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71860-6

No. 71860-6-1

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of:

KATHRYN ROSTROM,

Respondent,

v.

DALE ROSTROM,

Appellant.

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DALE ROSTROM'S
OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR.....7

IV. FACT STATEMENT9

V. ARGUMENT22

A. Standards of Review22

B. The trial court abused its discretion when it permitted the children to relocate to Washington without assuring the Washington courts’ continuing jurisdiction because it did not fully understand the Convention or Australian Law.. .23

C. The trial court should have required adequate enforcement safeguards before allowing the children to leave the U.S... .27

D. The trial court’s decision is internally inconsistent as to the Father’s alcohol use and restrictions, and the parties did not even request restrictions...30

E. The detrimental effects of relocation outweigh benefits of the change to the children and the Respondent.....33

F. The trial court failed to adequately consider the statutory factor contained in RCW 26.09.520(1)...35

G. The counselor did not testify to the father’s overall parenting skills..36

H. Because the maternal grandparents were granted residential time with the children under the parenting plan agreed to in September, 2013, and entered in December, 2013, they should have been given notice of relocation.....37

I. The Respondent would not be a “single parent” if she remained in Washington.....37

J. The Father acknowledged his drinking problem and took responsibility for the 2013 DUI charge...38

K. It was procedurally incorrect for the trial court to enter a permanent parenting plan after a Notice of Intended Relocation had been filed, and to conduct relocation proceeding using the statutory relocation factors respecting

	a permanent parenting plan that had not been entered at the time of the Notice of Intended Relocation.....	39
L.	The trial court erred when it incorrectly stated its own prior conclusion.....	40
M.	The trial court did not properly separate the issue of the children’s relocation from whether Respondent would relocate without the children.....	41
N.	Father did propose becoming the children’s primary residential parent and the evidence supports him in that role.....	42
O.	With the children in Australia, a residential plan cannot be made allowing Father to maintain a close bond with them.....	43
P.	The trial court erred when it concluded the youngest child’s relationship is more stable and dependent on Respondent and that he depends on her to provide secure and stable routine.....	44
Q.	Father is entitled to attorney fees on appeal.....	45
VI.	CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Caban v. Mohammed</i> , 441 U.S. 380, 397, 99 S.Ct. 1760, 1770, 60 L.Ed.2d 297 (1979)	33
<i>In re Custody of Halls</i> , 126 Wn. App. 599, 109 P.3d 15, 19 (2005)	22
<i>In re Dependency of J.H.</i> , 112 Wn. App. 486, 492, 49 P.3d 154 (2002), review denied, 148 Wn.2d 1024 (2003).....	22
<i>In re Deville</i> , 361 F.3d 539, 548 (9 th Cir. 2004).....	32
<i>In re Marriage of Condon</i> , 62 Cal. App.4th 533,556, 73 Cal.Rptr.2d 33 (1998).	24-27, 30
<i>In re Marriage of Grigsby</i> , 112 Wn. App. 1, 57 P.3d 1166 (2002) ...	33, 34
<i>In re Marriage of Ebbinghausen</i> , 42 Wn. App. 99, 102, 708 P.2d 1220 (1985).	32
<i>In re Marriage of Lasich</i> , 99 Cal. App. 4th 702, 712-13, 121 Cal. Rptr. 2d 356, 363-64 (2002); <i>rejected on other grounds In re Marriage of LaMusga</i> , 32 Cal. 4th 1072, 1097 - 98, 88 P.3d 81, 97 (2004).....	28-30
<i>In re Marriage of Watson</i> , 132 Wn. App. 222, 233, 130 P.3e 915 (2006)	32
<i>In re Myricks</i> , 85 Wn.2d 252, 253-43, 533 P.2d 841 (1975)	33
<i>In re Sumey</i> , 94 Wn.2d 757, 762, 621 P.2d 108 (1980)	33
<i>Lehr v. Robertson</i> , 463 U.S. 248, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983)	33
<i>Lozano v. Montoya Alvarez</i> , 134 S.Ct. 1224, 1229, 188 L.Ed.2d 200 (2014).	24, 27
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314, 70 S.Ct. 652, 657, 93 L.Ed. 865 (1950).	32
<i>Scott v. Trans-Sys., Inc.</i> , 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003), rev'd, 148 Wn.2d 701, 64 P.3d 1 (2002).	23
<i>Smith v. Organization of Foster Families for Equality and Reform</i> , 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977).....	33
<i>State v. Niedergang</i> , 43 Wn. App. 656, 658, 719 P.2d 576 (1986).....	23
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003).	23
<i>Wenatchee Sportsmen Ass'n v. Chelan Cty.</i> , 141 Wn.2d 169, 176, 4 P.3d 123 (2000).	23
<i>Woodruff v. McClellan</i> , 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).	23
<i>Winans v. Ross</i> , 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983).....	23

Statutes

RCW 26.09.140.....45, 46
RCW 26.09.182.....39
RCW 26.09.184.....39
RCW 26.09.187.....6, 40
RCW 26.09.191.....20, 30, 31
RCW 26.09.194.....5
RCW 26.09.260.....22
RCW 26.09.430.....37
RCW 26.09.440.....37
RCW 26.09.450.....37
RCW 26.09.480.....39
RCW 26.09.520.....9, 20, 35, 40

Rules

RAP 18.145, 46

Other Authorities

(Australian) Fam. Law Act 1975(Cth) 25-26
Black's Law Dictionary37
The Australian Family Law (Child Abduction Convention) Regulations,
Reg. 16 23-24
The Hague Conference on Private International Law, Convention on the
Civil Aspects of International Child Abduction..... 23-24
U.S. Constitution, Am. XIV and XV32

I. Introduction

This is a case of first impression in Washington regarding what safeguards, if any, a trial court should put in place to ensure its custody orders remain enforceable when it permits a child to relocate to a Contracting State under the Hague Convention on the Civil Aspects of International Child Abduction (“Convention”). Because Washington has no guidance on what measures trial courts should take to guarantee their continuing jurisdiction over child custody matters, Father urges this Court to adopt the California rule and require trial courts to impose safeguards to assure Washington’s continuing jurisdiction to enforce or modify its custody orders *prior* to a child being allowed to relocate to a foreign country.

