

No. 63438-1-I

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

BRAJESH KATARE,

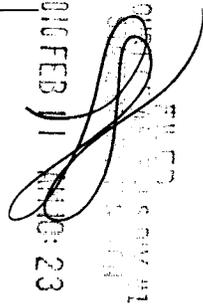
Appellant,

vs.

LYNETTE KATARE,

Respondent.

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is the father's third appeal of foreign-travel restrictions on his residential time with the parties' two young children. The restrictions were initially imposed because the father threatened to abduct the children to his native country, a non-Hague Convention state where all of his family reside, before the parties' divorce in 2003. Based on new evidence that this court specifically directed the trial court to consider on remand, the trial court in 2009 found that "the risk of abduction has not abated, and based on evidence presented at the hearing on remand is seen more clearly to have been strong at the time of the original trial, and perhaps to have now increased," (CP 161) and that "[the father's] 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." (CP 163)

This court has twice rejected most of the arguments that the father repeats in this third appeal. This court must once again reject the father's arguments, including his unfounded and incendiary accusation that the trial court's measured decision was

an attack on him, the color of his skin, or his nationality. That the father persists in making this baseless charge is further proof of the contempt in which he holds the courts of this state and the mother of his children. (CP 162) The foreign-travel restrictions comply with the statutory constraints of the Parenting Act and are in the children's best interests. They should be affirmed without further remand and with an award of attorney fees to the mother.

II. RESTATEMENT OF ISSUES

1. “[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.” ***Adamson v. Traylor***, 66 Wn.2d 338, 339, 402 P.2d 499 (1965). Should the father be barred from challenging the constitutionality of foreign-travel restrictions and the evidence from the 2003 trial on which they were based when (1) this court has already held in this case that foreign-travel restrictions imposed to protect the children and in their best interests are constitutional; (2) this court has twice rejected the father’s request to vacate the foreign-travel restrictions based on his claims that the evidence from the 2003

trial was insufficient to support the restrictions; and (3) to the extent the father challenges the trial court's consideration of certain evidence admitted during the 2003 trial, he failed to preserve that challenge during the first trial and in his two subsequent appeals?

2. In this remand, the trial court found that "the father threatened to take the children to India with the mother," that he sought documentation that would have allowed him to obtain international travel documents for the children, and that the "consequences of abduction to India are incredibly serious and irreversible" because India is not a signator to the Hague Convention on International Child Abduction. (CP 160-61, 163) Did the trial court abuse its discretion in imposing foreign-travel restrictions under RCW 26.09.191(3)(g) when it found that the risk of abduction is "sufficient to warrant limitations on the father's time with the children," which are in the children's best interests, and that the restrictions are reasonably calculated to address this identified harm? (CP 162-63)

3. Under the doctrine of invited error, a party cannot complain on appeal about an alleged error at trial that he himself set up. ***Dependency of K.R.***, 128 Wn.2d 129, 147, 904 P.2d 1132

(1995). Is the father barred by the doctrine of invited error from challenging the trial court's consideration (1) of sworn third-party affidavits that were admitted at trial when the father offered them into evidence and (2) of risk factors admitted during the remand hearing through unchallenged evidence of literature relied upon by individuals who deal with international parent-child abduction, which are nearly identical to the factors that the father urged this court to consider in his last appeal?

4. Should this court award attorney fees to the mother for having to defend for a third time the trial court's discretionary parenting plan decision, which the father, driven by "resentment," "extreme anger," and "poor judgment," has warned he is "committed to litigating over the long term?" (CP 161, App. Br. 53)

III. RESTATEMENT OF FACTS

Appellant's statement of the case ignores or minimizes the facts that caused the trial court to determine that it was in the best interests of the parties' children to impose foreign-travel restrictions. The trial court did not impose foreign-travel restrictions because of the father's "cultural affiliation" (App. Br. 35-36, 39-40, 44), or because of "bickering between both parents." (App. Br. 55-57)

Instead, the trial court initially imposed foreign-travel restrictions because the father threatened to take the children to India without the mother, and appeared to be taking steps to effect such a plan before the parties separated and during the dissolution action. (See CP 160-61) The court imposed its foreign-travel restrictions not because the father is Indian, but because India is not a signator country to the Hague Convention on International Child Abduction. (CP 163)

As the trial court's findings explain in detail, there was substantial evidence to support findings that the father posed a "sufficient risk of abduction" to warrant RCW 26.09.191 limitations. (CP 160-63) The father only specifically assigns error to the trial court's finding that the mother's testimony regarding the father's threats was credible. (See App. Br. 6) To the extent the father claims to challenge *all* of the trial court's findings, his attachment of the findings as an Appendix to his brief is not a proper means of assigning error under RAP 10.3(g), which requires "a separate assignment of error for each finding of fact a party contends was improperly made [] with reference to the finding by number." The remainder of the trial court's findings are verities on appeal.

Marriage of Possinger, 105 Wn. App. 326, 338, 19 P.3d 1109, *rev. denied*, 145 Wn.2d 1008 (2001) (unchallenged findings are verities).

Even if the findings were properly challenged, they are supported by substantial evidence. This restatement of the case sets forth the trial court's findings of fact and the substantial evidence on which the trial court relied in making its decision to impose the travel restrictions:

A. At The Conclusion Of A Dissolution Trial In 2003, The Trial Court Imposed Foreign-Travel Restrictions.

Lynette and Brajesh Katare were married on November 25, 1995 in Clearwater, Florida (CP 165), and have a daughter born May 27, 2000, and a son born September 28, 2001. (CP 54) After a five-day trial to King County Superior Court Judge Mary Roberts in June 2003, the trial court ordered that the father's residential time take place in Florida, where the children were allowed to relocate with the mother, until the younger child turned 5, and thereafter within the United States. (CP 176) The trial court placed travel restrictions on the father's exercise of residential time based on its finding that "India is not a signator to the Hague Convention on International Child Abduction... 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 consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children.” (CP 264)

There was substantial evidence supporting the foreign-travel restrictions. In May 2002, while the parties were still married, the father, a Microsoft employee, accepted a two-year position in India without ever discussing the job offer with the mother. (I RP 74, 104)¹ The father unilaterally announced that the mother and the children would move to India with him. (I RP 74, 109) The father told the mother that the relocation would occur even if it resulted in divorce, and told his mother-in-law that it would be “on Lynn's head” if the relocation to India caused a divorce. (I RP 74, 109, III RP 341) Despite the mother's vocal objections, the father stopped looking for other work and focused only on moving the family to India, unilaterally selling a family car in preparation for the move. (I RP 116-17, III RP 343)

¹ Respondent follows appellant's convention for citation to the reports of proceedings. (App. Br. 7, fn. 3) Exhibits from the 2003 trial are cited as “(Ex. 23 (2003))”.

