 VIII. ORDER BY THE COURT

7 It is ordered, adjudged and decreed that the parenting plan set forth above is adopted and
8 approved as an order of this court.

9 **WARNING:** Violation of residential provisions of this order with actual knowledge of
10 its terms is punishable by contempt of court and may be a criminal offense under RCW
11 9A.040.060(2) or 9A.40.070(2). Violation of this order may subject a violator to arrest.

12 When mutual decision making is designated but cannot be achieved, the parties shall
13 make a good faith effort to resolve the issue through the dispute resolution process.

14 If a parent fails to comply with a provision of this plan, the other parent's obligations
15 under the plan are not affected.

16 Dated: September ²¹ 5, 2003


17 JUDGE MARY ROBERTS

18 Presented by:

Approved for entry:

19 GORDON W. WILCOX, INC. P.S.

HARRIS, MERICLE & WAKAYAMA, PLLC

20 By _____

By _____

21 Gordon W. Wilcox
22 Attorney for Petitioner
23 WSBA No. 75

George W. Schoonmaker
Attorney for Respondent
WSBA No. 624

APPENDIX E

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Marriage of:

LYNETTE KATARE,

Petitioner,

and

BRAJESH KATARE,

Respondent.

NO. 02-3-05316-9 SEA

ORDER ON PETITIONER'S
REQUEST FOR FEES AND COSTS

This matter came before the court on the Petitioner's Submission Re Fees and Costs following entry of the court's Findings of Fact and Conclusions of Law on Second Remand. The court considered the materials submitted in support of and in response to the request.

The mother requests that the court award her fees and costs based in part on the alleged intransigence of the father. The mother points to disturbing behavior on the respondent's part following entry of the court's Findings and Conclusions as proof of intransigence. Immediately following this court's ruling, the father cancelled his summer 2009 visitation with the children, in order to "regroup." The mother argues that this shows the father's continued attempts for unrestricted travel with the children are based solely on a need to "win," i.e.,

1 intransigence. The court does not agree. While the father's conduct following this court's
2 ruling is of serious concern, it does not demonstrate intransigence of the sort that will support
3 an award of fees and costs at this juncture. It is possible that this most recent conduct could
4 support a finding of intransigence in the future.

5
6 The mother also requests an award of fees and costs under RCW 26.09.140, based on
7 her need, and the father's ability to pay. The court considered the financial resources of both
8 parties. Neither can reasonably afford to pay the other's fees. The mother is fortunate to have
9 assistance from family members to address her need.

10 The petitioner's request for an award of fees and costs is DENIED.

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King County Superior Court
Judicial Electronic Signature Page

Case Number: . 02-3-05316-9
Case Title: . . KATARE VS KATARE

Document Title: . ORDER ORDER ON REQUEST FOR FEES

Signed by Judge: Mary Roberts
Date: 11/24/2009 8:30:00 AM



Judge Mary Roberts

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: EF9EB5C45670570D0F782FAC8C319F8B55F924E0
Certificate effective date: 6/1/2009 4:10:28 PM
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CA, O=State of Washington PKI, C=US

APPENDIX F



Court of Appeals of Washington,
 Division 1.
 In re the Marriage of Lynette KATARE, Respondent,
 v.
 Brajesh KATARE, Appellant.
 No. 53231-6-I.

Dec. 20, 2004.
 Publication Ordered Jan. 20, 2005.

Background: In child custody dispute, the Superior Court, King County, Mary E. Roberts, J., adopted restrictions designed to prevent father from taking his children out of the United States, and to limit his visits to a two-county area in the state where mother and children would relocate. Father appealed.

Holdings: The Court of Appeals, Schindler, J., held that:

- (1) trial court's ambiguous and contradictory findings regarding risk of abduction required remand to trial court to clarify its intent regarding foreign travel restrictions;
- (2) evidence failed to support prohibition on father's removing children from two-county area in state where mother and children were to relocate; and
- (3) evidence supported denial of father's request to allow him to make up visitation time when he was unable to travel to visit children.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Child Custody 76D ⚡924

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk924 k. Determination and Disposition of Cause. Most Cited Cases
 Trial court's ambiguous order in child custody dispute, with regard to risk that father would abduct his two children and take them to his native country of India, required Court of Appeals to remand case to trial court to clarify the legal basis for its decision to impose restrictions to prevent father from taking children to

India, and, if appropriate, to make necessary findings; although trial court stated that father appeared to present no serious threat of abducting the children, trial court's findings addressed concerns about the risk of abduction, and trial court imposed limitations to prevent abduction which were supported by the court's findings. West's RCWA 26.09.191.

[2] Child Custody 76D ⚡921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited

Cases

The Court of Appeals reviews a trial courts decision on the provisions of a parenting plan for abuse of discretion.

[3] Child Custody 76D ⚡921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited

Cases

A trial court abuses its discretion if its decision on the provisions of a parenting plan is manifestly unreasonable or based on untenable grounds or untenable reasons.

[4] Child Custody 76D ⚡921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited

Cases

A trial court's decision on the provisions of a parenting plan is "manifestly unreasonable," so as to constitute an abuse of discretion, if it is outside the range of acceptable choices, given the facts and the applicable legal standard.

[5] Child Custody 76D ↪921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited
Cases

Child Custody 76D ↪922(4)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk922 Questions of Fact and Findings of
Court
76Dk922(4) k. Visitation. Most Cited
Cases

A trial court's decision on the provisions of a parenting plan is based on untenable grounds, so as to constitute an abuse of discretion, if the factual findings are unsupported by the record, and it is based on untenable reasons, likewise constituting such an abuse, if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

[6] Appeal and Error 30 ↪893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate
Court
30k893(1) k. In General. Most Cited
Cases

Statutory interpretation is a question of law that the Court of Appeals reviews de novo.

[7] Child Custody 76D ↪216

76D Child Custody
76DV Visitation
76Dk215 Visitation Conditions
76Dk216 k. In General. Most Cited Cases

Child Custody 76D ↪511

76D Child Custody
76DVIII Proceedings

76DVIII(C) Hearing

76Dk511 k. Decision and Findings by
Court. Most Cited Cases
The trial court may not impose limitations or restrictions in a parenting plan in the absence of express findings under statute authorizing such limitations, and any limitations or restrictions imposed must be reasonably calculated to address the identified harm. West's RCWA 26.09.191.

[8] Child Custody 76D ↪922(2)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk922 Questions of Fact and Findings of
Court
76Dk922(2) k. Credibility of Witnesses.

Most Cited Cases
Credibility determinations in a child custody dispute are the province of the trier of fact and will not be disturbed on appeal.