Here, the trial court seemed to recognize there was an enforceability issue, but could not have properly exercised its discretion because it misunderstood the Convention and Australian law. It tried to ensure enforceability by allowing the Parenting Plan to be registered in Australia and providing that any contempt order for Parenting Plan violations could be enforced in either Washington or Australia. These efforts, while a step in the right direction, fell far short of ensuring Washington’s continuing jurisdiction in Australia. This case provides an excellent opportunity for this Court to examine child relocations to foreign countries and provide

much needed guidance to practitioners and judges on what safeguards should be imposed.

Finally, if there was ever a case where a trial court abused its discretion in allowing children to relocate, then this is the case. Here, a 44-year-old Mother was carrying on an intimate relationship with a 64-year old man from Australia when she was still married to Father. Mother's paramour had very little contact with the children. Within two months of the parties signing a CR 2A Agreement, and before the trial court entered a permanent parenting plan in the underlying divorce, Mother had a whirlwind romance and became pregnant with her paramour's child. Her paramour has four children from two previous marriages (the youngest being 20-years-old), and he was either completely or partially estranged from all but one of them. Despite this, the trial court permitted Mother to whisk the parties' two children, ages 11 and 6, all the way to the other side of the world for them to now carry on a stepparent-child relationship with this man and substantially limit their Father's contact with them. Reversal is required.

II. Assignments of Error

1. The trial court erred when it permitted the children to relocate to Australia without requiring safeguards to assure that Washington courts continue to have jurisdiction to enforce or modify the permanent parenting plan entered in this case, *prior to the children's relocation to Australia*.

2. The trial court erred when it permitted the children to relocate to Australia without considering or understanding whether Washington courts can maintain jurisdiction to modify or enforce the trial court's parenting plan.

3. The trial court erred when it ordered that "if either party asserts the other has violated the [parenting] plan, a motion for contempt may be brought and, *if so ordered*, enforced in either Washington or Australia."

4. The trial court erred when it found that "*The parties* intend this order to be enforceable in Australia or Washington." *See* Parenting Plan, ¶ 3.13c, CP 1771.

5. The trial court erred when it permitted the children to relocate to Australia without explaining how the children's important relationships with extended family will be maintained and by not considering what the detrimental effect on the children would be to interrupt or maintain these relationships.

6. The trial court erred when it permitted the children to relocate to Australia.

7. The trial court erred when it concluded respondent failed to carry his burden of proving that the detrimental effects on the children outweigh the benefit of relocation to the children and Mother. Relocation Order, ¶2.3, CP 1762.

8. The trial court erred when it concluded that the youngest child's relationship is more stable with and dependent upon Mother because this conclusion was not based on substantial evidence. Relocation Order, ¶2.3.1., CP 1762.

9. The trial court erred when it found that the children's therapist confirmed challenges the Father has with his overall parenting skills. Relocation Order, ¶2.3.1, CP 1762.

10. The trial court erred when it found or concluded that the children's relationships with extended family can be maintained if they are permitted to relocate to Australia. Relocation Order, ¶2.3.1, CP 1762.

11. The trial court erred in failing to provide any mechanism for the children to maintain their significant relationships with extended family, especially when it removed the ability for the maternal grandparents to have one week alone with each of the two children during the summer and

provided no comparable residential time in the Parenting Plan now on appeal.

12. The trial court erred in not requiring Mother to provide her notice of intended relocation to the maternal grandparents, who were granted residential time with the children under the Parenting Plan the trial court entered on December 30, 2013.

13. The court erred when it summarized its prior conclusion this way “Given the Court’s conclusion that [Mother] is better able to manage and nurture the children, *and to foster a continuing and positive relationship between [Father] and the children.* Relocation Order, ¶2.3.3, CP 1763. The trial court’s prior conclusion never mentioned anything about Mother being better able to foster a continuing and positive relationship between Father and the children. *See* Relocation Order, ¶2.3.1, CP 1762. There is also insufficient evidence to support this finding or conclusion.

14. The trial court erred when it considered whether Mother would relocate to Australia if the children were not permitted to relocate.

15. The trial court erred when it approved and entered the parties’ agreed September 2013 permanent parenting plan after Mother had served a notice of intended relocation and Father had objected. The correct procedure would be to modify the temporary parenting plan pursuant to RCW 26.09.194(4).

16. The trial court erred when it utilized the statutory relocation factors to determine relocation pursuant to a permanent parenting plan that the trial court had not approved or entered at the time the notice of intended relocation was served or the time the objection to relocation was filed. The correct procedure would have been to utilize the statutory factors related to residential provisions in permanent parenting plans in RCW 26.09.187.

17. The trial court erred when it stated that Father minimized his vulnerability to alcohol and personal responsibility for his recent DUI charge. See Relocation Order, ¶2.3.4a, CP 1763.

18. The trial court erred when it found that Father's non-existent minimization of his vulnerability to alcohol and personal responsibility for his recent DUI charge "jeopardizes both his relationship with and the safety of his children." See Relocation Order, ¶2.3.4, CP 1763.

19. The trial court erred when it found that Mother would be "a *single* parent" if she remained in Washington. See Relocation Order, ¶¶ 2.3.5, 2.3.9; CP 1763 and CP 1764.

20. There was insufficient evidence to support the trial court's conclusion that the parties' youngest child is dependent on Mother "to provide the secure and stable routine he knows." See Relocation Order, ¶2.3.6, CP 1763.

21. The trial court erred when it found that Father did not propose he become the children's primary residential parent if Mother were to relocate to Australia without the children. See Relocation Order, ¶2.3.9, CP 1764.

22. The trial court erred when it found that the evidence does not support the Father in the role of the children's primary residential parent. See Relocation Order, ¶2.3.9, CP 1764.

23. The trial court erred when it concluded (improperly labeled a finding) "that a residential plan can be made that allows [Father] to maintain a close bond with his children." See Relocation Order, ¶2.6.1, CP 1765.

24. The trial court erred when it modified the parties' 12/30/13 parenting plan to provide restrictions on Father's alcohol use when neither parent requested this modification. Parenting Plan, ¶ 3.13b, CP 1770.

25. The trial court erred when it conducted a relocation proceeding respecting a permanent parenting plan that had not been entered by the trial court at the time the notice of relocation was served or at the time the objection to relocation was filed and served.