The father's threats to take the children to India unilaterally increased as the September 1, 2002 deadline to move got closer. (I RP 114) Beginning in June 2002, the father told the mother that he no longer wanted her to go to India, and that he would take the children alone. (I RP 75) "The mother found an application for an India PIO card (similar to a U.S. "green card") on the father's computer." (CP 161; I RP 75, 125-26) The father told the mother she had "no choice" about whether he would take the children to India. (I RP 113) After the mother filed for dissolution in July 2002, "the father sought information that would have allowed him to obtain documents that would assist in removing the children from the country." (CP 160-61; I RP 75, 124-26; Ex. 23 (2003))

The father made threats to take the children to India on at least eight occasions. (III RP 199, 213) The father's threats to abduct the children frightened the mother. (III RP 213-14) This fear was reasonable, especially given that India is not a Member state of the Hague Convention on International Child Abduction, promulgated to secure the prompt return of children wrongfully removed to a Member state and to ensure that the rights of custody and of access under the law of another Member state are effec-

tively respected.² (See I RP 113) As a non-Member state, India has no agreement to work with the United States State Department to recover abducted children from the country. (I RP 113)

“The consequences of abduction to India are incredibly serious and irreversible.” (CP 161) “The children were too young to seek help if the father improperly retained them in India.” (CP 161; I RP 63) The father told the mother that she would have no legal recourse if he took the children to India. (I RP 113) The father has the money and connections in India to prevent the mother from having the children returned to the United States. (I RP 113) The father told the mother that she would not “stand a chance” in the Indian court system, and that people use bribes and connections to get what they want in India, including manufactured birth certificates, passports and visas. (I RP 36-37, 113) Both the father and his brother told the mother that it was “easy to lose a child” in India. (I RP 36, II RP 13)

² *International Child Abduction Convention Between The United States Of America And Other Governments Done At The Hague October 25, 1980*. T.I.A.S. No. 11670, 1988 WL 411501 (Treaty).

B. This Court Refused To Vacate The Foreign-Travel Restrictions, Holding That The Trial Court Had Authority To Limit The Children’s Travel And Remanding For The Trial Court To Make An Express Finding As To The Legal Basis For Its Decision.

Despite entering findings warranting foreign-travel restrictions, the trial court initially declined to base its order on RCW 26.09.191. (CP 168, 171) The father appealed. This court rejected the father’s requested relief that the foreign-travel restrictions be vacated in a published decision, *Marriage of Katare*, 125 Wn. App. 813, 105 P.3d 44, *rev. denied*, 155 Wn.2d 1005 (2005) (*Katare I*). Instead, it held that the trial court’s findings supported foreign-travel restrictions under RCW 26.09.191(3)(g), but that the trial court’s form finding that RCW 26.09.191 “does not apply” created an ambiguity:

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).

Katare I, 125 Wn. App. at 831. This court held that although the trial court had authority to impose the foreign-travel restriction

based on its findings, the trial court needed to clarify whether it intended to impose restrictions under RCW 26.09.191. ***Katare I***, 125 Wn. App. at 831.

C. On Remand In 2005, The Trial Court Reiterated Its Earlier Findings And Clarified Its Intent To Impose Foreign-Travel Restrictions Under RCW 26.09.191(3)(g).

On November 18, 2005, on remand to enforce this court's mandate in ***Katare I***, Judge Roberts reiterated her earlier findings and clarified the trial court's intent to impose restrictions under RCW 26.09.191(3)(g). The trial court made an express additional finding that the risk of abduction was sufficient to justify limitations under RCW 26.09.191(3)(g):

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 the 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 limitation on the husband's time with the children. The risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g).

(Ex. 7)

D. This Court Refused To Vacate The Foreign-Travel Restrictions A Second Time, Remanding For The Trial Court To Take New Evidence On The Children’s Current Circumstances.

The father appealed a second time. Although this court in its unpublished decision in the second appeal noted that the trial court’s finding that the father “appears to present no serious threat of abducting the children” still created an ambiguity when considered in light of the trial court’s other findings and its conclusion that there was a “risk of abduction” warranting RCW 26.09.191 limitations, this court denied the father’s request that the travel restrictions be vacated. Instead, this court again remanded, holding that the trial court’s findings on remand did not “expressly address whether the evidence supports the limitations under RCW 26.09.191(3)... [and] also does not expressly address the best interests of the children.” *Katare II*, 140 Wn. App. 1041, * 3.

This court directed the trial court on remand “to explain the reasons for limitations under RCW 26.09.191(3).” *Katare II*, 140 Wn. App. 1041, * 3. This court directed that “[g]iven the passage of time, the trial court should also examine the current relevant information concerning any limitations under RCW 26.09.191(3).” *Katare II*, 140 Wn. App. 1041, * 3.

E. On Remand In 2009, The Trial Court Found That The “Risk Of Abduction Has Not Abated” And Appears “To Have Now Increased.” The Trial Court Found It Was In The Children’s Best Interests To Continue The Foreign-Travel Restrictions.

The parties appeared once again before Judge Roberts on January 14 and 15, 2009. The trial court largely re-affirmed its findings from the 2003 dissolution trial, but made the findings more specific. The court eliminated any ambiguity by vacating its earlier finding that “the husband appears to present no serious threat of abducting the children.” (*Compare* CP 160-61 *with* CP 168) The trial court also specifically found that it was in the best interests of the children to have their residential time with the father limited to the United States. (CP 161)

1. Recalling Evidence From The 2003 Dissolution Trial, The Trial Court Found A Sufficient Risk Of Abduction To Warrant Restrictions.

Consistent with this court’s mandate, the trial court specifically stated the evidence from the 2003 dissolution trial that it considered as the basis for the foreign-travel restrictions. (CP 160-61) The trial court noted that it considered “credible” evidence of the father’s threats to abduct the children to India in the testimony of the mother, the parenting evaluator, and third-party affidavits that the father had offered as evidence during the 2003 trial. (CP 160,

Exs. 142, 143 (2003), II RP 78) The trial court also relied on evidence that the father appeared to be planning to unilaterally remove the children from the United States during the dissolution proceedings by attempting to obtain information that would have allowed him to obtain travel documents for them. (CP 160-61)

Based on this evidence, the trial court found there was a “sufficient risk of abduction to warrant a geographical limitation on the father’s residential time with the children.” (CP 160) Noting that the consequences of abduction to India, a non-Hague Convention country, were “incredibly serious and irreversible,” the trial court found that “the risk of abduction by the father and the best interests of the children justify limitations under RCW 26.09.191(3)(g).” (CP 160-61)

Also consistent with this court’s mandate, the trial court addressed the children’s best interests, finding that “it was in the best interests of the children to have their residential time with their father in the United States given its [previously stated] findings; it was in their best interest to limit their travel outside the United States as well, given the risks.” (CP 161)

2. Based On More Recent Evidence, The Trial Court Found That The Risk Has Not Abated, Which Warrants Continuing The Restrictions.

As directed by this court, the trial court also took additional evidence beyond that presented during the 2003 dissolution trial. In addition to the parties, the trial court took testimony from the father's fiancée, a co-worker of the father, and Michael Berry, an attorney with experience in international child abductions. The trial court allowed Mr. Berry to testify over the father's objection that he was presenting "profiling" testimony, noting that "it will assist in the court's understanding of the status of the literature on these topics." (IX RP 81) "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 has been proved. 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." (IX RP 81-82)

At the conclusion of the remand hearing, based on "the evidence presented on remand, some of which are new, and some of which serve to bolster the findings based on evidence from the

original trial,” the trial court found that the risk of abduction had not “abated,” but had “now increased:”

The risk of abduction has not abated, and based on evidence presented at the hearing on remand, is seen more clearly to have been strong at the time of the original trial, and perhaps to have now increased.