[9] Child Custody 76D ↪474

76D Child Custody
76DVIII Proceedings
76DVIII(B) Evidence
76Dk466 Weight and Sufficiency
76Dk474 k. Geographical Limitations.

Most Cited Cases
Evidence in child custody dispute failed to support trial court's prohibition on the father's removing the children from a two-county area in the state where the mother and children were to relocate until the youngest child turned five; trial court's stated reason for the two-county restriction, that the children were too young to travel any farther during a three-day visit with the father, was not supported by any evidence in the record and was based on untenable grounds.

[10] Child Custody 76D ↪210

76D Child Custody
76DV Visitation
76Dk209 Physical Custody Arrangements
76Dk210 k. In General. Most Cited Cases
Evidence supported the trial court's denial, in child custody dispute, of father's request to add a provision to the parenting plan to allow him to make up visita-

tion time when he was unable to travel to the state where mother and children planned to relocate; father sought five-day visits following months in which he was unable to visit the children for his normal three-day visit, but undisputed evidence in the record indicated that five-day periods away from their mother, as the primary caretaker, would not be in the children's best interests, given their young age.

[11] Child Custody 76D ↪216

76D Child Custody
76DV Visitation
76Dk215 Visitation Conditions
76Dk216 k. In General. Most Cited Cases

Child Support 76E ↪559

76E Child Support
76EXII Appeal or Judicial Review
76Ek559 k. Determination and Disposition of Cause. Most Cited Cases

Trial court's order in child custody dispute that father pay all costs for his long-distance travel to visit children in another state, rather than allocating costs in the same proportion as the basic child support calculation, was justified by trial court's awarding father all of the community property air miles; however, since trial court did not make specific findings to deviate from basic support obligation in the child support order, it was necessary to remand to trial court to clarify whether it intended to deviate from the requirement that each parent pay a proportionate share of the travel expenses. West's RCWA 26.19.080.

[12] Child Custody 76D ↪100

76D Child Custody
76DIII Incidents and Extent of Custody Award
76Dk100 k. In General. Most Cited Cases

Child Support 76E ↪149

76E Child Support
76EIV Amount and Incidents of Award
76Ek149 k. Extraordinary Expenses in General. Most Cited Cases

The statutory language is mandatory that long distance travel expenses are extraordinary expenses that are to be shared by the parents in the same proportion as the

basic child support obligation. West's RCWA 26.19.080.

[13] Child Custody 76D ↪100

76D Child Custody
76DIII Incidents and Extent of Custody Award
76Dk100 k. In General. Most Cited Cases

Child Support 76E ↪149

76E Child Support
76EIV Amount and Incidents of Award
76Ek149 k. Extraordinary Expenses in General. Most Cited Cases

Once the trial court in a child custody dispute determines that extraordinary expenses are reasonable and necessary, it is required to allocate them in proportion with the parents' income.

****45 *815** Gregory Mann Miller, Seattle, WA, for Appellant.

***816** Catherine Wright Smith, Edwards Sieh Smith & Goodfriend, Gordon Wilson Wilcox, Seattle, WA, for Respondent.

SCHINDLER, J.

Under RCW 26.09.191, a trial court has authority to impose limitations in a parenting plan. Brajesh Katare contends the trial court erred in adopting restrictions designed to prevent him from taking his children out of the United States and limiting his visits to a two-county area in Florida until the youngest child turns five despite its finding that the factors in RCW 26.09.191 did not apply. Brajesh also contends the court abused its discretion when it refused to order additional time with his children if he is unable to travel to Florida and the trial court erred when it required him to pay all the transportation expenses. Lynette Katare cross-appeals and argues the trial court abused its discretion in not finding Brajesh engaged in an abusive use of conflict under RCW 26.09.191(3)(e) and the trial court's findings support imposing the challenged conditions under RCW 26.09.191(3)(g).

The trial court entered inconsistent and contradictory findings regarding its concerns about the risk of abduction. Although the court concluded there was no basis for finding that the factors in RCW 26.09.191

justified imposing restrictions in the parenting **46 plan and Brajesh did not present a serious risk, the court imposed restrictions on Brajesh's visitation because of his threats to take the children to India and the irreversible consequences of abduction. We remand to the trial court to clarify its intent in imposing the passport and foreign-travel restrictions and if appropriate to enter findings to justify limitations it imposed. We conclude the provision in the parenting plan that prohibits Brajesh from removing the children from a two-county area in Florida was an abuse of discretion. We reverse that *817 restriction and remand to amend the parenting plan to allow Brajesh to take the children to Orlando. We affirm the trial court's decision to deny Brajesh's request for make up time. We remand for the trial court to clarify its intent and if appropriate amend the child support order to include findings that support a deviation requiring Brajesh to pay the travel expenses.

FACTS

Lynette and Brajesh Katare were married on November 25, 1995, in Clearwater, Florida, and have two children, Annika, born May 27, 2000, and Rohan, born September 20, 2001.^{FN1} On July 22, 2002, after approximately seven years of marriage, Lynette filed a petition for dissolution.

^{FN1}. We refer to the Kataras by their first names to ensure clarity. No disrespect is intended.

Brajesh Katare was born and raised in India. He moved to Florida in 1989 to obtain a master's degree. All of his family members live in India. Lynette Katare was born and raised in Florida, and most of her family lives in Florida. Lynette and Brajesh met in Florida in 1992. Lynette was a student and Brajesh was employed in the computer industry. After Lynette and Brajesh married, they continued to live in Florida and in 1996, Lynette earned a master's in business administration. Both Lynette and Brajesh are very close to their families and maintained close contact with them during their marriage, including visits with Lynette's family in Florida, Brajesh's family visiting from India, and Lynette and Brajesh visiting Brajesh's family in India.

Lynette and Brajesh relocated to Washington State in 1999 when Microsoft hired Brajesh. Lynette did not

want to move to Washington and leave her family and friends. Brajesh insisted they move and Lynette eventually agreed. Lynette also worked for Microsoft in Washington until she became pregnant with Anni-ka.

*818 Brajesh's job with Microsoft required a great deal of travel.^{FN2} IN 2002, HE SOUGHT a different position within microsoft because a back injury made traveling difficult. In April 2002, Microsoft offered Brajesh a position in Florida. Brajesh did not accept the job offer. In May 2002, when Microsoft offered Brajesh a two year position in India to supervise local operations, he accepted.

^{FN2}. According to testimony at trial, Brajesh traveled approximately 102 out of 365 days in 2002.

Brajesh and Lynette gave different accounts about the decision to accept the position and move to India. Lynette said Brajesh accepted the job before discussing it with her. She said she expressed concerns about security in India, being isolated and the children's health. According to Lynette, when she expressed her objections and concerns, Brajesh became very angry and threatened her. Lynette said Brajesh told her he would go to India and take the children with or without her and he would relocate even if it meant divorce. At one point, Brajesh told Lynette she could stay and he would take the children to India.