III. Issues Related to Assignments of Error.

a. Whether the trial court's findings assigned error above are supported by substantial evidence.

b. Whether the trial court's conclusions of law above are supported by sufficient facts.

c. Whether a Washington trial court can assure enforcement of a parenting plan in an overseas jurisdiction, in particular Australia, merely by stating within the plan that it can be enforced by courts in either Washington or Australia.

d. Whether a trial court should permit relocation of children outside the United States without requiring provisions to assure that Washington courts continue to have jurisdiction to enforce or modify a permanent parenting plan.

e. Whether a motion for contempt may be brought and enforced in either Washington or Australia.

f. Whether a primary residential parent must notify every other person entitled to residential time or visitation with a child under a court order of an intended relocation.

g. Whether a trial court may consider whether a parent intending to relocate would still do so if the children were not permitted to relocate with that parent.

h. Whether a trial court may enter a parenting plan after service of a notice of intended relocation and an objection thereto and while the relocation matter is still pending.

i. Whether a trial court may conduct a relocation proceeding respecting a permanent parenting plan that has not been entered by the trial court at the time the notice of relocation was served or at the time the objection to relocation was filed and served.

j. Whether a trial court should consider before permitting relocation whether and how a child's important relationships with extended family can and should be maintained.

k. Whether a trial court should consider the statutory relocation factors or the statutory factors related to residential provisions when no permanent parenting plan has been approved or entered at the time of notice of intended relocation is given and objection is made thereto.

l. Whether a trial court can *sua sponte* modify provisions in a parenting plan when neither parent has requested the trial court's modifications.

m. Whether in a relocation proceeding a trial court may consider factors in addition to the ten enumerated in RCW 26.09.520.

IV. Fact Statement

Appellant Dale Rostrom ("Father") and Respondent Kathryn Rostrom ("Mother") were married on August 24, 1996, at Jackson County,

Oregon.¹ Their marriage was dissolved pursuant to a decree entered on December 30, 2013.² Two children had been born during the marriage: a daughter age 11 at time of dissolution, and a son age 6 at that time.³

For most of the marriage, Respondent was a hard-driven career woman and the family's primary breadwinner.⁴ The two children were born while she was working at Microsoft,⁵ the daughter in 2002, and the son in 2007.⁶ Respondent's initial stint at Microsoft lasted approximately 12 to 13 years, during which time she traveled frequently for work, about an average of three to four times a year, for at least a week at a time.⁷ While Respondent was traveling, Father was the exclusive caregiver for the children.⁸ In 2006, Father took nine months away from work to be a stay-at-home dad with his daughter.⁹ In the summer of 2010, when the children were approximately age two and seven, Respondent's sister Lucinda Frank ("Aunt Cindy") was engaged as caregiver for the children.¹⁰

The children have grown up with close ties to extended family here in the United States. In particular, during the summers, Aunts Cindy and Cori

¹ CP 911.

² CP 932-35.

³ CP 912.

⁴ RP 717 (Dale Rostrom, Apr. 23, 2014); RP 658 (Dean Rostrom, Apr. 23, 2014).

⁵ *Id.*

⁶ CP 37.

⁷ RP 718 (Dale Rostrom, Apr. 23, 2014); RP 313 (Kathryn Rostrom, Apr. 22, 2014).

⁸ RP 718 (Dale Rostrom, Apr. 23, 2014); RP 313 (Kathryn Rostrom, Apr. 22, 2014).

⁹ RP 709 (Dale Rostrom, Apr. 23, 2014).

¹⁰ RP 251-52 (Lucinda Frank, Apr. 22, 2014) and RP 718 (Dale Rostrom, Apr. 23, 2014).

(Corinna Rostrom, who is Dale Rostrom's sister and Aunt Cindy's life partner) were at the family home so much that they "moved in, practically."¹¹ Aunt Cindy continued to be the children's nanny until December, 2013.¹² Aunt Cindy testified that she had been an important part of the children's lives, that she and Aunt Cori had both been positive influences on the children, that it would be a loss in particular for the daughter if Aunt Cyndi's were not in the daughters life, and that she would be extremely saddened to see the children move to Australia.¹³

In addition to the two aunts, the children's maternal grandmother, Diane Roberts, lives in Kalama, Washington, and sees the children at least six times a year, sometimes for extended visits.¹⁴ Three of the children's uncles also testified. Mother's brother Gavin Roberts testified that he and his wife and five-year-old boy frequently see the Rostrom children at family gatherings for birthdays and holidays and for annual camping trips.¹⁵ Gavin testified that he did not think the children should be taken to Australia and that if they were, it would be very difficult for them to maintain a relationship with their Father.¹⁶ Father's brother, Dean Rostrom, gave similar testimony; he has a wife and four children, who

¹¹ RP 251 and RP 254 (Lucinda Frank, Apr. 22, 2014).

¹² RP 267 (Lucinda Frank, Apr. 22, 2014).

¹³ RP 291-92.

¹⁴ RP 296-97 (Diane Roberts, Apr. 22, 2014).

¹⁵ RP 562-63 (Gavin Roberts, Apr. 23, 2014).

¹⁶ RP 568 (Gavin Roberts, Apr. 23, 2014).

travel approximately once a year to spend time with Father and their children; Dean's youngest is about the same age as the parties' son, and the two boys enjoy playing together.¹⁷ Dean did not think it was right to take the children to Australia.¹⁸ Finally, Respondent's brother Chris Frank testified that he has a 10-year-old son, has spent holidays with and gone together on family camping trips with the Rostroms, and that he and his son were both saddened by the thought of the Rostrom children moving to Australia.¹⁹ Like Gavin and Dean, Chris also stated that it will be difficult for the Father to maintain a relationship with his children if they are in Australia.²⁰

The parties' daughter's extra-curricular activities have included, in addition to the camping mentioned above, soccer, kayaking trips, 4-H, and bicycling, all of which she participated in with her Father.²¹ The 4-H group was a natural resources group, not an agricultural group.²² She has also participated in swimming and karate.²³ Additionally, she has been

¹⁷ RP 656, 660 (Dean Rostrom, Apr. 23, 2014).

¹⁸ RP 666 (Dean Rostrom, Apr. 23, 2014).

¹⁹ RP 761-62, 765, 768 (Chris Frank, Apr. 24, 2014).

²⁰ RP 766 (Chris Frank, Apr. 24, 2014).

²¹ RP 534-36 (Kathryn Rostrom, Apr. 23, 2014).

²² RP 729 (Dale Rostrom, Apr. 23, 2014).