(CP 161) The trial court also noted that, despite the father’s testimony during the 2003 trial that he did not intend to relocate to India, he had in fact “spent significant time in India since that trial. He lived and worked there for at least two years.” (CP 162)

The trial court expressed concern that the father’s “extreme anger” “heightens the risk to the children.” (CP 161) The trial court noted that over the six years between the trials, while the father was aware of the “court’s involvement,” the father through emails to the mother “demonstrates extreme anger, abuse, unreasonableness, and poor judgment.” (CP 161) The trial court was particularly concerned that the father could not control his “utter disdain” for the mother even though he knew that it was likely that these emails would be presented in court. (CP 161) The trial court was concerned that the father’s “extreme anger” and his demonstrated poor judgment “could manifest itself by an abduction of the children:”

From the emails between the parties after the first trial, it is evident that the father still harbors resentment against the mother, which could manifest itself by an abduction of the children. The father's emails demonstrate extreme anger, abuse, unreasonableness, and poor 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.

(CP 161)

The evidence supporting these findings is summarized below:

- *The Father's Intemperate E-Mails*

On appeal, the father minimizes the emails relied on by the trial court as "bickering" between parents. (App. Br. 55) To the contrary, they reflect the father's anger and overreaction on even the simplest child-rearing issues. For example:

In response to the mother's email stating "it has been hot so I will pack shorts and other light clothing" for the children's residential time with the father:

There is no need to pack and bring anything as I have everything and am capable of taking care of their needs. I do not want to fall into your traps as I have

seen enough lies, manipulations and god know what you would pack to fabricate things.

(Ex. 15: 8/27/03 email)

In response to a comment by the parties' daughter that the son was given a time-out:

This is a coward way to punish and discipline a child who is not even 2 years of age.

(Ex. 15: 9/3/2003 email)

In response to the mother's decision to enroll the children in swimming lessons:

No wonder at this age they have dark circles around their eyes and look very very stressed. Just teach them self respect, stronger will power and a will to move forward and not look back. That will be more beneficial than making them "work" more than overtime by any standards.

(Ex. 15: 9/16/2003 email)

In response to the mother's request that the father be less abusive in his emails:

More lies from you. I have never ever been abusive in our relationship and perhaps your future relationships will give you a taste of that... The bottom line is your lies, fabrications, manipulations and injustice by the system will not stop this father giving his love and time to the children.

(Ex. 15: 12/04/03 email)

In response to the mother relaying the dentist's recommendation that the daughter have her cavities filled:

I do not endorse this until there is a second opinion and multiple doctors are consulted... This is another way for you to continue to harass father of Annika and Rohan.

(Ex. 15: 1/31/04 email)

In response to an email in which the mother asked the father to not put words in her mouth:

My mouth is full with delicious Indian food and sweets. I have no need to put any words in your mouth. I was just letting you know Annika and Rohan are most welcome anytime they become a burden for you as alluded by you.

(Ex. 15: 10/18/05 email)

In response to a dispute over missed phone calls:

You are a born liar [sic] who has developed a compulsive lying habit... If a judge believes your email over the phone company records then god bless this wonderful country on earth. I am more scare [sic] of children being raised in your company and in your family's surrounding. Annika and Rohan have a perfect father but what a shame they have to live with a liar, a sexual abuse and vindictive bunch.

(Ex. 15: 2/19/06 email)

In response to the mother giving the father an update on the children's performance in school:

I guess even they are taken away from me, my engineering genes are still at work... It is good to see Rohan doing great in school. He cannot be an abductor of his kids when he grows up. I guess genes have to play a role.

(Ex. 15: 10/28/07 email)

In response to the mother asking the father not to direct the children to ask their teachers to be let out of school early for their residential with the father:

I come from a well educated family and background. Missing school is not tied to lack of academic performance. Snatching kids away from father and telling lies and lies is more dangerous than one hr. of missing school.

(Ex. 15: 11/12/2007 email)

In response to a dispute regarding the start time for Thanksgiving:

I do want to see kids as I have been seeing them for several years despite of injustice and your lies that have prevented kids from enjoying normal childhood and experience a diverse, rich culture. They have been raised in the vicinity of an offender. Sickening...

(Ex. 15: 10/10/08 email)

In response to the mother's request to not be put on speakerphone when she speaks to the children:

Total shameless behavior. I dare you to have kids being called to the court or an evaluator to prove you

are lying. Do I have permission to have kids read this email. I won't do it unless you allow me to. This is so awful [sic] to deal with.

(Ex. 15: 11/24/08 email)

- *The Father's Willingness To "Punish The Children" To "Taunt The Mother."*

The trial court also found that the father has "demonstrated his willingness to punish the children in response to the parenting plan, and to continue to taunt the mother." (CP 161) As an example, the trial court pointed to evidence that the father refused to provide the children with Diwali gifts and to explain the significance of the celebration of Diwali³ "simply because he was required to visit the children in Florida rather than bring them to his home in Washington while they were young." (CP 162; Ex. 38)

Another example, and the subject of a post-trial motion, was the father's refusal to visit the children for nearly 11 months after learning of the trial court's decision on remand in 2009, so that he could "reflect on myself and think about my future and the life I want to build." (CP 193, 228-29) This, despite the father's testimony that the children would be "devastated" if they were unable to visit him for five or six months. (XI RP 11-12)

³ Diwali is a Hindu celebration, also known as the "Festival of Light." (V RP 550)

- *The Father's Contempt For The Courts.*

The trial court also expressed concern for the father's "expressed [] contempt for the legal system," including "referring to the court's order allowing the mother to relocate to Florida with the children as a 'legal abduction.'" (CP 162, Ex. 15: 3/08/07 email) Recognizing that the "father's time with the children is not now limited to Florida," the trial court found that the father's "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." (CP 163)

Based on this new evidence, taken at this court's direction, the trial court found that the father's conduct "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 tools to continue this conduct. The passport and travel restrictions set forth in the parenting plan are reasonably calculated to address this identified harm." (CP 163)

3. The Trial Court Reiterated Its Earlier Finding That The Consequences Of Abduction Would Be Serious And Irreversible.

The trial court expressed its continuing concern about the serious consequences if the children are abducted. Based on

unchallenged evidence at trial, the trial court found that “child abduction is not a crime in India.” (CP 162; IX RP 16-17, Ex. 32) “India has its own laws giving it broad authority to rewrite parenting orders of other states.” (CP 163; IX RP 20, Ex. 11) “There is no guarantee of enforcing a U.S. parenting order in India... that proceedings in India do not include summary proceedings... that such proceedings can take six months to a year.” (CP 163; IX RP 20, Ex. 11)

The trial court found that “the children, now ages 8 and 7, are too young to seek assistance in the event that they are improperly retained by their father or otherwise unable to return to their mother. This is especially true if the children are taken to a foreign country such as India.” (CP 162, VIII RP 38-43) The trial court found that “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.” (CP 162) The trial court further found that “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." (CP 162)

The father once again appeals. (CP 158)

IV. ARGUMENT

A. Standard Of Review.

Trial courts have wide discretion in establishing the terms of a parenting plan; decisions on parenting will not be reversed unless manifestly unreasonable or based on untenable grounds or reasons. **Marriage of Jacobson**, 90 Wn. App. 738, 743, 954 P.2d 297, *rev. denied*, 136 Wn.2d 1023 (1998) (citing **Marriage of Littlefield**, 133 Wn.2d 39, 52, 940 P.2d 1362 (1997)). "Because of a trial court's unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence, its decisions are allowed broad discretion." **Marriage of Woffinden**, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983). This court does not review the trial court's credibility determinations, nor weigh the conflicting evidence. **Woffinden**, 33 Wn. App. at 330. "So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it."

Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). Substantial evidence is that which is sufficient “to persuade a fair-minded person of the truth of the matter asserted.” ***Burrill***, 113 Wn. App. at 868.

Here, the trial court’s findings, including that the father’s “pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tools to continue this conduct” (CP 163), are supported by substantial evidence, and the trial court did not abuse its discretion in imposing foreign-travel restrictions after finding that the father made threats to abduct the children to India and that his conduct was “adverse to the best interests of the children.” (CP 160, 163) This court should affirm without remand.

B. As This Court Held *In This Case*, “A Parenting Plan That Complies With Statutory Requirements To Promote The Best Interests Of The Children” Does Not Violate A Parent’s Constitutional Rights.

The travel restrictions comply with the applicable law, which was established in this case. The father makes no different argument nor cites to any additional authority to support his claim, for the third time, that the travel restrictions imposed by the trial court violate his constitutional rights. “[O]nce there is an appellate holding enunciating a principle of law, that holding will be followed

in subsequent stages of the same litigation.” *Roberson v. Perez*, 156 Wn.2d 33, 41, ¶ 21, 123 P.3d 844 (2005). This court has already held that a parenting plan that “complies with statutory requirements to promote the best interests of the children” does not violate a parent’s constitutional rights. *Katare (I)*, 125 Wn. App. at 823. Because the parenting plan “complies with statutory requirements to promote the best interests of the children” this court must reject the father’s renewed constitutional arguments.

1. “A Trial Court Has Authority To Impose Limitations Or Restrictions Under RCW 26.09.191(3)(g) To Prevent The Risk Of Abduction.”

RCW 26.09.191(3) allows a court to limit any provisions in the parenting plan based on potentially adverse effects on the child's best interests where there are “factors or conduct as the court expressly finds adverse to the best interests of the child.” RCW 26.09.191(3)(g). Here, the trial court acted within its discretion to impose limitations under RCW 26.09.191(3)(g) because of the “risk of abduction,” the consequences of which are “incredibly serious and irreversible,” and adverse to the children’s best interests. (CP 160-61)

a. **The Trial Court’s Findings Support Foreign-Travel Restrictions.**

This court held in the father’s first appeal that a “trial court has authority to impose limitations or restrictions under RCW 26.09.191(3)(g) to prevent the risk of abduction.” *Katare I*, 125 Wn. App. at 830; see also *Marriage of Sanders*, 63 Wn.2d 709, 715, 388 P.2d 942 (1964) (requiring father to post a bond before exercising visitation was not an abuse of discretion where child is or might be taken beyond the jurisdiction of the court). Any “limitations or restrictions imposed must be reasonably calculated to address the identified harm.” *Katare I*, 125 Wn. App. at 826. As this court noted in *Katare I*, “Brajesh does not dispute that the restrictions imposed by the parenting plan would be permissible if RCW 26.09.191(3) factors were present.” 125 Wn. App. at 830-31.

Here, as the trial court found at the conclusion of the 2003 dissolution trial and more specifically after the 2009 remand hearing, the “identified harm” to the children was the “sufficient risk of abduction” (CP 160, 168), and the “passport and travel restrictions set forth in the parenting plan are reasonably calculated to address this identified harm.” (CP 163, 168) In support of its determination that there was a sufficient risk of abduction, the trial

court found that the “father threatened to take the children to India without the mother” (CP 160); “the father sought information for the children in discovery, which would have allowed him to obtain documents (Indian PIO cards) which would assist in removing the children from the country” (CP 160-61); and that the father’s demonstrations of “extreme anger, abuse, unreasonableness, and poor judgment,” could “manifest itself by an abduction of the children.” (CP 161)

The trial court also found that the father’s “pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tool to continue this conduct” (CP 163), and that 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.” (CP 162) These findings, which are supported by substantial evidence, support the trial court’s imposition of RCW 26.09.191(3) restrictions to protect the children.

b. It Is Not Necessary For The Children To Be Abducted Before The Trial Court Can Impose Foreign-Travel Restrictions.

The father is wrong when he claims that the trial court could not impose travel restrictions on his residential time because he has not “engaged in abduction.” (App. Br. 28) It is not necessary, nor would it be sound policy, for the courts to only be given discretion to impose limitations to prevent abduction *after* a parent had already “engaged in abduction.” If the trial court had to wait until the father actually abducted the children before it could impose safeguards to prevent an abduction, it would be too late. The consequences of removal to India would be “incredibly serious and irreversible.” (CP 161) Because of how the legal system works in India, “there is no guarantee of enforcing a U.S. parenting order,” and any proceedings could take “from six months to a year.” (CP 163) In fact, the laws of India give its courts “broad authority to rewrite parenting orders of other states.” (CP 163)

The father’s argument that there must be evidence that he had already abducted the children before the court can impose restrictions is similar to that rejected in *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d

1007 (2003). In *Burrill*, concerned that the mother's actions would result in the children's alienation from the father, the trial court imposed RCW 26.09.191(3) limitations barring the mother from joint decision-making after finding she had engaged in the abusive use of conflict. The *Burrill* court agreed with the mother that there was no evidence that the children had been alienated from the father to date, but held that evidence of "actual" damage was not necessary. Instead, RCW 26.09.191(3) restrictions were justified because there was a "danger" of damage to the child's psychological development. *Burrill*, 113 Wn. App. at 872. Similarly here, while it is true that the father has not "engaged in abduction," there was "sufficient risk [*i.e.* "danger"] of abduction to warrant a geographical limitation on the father's residential time with the children." (CP 160)

c. Restrictions Are Warranted When The Consequences Of The Threatened Harm Are "Incredibly Serious And Irreversible."

Marriage of Wicklund, 84 Wn. App. 763, 932 P.2d 652 (1996) does not support the father's argument that the trial court could not impose restrictions on the father's residential time "absent known, actual harmful conduct to the child that was occurring or

that the accused parent admitted he was engaged in.” (App. Br. 28) In **Wicklund**, this court reversed a trial court’s order prohibiting the father from showing affection with a same-sex partner in the presence of the children because the only harm perceived by the trial court was the difficulty the children were having adjusting after their parents’ separation – a harm that could be remedied by counseling. 84 Wn. App at 771. In this case, however, the perceived harm is abduction of the children to a foreign country where they could not be recovered through the Hague Convention. (CP 163) Unlike the “harm” in **Wicklund**, abduction cannot be remedied by counseling or “adjustment.” If the father followed through with his threats to abduct the children to a foreign country, his conduct clearly “would endanger the child(ren)’s physical, mental or emotional health,” thus warranting restrictions under RCW 26.09.191 and **Wicklund**, 84 Wn. App. at 770.

