

COURT OF APPEALS, DIVISION I
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No. ~~63483-1~~

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re the Marriage of:

LYNETTE KATARE,

Respondent,

and

BRAJESH KATARE,

Appellant.

RESPONDENT'S
STATEMENT OF
SUPPLEMENTAL
AUTHORITIES

(RAP 10.8)

Respondent Lynette Katare submits the following additional authority:

In response to the court's question whether foreign law is a question of fact or an issue of law:

State v. Rivera, 95 Wn. App. 961, 966, 977 P.2d 1247 (1999) ("Foreign law is a fact issue that must be pleaded and proved like any other fact by the party relying on the foreign law. The requirement that foreign law be proven as a fact places the

responsibility of presenting appropriate evidence of foreign law on the proponent of the foreign law.”) (*citations omitted*).

In response to the court's inquiry regarding the father's earlier position in this court whether the trial court could consider "risk factors" in deciding whether to impose restrictions on a parent's residential time:

Respondent attaches as Appendix A an excerpt from the father's opening brief in Cause no. 78080-3 (*Katara II*), citing several out-of-state statutes and the then draft Uniform Child Abduction Prevention Act, all of which set forth "factors" to consider to determine whether there is a risk of abduction to warrant imposing restrictions on a parent's residential time.

Respondent attaches as Appendix B an excerpt from the mother's respondent's brief in Cause no. 78080-3 (*Katara II*) addressing the out-of-state statutes cited by the father.

Deborah M. Zawadzki, *The Role of Courts In Preventing International Child Abduction*, 13 *Cardozo J. Int'l & Comp. L.* 353, 385 (Spring 2005) ("In addition to training judges to better handle these cases, it is imperative that states follow Texas and adopt legislation similar to Texas's Prevention of International Parental Child Abduction Act. Such legislation will provide state courts with a

detailed guideline to evaluate such cases regarding the parent-child relationship and provide judges with the possible preventative measures they can implement when a viable risk for abduction abroad exists.”)

In response to the court’s questions whether the appellant preserved his challenge to the court’s consideration of third party affidavits as evidence in the first trial as a basis for its conclusion that foreign-travel restrictions were warranted:

Respondent attaches as Appendix C an excerpt from the father’s Opening Brief in Cause no. 53231-6-1 (*Katara I*) setting forth his Assignments of Error and Issues on Appeal in father’s appeal after the first trial.

Respondent attaches as Appendix D an excerpt from the father’s opening brief in Cause no. 78080-3 (*Katara II*) setting forth his Assignments of Error and Issues on Appeal in father’s appeal after the remand hearing.

Ryder v. Port of Seattle, 50 Wn. App. 144, 155, 748 P.2d 243 (1987) (Appellant’s challenge to an alleged error is waived by failing to assign error in its brief under RAP 10.3(g)).

Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965) (“[Q]uestions determined on appeal, or *which might have*

been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.”)
(emphasis added).

Dated this 2d day of June, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 2, 2010, I arranged for service of the foregoing Respondent's Statement of Supplemental Authorities, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Gregory M. Miller Carney Badley Spellman, P.S. 701 Fifth Avenue. Suite 3600 Seattle, WA 98104-7010	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Lorraine K. Bannai Attorney at Law 901 12 th Avenue Seattle, WA 98122	<input type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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Huyen-Lam Q. Nguyen-Bull Attorney at Law 1191 Second Ave., Suite 1800 Seattle, WA 98101	<input type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Gordon Wilcox Gordon W. Wilcox, Inc., P.S. 1191 Second Ave., Suite 1800 Seattle, WA 98101-2939	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 2nd day of June, 2010.



Carrie O'Brien

No. 78080-3

WASHINGTON STATE SUPREME COURT

LYNETTE KATARE,

Respondent,

vs.

BRAJESH KATARE,

Appellant.

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

CORRECTED OPENING BRIEF

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and Indian culture, and thus the Indian part of their own selves. The children's right to learn and develop their full identities should not be denied. There is no finding or conclusion made that the children's best interests are served by diminishing half their cultural and racial identity. Rather, it becomes crystal clear the children's best interests are compromised by the travel restrictions.