²³ RP 727 (Dale Rostrom, Apr. 23, 2014).

active in the performing arts, including ballet and school musical.²⁴ The parties' son, now six, also participated in the camping and 4-H activities.²⁵

In January of 2011, Respondent left Microsoft and moved to Amazon, where she stayed for only six months.²⁶ After Amazon, she briefly tried her hand at a social networking start-up, and then returned to Microsoft in June of 2012.²⁷

A few months after her return to Microsoft, Respondent made a business trip to Shanghai, China, from October 16 to October 20, 2012, where she met Mr. John Foster in a hotel bar on October 16.²⁸ John Foster is age 64 and lives in Buderim, Australia, where he works as a financial planner.²⁹ Respondent is 44.³⁰ When Respondent returned to the United States, she quickly arranged a personal trip to Australia to visit Mr. Foster, arriving on November 1, 2012.³¹ Respondent did not tell Father the purpose of her trip to Australia.³² Respondent told Mr. Foster that she was

²⁴ RP 726 (Dale Rostrom, Apr. 23, 2014).

²⁵ RP 731 (Dale Rostrom, Apr. 23, 2014).

²⁶ RP 313 (Kathryn Rostrom, Apr. 22, 2014).

²⁷ *Id.*

²⁸ RP 118 (John Foster, Apr. 21, 2014); RP 312 (Kathryn Rostrom, Apr. 22, 2014); RP 512 (Kathryn Rostrom, Apr. 23, 2014); RP 336 (Kathryn Rostrom, Apr. 22, 2014).

²⁹ RP 104 and 106 (John Foster, Apr. 21, 2014).

³⁰ RP 310 (Kathryn Rostrom, Apr. 22, 2014).

³¹ RP 126 (John Foster, Apr. 21, 2014); RP 512 (Kathryn Rostrom, Apr. 23, 2014); RP 336 (Kathryn Rostrom, Apr. 22, 2014).

³² RP 513 (Kathryn Rostrom, Apr. 23, 2014).

already separated from her husband,³³ and while in Australia had sex with Mr. Foster.³⁴

Respondent then flew back to the United States and told Father on November 10, 2012, that she wanted him to move out of the marital home, which he did the next day, November 11, 2012.³⁵ The trial court entered a finding that the parties separated that day, November 11, 2012.³⁶ The next month, Mr. Foster spent approximately three weeks in Washington state, over the Christmas season.³⁷ Although Respondent had known Foster for only about two months, she insisted that Foster be part of her extended family's Christmas celebration, to the dismay of her two brothers; Chris Frank found it awkward having to explain to his 10-year-old why a stranger had suddenly replaced his uncle Dale, and so Chris and his family simply left the gathering after Respondent arrived with Foster;³⁸ Gavin Roberts had also asked his sister not to bring Foster to the family Christmas celebration so soon after her separation, but to no avail.³⁹

Beginning at the time of the separation, Father's relationship with his daughter became more difficult.⁴⁰ His daughter has periodic anger with

³³ RP 126 (Kathryn Rostrom, Apr. 21, 2014) and RP 513 (Apr. 23, 2014).

³⁴ RP 512 (Kathryn Rostrom, Apr. 23, 2014).

³⁵ RP 513 (Kathryn Rostrom, Apr. 23, 2014).

³⁶ CP 911.

³⁷ RP 140-41 (John Foster, Apr. 21, 2014).

³⁸ RP 762-63 (Chris Frank, Apr. 24, 2014).

³⁹ RP 567-68 (Gavin Roberts, Apr. 23, 2014).

⁴⁰ RP 215 (Janet Tatum, Apr. 21, 2014).

him,⁴¹ and sometimes stated that she did not want to go to her Father's home anymore.⁴² Janet Tatum, who has been the daughter's counselor since first grade and who finds her to be more articulate than most 11-year-olds,⁴³ was unaware of any issues the daughter had with her Father prior to the separation.⁴⁴ Tatum testified that it is not at all unusual, during a divorce proceeding, for a child to become angry with one of the parents.⁴⁵ Tatum testified that it was because of the daughter's feelings concerning her Father that she recommended a parenting coach get involved.⁴⁶ Tatum testified that repairing the relationship between Father and his daughter would have a better chance to succeed if a professional were involved, that she imagined the process would take several months, and that parenting coaches typically go into the home to sit down with the parent and child.⁴⁷

On October 31, 2013, Mr. Foster and Respondent became engaged, on Mount Coolum in Australia, near Mr. Foster's home.⁴⁸ Mr. Foster has been married and divorced twice before.⁴⁹ He testified that he is completely estranged from the children of his first marriage, having last

⁴¹ RP 214-15 (Janet Tatum, Apr. 21, 2014).

⁴² *Id.*

⁴³ RP 217 (Janet Tatum, Apr. 21, 2014).

⁴⁴ RP 215 (Janet Tatum, Apr. 21, 2014).

⁴⁵ RP 214-15 (Janet Tatum, Apr. 21, 2014).

⁴⁶ RP 216 (Janet Tatum, Apr. 21, 2014).

⁴⁷ RP 218-19 (Janet Tatum, Apr. 21, 2014).

⁴⁸ RP 143-44 (John Foster, Apr. 21, 2014).

⁴⁹ RP 106 (John Foster, Apr. 21, 2014).

seen his son Damien in 1983 or 1984, some thirty years ago.⁵⁰ The children from Foster's second marriage, Jacquelyn Foster and Alexandria Foster, are now 20 and 25, respectively.⁵¹ Jacquelyn testified that her parents divorced when she was three years old and that she ceased having contact with her father when she was six.⁵² Ten years later, when she was 16, she renewed contact with her father.⁵³ Of Foster's four children, only Alexandria has had regular contact with him throughout her life.⁵⁴

Neither did Foster cultivate a relationship between the children of his first and second marriages. Alexandria Foster testified that she last saw the children from her father's first marriage, her older half-siblings Damien and Natasha, when she was "very, very young," but has had no relationship with that part of her family since.⁵⁵

On November 27, 2012, just 16 days after Dale moved out of the family home, Respondent petitioned to dissolve the parties' marriage. The parties settled all issues at mediation on September 24, 2013; they adopted a CR 2A Agreement, and an agreed parenting plan⁵⁶ with Washington State residence contemplated for all concerned, but the court did not enter

⁵⁰ RP 147-48 (John Foster, Apr. 21, 2014).

⁵¹ RP 412-13 (Jacquelyn Foster, Apr. 22, 2014) and RP 443-44 (Alexandria Foster, Apr. 22, 2014).