According to Brajesh, he was excited about the job in India because it was the best option for him in terms of professional advancement and avoiding extensive travel. He said he was frustrated with Lynette's unwillingness to go because he thought some of her concerns were not valid. He denied threatening to take the children to India without her.

As the deadline to move to India in September 2002 got closer, Lynette and Brajesh fought more about the move. In July 2002, Brajesh went on a two-week business trip to India to prepare for the family's move. While Brajesh was gone, Lynette filed for dissolution and obtained an ex parte restraining order. In support of the restraining**47 order, Lynette told the court Brajesh threatened to take the children to India. After Brajesh returned, he and Lynette agreed to a temporary parenting plan that required Lynette and a court-approved supervisor to attend the twice-weekly

*819 visits with the children and Brajesh at specific locations.^{FN3} Lynette and Brajesh also agreed to appoint Margo Waldroup to conduct a parenting assessment and make recommendations regarding a parenting plan.

FN3. The week after the temporary parenting plan was entered, Brajesh moved to amend the temporary parenting plan to allow his visits to occur anywhere in King County, including at his apartment, to exclude Lynette from the visits, and to order her to facilitate the scheduled phone conversations with the children. The court granted the motion to expand the location for Brajesh's visits to a portion of King County and set a schedule to reduce the number of visits Lynette could attend.

In October 2002, Lynette filed a notice of her intent to relocate with the children to Florida. After Brajesh objected, the relocation decision was postponed to the dissolution trial in June 2003.

In fall 2002, Waldroup completed her parenting assessment and submitted a report with her recommendations. In Waldroup's opinion, the children were close to both parents but they were closer to Lynette as the primary caregiver. Waldroup's report included an extensive discussion of the threats to abduct the children and the risk of abduction. While Brajesh denied making threats, Waldroup stated Lynette's allegation that Brajesh threatened to abduct the children was corroborated by two witnesses. But in Waldroup's opinion, no evaluation could predict whether Brajesh would abduct the children.

Waldroup recommended that the twice-weekly visitation schedule established in the temporary parenting plan continue for a few months before adding overnight visits, and that Lynette no longer attend the visits. If Lynette was allowed to relocate to Florida with the children, Waldroup recommended Brajesh have three consecutive days with the children each month, adding staying overnight during the three day periods after Rohan turned two. Waldroup recommended Brajesh's vacation time coincide with school vacations when Annika reaches school age. While the monthly visits would occur in Florida, the vacation time with the children could occur in Florida or Seattle. Waldroup also recommended that the current

requirement *820 of supervised visitation not be lifted until the children's passports were secured, and suggested that perhaps Brajesh's and the children's passports could be added to a watchlist.

Brajesh moved to modify the temporary parenting plan to eliminate supervision based on Waldroup's report. His motion was granted subject to the requirement that his attorney hold his passport during his visitation.

A five day long trial was held in June 2003. The primary issues at trial were Lynette's intent to relocate with the children to Florida and Lynette's request that the court impose restrictions in the parenting plan. Several people testified, including the parties, Margo Waldroup, the parenting evaluator, and Marya Bary,^{FN4} the Director of Family Court Services.

FN4. Bary testified by deposition.

Lynette testified Brajesh repeatedly threatened to take the children to India without her and Brajesh was still planning on moving to India. Lynette also testified that during discovery, Brajesh requested copies of the applications for the children's passports and Indian tourist visas, copies of passport pages and Indian tourist visas from their passports, and copies of the children's immunization records. Lynette also said she found an application for an Indian PIO card (similar to a U.S. "green card") on Brajesh's computer. Lynette argued this evidence showed Brajesh was planning to take the children to India. Lynette also said she was concerned about the possibility that Brajesh might abduct the children to India because India is not bound by the Hague Convention on International Child Abduction, so it would be difficult if not impossible for her to get the children back to the United States. Brajesh denied making threats. Brajesh said the job in India was no longer a possibility **48 because the role he would have played there was no longer necessary, but he acknowledged that he was supervising employees there and traveling back and forth several times a year. Waldroup testified consistent with her *821 report about Brajesh's threats to abduct the children and her opinions and recommendations.

The trial court carefully analyzed the statutory factors for relocation and decided Lynette should be allowed to relocate to Florida with the children.^{FN5} The court followed Waldroup's recommendations and adopted a

parenting plan that established a residential schedule allowing Brajesh three consecutive days, including overnights, each month for residential time with the children in Florida. The court imposed limitations on Brajesh's residential time with the children designed to prevent Brajesh from taking the children to India, including: (1) prohibiting Brajesh from taking the children out of a two-county area in Florida until Rohan turns five, and prohibiting him from taking the children out of the country until they turn 18; (2) prohibiting Brajesh from holding or obtaining certain documents, including passports and birth certificates, for the children; (3) requiring Brajesh to surrender his passport to a neutral third party for the duration of each visit; and (4) requiring Brajesh to notify Lynette and the court of any change in his citizenship status.

FN5. The court entered an order setting forth detailed findings to support the statutory factors for relocation.

In the decree, the court awarded all of the community's 625,000 air miles to Brajesh taking into account that he may use some of the miles to travel to Florida for visitation time with the children. In the child support order, the court allocated the basic support obligation 65 percent to Brajesh and 35 percent to Lynette, but required Brajesh to pay for all the travel expenses until Rohan turns five.

In his motion to reconsider, Brajesh challenged the limitations on the location of his residential time and the passport controls. Brajesh also asked the court to add a provision to the parenting plan that would allow him to make up missed visits and to apportion the transportation expenses for visitation in Florida in the same proportion as the standard support. The court denied Brajesh's motion for *822 reconsideration and his request to order make up visitation time and to apportion travel expenses.

Brajesh appeals the provisions in the parenting plan that impose conditions on visitation with his children in Florida, the child support order requiring him to be solely responsible for transportation expenses until Rohan turns five, and denial of his request for make up visitation time if he is unable to travel to Florida for a scheduled visit.

Lynette files a conditional cross-appeal and argues the court erred when it found no RCW 26.09.191 factors

were present.^{FN6}

FN6. Lynette also argues that the trial court's findings support imposing the restrictions under RCW 26.09.191(3)(g).

ANALYSIS

Parenting Plan Provisions

[1] Brajesh argues the trial court erred when it imposed limitations on his residential time with Annika and Rohan. He contends there was no legal basis to impose the limitations because the court expressly found the factors to justify imposing restrictions under RCW 26.09.191 did not apply. He also contends that because the court found there was "no serious threat" that he would abduct the children, the court's findings do not support limitations or restrictions under RCW 26.09.191.^{FN7}

FN7. CP at 168.