C. Non-Washington Approaches to Restrictions on Foreign-Born Parents Support Brajesh's Position.

1. Other state court decisions.

The test proposed by Brajesh is consistent with the approach taken by other state courts, which have generally addressed visitation or travel restrictions on foreign-born parents on a case by case basis, with explicit findings supported by substantial evidence that the restricted parent was a genuine and substantial threat to abduct the children in question, consistent with the common law. Thus, the Court of Appeals' summary in footnote 22 is generally correct: Where the trial court's factual finding about the likelihood of abduction was greater, the courts imposed restrictions to prevent abduction; where abduction was unlikely, the courts declined to impose preventive measures, in those cases, supervised visitation. *Katara I, supra*, 125 Wn. App. at 831, n. 22, citing cases from Wisconsin, New Jersey, Utah, and North Dakota. The key focus in those decisions,

recognized by the Court of Appeals here, was the findings made by the trial court on the likelihood or risk of abduction by the parent in question.¹⁶

¹⁶ For example, the Utah case which imposed visitation restrictions (including that the father had to deposit his passport and visa with the clerk of the court to see the children) is dramatically distinguished from Brajesh's case. In *Soltanieh v. King*, 826 P.2d 1076 (Utah App. 1992), the father, Soltanieh, was an Iranian citizen on a student visa to the United States who met King, a Bolivian citizen also in the United States on a student visa. Their child was born in 1982, five years after their marriage in 1977 and after the Iranian revolution in 1979. The father had to leave the U.S. in 1983 after completing his studies because he no longer qualified for a student visa, and returned to Iran expecting King and their daughter to join him. Instead, the mother filed for divorce in 1984 and sent the father papers which he signed. The decree she got gave her custody and provided "reasonable visitation rights" for the father. But the father was not able to obtain a visitor's visa to return to the United States until April 1989, by which time the mother had remarried. Upon the father's return to the United States he sought visitation and the litigation ensued. At the hearing on visitation, the trial court made specific findings which the father failed to challenge on appeal that justified the passport controls and visitation restrictions which the Utah Court of Appeals summarized:

The trial court found [the father] had no respect for United States laws, and did not want [the daughter] raised under United States standards of education, dress, social relations, political philosophy, and religion. The court further found that [the father] viewed [the mother and daughter] as his property and believed he was justified in doing anything necessary to remove [the daughter] from the United States.

Id., 826 P.2d at 1079-1080. These findings in Utah are in stark contrast to the only relevant finding made by the Superior Court as to Brajesh, that he appears to present "no serious risk of abducting the children."

In contrast, other cases have refused to impose restrictions when the evidence would not support a finding of a genuine, credible risk the parent in question would violate court orders and not return or abduct the child. *See, e.g., Grimditch v. Grimditch*, 226 P.2d 142, 142-143 (Ariz. 1951) (*reversing* requirement of posting \$25,000 bond to insure safe return of children at end of scheduled visitations for lack of evidence: "we can find nothing in the record to justify the trial court in believing that [the father] would deliberately or at all violate the judgment of that court. . . . we find nothing in the record that justifies such action on the part of the trial court.").

In this case, the only finding related to a likelihood that Brajesh would abduct the children was that Brajesh appears to present “no serious threat of abducting the children.” CP 445 (App A-1); CP 264, ¶ 2.20.2 (App. C-2). The Court of Appeals remanded in order for the trial court to determine if it would impose travel restrictions and, if so, specify the factual basis and legal basis for any travel restrictions. The trial court did not supplement or change the findings on abduction so that the original finding -- that Brajesh presents “no serious threat of abducting the children” -- is the sole finding as to Brajesh. As a matter of law, this finding is insufficient to support the restrictions. It also would be inadequate in other states that have addressed the issue.

2. Other states’ statutes governing travel restrictions.

At least four states have passed statutes that recognize courts may not impose travel or other substantial limitations on a non-custodial parent’s visitations with his or her child absent substantial evidence which supports express findings that the parent in question constitutes a serious, credible threat to abduct the children. Copies are in App. F. This reflects an implicit balancing of both of the constitutional rights of the parents involved and the best interests of the children. It also reflects common sense, equity, and adherence to the common law tradition.

3. **Oregon statute requirement: “Clear and convincing evidence” of risk of abduction supported by findings of fact and conclusions of law.**

Our close neighbor Oregon took a very strong position requiring clear and convincing evidence of abduction risk when it passed a statute in 2003 entitled “Issuance of Court Order When Risk of International Abduction of Minor Child”. O.R.S. § 109.035 (2003). App. F-1 to 2. The statute anticipates the issue of abduction may involve a non-Hague-signing country. O.R.S. § 109.035(1)(b)(A). Subsection (2) of the statute states the threshold that applies to issue an order:

A court that **finds by clear and convincing evidence** a risk of international abduction of a minor child may issue a court order requiring a parent who is subject to a custody order and who plans to travel with a minor child to a foreign country to provide security, bond or other guarantee as described in subsection (4) of this section.