⁵² RP 413 (Jacquelyn Foster, Apr. 22, 2014).

⁵³ RP 414 (Jacquelyn Foster, Apr. 22, 2014).

⁵⁴ RP 440-41 (Alexandria Foster, Apr. 22, 2014).

⁵⁵ RP 443-44 (Alexandria Foster, Apr. 22, 2014).

⁵⁶ CP 26-28, Declaration of Kathryn Rostrom; CP 32, Notice of Settlement of All Claims Against All Parties; CP 1762, Relocation Order at ¶ 2.3.2.

the parenting plan until December 30, 2013.⁵⁷ Among this parenting plan's provisions, it stated that the children would have residential time with the maternal grandparents, "one week every summer separately (one week each child)."⁵⁸

By the time the court entered the parenting plan, however, the relocation matter was already pending: on or about November 25, 2013, the Respondent filed a Notice of Intended Relocation of the Children, to Australia.⁵⁹ She had used a home pregnancy test to find out that she was pregnant, and then reached out to Foster with the news.⁶⁰ Foster testified that it was November 22, 2013, that Respondent informed him she was pregnant with his child.⁶¹ At that point, Respondent and Foster agreed together that she and the two Rostrom children should plan to move to Australia to live with Foster.⁶² However, Foster testified that he planned to marry Respondent regardless of whether she proved able to relocate from the U.S. to Australia.⁶³

Respondent's own testimony was that if she could not go to Australia, "I could go live with my mom with the children," adding that this would

⁵⁷ CP 916-31; RP 522-23 (Kathryn Rostrom, Apr. 23, 2014).

⁵⁸ CP 920.

⁵⁹ CP 1792-94; CP 126-28.

⁶⁰ RP 406 (Kathryn Rostrom, Apr. 22, 2014).

⁶¹ RP 127 (John Foster, Apr. 21, 2014).

⁶² RP 406 (Kathryn Rostrom, Apr. 22, 2014).

⁶³ RP 120 (John Foster, Apr. 21, 2014).

be without an income or a job, and with an infant.⁶⁴ But neither was she planning to work if she lived with Foster in Australia, who testified, “she’ll be a stay-at-home mum... I don’t want her to work. I would like her to be a stay-at-home mum.”⁶⁵ Similarly, Respondent testified that in Australia she would be able to have more involvement with the children’s activities because she would have “the opportunity to be a stay-at-home mom”⁶⁶ and that she thought that her “staying home would be in the best interests of the children.”⁶⁷ During the marriage, Respondent was accustomed to a combined household income of some \$315,000 a year (\$255,000 from her employment at Microsoft plus \$60,000 from Father’s employment).⁶⁸ Foster’s total income for 2013 was Australian \$198,000.⁶⁹ Foster and Respondent have decided to send her two children to Immanuel Lutheran, a private school near his home.⁷⁰ Foster will be paying the tuition.⁷¹

On December 10, 2013, Father filed an Objection to Petition to Relocate.⁷² Respondent asserted that originally “her plan was to remain

⁶⁴ RP 545 (Kathryn Rostrom, Apr. 23, 2014).

⁶⁵ RP 150-51 (John Foster, Apr. 21, 2014).

⁶⁶ RP 425-26 (Kathryn Rostrom, Apr. 23, 2014).

⁶⁷ RP 613 (Kathryn Rostrom, Apr. 23, 2014).

⁶⁸ RP 603 (Kathryn Rostrom, Apr. 23, 2014).

⁶⁹ RP 109 (John Foster, Apr. 21, 2014). At current exchange rates this is approximately equivalent to U.S. \$186,000.

⁷⁰ RP 115-16 (John Foster, Apr. 21, 2014); RP 607 (Kathryn Rostrom, Apr. 23, 2014).

⁷¹ RP 607-08 (Kathryn Foster, Apr. 23, 2014).

⁷² CP 96-101.

local for an indeterminate period of time as her new relationship developed. Soon thereafter, however, she learned she was pregnant and the father is her new partner, who lives in Australia.”⁷³ Although Father questioned whether Respondent had intended all along to move to Australia and whether her assertion was made in good faith, the trial court concluded that it was.⁷⁴

Meanwhile, starting November 15, 2013, Respondent went on an unpaid disability leave from her job at Microsoft, claiming to be suffering from anxiety.⁷⁵

The trial court entered final orders, including an Order for Support, Findings of Fact and Conclusions of Law, a Parenting Plan, and a Dissolution Decree on December 30, 2013.⁷⁶

In April, 2014, there was a four-day bench trial on relocation before the same trial court judge that entered the Parenting Plan and Decree.

When Father was asked whether it had been determined that he had a drinking problem, he openly and frankly responded, “I would say yes.”⁷⁷ He also testified, however, that he is not drinking now, and that the last

⁷³ CP 1762, Relocation Order at ¶ 2.3.2.

⁷⁴ *Id.*

⁷⁵ RP 431-32 and RP 461 (Kathryn Rostrom, Apr. 22, 2014).

⁷⁶ CP 895-909; CP 910-15; CP 916-31; and CP 932-35.

⁷⁷ RP 711-12 (Dale Rostrom, Apr. 23, 2014).

time he had a drink was August 18, 2013.⁷⁸ On that night, he was stopped for driving under the influence, but the matter was still pending at time of the relocation trial.⁷⁹ He testified that he was under a restriction requiring an AutoSafe Breathalyzer instrument installed in his car.⁸⁰ Additionally, Respondent testified that the Parenting Plan's paragraph 3.10 included no restrictions on Father pursuant to RCW 26.09.191 because "we removed them earlier."⁸¹ Father also testified that his wife's proposed parenting plan removed the restrictions and removed the prohibition against him drinking.⁸² Respondent's attorney articulated his client's position in closing argument, "We've agreed to drop the restrictions in our proposed parenting plan because realistically, if she's in Australia, it's pretty much impossible to enforce. You just can't do it."⁸³

After trial, the court entered a new Parenting Plan⁸⁴ and an Order Granting Relocation,⁸⁵ signed by the court on May 1, 2014 and filed on May 2, 2014. After a review of the statutory child relocation factors under RCW 26.09.520, the Relocation Order permitted the Rostroms' two

⁷⁸ RP 712 (Dale Rostrom, Apr. 23, 2014).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ RP 637 (Kathryn Rostrom, Apr. 23, 2014).

⁸² RP 793 (Dale Rostrom, Apr. 24, 2013).