[2][3][4][5] We review a trial court's decision on the provisions of a parenting plan for abuse of discretion. In re the Marriage of Littlefield, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Littlefield, 133 Wash.2d at 46-47, 940 P.2d 1362. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable**49 grounds if the factual findings are unsupported by the record; it is based *823 on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Id. at 47, 940 P.2d 1362.

Relying on Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), In re Custody of Smith, 137 Wash.2d 1, 15, 969 P.2d 21 (1998), and State v. Ancira, 107 Wash.App. 650, 654, 27 P.3d 1246 (2001), Brajesh argues the limitations in the parenting plan violate his fundamental liberty interest in the care, custody and control of his children because no compelling interest for restricting his fundamental rights is supported by the record. But the cases Brajesh relies on do not support his argument that a parenting plan that complies with the statutory requirements to

promote the best interests of the children raises an issue of constitutional magnitude or violates a parent's constitutional rights.^{FN8}

FN8. Similarly, Brajesh has failed to cite any authority that supports his contention that the clear and convincing standard of proof should be met before a trial court can impose any limitations on a parent's exercise of residential time. (He cites only Santosky v. Kramer, 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (clear and convincing evidence was required for termination of parental rights), Nguyen v. State Dep't of Health Medical Quality Assurance Comm'n, 144 Wash.2d 516, 523-27, 29 P.3d 689 (2001) (clear and convincing evidence required when loss of medical license is at stake), and In re Parentage of C.A.M.A., 120 Wash.App. 199, 84 P.3d 1253 (2004) (clear and convincing evidence standard applies in third-party visitation context).) Here, Brajesh's parental rights were not terminated and his residential time with his children was not limited; the limitations imposed were intended to protect the best interests of the children and do not raise constitutional issues.

Brajesh argues the limitations imposed on his residential time violate the requirements of the Parenting Act. He contends the limitations were imposed without regard to the factors in RCW 26.09.187(3) and the best interests of the children under RCW 26.09.002, and they are not justified under RCW 26.09.191.

The trial court must consider a number of provisions in the Parenting Act in adopting a parenting plan, including the guidelines set forth in RCW 26.09.187(3), which must be read in conjunction with RCW 26.09.184 (setting forth the objectives and required contents of a *824 permanent parenting plan), RCW 26.09.002 (stating the policy of the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with a child). Littlefield, 133 Wash.2d at 50, 940 P.2d 1362.

Brajesh contends that under RCW 26.09.002, the existing pattern of interaction between a parent and child may only be altered when specific findings es-

tablish that the changes are necessary to protect the child. He claims the limitations in the parenting plan are unjustified departures from the previous patterns of his interaction with his children.

RCW 26.09.002 provides, in part:

[T]he best interests of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

The Court in In re the Marriage of Kovacs, 121 Wash.2d 795, 854 P.2d 629 (1993), rejected the argument that the existing pattern of interaction may be changed only when it is harmful to the child. Instead, the Court held that when setting a residential schedule under RCW 26.09, the best interests of the child is to be determined with reference to the seven factors in RCW 26.09.187(3)(a).^{FN9} **50 There is no requirement in RCW 26.09.002 for specific findings. The limitations do not violate RCW 26.09.002.

FN9. The seven factors are:

- (i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

RCW 26.09.187(3)(a).

*825 Brajesh contends a court may impose restrictions or limitations on a parent's residential time only if the court expressly finds there are factors or conduct that is adverse to the best interest of the child. He argues that because the trial court concluded no RCW 26.09.191 factors were present, there was no legal basis to impose limitations on his residential time.

[6] Whether RCW 26.09.191 factors must be present before limitations may be imposed on residential provisions of a parenting plan is a question of statutory interpretation. Statutory interpretation is a question of law this court reviews de novo. Berger v. Sonneland, 144 Wash.2d 91, 104-05, 26 P.3d 257 (2001).

RCW 26.09.191(1) and (2) are mandatory provisions that require the trial court to restrict a parent's conduct or involvement with the child, while RCW 26.09.191(3) is a discretionary provision that permits a trial court to restrict a parent's actions. RCW 26.09.191(1) prohibits a court from requiring mutual decision-making or dispute resolution other than court action if certain factors are present. RCW 26.09.191(2) requires a court to limit a parent's residential time with a child if any factors listed under that section are present. RCW 26.09.191(3) allows a court to limit any provision of a parenting plan if the court finds a parent's involvement or conduct may have an adverse effect on the child's best interest and any of the factors in RCW 26.09.191(3) are present.^{FN10} Under RCW 26.09.191(3):

^{FN10}. While under the mandatory provisions of RCW 26.09.191(1) and (2) the court cannot allow dispute resolution and decision making provisions, the same result is not required for the discretionary factors in RCW 26.09.191(3). See, e.g., RCW 26.09.187(1) (limiting dispute resolution procedures

where any .191 factor applies), RCW 26.09.187(2) (requiring consideration of the presence of any .191 factor in determining what type of decision-making authority to provide). For factors under RCW 26.09.191(3), the trial court has the discretion to impose dispute resolution and decision-making provisions that are in the best interests of the child.

*826 A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

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

[7] We conclude the court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191.^{FN11} We also conclude that any limitations or restrictions imposed must be reasonably calculated to address the identified harm.

^{FN11}. In her cross-appeal, Lynette contends the trial court was not required to enter RCW

26.09.191 findings because the limitations it imposed are not .191 restrictions. She relies on the boilerplate language from the parenting plan form to argue RCW 26.09.191 applies only where a court limits or prohibits a parent's contact with the children and the right to make decisions for the children. But RCW 26.09.191 is not so limited.

Lynette argues the evidence established Brajesh was planning to remove the children **51 from the country. Lynette testified Brajesh repeatedly threatened to take the children to India without her and Brajesh was still planning*827 on moving to India. Lynette also testified that while their dissolution was pending, Brajesh requested copies of documents he would need to obtain immigration documents for the children. Lynette said she was especially concerned about the possibility that Brajesh might abduct the children to India because India is not bound by the Hague Convention on International Child Abduction.

Brajesh denied making threats. He testified that the job in India was no longer available but he was supervising employees there and traveling back and forth several times a year.

Waldroup addressed Brajesh's threats to take the children to India and the risk of abduction in the materials she submitted to the court and in her testimony at trial. Waldroup's report said:

No evaluation of this type can tell whether the father will abduct the children. I am not aware of any criteria that can predict if such would occur. The Kataré's [sic] situation is somewhat unusual in that there is not only the allegation of abduction but corroboration of two witnesses hearing the threat that Brajesh would take the children to India "with our [sic] without" their mother. As Brajesh denies these statements it is impossible to evaluate whether the statements were said in crisis to pressure the mother to move to India, rather than being his literal intent or whether Brajesh truly intended to remove the children from the country without the mother's consent.^{FN12}

FN12. Exhibit 25 at 18.