O.R.S. § 109.035(2) (bold added). Subsection (3) of the statute sets out specific risk factors, with a catchall provision for “any other relevant factors.” Subsection (4) of the statute then lists a number of measures the trial court may impose, noting that it is not an exclusive list. Invoking the normal operation of common law courts, subsection (5) requires express findings, *i.e.*, issuance of “a written determination supported by findings of fact and conclusions of law” to impose the travel restrictions.

To date there are no reported or unreported decisions citing the Oregon statute. But it makes a clear statement: one parent's worry or fear, or a trial judge's uncertainty, are not enough to restrict the non-custodial parent. Only a serious, genuine risk, one supported by clear and convincing evidence, suffices. The clear and convincing standard appears to respect the constitutional rights of the non-custodial, fit parent, who is otherwise entitled to be free from state interference during visitation.

4. **Florida statute requirement: "Competent substantial evidence" a parent may violate the court order.**

Brajesh brought to the trial court's attention in August of 2003 (on reconsideration from the initial orders entered) the Florida statute which specifies the remedies and the requirements for imposing travel restrictions when there is an allegation that one parent may violate the court's order and remove the child. *See* CP 276-278 (reconsideration briefing), CP 285-286 (copy of statute). The Florida statute states the predicate for imposing controls such as were imposed here:

In a proceeding in which the court enters an order of child custody or visitation, including in a modification proceeding, upon the presentation of **competent substantial evidence** that there is a risk that one party may violate the court's order of visitation or custody by removing a child from the state or country or by concealing the whereabouts of a child, or upon stipulation of the parties, the court may: . . .

Fl. Stat. § 61.45(1)(2002)(bold added).

Florida's requirement of "competent substantial evidence" that a party may violate the court's order necessarily requires an express finding the parent in question may violate the court's order. That finding cannot be based on speculation, or on unfounded facts, or on a "hunch." Nor may it be based on a trial judge's "worry" that it made a wrong decision. It must be based on "substantial competent evidence," the hallmark of each and every finding under common law, including in Washington as discussed *supra*. Only then may the Florida trial court impose the restrictions there listed, such as local geographic restrictions, restrictions on leaving the state or the country, or on traveling to a non-Hague country, or surrendering the child's passport, or requiring the party post bond or other security.

As with the other state statutes, whether the parent for whom restrictions are sought is from a non-Hague treaty country is not listed as a risk factor. *See* Fl. St. § 61.45(3), listing risk factors. Rather, the focus is on the behavior of the parent in question. *Id.*

The 2002 Florida statute thus recognizes both the potential need to take preventive measures where warranted – under specified circumstances objectively established in court – and the fact that one

parent's subjective fear of potential abduction (as here) is not enough.

Only "competent substantial evidence" of a risk the party may violate the court's order of visitation or custody by removing and concealing the child or children at issue will permit restrictions. Worry is not enough. Nor is "just in case."

5. Texas statute requirement: "Credible evidence" that preventive measures are "necessary" to protect a child.

Texas passed a statute in 2003 to guide its trial courts in placing preventive restrictions on the non-custodial parent where there are allegations of potential international abduction. *See* Tex. Fam. Code §§ 153.501, .502, .503. App. F-8 to F-13. Under the Texas statute, the predicate for engaging in the risk analysis is the presentation of "credible evidence . . . indicating a potential risk of the international abduction of a child by the parent of the child." Tex. Fam. Code § 153.501(a). Section 502(a) then lists the factors the court is to consider in determining whether there is "credible evidence of a risk of abduction." It is apparent from the risk factors that the primary focus is on the individual parent in question. Nowhere in the initial risk factors does the court focus on whether the parent is from a non-Hague treaty country.

Section 502(b) of the statute then sets out a second set of factors,

which the trial court is to consider **only** if it has first determined there is a credible risk of abduction of the child:

If the court finds that there is credible evidence of a risk of abduction of the child by a parent of the child based on the court's consideration of the factors in Subsection (a), the court shall also consider evidence regarding the following factors to evaluate the risk of international abduction of the child by a parent:

Only at this juncture does the Texas court take into account the parent's international family ties and characteristics of the country of origin, including Hague treaty status.