⁸³ RP 871 (Craig Hansen closing argument, Apr. 24, 2014).

⁸⁴ CP 1767-1774.

⁸⁵ CP 1761-1766.

children to relocate to Australia.⁸⁶ The parenting plan eliminated the residential time with the grandparents.⁸⁷

Regarding the alcohol issue, the Relocation Order stated, “the Court is concerned that [Father] minimizes his vulnerability to alcohol and personal responsibility for his recent DUI charge. This jeopardizes both his relationship with and the safety of the children. Accordingly, the parenting plan shall contain some controls on Respondent’s use of alcohol.”⁸⁸ The Parenting Plan stated, “The father must maintain sobriety and successfully complete treatment recommendations and legal requirements associated with his alcohol use. He may not use alcohol when the children are in his care or he is communicating with them.”⁸⁹

Regarding the Washington courts’ continuing jurisdiction to enforce, the Parenting Plan stated:

Either party may file this parenting plan as an order in the Australian Family Law court system. The parties intend this order to be enforceable in Australia or Washington. If either party asserts the other has violated the plan, a motion for contempt may be brought and, if so ordered, enforced in either Washington or Australia.⁹⁰

⁸⁶ CP 1761-65.

⁸⁷ CP 1767-1774.

⁸⁸ CP 1763, Relocation Order at ¶ 2.3.4a.

⁸⁹ CP 1770, Parenting Plan at ¶ 3.13b.

⁹⁰ CP 1771, Parenting Plant at ¶ 3.13(c).

Although Respondent had testified that she intended the order to be enforceable in either Washington or Australia,⁹¹ there was no corresponding testimony from Father.

Respondent left the U.S. with the children on May 4, 2014, within just three days of entry of the Relocation Order. On May 6, 2014, Father timely filed a Notice of Appeal, seeking review by this Court of the Parenting Plan and Relocation Order.⁹²

V. Argument

A. Standards of Review.

A trial court's rulings about the provisions of a parenting plan are reviewed for abuse of discretion.⁹³ An abuse of discretion occurs where a trial court's decision is manifestly unreasonable or is based upon untenable reasons or grounds.⁹⁴ RCW 26.09.260 sets forth the procedures and criteria to modify a parenting plan. Accordingly, a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria.⁹⁵

A trial court's findings of fact and conclusions of law following a bench trial are reviewed to determine whether substantial evidence

⁹¹ RP 638-39 (Kathryn Rostrom, Apr. 23, 2014).

⁹² CP 1760-74.

⁹³ *In re Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15 (2005).

⁹⁴ *In re Dependency of J.H.*, 112 Wn. App. 486, 492, 49 P.3d 154 (2002), review denied, 148 Wn.2d 1024 (2003).

⁹⁵ *Id.*

supports the findings of fact and, in turn, whether the findings of fact support the conclusions of law.⁹⁶ Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.⁹⁷

Conclusions of law are reviewed *de novo*.⁹⁸ A conclusion of law is a conclusion that follows, through the process of legal reasoning, when the law is applied to the facts as found by the court.⁹⁹ Findings of fact that appear in the conclusions of law, and *vice versa*, are mislabeled and will be analyzed under the applicable review standard.¹⁰⁰ Findings of fact with legal ramifications are conclusions of law and are reviewed *de novo*.¹⁰¹

B. The trial court abused its discretion when it permitted the children to relocate to Washington without assuring the Washington courts' continuing jurisdiction because it did not fully understand the Convention or Australian Law

Despite the trial court's provision regarding enforcement of the Parenting Plan, there is no guarantee Australia will return the children, enforce the Parenting Plan, or refrain from modifying the Parenting Plan. The Hague Conference on Private International Law, Convention on the

⁹⁶ *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003), rev'd, 148 Wn.2d 701, 64 P.3d 1 (2002).

⁹⁷ *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

⁹⁸ *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

⁹⁹ *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986) ("If the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.").

¹⁰⁰ *Winans v. Ross*, 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983).

¹⁰¹ *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

Civil Aspects of International Child Abduction (“Convention”), is the *international* treaty that controls whether to return a child to the jurisdiction issuing an original custody order.¹⁰² The Convention and its regulations, however, give parents “no assured method of securing the return of their children.”¹⁰³ “The Convention’s Regulations control how an Australian court responds to orders made through Hague Convention procedures for the return of children”¹⁰⁴ Reg. 16(1) generally requires a child be returned if an application is made within one year, but it has exceptions. For example, Reg. 16(3)(b) allows Australian courts to not return a child if “there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

After one year another affirmative defense—the child’s settlement in the foreign country—is added.¹⁰⁵ Reg. 16(2)(c) allows Australian courts to not return a child if “the child has settled in his or her new environment.” Moreover, expiration of the one-year period opens the door to considerations of the child’s interests in settlement.¹⁰⁶ As such, the

¹⁰² *In re Marriage of Condon*, 62 Cal. App.4th 533,556, 73 Cal.Rptr.2d 33 (1998).

¹⁰³ *In re Marriage of Condon*, 62 Cal. App. 4th 533, 559, 73 Cal. Rptr. 2d 33, 51 (1998) *citing* The Australian Family Law (Child Abduction Convention) Regulations, Reg. 16, attached as **Appendix A**

¹⁰⁴ *Condon* at 559

¹⁰⁵ (Hague Convention, art. 12; see also *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1229, 188 L.Ed.2d 200 (2014).

¹⁰⁶ *Lozano* at 1234

chances the children will be returned to the U.S. decreases dramatically once they have lived in Australia for one year.¹⁰⁷ As such, “Regulation 16...does not provide strong protection of [a state court’s] continuing jurisdiction over its child custody determinations.”¹⁰⁸

Moreover, registering an “overseas child order” in signatory countries like Australia “provides some measure of protection, but not absolute protection.”¹⁰⁹ In fact, Australian courts can exercise jurisdiction over the making of a child’s residence or “contact orders” at any time if “there are substantial grounds for believing that the child’s welfare requires that the court exercise jurisdiction in the proceedings.”¹¹⁰ That means if an Australian court believes the children’s welfare would be adversely affected by its refusal to exercise jurisdiction over the Washington order, it may assert jurisdiction.¹¹¹ Once it has asserted jurisdiction over the foreign custody order, the Australian court can modify the Washington order if it is satisfied the children’s welfare would “likely” be “adversely affected” by its inaction, or due to a “change of circumstances.”¹¹²

Here, the children are now residents of Australia and in Australian schools, giving Australia’s courts what could be “substantial grounds for

¹⁰⁷ *Condon* at 556-57

¹⁰⁸ *Condon* at 560

¹⁰⁹ *Condon*, 62 Cal. App. 4th at 557

¹¹⁰ Fam. Law Act 1975(Cth) § 70J(1)(b), **attached as Appendix B**; and *Condon* at 558

¹¹¹ *See Condon* at 560.