Waldroup's recommendations also addressed the risk of abduction and restrictions that should be imposed.

There is no way to know if the father is at risk of taking the children to India and therefore I cannot recommend restrictions, or lack of them, based on the allegations. I do believe the father made the threats to take the children to India without Lyn, and had likely done so in an effort to coerce Lyn into moving to India. Whether he would take the children at this time to "punish" Lyn remains unknown.

*828 The current restrictions of supervised visitation should certainly not be lifted until the children's passports have been secured and the attorneys should pursue whether the father and children's passports [sic] numbers can be placed on a watch list with the appropriate agency (Customs and/ or Immigration). Consideration could also be given to the father posting a bond so that should abduction occur, the mother would have access to enough fund [sic] to retrieve the children from India.^{FN13}

FN13. Exhibit 25 at 19.

Waldroup testified that she consulted colleagues and research literature regarding the risk of abduction and concluded there were no criteria to predict whether someone who threatened to abduct children would actually do so. Waldroup said that because she was unable to predict the likelihood that Brajesh would abduct the children, the court had to decide whether the risk of abduction was significant enough to impose the restrictions she recommended.

Lynette also presented evidence and argued that Brajesh engaged in a pattern of emotional abuse of a child that required restrictions under RCW 26.09.191(1)(b) and that Brajesh's involvement or conduct may have an adverse effect on the children's best interests permitting restrictions under RCW 26.09.191(3) because of his negligent or substantial nonperformance of parenting functions (RCW 26.09.191(3)(a)), the absence or substantial impairment of emotional ties between him and the children (RCW 26.09.191(3)(d)), and his abusive use of conflict (RCW 26.09.191(3)(e)).

[8] The court in its oral decision found Brajesh had not engaged in a pattern of emotional abuse of a child or abusive use of conflict under RCW 26.09.191. The court then addressed the risk of abduction and whether restrictions should be imposed to prevent Brajesh

from taking the children to India.

****52** I gave a long and careful consideration to the issue of the risk of abduction and confess today being concerned about this. I'm ***829** not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of abducting the children. Nonetheless, if I'm wrong on this the consequences are incredibly serious and I'm mindful about that. I'm going to impose some restrictions in the parenting plan that will be designed to address this issue, and I hope that everything that has been brought to this Court, which I think indicates that, [sic] there is not a serious risk of abduction [sic] turns out to be the truth.^{FN14}

FN14. RP (July 7, 2003) at 10.

The trial court entered findings and conclusions regarding the specific RCW 26.06.191 sections Lynette raised, including RCW 26.09.191(1)(b) and RCW 26.09.191(3)(a), (d) and (e), but it did not address the risk of abduction under RCW 26.09.191.^{FN15} In the parenting plan, the court found there was no basis for restrictions under RCW 26.09.191. The Parenting Order provides:

FN15. Lynette argues in her cross appeal that the trial court erred in finding Brajesh did not engage in the abusive use of conflict for purposes of RCW 26.09.191(3)(e). Lynettes argument consists wholly of a recitation of the evidence that would support a finding in her favor. But she does not dispute that the courts finding to the contrary was supported by substantial evidence. Although Lynette presented evidence to support her argument, Brajesh presented contrary evidence and the court made a credibility determination in his favor. Credibility determinations are the province of the trier of fact and will not be disturbed on appeal. In re Marriage of Olivares, 69 Wash.App. 324, 336, 848 P.2d 1281 (1993).

Lynette also assigns error to the trial court's findings that Brajesh did not engage in a pattern of emotional abuse under RCW 26.09.191(1)(b) and that he did not have a long-term emotional impairment under

RCW 26.09.191(3)(b), but she does not present any argument to support these assignments of error. This argument is therefore abandoned. See RAP 10.3(a)(5).

II. BASIS FOR RESTRICTIONS

Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the children and the right to make decisions for the children.

2.1 PARENTAL CONDUCT (RCW 26.09.191(1), (2)). Does not apply.

2.2 OTHER FACTORS (RCW 26.09.191(3)). Does not apply.^{FN16}

FN16. CP at 615.

***830** Although the trial court found Brajesh "appears to present no serious threat of abducting the children,"^{FN17} it imposed limitations in the parenting plan to prevent Brajesh from taking the children to India. While Brajesh focuses on the court's findings that he presents no serious threat of abducting the children, the court also entered findings that limitations were warranted to prevent Brajesh from abducting the children based on the evidence.

FN17. CP at 168.

2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, the consequences of such an abduction are so irreversible to warrant limitations on the husband's residential time with the children, including location of exercise of residential time, surrender of his passport, notification of any change of his citizenship status, and prohibition of his holding or obtaining certain documents (i.e., passports, birth certificates) for the children. The mother shall retain the children's passports.^{FN18}

FN18. CP at 168.

The court also found “[l]imitations on the parents’ residential time with the children to a particular location is [sic] also justified by the age of the children.”
FN19

FN19. CP at 168.

These findings support restrictions under RCW 26.09.191(3)(g). But the court’s finding **53 in the parenting plan that there is no basis to impose restrictions under RCW 26.09.191 creates an ambiguity. The trial court has authority to impose limitations or restrictions under RCW 26.09.191(3)(g) to prevent the risk of abduction. Brajesh does not dispute that the restrictions imposed by the parenting plan would be permissible if RCW *831 26.09. 191(3) factors were present. But he contends the trial court’s conclusion that there was no basis to impose restrictions under RCW 26.09.191 cannot be disturbed on appeal. In the absence of some indication in the record that the court’s failure to make a specific finding was intentional, it is inappropriate to treat the absence of a finding as the equivalent of a negative finding on the issue. Douglas Northwest, Inc. v. Bill O’Brien & Sons Construction, Inc., 64 Wash.App. 661, 682, 828 P.2d 565 (1992). Here, the trial court’s findings of fact only addressed the specific portions of RCW 26.09.191(2) and (3) raised by Lynette. We do not interpret the general statement in the parenting plan that RCW 26.09.191(3) “does not apply” as a finding on whether the risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g).
FN20

FN20. CP at 615.

Although the trial court stated Brajesh “appears to present no serious threat of abducting the children,”
FN21 it addressed concerns about the risk of abduction and imposed limitations to prevent abduction. Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court’s discussion of the risk of abduction, the findings it made and the limitations it imposed. Except for the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply, the court’s findings support restrictions under RCW 26.09.191(3)(g). Rather than speculate, we remand for

the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.
FN22

FN21. CP at 168.