Section 503 of the statute specifies "abduction prevention measures" that may be applied only after a predicate determination is made that "the court finds it is **necessary** under Section 153.501 to take measures to **protect a child** from international abduction by a parent of the child." Tex. Fam. Code § 153.503 (bold added). The preventive measures include supervised visitation and passport and travel controls. However, as with the Florida statute, the only passport controls which may be imposed are those on the children, not on the parent in question. This reflects the point Brajesh made in his 2003 Motion for Reconsideration that there is no rationale at all for imposing passport controls on the non-custodial parent and requiring Brajesh to surrender his passport in order to see his children. *See* CP 277-278.

6. **California statute requirement: Express findings of need for preventive measures based on specified risk assessment, and the degree of risk must be sufficient to warrant the restrictions imposed; mere possible risk is insufficient.**

California also adopted a statute in 2002 aimed to help prevent child abduction, Cal. Fam. Code § 3048. App. F 5-7. California's threshold for requiring trial courts to engage in a risk analysis is where it "becomes aware of facts which may indicate there is a risk of abduction of a child." Cal. Fam. Code § 3048(b)(1). But that is the standard for holding an inquiry, not for imposing restrictions, as the trial court did here. The statute then sets out eight specific risk factors the court must consider before it can make a formal finding whether there is a **need** for preventative measures. Cal. Fam. Code § 3048(b)(1)(A-H), (2).

If, and only if, an express finding is made that there is a need for preventative measures, the statute sets out what measures may then be taken by the court. They include supervised visitation, posting a bond, travel restrictions, relocation restrictions, passport controls, prohibiting a parent from applying for new or replacement passports for the child, notification of foreign embassies or consulates of passport restrictions, and other assurances, including for any foreign travel by the child, giving the other parent the itinerary, contact information at all times, and leaving "an

open airline ticket for the left-behind parent.” *Id.*, § 3048(b)(2).

Subsection (b)(4) of the statute specifies that the restrictions or preventative measures cannot be imposed simply because there exists “a risk.” Rather, the trial court is required to make a determination that the risk of abduction is “sufficient to warrant the application” of the measures which are imposed. Cal. Fam. Code § 3048(b)(4). This is consistent with rulings under the common law.

Finally, as with the other statutes, under the California statute whether a parent is from a non-Hague treaty country is not among the risk factors listed to help determine whether there is a risk of abduction so that a parent’s birth country’s Hague treaty status is not a basis for imposing restrictions. *See* Cal. Fam. Code § (b)(1). This omission must be deemed intentional since one of the listed potential preventive measures is including provisions in the custody order “to facilitate use of” the Hague Child Abduction Convention. Cal. Fam. Code § 3048 (b)(2)(J).

California’s statute thus also does not permit travel restrictions based restrictions on a mere hunch or worry.

7. Proposed Uniform Act: Express finding of substantial or credible risk based on preponderance of the evidence.

The National Conference of Commissioners on Uniform Laws

began exploring a uniform child abduction prevention act in 2004, which is still in the draft stage. Reports and drafts are available at the University of Pennsylvania website.¹⁷ A Hofstra Law School professor summarized its initial provisions in a September, 2005 issue of the NEW YORK LAW JOURNAL in the only commentary found to date.¹⁸

Professor Schepard took note of the Texas and California statutes, then focused on the proposed Uniform Act draft and suggested that New York state should consider enacting similar measures.

Professor Schepard describes the Uniform Act as “a sophisticated effort to define the factors that a court should consider in an abduction risk assessment” with the requirement for “the court to tailor a preventative remedy appropriate to the degree of risk of abduction it perceives,” *id.*, echoing the draft’s commentary quoted later that directs judges to use the “least restrictive measures to maximize the opportunities for continued parental contact while minimizing the opportunities for abduction.”

Professor Schepard provides a good summary of some of the policy

¹⁷ The general site on uniform state laws is: <http://www.law.upenn.edu/bll/ulc/ulc.htm>. The sites for drafts include: <http://www.law.upenn.edu/bll/ulc/ucapa/2005AmChildDraft.pdf>; <http://www.law.upenn.edu/bll/ulc/ucapa/apr2006draft.htm>.

¹⁸ See Schepard, “Law and Children: Statutes to Prevent Child Abduction,” 234 NEW YORK LAW JOURNAL (Sept. 14, 2005).

dilemmas facing the drafters and the debate, or tug-of-war, that is going on between some of the so-called vested interests, in his parlance, “child advocates” and “civil libertarians”:

The Uniform Act thus requires courts to make predictions of the risk that a parent will abduct a child and frame a remedy with sensitivity to the importance of preserving parent-child relationships. Such judicial prediction, even if based on risk factors identified by substantial research, still remains educated guesswork. A child advocate might be willing to tolerate a high rate of erroneous findings of probable abduction to protect children from the trauma of abduction. A civil libertarian, however, will surely worry about the flip side – erroneous judicial findings of a high risk of abduction resulting in injunctions and a serious restraint on a parent’s liberty and relationship with a child. A civil libertarian might particularly worry that, in our current political climate, the risk of wrong predictions will fall disproportionately on parents of certain nationalities – especially men with ties to Islamic countries.