¹¹² *Id.*, citing Fam. Law Act 1975(Cth) § 70J(2).

believing that the child[ren]’s welfare requires that the court exercise jurisdiction in the proceedings.”¹¹³ An Australian court could consider it against their best interests to require them to fly 8,000 miles across eight time zones two or three times a year.¹¹⁴

The trial court’s decisions make clear that it thought it would retain jurisdiction and allow Father to enforce or modify the Parenting Plan by inserting a simple provision allowing the Parenting Plan to be registered in Australia by either party. This put the onus on Father to pay the money to make it happen if he wanted the imperfect protections Australian registration has to offer.

More importantly, however, the trial court failed to evidence understanding its custody orders might not be enforced by Australian courts. The enforceability of the orders, especially after residence in Australia for more than one year, is uncertain. A parenting plan or custody order guaranteed enforceability for only one year of the remaining seven to 12 years of minority is an abuse of discretion.¹¹⁵ Reversal is required.

This matter must be decided very quickly. In some cases, failure to file a petition for return within one year renders the return remedy

¹¹³ See *Condon* at 560-61, citing Fam. Law Act 1975(Cth) § 70J(1)(b).

¹¹⁴ See *Condon* at 561.

¹¹⁵ *Condon* at 561.

unavailable.¹¹⁶ If this appeal was not decided expeditiously in sufficient time for Father to file a Convention petition by May 4, 2015, then his ability to compel the children's return would be significantly decreased.

C. The trial court should have required adequate enforcement safeguards before allowing the children to leave the U.S.

As stated above, *In re Marriage of Condon*,¹¹⁷ which is the leading case discussing the interplay between U.S. custody decrees and the Australian Family Court, shows that the Parenting Plan is not necessarily enforceable. In *Condon*, the court states the problem plainly: "Unless the law of the country where the children are to move guarantees enforceability of custody and visitation orders issued by American courts, and there may be no such country, the court will be required to use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court."¹¹⁸ Specific to Australia, the *Condon* court stated, "No matter how careful its judgment, however...once [the mother] relocates to Australia, the California court has no way of guaranteeing its intricate order will be enforced by the foreign court."¹¹⁹

¹¹⁶ *Lozano* at 1229.

¹¹⁷ 62 Cal. App. 4th 533, 73 Cal. Rptr. 2d 33, 43 (1998).

¹¹⁸ *Condon*, 62 Cal. App. 4th at 547-48.

¹¹⁹ *Condon*, 62 Cal. App. 4th at 554.

That is the problem here—there is no way for the Washington trial court to guarantee the Relocation Order or Parenting Plan are currently enforceable. It should have, but did not, used its ingenuity to put in place adequate safeguards to assure Washington’s ability to enforce or modify the Parenting Plan and to coerce Respondent into not challenging Washington’s jurisdiction.

California has developed reasonable safeguards to assure continuing jurisdiction, and these safeguards should be enunciated in a reported decision to provide guidance to practitioners and judges who encounter a similar issue. At a minimum courts need to:

- Require the relocating parent to register the U.S. custody order with the foreign country annually.
- Require the custody order specify that because the children’s residence will be in the U.S. for many weeks a year, the children’s “habitual residence” for purposes of the Hague Convention will be the children’s U.S. home state (here, Washington).
- Require the relocating parent to file a declaration acknowledging the children’s habitual residence status and provide proof to the non-relocating parent that these requirements have been timely performed by the relocating parent.
- Require the relocating parent to concede that the U.S. home state (Washington) has *exclusive* jurisdiction over custody and that the relocating parent consents to the Washington court’s exercise of jurisdiction to make any offers pertaining to custody.
- Require the relocating parent to post annually a large bond (\$100,000) forfeitable if the relocating parent seeks to modify the U.S. custody order in any country other than the U.S.

- Require the relocating parent to provide proof of compliance of all of the foregoing to the non-relocating parent at least annually.
- Require the relocating parent to stipulate to an order that should the relocating parent violate any of these conditions, then the violation will be deemed a substantial change of circumstances that is not in the children's best interests.
- Require the relocating parent to retain an attorney in the foreign country, at the relocating parent's sole cost and expense, to accomplish these conditions.
- Require the relocating parent to file a translated copy of the U.S. custody order, which shall be entered and made an order of the foreign court, specifying that only Washington courts have jurisdiction to modify the custody order, that the foreign country has jurisdiction only to enforce the U.S. custody order as outlined herein, and that the minors are habitual residents of the U.S. home state (here, Washington).
- Require the relocating parent to acknowledge that United States Code title 18, section 1204, pertaining to parental kidnapping, applies to him or her, that if she or he violates the U.S. court's order, then she or he may be arrested pursuant to that provision, and that he or she will waive extradition on the arrest warrant.
- Require that the relocating parent not move the minors' residence to any country other than the United States or the country to which relocation was expressly permitted.
- Require that the relocating parent designate an agent for service of process in the U.S. home state before the minors are relocated to the foreign country.¹²⁰

Moreover, it is vitally important to make sure these safeguards are put in place *before* a child is allowed to relocate to a foreign country.¹²¹

¹²⁰ *In re Marriage of Lasich*, 99 Cal. App. 4th 702, 712-13, 121 Cal. Rptr. 2d 356, 363-64 (2002); *rejected on other grounds In re Marriage of LaMusga*, 32 Cal. 4th 1072, 1097 - 98, 88 P.3d 81, 97 (2004).

Without these safeguards in place before the child relocates, may allow the foreign country to assert jurisdiction while the safeguards are being implemented.

It is also especially important to order a large bond. This not only serves to deter Respondent from contesting Washington's jurisdiction lest the bond be forfeited, but it also provides Father with sufficient funds to seek the children's return in Australia. The mother's own witness, an Australian family law attorney named Damien Greer,¹²² testified that if multiple court appearances are required, such an action could run to \$100,000 in legal fees.¹²³

D. The trial court's decision is internally inconsistent as to the Father's alcohol use and restrictions, and the parties did not even request restrictions.