FN22. Lynette cites out of state cases In re the Marriage of Long v. Ardestani, 241 Wis.2d 498, 624 N.W.2d 405 (2001), Abouzahr v. Matera-Abouzahr, 361 N.J.Super. 135, 824 A.2d 268 (2003), Soltanieh v. King, 826 P.2d 1076 (Utah App.1992), and Bergstrom v. Bergstrom, 320 N.W.2d 119 (N.D.1982), as examples of cases that have held the best interests of the child governs whether conditions should be placed on a parent’s residential time where there is a risk of abduction to a non-Hague Convention country. In all four cases the dispositive factor was the trial court’s factual finding about the basis for imposing the restrictions. Where the likelihood of abduction was greater, based on the factual circumstances in the case, the courts imposed restrictions to prevent abduction. See, e.g., Soltanieh and Bergstrom. Where abduction was unlikely, the courts declined to impose preventive measures. See, e.g., Abouzahr and Long.

[9] *832 Unlike the passport requirements and the prohibition on removing the children from the United States, we conclude the prohibition on removing the children from a two-county area in Florida until Rohan turns five is not logically related to the risk of abduction. Brajesh argues he should be allowed to take the children outside the two-county area to Orlando to visit Disney World. The apparent source of the two-county limitation is Lynette’s proposed parenting plan. The court’s stated reason for the two-county restriction, namely, that the children were too young to travel any farther during a three day visit, is not supported by any evidence in the record. We conclude the two-county limitation was based on untenable grounds. On remand, the court shall allow Brajesh to take the children to Orlando during his visits with them in Florida.

Make Up Visitation Time

[10] Brajesh argues the trial court abused its discretion

when it denied his request on reconsideration to add a provision to the parenting plan to allow him to make up visitation time when he is unable to travel to Florida for his regularly scheduled visitations. Brajesh asked the court to provide for a five day visitation (including overnights) in the month following the missed visit, and he agreed to limit the make up clause to two years, until Annika is in school.^{FN23} The trial **54 court denied Brajesh's request.^{FN24}

FN23. The proposed provision reads:

In the event that the father is unable to have residential time during one of the monthly three-day periods provided for above in this Parenting Plan, he may have make-up time constituting two additional overnights, for a total of five days, provided that this make-up time shall take place the month following the month when residential time was missed.

CP at 582.

FN24. See CP at 630-31 (order denying reconsideration in part), 637-38 (final parenting plan).

*833 Brajesh contends that because the court found relocation would have a severe impact on his ability to bond with his children, and because it is in the children's best interests to learn about their Indian cultural heritage, it was an abuse of discretion to deny his request for make up visits. But there was undisputed evidence in the record that five day visits would not be in the children's best interests, especially within the first two years after entry of the parenting plan.^{FN25} The trial court did not abuse its discretion when it denied the request for a make up time provision.

FN25. Waldroup testified that because the children were so young, it would be detrimental for them to be away from their primary caretaker (Lynette) for long periods of time. She said that if the children were away from their mother for more than a few days, they would start to feel abandoned and angry and would start acting out. Waldroup also said that because Rohan was so young (20 months at the time of trial), he did not have the verbal ability to understand reassuring

words and would therefore have a hard time processing separation from his mother for more than a couple of days at a time.

Long-Distance Travel Expenses

[11] Brajesh argues the trial court erred in ordering him to pay all the costs for long-distance travel to visit his children in Florida until Rohan turns five. In the child support order, each parent was ordered to pay the proportional share of expenses, 65 percent to Brajesh and 35 percent to Lynette. Brajesh contends that under RCW 26.19.080(3), long-distance travel expenses must be allocated in the same proportion as the basic child support calculation.

[12][13] Long distance travel expenses are considered extraordinary expenses not accounted for in the basic child support obligation. RCW 26.19.080(1). Under RCW 26.19.080(3), “[t]hese [extraordinary] expenses shall be shared by the parents in the same proportion as the basic child support obligation.” This statutory language is mandatory. *In re Paternity of Hewitt*, 98 Wash.App. 85, 988 P.2d 496 (1999).^{FN26} Once the trial court determines that extraordinary *834 expenses are “reasonable and necessary,”^{FN27} it is required to allocate them in proportion with the parents' income. *Murphy*, 85 Wash.App. at 349, 932 P.2d 722.^{FN28}

FN26. See also *Murphy v. Miller*, 85 Wash.App. 345, 349, 932 P.2d 722 (1997); *In re Marriage of Scanlon*, 109 Wash.App. 167, 34 P.3d 877 (2001), review denied, 147 Wash.2d 1026, 62 P.3d 889 (2002).

FN27. RCW 26.19.080(4) grants trial courts the discretion to determine the “reasonableness and necessity” of extraordinary expenses.

FN28. The rule requiring apportionment of long-distance travel expenses applies where the parent must travel to visit the child because the child is too young to travel. *Hewitt*, 98 Wash.App. at 89, 988 P.2d 496.

This court recognizes an exception to the rule requiring allocation in the same proportion as the basic child support obligation where findings support a deviation.

In re Marriage of Casey, 88 Wash.App. 662, 967 P.2d 982 (1997). In *Casey*, the trial court entered a child support order that deviated from the basic support obligation for the mother and imposed 100 percent of the travel expenses on the father because of a significant disparity in the parents' incomes. On appeal, this court affirmed the child support order, including its allocation of 100 percent of the travel costs to the father, because the trial court made the findings to support the deviation from the basic support obligation.

Here, in the dissolution decree, the trial court awarded all of the community property air miles to Brajesh. "The husband is awarded as his separate property the following property: ... All air miles in his name, taking into account that he may use some of those miles to travel for his residential time with the children." ^{FN29} The Order of Child Support states that the amount ordered does not deviate from the standard calculation and that a deviation was not requested. But the **55 court ordered Brajesh and Lynette to pay for day care and transportation expenses in proportion to their share of income, except that "[t]ransportation expenses for the children's residential time with the father prior to Rohan's 5th birthday shall be the father's obligation using the air miles he is awarded in the Decree of Dissolution and accrues due to his work." ^{FN30} In its oral *835 decision the court explained why it struck the reference to air miles: "If he wants to use those air miles, that is great. But he doesn't have to use them." ^{FN31}

^{FN29}. CP at 172.

^{FN30}. CP at 147 (strikethrough in original).

^{FN31}. RP 7/30/03 at 33.

Below, Brajesh challenged the court's ruling on travel expenses and argued that, under *Hewitt*, "to the extent that the father has to travel to Florida because the children can't come here, that the mother would share in those travel expenses. If he can't use air miles, she should share 65/35 in his expense." ^{FN32} The court responded,

^{FN32}. RP 7/30/03 at 34.