Schepard, *supra*.

Professor Schepard then notes the test under the proposed Uniform Act as of September, 2005: “A determination that there is a substantial risk of abduction justifying preventive remedies.” *Id.*, quoting text of the proposed act.¹⁹

¹⁹ See discussion draft for the July, 2005 annual meeting of the National Conferences Section 4 (“An individual . . . may file a motion or an independent action alleging there is a substantial risk of abduction of the child”) and Section 5 (“Before the court may order relief . . . the movement or petitioner must show by a preponderance of the evidence that, based on the [risk] factors set forth in Section 7 there is a substantial risk the respondent will abduct the child.”), at <http://www.law.upenn.edu/bll/ulc/ucapa/2005AmChildDraft.pdf>.

Thus, the point at which imposition of restrictions is appropriate is when there is an express finding "there is a substantial risk of abduction," the same test that Brajesh proposes here: A serious, genuine and substantial risk of abduction. The terms "serious" and "genuine" in Brajesh's proposed test reflect the normal requirement of substantial, competent and credible evidence, standards reflected in the California and Florida statutes. Only the Oregon statute has a higher requirement with clear and continuing evidence.²⁰

What is not addressed by Professor Schepard, and to date only most fleetingly in any of the commentaries, is the aspect of the best interests of the child analysis of their need to fully bond with the non-custodial parent and to understand and identify with that half of their family, particularly where the non-custodial parent is of a different nationality or ethnicity from the U.S.-born parent. The need for such cultural development and identity by the children was raised at trial and its importance recognized even by the parenting evaluator testifying on behalf

²⁰ The most recent Uniform Act draft restates the required finding as "a credible risk of abduction by a preponderance of the evidence." *See* April, 2006, proposed draft, Section 8. The commentary section does not discuss this change in language nor the balancing of the constitutional rights of the parents involved. Nor does the Uniform Act require a specific finding as to the best interests of the children involved.

of Lynette, Ms. Waldroup.²¹ Although Ms. Waldroup stated she did not consider the potential negative impact on the ability of the children to be able to absorb and learn their father's cultural side if they relocated to Florida, II RP pp. 152-153:12, she was clear about the importance of that contact and cultural identity.

Q Would it be important for the children to maintain strong contact with the father's culture?

A Yeah. I don't see that as being critical at the age they are now, but certainly as they get older and understand that their father came from a different country and understand what those rituals and holidays and beliefs are and where they overlap American culture and where they are different. That will be a very important part of their identity.

Q Isn't [AK] almost at the age where that begins to have an impact?

A I didn't interview her, because she is three. I would say probably more like five, six, seven, where kids really start to notice facial differences and differences in skin, and they might have questions about that. That is the age at which they can really start to intellectually process this is what a holiday is about and they start remembering from year to year. I would think that is a more critical time, five, six, seven.

Q Is it fair to say that having that cultural tie for the children is pretty vital to their knowledge about themselves?

A Oh, yes. These children both look as though they belong to both cultures. So when they [I]ook at themselves in the mirror, they will know certain attributes they got from their

²¹ See II RP pp. 153-154.

Indian side and others from the Caucasian side.

II RP pp. 153:13-154:15.

The uncontroverted testimony from the parenting evaluator is thus that the children's cultural identity, and the ability of that knowledge of themselves and those portions of themselves, will become increasingly important as they get older and is a critical part of their personal identities. It is therefore necessarily in their best interests under the analysis put forth by the parenting evaluator. It is therefore a factor which must be taken into account as this issue is addressed under the statutory requirement that deference be given to the best interests of the children. RCW 26.09.002.

In this case, not only Ms. Waldroup's opinion, but also the amicus position of the Asian Bar Association and the Southeast Asian Bar Association emphatically confirm the importance to the children of the kinds of contacts that Brajesh, as any good American parent with roots in another country, would wish his children to have so that they can be fully functioning and fully American citizens by the time they reach adulthood without large questions about their identity or personhood.