The father’s claim that the trial court could not impose restrictions on his residential time with the children because of the mother’s “irrational fear” (App. Br. 38) ignores the evidence that the trial court relied on in finding that the father’s “extreme anger, abuse, unreasonableness, and poor judgment” “heightens the risk”

that he may abduct the children. (CP 161) There is nothing “irrational” about the mother’s fear that the father will act on his threats to abduct the children; his “extreme anger” has continued unabated and uncontrolled for six years, and India remains a non-Hague state from which the children could not be retrieved. (CP 161, 163) The trial court properly imposed foreign-travel restrictions under RCW 26.09.191(3) to protect the children from the risk of abduction after making extensive findings, including finding that it was in the children’s best interests to maintain their residential time with their father within the United States.

2. The Imposition Of Restrictions On The Children’s Travel Does Not Implicate The Father’s Constitutional Rights.

Because the parenting plan “complies with statutory requirements to promote the best interests of the children” this court must reject the father’s renewed constitutional arguments. Parenting plan restrictions are not a constitutional infringement on the “right” to parent.

Parents necessarily invoke the power of the state and the responsibility of the court to develop a parenting plan in the best interests of their children when they divorce, and a divorced

parent's right to the care, custody and control of their child is constrained by the competing constitutional interests of the other parent and the best interests of their child. See ***Momb v. Ragone***, 132 Wn. App. 70, 77, ¶ 14, 130 P.3d 406, *rev. denied*, 158 Wn.2d 1021 (2006); ***Marriage of King***, 162 Wn.2d 378, 385, 388, 394, ¶¶ 11, 16, 36, 174 P.3d 659 (2007). “[F]undamental constitutional rights are not implicated in a dissolution proceeding;” “generally a private action between spouses resulting in termination of the marriage” that does “not sever either parent's rights and responsibilities over the children. The rights and responsibilities of the parents are not terminated but rather allocated.” ***King***, 162 Wn.2d at 385, 388, 394, ¶¶ 11, 16, 36.

In ***Momb***, the court had denied the father's request to relocate with the child. Citing the same cases cited by appellant here, the father claimed that the Relocation Act, RCW 26.09.405 *et seq.*, violated his fundamental right to autonomy in child-rearing decisions. In rejecting the father's arguments, the appellate court noted that the father relied on the analysis and standards adopted in nonparental visitation cases, and that “no case has applied a strict scrutiny standard when weighing the interests of two parents.”

Momb, 132 Wn. App. at 77, ¶ 14; see also *Magnusson v. Johannesson*, 108 Wn. App. 109, 112, 29 P.3d 1256 (2001) (rejecting application of strict scrutiny to the design of a parenting plan that accommodates the “conflicting wishes” of two parents).

None of the cases cited by the father to support his claim that restrictions in a parenting plan unconstitutionally infringe on his “fundamental rights” as a parent consider either the competing constitutional interests of two parents or the best interests of the children in the context of a marriage dissolution. Rather, the father cites cases that address a parent's due process right against state action in awarding visitation to a non-parent. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (App. Br. 22); *Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005) (App. Br. 22); *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998) (App. Br. 22). The father also puts misplaced reliance on federal cases that deal with the State's unilateral interference into the realm of the family rather than the competing interests of two parents. See *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (statute declaring children of unwed fathers wards of the state upon death of their mother unconstitutional) (App. Br. 24);

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (considering right of Amish parents to determine their children's education without state interference) (App. Br. 24); **Meyer v. Nebraska**, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (statute forbidding the teaching of foreign languages in primary school unconstitutional) (App. Br. 25).

Here, the trial court imposed foreign-travel restrictions under RCW 26.09.191(3)(g) in a dispute between divorcing parents because it found that the risk of abduction justified the restriction and the limitations were in the children's best interests. The parenting plan "complies with statutory requirements to promote the best interests of the children," **Katare (I)**, 125 Wn. App. at 823, and thus does not violate the father's constitutional rights.

C. The Trial Court Did Not Abuse Its Discretion In Considering Third Party Statements Corroborating The Father's Threats And Unchallenged Evidence About The "Risk Factors" Of Parental Abduction.

It is important in cases dealing with the best interests of children for the trial court to have all relevant evidence before it. See **Guardianship of Way**, 79 Wn. App. 184, 192, 901 P.2d 349 (1995), *rev. denied*, 128 Wn.2d 1014 (1996). Here, the trial court did not abuse its discretion in considering third party statements

corroborating the father's threats to abduct the children, which were initially proffered as part of the parenting evaluator's report to the court and through sworn affidavits admitted at the 2003 trial by the father himself. (Ex. 3, 4, 142, 143, II RP 78, CP 235-40) Similarly, the trial court did not abuse its discretion in considering "risk factors" and "red flags" for parental abduction that the father championed in his second appeal (Cause no. 59061-8-I App. Br. 29-42), and which were proffered through literature to which the father did not object on remand. (Ex 25, 28, 30, 31, IX RP 18, 28, X RP 5)

1. The Trial Court Properly Considered Evidence Of Third Parties Who Were Interviewed By The Parenting Evaluator And Whose Sworn Affidavits The Father Admitted At Trial.

a. Any Challenge To The Admission Of Third-Party Statements Is Not Preserved.

The law of the case prevents the father from raising his belated challenge to the trial court's consideration of evidence that was also presented at the 2003 dissolution trial. The father's challenge to third party statements that were made to the parenting evaluator and through affidavits that were admitted as evidence during the 2003 dissolution trial is a question that should have been raised during the first appeal of the dissolution trial. "[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.” ***Adamson v. Traylor***, 66 Wn.2d 338, 339, 402 P.2d 499 (1965).

There was no “substantial change in the evidence” presented at the remand hearing relating to these third party statements. To the extent that these third party statements were re-introduced at the remand hearing through the testimony of Mr. Berry, who testified that he reviewed the parenting evaluation and recalled that third parties corroborated the father’s threats (X RP 17-18), any challenge was not preserved.

First, the parenting evaluation had already been admitted in both the 2003 dissolution trial and 2009 remand hearing without objection. (See Ex. 3, 4) Any challenge to the parenting evaluation, including its contents, should have been made at the dissolution trial, or at the very latest, when the mother again offered the parenting evaluator’s report during the remand hearing.

Second, the father did not object to Mr. Berry’s testimony describing what he gleaned from the parenting evaluation. (See X

RP 17-18) The father failed to preserve any challenge to this evidence during the remand hearing by failing to object when Mr. Berry testified about the information he reviewed from the parenting evaluation. RAP 2.5(a); **Marriage of Studebaker**, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); **Lindblad v. Boeing Co.**, 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

b. The Trial Court Found Evidence Of The Father's Threats Credible In 2003.