I don't have any evidence before me that he can't use

the air miles. Everything that came before me during trial indicated that that worked just great for him. And that is why all the miles were awarded to him so he had access to them. So I am not going to change that with regard to his transportation. And I made a specific finding with regard to that. ^{FN33}

^{FN33}. RP 7/30/03 at 34.

On appeal, Brajesh argues the trial court erred when it imposed 100 percent of the transportation expenses on him because, under RCW 26.19.080(3), a court does not have discretion to deviate from the standard apportionment for extraordinary expenses. Notably absent from Brajesh's argument, however, is any reference to the trial court's decision to award to him of all of the community air miles to travel to Florida to visit the children.

Although the trial court did not make findings to deviate from the basic support obligation in the child support order, it made findings in the dissolution decree that would support a deviation. ^{FN34} In the dissolution decree, the trial court found the community owned 625,000 air miles, which the court awarded to Brajesh, "taking into account that he may use some of those miles to travel for his *836 residential time with the children." ^{FN35} Although the court's findings in awarding all the community property air miles to Brajesh support a deviation in the child support order, the child support order does not contain these findings. We remand for the trial court to clarify whether it intended to deviate in the child support order from the requirement that each parent pay a proportionate share of the travel expenses.

^{FN34}. This approach is consistent with this court's suggestion in *In re Marriage of Stenshoel*, 72 Wash.App. 800, 866 P.2d 635 (1993), that in some cases it may be appropriate to consider property distribution payments pursuant to dissolution order a resource to be taken into account when determining whether to deviate from a child support schedule.

^{FN35}. CP at 172.

CONCLUSION

On remand, the trial court should clarify its intent in imposing the passport and foreign-travel restrictions and whether the risk of abduction was a factor justifying limitations under RCW 26.09.191(3)(g). We conclude the trial court's decision to prohibit Brajesh from removing the children from the two-county area in Florida is an abuse of discretion. We reverse and remand for the court to amend the parenting plan to allow Brajesh to take his children to Orlando. We affirm the trial court's decision to deny Brajesh's request to make up missed visitation time. Finally, we remand for the trial court to clarify whether it intended to deviate from the requirement that each parent pay a proportionate share of the travel expenses in the child support order.

WE CONCUR: BECKER and APPELWICK, JJ.
Wash.App. Div. 1,2004.
Katare v. Katare
125 Wash.App. 813, 105 P.3d 44

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APPENDIX G

Not Reported in P.3d, 140 Wash.App. 1041, 2007 WL 2823311 (Wash.App. Div. 1)
 (Cite as: 2007 WL 2823311 (Wash.App. Div. 1))

H

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 1.
 In re the Marriage of Lynette KATARE, Respondent,
 v.
 Brajesh KATARE, Appellant.
 No. 59061-8-I.

Oct. 1, 2007.

Appeal from King County Superior Court, Honorable
Mary E. Roberts, J.
Gregory Mann Miller, Reed Longyear Malnati Ahrens
 & West PLLC, Seattle, WA, for Appellant.

Gordon Wilson Wilcox, Attorney at Law, Catherine
 Wright Smith, Valerie A. Villacin, Edwards, Sieh,
 Smith & Goodfriend, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

SCHINDLER, A.C.J.

*1 In *In re the Marriage of Katare*, 125 Wn.App. 813, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005) we held that RCW 26.09.191(3) gives the trial court the discretion to impose limitations in a parenting plan if the court expressly finds the parent's conduct is adverse to the best interests of the child and the limitations are reasonably calculated to address the identified harm. Brajesh Katare contends that on remand the trial court failed to comply with this court's mandate to enter findings that justify the passport and foreign travel restrictions in the parenting plan imposed under RCW 26.09.191(3). He also contends the trial court's decision to temporarily deviate from the child support obligation was an abuse of discretion. Because the trial court's findings in the parenting plan do not expressly address whether the parenting plan limitations are justified under RCW 26.09.191(3), we remand to the trial court. But based on the decision to award all of the air miles to Brajesh, the trial court did not abuse its discretion in temporarily deviating from

the allocation in the child support order. ^{FN1}

FN1. Lynette Katare argues that Brajesh's challenge to the passport and foreign travel restrictions in the parenting plan is barred by the law of the case doctrine. *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) ("once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation."). But here, the doctrine does not apply because we remanded. See RAP 2.5(c)(2); *Fluke Capital & Management Services Co. v. Richmond*, 106 Wn.2d 614, 724 P.2d 356 (1986) (when an issue has not been decided by a prior appellate decision in the same case, the doctrine does not apply).

The facts in this case are fully set forth in *In re Katare*, 125 Wn.App. 813, and will be repeated only as necessary.

Brajesh was born and lived much of his life in India. His family still lives in India. Brajesh went to school in Florida and obtained a masters degree in 1989. Brajesh met and married Lynette while attending school in Florida. ^{FN2} In 1999, Brajesh and Lynette moved to Washington to work for Microsoft. Brajesh and Lynette have two children, A.K., born May 27, 2000, and R.K., born September 20, 2001. In April 2002, Microsoft offered Brajesh a two-year position in India, which he accepted. Lynette did not want to leave the states and live in India.

FN2. We refer to Brajesh and Lynette Katare by their first names to ensure clarity.

Before separating in July 2002, Brajesh and Lynette often argued about moving to India. Lynette testified that Brajesh repeatedly threatened to take the children to India without her and was planning to do so. During discovery, Brajesh requested copies of the applications for the children's passports and India tourist visas and copies of the children's immunization records. Lynette also testified that she found an application for an India PIO card (similar to a United States "green

Not Reported in P.3d, 140 Wash.App. 1041, 2007 WL 2823311 (Wash.App. Div. 1)
 (Cite as: 2007 WL 2823311 (Wash.App. Div. 1))

card”) on Brajesh's computer. Margo Waldroup, who prepared a parenting assessment and parenting plan recommendations report, testified that despite Brajesh's denial that he threatened to take the children to India, two witnesses heard him threaten Lynette on two separate occasions. The witnesses each said Brajesh threatened to take the children to India with or without her. While Waldroup believed that Brajesh “used threats of kidnapping the children or killing the family in an effort to force Lyn's agreement to move to India,” because he denied making the threats, she concluded it was impossible to predict whether he would abduct the children.