8. Conclusions from non-Washington sources: This record does not support travel restrictions.

Whether one examines the proposed Uniform Act, the statutes passed in Florida, California, or Texas, or the cases which have applied the

common law on an individual basis, all agree either expressly or by their application that the necessary predicate for imposing travel restrictions on a non-custodial parent is a finding by the trial court that there is a genuine, credible, substantial risk of abduction by the parent in question and that that risk is supported by substantial evidence. Oregon goes further to require clear and convincing evidence. Neither the cases nor the proposed Uniform Law drafts explicitly address the constitutional rights of the parents involved. Brajesh reiterates that the constitution requires no less than the standard he proposes: an explicit finding the parent in question poses a serious, genuine and substantial risk of abduction, which finding is supported by at least substantial evidence, if not the clear and convincing evidence recognized by Oregon. But because neither standard is met in this case, the Court need not decide what the Constitution requires.

In this case, Judge Roberts refused to make such a finding. Rather, she found against Lynette. She found that Brajesh did not present a serious risk of abduction. The entire point of the preventive measures imposed were not for the best interests of the children – the best interests standard was never explicitly used or tied to the restrictions – but rather is revealed clearly in the oral decision, which may be used to interpret any ambiguities in final orders. What Judge Roberts said in her oral decision

was the measures were imposed "in case I am wrong." See VI RP 10. (App. D3.) The problem with permitting such a standard is that every trial court decision on every kind of case, whether child custody or otherwise, is subject to the same kind of standardless safety-net for the trial judge. But such is an unworkable rule of law because it undercuts the findings required for any given set of restrictions or rulings made by the trial court in the first place and makes the substantive rights meaningless, be they statutory, common law, or constitutional.

D. There is Not Substantial, Credible Evidence That Brajesh is a Serious Risk to Violate Court Orders and Abduct the Children By Failing to Return Them to Lynette at the End of Scheduled Visitations or Vacations, Which Would be Contrary to the Trial Court's Unchallenged Finding Brajesh Does Not Present a Serious Risk of Abducting the Children.

On the most basic level, the Court must ask, if not Brajesh, then who? If not Brajesh, what foreign-born U.S. citizen-parent with a birth family in a non-Hague country will ever be permitted to take his or her children to visit their grandparents and cousins and aunts and uncles in the "old country" while they are still children, as so many other new Americans have done and continue to do, if, as here, their American-born ex raises the unfounded claim of potential abduction? In our Post-9/11 world, is that foreign-born status, and the treaty-status of that country,

No. 78080-3

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BRAJESH KATARE,

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APPEAL FROM THE COURT OF APPEALS – DIVISION I

BRIEF OF RESPONDENT

EDWARDS, SIEH, SMITH
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physical, mental or emotional health," thus warranting restrictions under RCW 26.09.191 and *Wicklund*, 84 Wn. App. at 770. See also *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003) (actual harm not required before RCW 26.09.191 restrictions may be imposed).

2. The Foreign Statutes Cited By The Father Support The Travel Restrictions, As Do Other States' Cases.

The father cites to several out of state statutes to support his assertion that the trial court abused its discretion in imposing foreign travel restrictions. (App. Br. 29-36) But these statutes support the trial court's decision. Each statute allows a trial court to impose foreign travel restriction when it determines there is a risk of abduction, as the trial court found in this case. (CP 446) These statutes do not require the trial court to find a "serious, genuine risk" of abduction, as argued by the father (see App. Br. 20) but only that a "risk" of abduction exists. No quantum of risk is required. In fact, the Texas statute relied on by the father requires only that evidence point to a "potential" risk of international abduction before a court can impose limitations on a parent's residential time. V.T.C.A. Family Code § 153.501(a).

The out of state statutes cited by the father recite factors that consider when assessing the "risk" of abduction, including:

(1) whether a party has previously threatened to take the child away from the jurisdiction (CA. Fam. Code § 3048(b)(1)(B); O.R.S. (Oregon) § 109.035(3)(a); F.S.A. (Florida) § 61.45(3)(a); V.T.C.A. (Texas) Family Code § 153.502(a)(2); Draft Uniform Child Abduction Prevention Act § 8(a)(2));

(2) whether a party lacks strong ties to the state and whether the party has strong familial, emotional or cultural ties to another state or country (CA. Fam. Code § 3048(b)(1)(C), (D); O.R.S. (Oregon) § 109.035(3)(c); F.S.A. (Florida) § 61.45(3)(b); V.T.C.A. (Texas) Family Code § 153.502(b)(1), (2); Draft Uniform Child Abduction Prevention Act § 8(a)(6), (7));

(3) whether a party has no financial reason to stay in this state or is able to work anywhere (CA. Fam. Code § 3048(b)(1)(E); F.S.A. (Florida) § 61.45(3)(c); V.T.C.A. (Texas) Family Code § 153.502(a)(3));