In any event, the father is wrong when he claims that the trial court “found that the predicate 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 statement of Lynette’s two friends when Mr. Berry related what the parenting evaluator related she had been told in 2002.” (App. Br. 17) It is clear from its findings that the trial court considered the corroborating third party statements as elicited in the dissolution trial, not the remand hearing:

In finding that there is a sufficient risk of abduction to warrant a geographical limitation on the father’s residential time with the children, *the trial court considered the following evidence, which was brought forth during the June 2003 dissolution trial:*

In the months leading up to the mother filing a petition for dissolution of their marriage, the father repeatedly threatened to take the children to India without the mother. Third parties interviewed by the parenting evaluator stated that they heard the father make similar threats. The trial court finds that the mother's testimony that the father made threats to be credible...

(CP 160, emphasis added)

Regardless of the evidence in the remand hearing, it is clear from the trial court's original findings that it found the mother's testimony regarding the father's threats credible. While the trial court had previously found that the father "appears to present no serious threat" of abducting the children (CP 168), it nonetheless found that there was a "risk" (VI RP 10), and thus necessarily found the evidence that father had made threats credible at the time of the dissolution trial, and not just on remand.

c. The Third-Party Statements Were Not "Unsworn Hearsay," But Sworn Affidavits That The Father Offered Into Evidence.

Even if this court could consider the father's belated challenge to this evidence, this court should reject it because the statements by the third party witnesses, who each testified that they heard the father threaten to take the children, were not "unsworn." (App. Br. 17) These statements were affidavits, sworn "under the

penalty of perjury,” and admitted as evidence during the dissolution trial after being offered by the father. (See Ex. 142, 143, II RP 78-79, CP 235-40)

To the extent the trial court should not have considered these third-party affidavits, the father invited any error by introducing them into evidence. *Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself). The father cannot now complain about evidence that he solicited.

In any event, the father was not prejudiced by the admission of these affidavits, because he had the opportunity to attack the credibility of the third parties who made the statements. When an otherwise hearsay statement is admitted in evidence, ER 806 allows the credibility of a declarant to be attacked. Here, after offering the affidavits as evidence, father’s counsel cross-examined the mother on her relationship with the third parties, who were “close” family friends. (II RP 79-82) Father’s counsel also inquired of the parenting evaluator whether she believed that the third parties were “coached.” (II RP 145-49)

It was well within the trial court's discretion to consider affidavits of third parties who corroborated the mother's testimony that the father threatened to abduct the children when the father offered these affidavits into evidence and was given the opportunity to challenge the credibility of the third parties through cross-examination of the mother and the parenting evaluator.

2. The Trial Court Properly Considered Testimony And Literature Regarding "Risk Factors" Used In Assessing The Risk Of Parental Abduction.

a. The Admission Of Literature Describing Risk Factors Was Unchallenged.

The trial court relied on the literature describing "red flags" and "risk factors" of international parental abduction, admitted without objection during Mr. Berry's testimony, in making its independent determination, based on the evidence presented at trial, that the father posed a sufficient risk to justify restrictions. (See CP 163, *citing* Ex. 25, 28, 30, 31, IX RP 18, 28, X RP 5) The court considered the books *Accounting for Non-Resident Indian Clients* (2004) (Ex. 11) and *International Parental Child Abduction* (1998) (Ex. 25); 2001 "white papers" from the U.S. Department of Justice (Ex. 27, 28, 33); an April 2008 Report on the Compliance with the Hague Convention by the U.S. Department of State (Ex.

29); a 2007 Family Resource Guide on International Parental Kidnapping by the Department of Justice (Ex. 30); a 2002 Family Abduction and Prevention and Response booklet published by the National Center for Missing and Exploited Children (Ex. 31); and a travel alert issued by the State Department in December 2008. Courts routinely consider this type of information in making determinations at trial. See e.g. **State v. Ciskie**, 110 Wn.2d 263, 272-273, 751 P.2d 1165 (1988) (relying on treatises describing battered woman syndrome); **Marriage of Pape**, 139 Wn.2d 694, 706, 989 P.2d 1120 (1999) (relying on articles regarding child relocation). Any challenge to admission of this literature is not preserved. **Lindblad v. Boeing Co.**, 108 Wn. App. at 207.

b. Considering Risk Factors Useful In Determining Whether A Parent Poses A Risk of Abduction Is Not “Criminal Profiling.”

The Parenting Act requires that courts engage in “prediction” when fashioning parenting plans, obligating the court to consider evidence to determine a parent’s “potential” for “future performance of parenting functions.” RCW 26.09.187(3)(a)(iii). When determining whether limitations should be imposed, the trial court must necessarily predict whether “a parent’s involvement or

conduct *may have* an adverse effect on the children's best interests." RCW 26.09.191(3) (emphasis added). The father's reliance on criminal "profiling" cases to claim that the trial court could not consider whether his actions pre- or post-trial make it more likely that he will kidnap the children is misplaced. (App. Br. 31-32) Unlike proving whether a crime has occurred, determining whether a parent poses a risk of abduction is necessarily predictive. Further, it results not in conviction or imprisonment, but in imposition of constitutional limitations on the children's travel.

Our courts have specifically approved the use of risk assessments to determine the "future dangerousness" of sexual predators in civil commitment cases, noting that the probative value of this type of testimony is high, is directly relevant to whether an individual should be committed, and outweighs any prejudicial effect. ***Detention of Thorell***, 149 Wn.2d 724, 758, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). Mr. Berry's testimony was intended to aid the court in determining whether the father's actions present a risk of abduction to the children. The concern in criminal cases is related to the prejudicial effect of this type of evidence on a jury. Here, the trier of fact is the trial court, which is

in a better position to consider the probative value of the evidence without being prejudicially affected by it. In fact, in allowing the testimony, the trial court specifically stated that it would apply the factors to the facts of this case itself, rather than rely on Mr. Berry's opinion. (IX RP 81-83) And as is evident in the trial court's findings, the trial court did not rely on Mr. Berry's testimony that the father posed a risk of abducting the children, but on its own independent assessment of the evidence. (CP 163)

c. The Father Insisted That The Courts Consider These Risk Factors In His Last Appeal.

The father's complaint that the trial court erred in considering evidence of risk factors is particularly unfounded when, as set out in Appendix A, the "risk factors" described by Mr. Berry and set forth in literature admitted as exhibits without challenge are nearly identical to the factors in the statutes of other states addressing parental abduction that the father urged this court to consider in his last appeal. (Cause no. 59061-8-I App. Br. 29-42) That the existence of certain factors may be relevant to a determination of whether a parent poses a risk of abduction is not akin to "criminal profiling," nor based on a "suspect classification, [the father]'s

national origin.” (App. Br. 32) Instead, as the prefatory notes to the Uniform Child Abduction Prevention Act state: “family abductions may be preventable through the identification of risk factors.” The trial court’s unchallenged consideration of risk factors similar to those in the Uniform Child Abduction Prevention Act and other state statutes to determine whether there was a credible risk of abduction was not an abuse of discretion.

d. The Trial Properly Assessed The Risk Factors And Its Findings Are Supported By Substantial Evidence.