No evaluation of this type can tell whether the father will abduct the children. I am not aware of any criteria that can predict if such would occur. The Kataras' situation is somewhat unusual in that there is not only the allegation of abduction but corroboration of two witnesses hearing the threat that Brajesh would take the children to India ‘with our [sic] without’ their mother. As Brajesh denies these statements it is impossible to evaluate whether the statements were said in crisis to pressure the mother to move to India, rather than being his literal intent or whether Brajesh truly intended to remove the children from the country without the mother's consent. Because Brajesh is not willing to acknowledge his anger over the mother's lack of agreement to move, I cannot assess whether his anger has decreased over time and if he has gained any perspective on his actions of last summer. His assurances that he has surrendered his Indian passport and citizenship are of no comfort given that he can easily be reinstated as an Indian citizen and obtain a passport.

*2 Waldroup told the court that because she was unable to predict the likelihood that Brajesh would abduct the children, the court had to decide whether the risk of abduction was significant enough to impose the restrictions she recommended.

At the conclusion of the trial, the court stated in its oral ruling that it was not persuaded that Brajesh posed a serious threat, but said “if I'm wrong on this the consequences are incredibly serious and I'm mindful about that.” The court then said, “I'm going to impose some restrictions in the parenting plan that will be designed to address this issue....”

In the parenting plan, the trial court expressly found that the provisions of RCW 26.09.191 did not apply, but nonetheless imposed limitations, apparently based on the risk of abduction.

2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

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

On appeal, we held that a trial court has the authority under RCW 26.09.191(3) to impose limitations in a parenting plan if the court enters express findings to justify the limitations.^{FN3} Katara, 125 Wn.App. at 826. Because the trial court stated that Katara appeared to present no serious threat of abducting the children, yet imposed limitations to prevent abduction, we remanded to the trial court. “Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of the risk of abduction, the findings it made, and the limitations imposed ... Rather than speculate, we remand for the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.” Katara, 125 Wn.App. at 831.

FN3. Under RCW 26.09.191(3):

A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan,

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if any of the following factors exist:

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

On remand, the trial court amended paragraph 2.2 of the parenting plan as follows:

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

*3 By basically restating its earlier findings as the justification for imposing limitations on Brajesh's residential time with the children under RCW 26.09.191(3)(g), the trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3). The amended parenting plan still states that "the husband appears to present no serious threat of abducting the children," and again, without express findings to justify the limitations, the court imposed restrictions, apparently based on an implicit risk of abduction. In addition, the court also does not expressly address the best interests of the children. Because these findings do not comply with the mandate to explain the reasons for the limitations under RCW 26.09.191(3), we remand. *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (cursory findings of fact, even when supported by the record, are insufficient); *In re Marriage of Horner*, 151 Wn.2d 884, 896-897, 93 P.3d 124 (2004) (conclusory findings are insufficient because its basis is unclear and appellate courts cannot review the trial court's decision); *In re Marriage of Kinnan*, 131 Wn.App. 738, 129 P.3d 807 (2006) (trial court's failure to make findings that reflect the application of each relevant factor is error). Given the passage of time, the trial court should also examine current relevant information concerning any limitations under RCW 26.09.191(3).^{FN4}

^{FN4}. We reject Brajesh's reliance on out-of-state statutes to argue that the trial court must find a "serious risk of abduction" before imposing limitations designed to prevent abduction as unpersuasive. RCW 26.09.191(3)(g) expressly gives the trial court discretion to examine whether the conduct of a parent is averse to the best interests of the child.

Brajesh also contends the trial court erred in deviating from the basic support obligation for long-distance travel expenses without a finding of financial need. In *Katara*, we recognized that "in some cases it may be appropriate to consider property distribution payments pursuant to a dissolution order, a resource to be taken into account when determining whether to deviate from a child support schedule. *Katara*, 125 Wn.App. at 835, citing *In re Marriage of Stenshoel*, 72 Wn.App.

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800, 866 P.2d 635 (1993). But we remanded to the trial court “to clarify whether it intended to deviate in the child support order from the requirement that each parent pay a proportionate share of the travel expenses.” *Katare*, 125 Wn.App. at 836.

On remand, the trial court amended the child support order to expressly state that the court was deviating from the child support allocation for long-distance travel expenses because all of the community air miles were awarded to Katare.

REASONS WHY REQUEST FOR DEVIATION WAS DENIED. A deviation was not requested, except with regard to the apportioning of the father's long-distance travel expenses, which is set forth in Paragraph 3.15.

Paragraph 3.15 read:

The court deviates from apportioning the father's long-distance travel expenses per the percentages at Line 6 of the worksheets in consideration of the award of all of the parties' 625,000 air miles solely to the father, which he may choose to use towards those long-distance travel expenses.

*4 Because the trial court's findings on remand support the deviation, we conclude the trial court did not abuse its discretion in deviating from the basic support obligation for the long-distance travel expenses based on its award of all the community air miles to Brajesh in the dissolution decree.

While we affirm the trial court's decision regarding the long-distance travel expenses because the court did not comply with the mandate for the findings in the parenting plan under RCW 26.09.141(3), we remand to enter findings consistent with this opinion.^{FN5}

FN5. Because we conclude the trial court's findings do not support the limitations under RCW 26.09.191(3) and remand for the trial court to enter the necessary findings and if appropriate, Brajesh's alternative constitutional challenge is premature. And because Brajesh's appeal is not frivolous, Lynette's request for attorney fees under RAP 18.9 is denied.

WE CONCUR: ELLINGTON and BAKER, JJ.
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APPENDIX H

APPENDIX H: Merits Briefs from *Katare I* and *Katare II*.... (H-1 to H-391)

No. 53231-6-I, *Katare I*

1. Brajesh Katare's corrected opening brief (H-1 to H-112)
2. Lynnette Katare's brief in response & cross-appeal (H-113 to H-166)
3. Brajesh Katare's reply brief & answer to cross-appeal (H-167 to H-195)
4. Lynnette Katare's reply brief on cross-appeal (H-196 to H-206)

No. 59061-8-I, *Katare II*

5. Brajesh Katare's corrected opening brief (H-207 to H-301)
6. Lynnette Katare's response brief (H-302 to H-351)
7. Brajesh Katare's reply brief (H-352 to H-391)

Also, a CD disk is attached containing a PDF for the full merit briefs from the two prior appeals No. 53231-6-I and 59061-8-I. Adobe Acrobat 8 was used to create the PDF and each brief has been bookmarked in chronological order for ease in jumping to the first page of each brief. (See attached PDF snapshots demonstrating opening the Bookmarks panel in the navigation pane)

Bookmarks

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Brajesh Katere's reply
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WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

LYNETTE KATARE,

Respondent,

vs.

BRAJESH KATARE,

Appellant.

On Appeal From King County Superior Court
Hon. Mary E. Roberts

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WYOMING STATE COURT OF APPEALS, DIVISION ONE

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APPELLANT'S CORRECTED OPENING BRIEF

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