(4) whether a party has engaged in planning activities that would facilitate removal of a child from this state, including quitting a job, selling his or her primary residence, liquidating other assets, applying for a passport, applying to obtain a birth certificate

or school or medical records (CA. Fam. Code § 3048(b)(1)(F); O.R.S. (Oregon) § 109.035(3)(b), (d); F.S.A. (Florida) § 61.45(3)(d); V.T.C.A. (Texas) Family Code § 153.502(a)(4); Draft Uniform Child Abduction Prevention Act § 8(a)(3)); and

(5) the obstacles to recovering the children if abducted, including whether the country where the children may be abducted is a member of the Hague Convention, and the potential harm to the children if abducted. (CA. Fam. Code § 3048(b)(1), (b)(2)(J); O.R.S. (Oregon) § 109.035(1)(b)(1); F.S.A. (Florida) § 61.45(1)(c); V.T.C.A. (Texas) Family Code § 153.502(b)(1); Draft Uniform Child Abduction Prevention Act § 8(a)(8)).

Evidence of each of these factors was presented in this case. The trial court properly considered the evidence presented of the father's previous threats to abduct the children to India (I RP 75, 113, 119-120, III RP 199, 213, Exhibit 17, 18, 163); the father's lack of family ties in the United States (IV RP 394, Exhibit 29); the father's family ties in India, including the fact that he regularly sent money to his family in India (I RP 95-96, Exhibit 29); the father's potential for relocation to India for employment and his past expressed desire to "settle in India" (I RP 110, 121-122; III RP 233-234, Exhibit 33, Exhibit 1:"After working for several years in the

United States, I am planning to settle in India.”); the father’s attempts to obtain applications prepared for the children’s passports and Indian tourist visas and the children’s immunization records, which would allow him to obtain visas or passports for the children (I RP 124-126, Exhibit 23); and the father’s resistance to the safeguards recommended by the parenting evaluator and the lack of remedy if an abduction were to occur because India is not a member of the Hague Convention. (III RP 304-306)

While the father complains that consideration of a parent’s country of origin’s Hague treaty status is irrelevant and discriminatory (App. Br. 22), each of the out of the state authorities relied on by the father in fact also requires this consideration. See CA. Fam. Code § 3048(b)(1); O.R.S. (Oregon) § 109.035(1)(b)(1); F.S.A. (Florida) § 61.45(1)(c); V.T.C.A. (Texas) Family Code § 153.502(b)(1); Draft Uniform Child Abduction Prevention Act § 8(a)(8). Many other jurisdictions have held that the best interests of the child govern whether conditions should be placed on a parent’s residential time when there is a risk of unlawful retention, and in the case of non-Hague countries, there is a lack of remedy:

We are satisfied that the standard of the best interests of the child, comprehensive as it is, permits a full consideration of concerns both about a parent’s

intention in abducting a child and about the lack of remedy should that occur. We are also satisfied that there is no need to alter the deference appellate courts give to trial courts' decisions on a child's best interests in order to insure a full consideration of those concerns.

Marriage of Long/Ardestani, 241 Wis.2d. 498, 624 N.W.2d 405 (2001). See also *Marriage of Abouzahr*, 361 N.J. Super. 135, 824 A.2d 268 (2003); *Soltanieh v. King*, 826 P.2d 1076 (Utah App. 1992); *Marriage of Bergstrom*, 320 N.W.2d 119 (N.D., 1982).

Finally, the Washington legislature has specifically rejected a "clear and convincing" standard for imposition of limitations on a parent's residential time, as advocated by the father based on other state's statutes:

[A]s to all of the limiting factors in [RCW 26.09.191], the standard of proof required should be less than the clear and convincing evidence required in a dependency action, since no termination of parental rights is intended.

Commentary and Text to 1987 Parenting Act at 29. Thus, the "clear and convincing" standard of proof required by the Oregon statute (O.R.S. § 109.035(2)) and advocated by the father (App. Br. 30-31), is not appropriate here in the context of determining a parenting plan in the best interests of the children under Washington law.

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No. 53231-6-I

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ATTORNEYS AT LAW**

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

APPELLANT'S CORRECTED OPENING BRIEF

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II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL.