The father’s allegation that the risk factors “tarred [him] with the accusation of a ‘possible’ abductor because of his ‘cultural affiliation” (App. Br. 40) is wholly unfounded. The trial did not impose limitations on the father because of his “cultural affiliation,” but because he threatened to abduct the children. While the father complains of the admission of Mr. Berry’s testimony analyzing the risk factors, there is nothing in the record to support the father’s claim that the trial court relied on Mr. Berry’s testimony to make its determination whether there was a risk of abduction in 2003 and whether that risk continues today. In fact, the trial court specifically stated that regardless of the testimony of Mr. Berry, it would make

the “ultimate determination” of whether the father continues to pose a risk of abduction (IX RP 81), and when addressing the risk factors in its findings of fact the trial court makes no mention of Mr. Berry’s testimony. Rather, it focused solely on the unchallenged literature admitted at trial. (CP 162-63)

As set forth in Appendix B, the trial court properly considered the risk factors to determine whether there was a credible risk of abduction, and made specific findings supported by substantial evidence related to the relevant factors. The father’s reliance on other evidence that might have supported a different result (App. Br. 44-48) is irrelevant, because there was substantial evidence to support the trial court’s findings. *Marriage of Burrill*, 113 Wn. App. at 868.

D. This Court Should Affirm The Trial Court’s Foreign-Travel Restrictions. Any Remand Must Be To The Same Judge Who Has Followed This Case Since Its Inception.

After hearing the parents testify again, reviewing six years of emails, and considering risk factors that the father had, until this appeal, insisted should govern its decision, the trial court determined that in fact the father did pose a threat to the children of abduction, and that threat “is seen more clearly to have been strong

at the time of the original trial, and perhaps to have now increased.” (CP 161) This is not an act of bias, but a measured decision by the fact finder who was required to weigh evidence and the credibility of witnesses. In the unlikely event that this matter is remanded to the trial court for any reason, this court must reject the father’s request for a different judge, as there is no evidence that the trial court was biased. ***Marriage of Sievers***, 78 Wn. App. 287, 314, 897 P.2d 388 (1995).

As evidence of the trial court’s bias, the father points to a statement by the trial court that it would not be “simply [be] changing [its] mind” in the remand hearing. (App. Br. 60, *citing* IX RP 82) It is clear in context that statement related to the trial court’s prior determination that the father did not pose a “serious threat” of abduction. (IV RP 82) In other words, the trial court affirmed that it would reconsider its prior determination that the father was not a serious threat only based on the new evidence presented at the remand hearing, and would not simply vacate its finding just so that it would coincide with its foreign-travel restrictions.

The father also points to the trial court's statement in its order denying the mother's request for attorney fees that the father's conduct after trial may "support a finding of intransigence in the future" (App. Br. 60, *citing* CP 181) as evidence of bias. In seeking attorney fees for the father's intransigence, the mother relied on the father's refusal to visit with the children for almost a year after he learned of the trial court's 2009 decision. The trial court did not agree with the mother that the father's cancellation of his time with the children was compensable intransigence, but did note that his actions were of "serious concern." (CP 181)

The fact that the trial also noted that the father's "most recent conduct could support a finding of intransigence in the future" is not evidence of bias. Instead, the court was informing the father of the potential legal consequences of his actions. See ***Marriage of Wallace***, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002) ("merely inform[ing] [the husband] of the legal consequences of his position" is not bias), *rev. denied*, 148 Wn.2d 1011 (2003). "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." ***Santos v. Dean***, 96 Wn. App. 849, 857, 982 P.2d 632 (1999), *rev. denied*,

139 Wn.2d 1026 (2000) (citations omitted). This court should reject the father's meritless argument that any remand be to a different judge.

E. This Court Should Award Attorney Fees To The Mother.

This is the third appeal by the father of foreign-travel restrictions imposed not because of his "cultural affiliation," but because he threatened to abduct the children to a non-Hague state. Every legal issue raised by the father has either been resolved by this court's decisions or should have been raised in his earlier appeals. As the father admits in his opening brief, however, he is "committed to litigating over the long term." (App. Br. 53) That decision should have some cost to the father; the mother should not be required to defend the trial court's decision to protect the children from the same arguments made over and over, with increasing hostility and irrationality. The court should award attorney fees to the mother under RAP 18.9, **Marriage of Greenlee**, 65 Wn. App. 703, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992), and on the basis of her need and the father's ability to pay attorney fees. RCW 26.09.140; RCW 26.09.140;

Leslie v. Verhey, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999).

V. CONCLUSION

The travel restrictions on the children's foreign travel imposed in this case comply with the statutory constraints of the Parenting Act and are in the children's best interests. They should be affirmed without further remand and with an award of attorney fees on appeal to the mother.

Dated this 10th day of February, 2010.

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

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

By: _____


Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

By: _____


Gordon W. Wilcox
WSBA No. 75

Attorneys for Respondent

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 February 10, 2010, I arranged for service of the foregoing Brief of Respondent, 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 type="checkbox"/> Messenger <input checked="" 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
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

DATED at Seattle, Washington this 10th day of February, 2010.



Carrie O'Brien

Risk Factors Considered By Court

Parent has threatened to abduct or abducted previously. (Ex. 28, 30, 31, 33)

ORS § 109.035(3)(a)	VTCA Family Code §153.502(a)(1),(2)	FSA § 61.45(3)(a)	Cal.Fam.Code §3048(5)(b)(1)(B)	§7(a)(2)
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*Parent has strong ties to another country and/or no strong ties to the child's home state.
(Ex. 28, 30, 31, 33)*

ORS § 109.035(3)(c)	VTCA Family Code §153.502(b)(1), (2)	FSA §61.45(3)(b)	Cal.Fam.Code §3048(5)(b)(1)(C), (D);	§7(a)(6), (7), Comment: "Courts should consider evidence that [parent] was raised in another country and has family support there."
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Parent has family living in another country. (Ex. 28, 30, 31, 33)

ORS § 109.035(3)(c)	VTCA Family Code §153.502(b)(1)	FSA § 61.45 (3)(b)	Cal.Fam.Code §3048(5)(b)(1)(D)	§7(a)(6)
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Parent has no financial reason to stay in the area. (Ex. 28, 30, 31, 33)

	VTCA Family Code §153.502(a)(3)	FSA§ 61.45(3)(c)	Cal.Fam.Code §3048(5)(b)(1)(E)	
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Similar Factors Found in the Statutes of:

OREGON

TEXAS

FLORIDA

CALIFORNIA

UNIFORM LAWS

Parent engaged in planning activities. (Ex. 28, 30, 31, 33)

ORS § 109.035(3)(b)	VTCA Family Code §153.502(a)(4)	FSA §61.45(3)(d)	Cal.Fam.Code §3048(5)(b)(1)(F)	§7(a)(3)
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History of domestic violence or lack of parental cooperation. (Ex. 28, 30, 31, 33)

	VTCA Family Code §153.502(a)(5)	FSA §61.45(3)(e)	Cal.Fam.Code §3048(5)(b)(1)(G)	§7(a)(4)
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Parent has prior criminal record. (Ex. 28, 30, 31, 33)

	VTCA Family Code §153.502(a)(6)	FSA § 61.45(3)(f)	Cal.Fam.Code §3048(5)(b)(1)(H)	
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Parent feels alienated from legal system. (Ex. 28, 30, 31, 33)

	VTCA Family Code §153.502(a)(6) History of violating court orders			§7(a)(5) History of violating court orders
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Similar Factors Found in the Statutes of:

OREGON

TEXAS

FLORIDA

CALIFORNIA

UNIFORM LAWS

Risk Factors Considered By Trial Court

Parent has threatened to abduct or abducted previously. (Ex. 28, 30, 31, 33)

Findings of Fact: “In the months leading up to the mother filing a petition for dissolution of their marriage, the father threatened to take the children to India without the mother.”
(CP 160)

Evidence: The mother testified that the father threatened to take the children. (I RP 75, 113, 119; III RP 199, 213-14)

Third parties testified that the father threatened to take the children to India without the mother. (Ex. 3, 4, 142, 143, CP 235-41)

Third parties testified to observing the father pressure the mother into relocating to India. (III RP 341, 343; IV RP 360-63)

*Parent has strong ties to another country and/or no strong ties to the child’s home state.
(Ex. 28, 30, 31, 33)*

Findings of Fact: “The father was born and raised in India, where his immediate family still remain.” (CP 160)

Evidence: Parenting evaluator reported the father’s family ties to India. (See Ex. 3, 4)

“Contrary to his representation at the previous trial, the father has spent significant time in India since that trial. He has lived and worked there for at least two years.”
(CP 162)

The father testified that he has a lot of pride in India. (XI RP 14)

Both parties testified that after the dissolution, the father relocated to India for two years. (VIII RP 27; X RP 72)

Other than the parties’ children, the father has no family ties to the United States. (He is now engaged to marry and Indian woman who lives and works in the Seattle area and has applied for a green card.) (CP 160)

The father testified that he has no family in the United States other than the children. (IV RP 394)

The father’s fiancée testified that she relocated to United States from India two and half years ago and is pursuing her green card. (XI RP 51-52)

Parent has family living in another country. (Ex. 28, 30, 31, 33)

Findings of Fact: “The father was born and raised in India, where his immediate family still remains.” (CP 160)

Evidence: Parenting evaluator reported the father’s family ties to India. (See Ex. 3, 4)

The father testified that he has no family in the United States other than the children. (IV RP 394)

Parent has no financial reason to stay in the area. (Ex. 28, 30, 31, 33)

Findings of Fact: “The father has the means and potential to relocate to India for employment.” (CP 161)

Evidence: Both parties testified that after the dissolution, the father relocated to India for two years for employment. (VIII RP 27; X RP 72)

The father in the past has pursued employment in India, stating that he intended to “settle in India.” (Ex. 1)

Parent engaged in planning activities. (Ex. 28, 30, 31, 33)

Findings of Fact: “Through discovery, the father sought documentary information for the children, which would have allowed the father to remove the children from the country. “ (CP 160-61)

“The mother found an application for an Indian PIO card (similar to a U.S. “green card”) on the father’s computer.” (CP 161)

Evidence: The mother testified that the father sought to obtain passports and PIO cards for the children. (I RP 75, 125-26)

Father sought discovery from the mother for copies of passports and Indian tourist visas for the children; previously prepared applications for passports and visas for the children; and immunization records for the children. (I RP 124-25; Ex. 23)

The father sold one of the family vehicles in preparation of moving to India. (I RP 116)

Two weeks before the mother filed for dissolution on July 22, 2002, the father unilaterally removed her as a beneficiary of his life insurance policy, and named the children as beneficiaries. (XI RP 29-31)

History of domestic violence or lack of parental cooperation. (Ex. 28, 30, 31, 33)

Findings of Fact: “From the emails between the parties after the first trial, it is evident that the father still harbors resentment against the mother, which could manifest itself by an abduction of the children. The father’s emails demonstrate extreme anger, abuse, unreasonableness, and poor 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.” (CP 161)

“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 parents show that he meets several Profiles and “red flags” which indicate a risk of abduction by the father, which is against the best interests of the children.” (CP 163)

Evidence: The mother testified to verbal abuse by the father before the divorce. (I RP 20-33, 73)

Third parties testified to witnessing verbal abuse during the marriage. (III RP 336; IV RP 358)

Since the divorce, the father continued his abuse through emails:

The father insults the mother and her family: “lying, fabrications and cowardness runs in your family.” (Ex. 15: 4/11/04 email)

The father sent an email to a third person mocking the mother: “Hey dude... She is as usual. Nothing new. Bitter and pissed at god only knows what. She is dumb to have moved out of Seattle. The house that I had purchased for \$365K and she sold for \$369K are now selling for \$650K. What a gain she would have enjoyed by destructive mentality she has only brings destruction.” (Ex. 15: 8/03/05 email)

The father responds to the mother’s suggestion that he look ahead for flights in July because it is prime season: “Thanks for the brilliant advice. My thought process is not like you but I sure hope to tune myself to think like you. Wouldn’t that be scary though.” (Ex. 15 email: 5/20/07 email)

In response to the mother’s inquiry about the father’s payment for children’s travel: “Feel free to talk to you attorney. I am tired of your bullshit. MONEY WILL BE SENT OUT TODAY. I have beautiful things in life to worry about instead of bunch of losers.” (Ex. 15: 9/12/07 email)

Parent feels alienated from legal system. (Ex. 28, 30, 31, 33)

Findings of Fact: “He implies that the mother and the court have made it impossible for him to provide the gifts and to explain the significance of the [Diwali] celebration [to the children], simply because he was required to visit the children in Florida rather than bring them to his home in Washington state while they were young.” (CP 162)

“The father, in his correspondence, expressed his contempt for the legal system, e.g., referring to the court’s order allowing the mother to relocate to Florida with the children as, ‘legal abduction.’” (CP 162)

Evidence: Emails from the father explaining why he does not intend to provide Diwali gifts to the children. (Ex. 37)

Emails from the father showing contempt of legal system: The father accuses the mother of making a “joke of our legal system.”
(Ex. 15: 8/29/04 email)

The father asserts that the legal system has provided the mother with “positive results” for her lying. (Ex. 15: 5/28/05 email)

The father claims that the “biased system” is supporting the mother. (Ex. 15: 2/01/06 email)

The father refers to the mother’s relocation with the children to Florida as a “legal abduct[ion].” (Ex. 15: 3/09/07 email)

Parent is suspicious or distrustful due to a belief abuse has occurred. (Ex. 28, 30, 31, 33)

Evidence: Emails from father accusing the mother of “abuse” of the children:

Regarding a time out in the bathroom: “this is a coward way to punish and discipline a child who is not even 2 years of age.”
(Ex. 15: 9/3/2003 email)

Regarding the mother’s decision to enroll the children in swimming lessons: “No wonder at this age they have dark circles around their eyes and look very stressed. Just teach them self respect, stronger will power, and a will to move forward and not look back.” (Ex. 15: 9/16/2003 email)

In response to the mother's request that the father be less abusive in his emails: "More lies from you. I have never ever been abusive in our relationship and perhaps your future relationships will give you a taste of that... The bottom line is your lies, fabrications, manipulations and injustice by the system will not stop this father giving his love and time to the children." (Ex. 15: 12/04/03 email)

In response to mother relaying a dentist's recommendation that daughter have her cavities filled: "I do not endorse this until there is a second opinion and multiple doctors are consulted... This is another way for you to continue to harass father of Annika and Rohan." (Ex. 15: 1/31/04 email)