A. Assignments of Error.

1. The trial court erred by entering the portions of the parenting plan (App. A.; CP 615-621, *esp.* CP 620) that restrict Brajesh's residential and vacation time with the children to Pinellas and Hillsborough Counties, Florida, until Rohan reaches age five, late September, 2006.
2. The trial court erred by ordering in the parenting plan (App. A) that the children may not travel outside the United States to visit or vacation with their father until they are 18.
3. The trial court erred by ordering passport controls in the parenting plan (App. A) including that Brajesh must surrender his passport to a mutually-agreed party or one selected by the court in the Pinellas/Hillsborough County area before he has any contact with the children
4. The trial court erred by entering the final two sentences of ¶ 2.20.2, of the Findings of Fact and Conclusions of Law (CP 168; App. B) which impose the various "limitations" on Brajesh's exercise of his residential and vacation time with the children also stated in the parenting plan.
5. The trial court erred in entering the conclusion in ¶ 2.20.6 of the Findings & Conclusions (CP 168) that limiting the father's time to a particular location was justified by the age of the children.
6. The trial court erred by imposing the residential time restrictions placed on Brajesh without finding the specified restrictions are necessary to protect them from a specified harm, contrary to the requirements of RCW 26.09.002 and the Constitution.
7. The trial court erred by concluding in ¶ 2.3(6) of the Order re Objections to Relocation (App. C; CP 157) that the detriments of relocation do not outweigh its benefits after specifically finding that "this move will have a severe impact on the father's ability to bond with the children."

8. The trial court erred by entering the portion of ¶ 3.15 of the order of child support (CP 147; App. D) which requires that transportation expenses for the children's residential time with Brajesh prior to Rohan's 5th birthday are solely Brajesh's obligation and that Mrs. Katare is not obligated to pay transportation expenses Brajesh incurs in connection with the exercise of his residential time with his children.
9. The trial court erred by denying, on motion for reconsideration (*compare*, CP 5 82, requested change, with 630 - 631 & 637-638, order denying reconsideration in part and final parenting plan), Brajesh's request for make-up visitation time with his children in the event he is unable in a particular month, through no fault of his own and due to unforeseen circumstances, to travel from Washington to Florida for his monthly three-day visitation.

B. Issues on Appeal.

1. The trial court specifically found that Brajesh "appears to present no serious threat of abducting the children," CP 168, App.B-4; that "this move [relocation to Florida] will have a severe impact on the father's ability to bond with the children," CP 157, App. C-3; and that § 191 restrictions do not apply. In these circumstances, did the trial court abuse its discretion by imposing material limitations on Brajesh's limited, once-monthly visitation time and vacation time (including the arbitrary two-county restriction until late September 2006, control of Brajesh's passport, and preventing him from any foreign travel to any country with the children until the children are 18) where (1) the claimed basis for the limitations – the prevention of abduction – is contradicted by the trial court's only finding on abduction so that there is no factual predicate for imposing the restrictions; and (2) such restrictions harm the children by compromising bonding with and learning about their father and their paternal heritage, and also eliminate favored and prior patterns of interaction between Brajesh and the children?
2. Given the lack of findings that the limitations were necessary to protect the children from specified harms since the trial court found Brajesh did not present a serious threat of abduction, did the trial court violate Brajesh's fundamental constitutional rights and/or his

statutory rights to raise and interact with his children during his residential and vacation time without interference by imposing arbitrary limitations and restrictions on where they can go?

3. Did the restrictions placed on Brajesh for his visitations and vacations violate his Constitutional rights because they impermissibly infringed on his fundamental parental right to raise and interact with his children?
4. Must the restrictions placed on Brajesh for his visitations and vacations with his children be stricken from the parenting plan as a matter of law because they are improper under the Parenting Act or because they violate his Constitutional rights as a parent?
5. Did the trial court err by ordering that transportation expenses for the children's residential time with Brajesh are solely Brajesh's responsibility and there is no obligation for Ms. Katare to contribute to expenses incurred by Brajesh where statute and case law mandate that these expenses must be apportioned in same manner as the court apportions the basic child support obligation?
6. In the context of this case, did the trial court abuse its discretion by denying Brajesh's request on reconsideration for make-up visitation time when, through no fault of his own, he is unable to make the trip from work in either Seattle or India to Florida for the monthly three-day visitation where the court has already found that the relocation to Florida "will have a severe impact on the father's ability to bond with the children" and refusing make-up time harms the children by further reducing the time the children have with their father so that it cannot be in their best interest.

III. STATEMENT OF THE CASE.¹

A. The Parties and Their Families.

¹ References to transcripts are chronological: 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), App. E hereto; VII RP: July 30, 2003 (Post-trial hearing).

No. 78080-3

WASHINGTON STATE SUPREME COURT

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CORRECTED OPENING BRIEF

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