The Relocation Order refers to the Father having "a history of alcohol use that interferes with the performance of parenting functions," and citing RCW 26.09.191(3)."¹²⁴ However, a "history of use" is not the statutory standard under the referenced statute to preclude or limit any provisions of a parenting plan. Per the express language of the statute, to

¹²¹ See *Condon*, 62 Cal. App. 4th at 547 ("before permitting any relocation which purports to maintain custody and visitation rights in the non-moving parent, the trial court should take steps to insure its orders to that effect will remain enforceable throughout the minority of the affected children."); and *Lasich*, 99 Cal. App. 4th at 713 ("mother will file this order and provide proof she has done so before the minors may move to Spain.")

¹²² RP 169 (Damien Greer, Apr. 21, 2014).

¹²³ RP 181 (Damien Greer, Apr. 21, 2014).

¹²⁴ Attachment B, Relocation Order at ¶ 2.3.4a.

preclude or limit provisions of a parenting plan due to alcohol use, there must be a finding of a “long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions.”¹²⁵ Here, paragraph 3.13 of the Parenting Plan imposes requirements and restrictions on the Father related to alcohol based only on a history of “use,” not a “long-term impairment.” Nonetheless, the Relocation Order states that the Father is “*not* subject to limitations under RCW 26.09.191.”¹²⁶ The trial court improperly and inconsistently applied RCW 26.09.191.

1. The trial court may not sua sponte impose restrictions on a fit parent.

Neither of the parties requested any restrictions in the parenting plan on Father’s alcohol use. Both parties stated in their testimony, and Respondent’s attorney confirmed in closing argument, that 191 restrictions had been removed from Respondent’s proposed parenting plan.¹²⁷ The trial court therefore violated Father’s procedural due process rights when it *sua sponte* imposed a restriction on a fit father’s relationship with his

¹²⁵ RCW 26.09.191(3)(c): “(3) A parent’s involvement or conduct may have an adverse effect on the child’s best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist... (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions...”

¹²⁶ CP 1763; Relocation Order, ¶ 2.3.4a (emphasis added).

¹²⁷ RP 637 (Kathryn Rostrom, Apr. 23, 2014); RP 793 (Dale Rostrom, Apr. 24, 2013); RP 871 (Craig Hansen closing argument, Apr. 24, 2014).

children on its own initiative without giving him notice or an opportunity to be heard.¹²⁸

The Fourteenth and Fifth Amendments of the Constitution provide for procedural due process which, at a minimum, requires notice and opportunity to be heard and defend before a competent tribunal.¹²⁹ The fundamental requirements of procedural due process guaranteed by the U.S. and Washington Constitutions are notice and opportunity to be heard and defend before a fair and impartial tribunal.¹³⁰ Judgments entered in a proceeding that fail to provide procedural due process are void.¹³¹

Division III of the Washington Court of Appeals found that a father's constitutional due process rights were violated when the trial court resolved a custody issue in chambers with each parties' counsel but failed to hear testimony from the parents concerning the merits of both parents' custody requests.¹³² Given the father's fundamental right to the care, custody and companionship of the child that is protected by the due process clause of the Fourteenth Amendment, the Court of Appeals found

¹²⁸ *In re Marriage of Watson*, 132 Wm. App. 222, 233, 130 P.3e 915 (2006)

¹²⁹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 93 L.Ed. 865 (1950).

¹³⁰ *In re Marriage of Ebbinghausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985).

¹³¹ *Id.*, see also, *In re Deville*, 361 F.3d 539, 548 (9th Cir. 2004) ("A court's failure to give notice of an intent to exercise inherent power may, therefore invalidate the action taken").

¹³² *Ebbinghausen*, 42 Wn. App. at 101-02.

that the father's due process rights were violated because he had the right to present his position and was not afforded the opportunity to be heard.¹³³

Similarly here, the trial court violated Father's procedural due process rights when it did not provide him with notice about the trial court's *sua sponte* orders concerning its restricting his alcohol use. Consequently, neither parent, nor their respective attorneys, had any notice or opportunity to be heard to support or defend the trial court's unilaterally-imposed restrictions, resulting in a violation of the Father's due process rights.

E. The detrimental effects of relocation outweigh benefits of the change to the children and the Respondent.

This court in *In re Marriage of Grigsby* held that the detrimental effects of relocating the children outside Washington state, in that instance to Dallas, Texas, would outweigh the benefits of the change to the children and the former wife.¹³⁴ The facts in *Grigsby* are very similar to the facts here. In *Grigsby*, the trial court made a finding that the children, two boys, had never been to Dallas, and that their mother's new romantic interest there rarely spent time with the boys and did not even know their

¹³³ *Id.* at 102-04 (citing *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); *In re Myricks*, 85 Wn.2d 252, 253-43, 533 P.2d 841 (1975); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983); *Caban v. Mohammed*, 441 U.S. 380, 397, 99 S.Ct. 1760, 1770, 60 L.Ed.2d 297 (1979); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977).

¹³⁴ 112 Wn. App. 1, 57 P.3d 1166 (2002).

birthdays.¹³⁵ The trial court also found that disrupting contact with the father would be more detrimental to the children than disrupting contact with the mother.¹³⁶ The trial court found that the boys' adjusting to living with their mother's new romantic interest, by that time her fiancé, would be a "further disruption."¹³⁷ Findings of fact will be upheld only if they are supported by substantial evidence.¹³⁸

Here, it is debatable whether the trial court's conclusion that the detrimental effects of their relocation are outweighed by the advantages of relocation to the children and the Respondent are supported by sufficient facts or substantial evidence. Just as the boys in *Grigsby* had never been to Dallas and would have to adjust to living with their mother's new fiancé, the children at issue here had been to Australia for only five days, in December, 2013, and will have to adjust to living with their mother's new 64-year-old partner, with whom they have spent less than 30 days total. They will be separated from friends and extended family in the U.S., including maternal and paternal aunts and uncles and grandparents. They will be removed from their schools and accustomed peer group and activities.

¹³⁵ *Grigsby*, 112 Wn. App. at 10.

¹³⁶ *Grigsby* at 11.

¹³⁷ *Grigsby* at 12.

¹³⁸ *Grigsby* at 9.

Additionally, there is a finding that the parenting evaluator concluded that it is important to work on the relationship between the Father and the daughter.¹³⁹ This work will be more difficult to accomplish, if not impossible, with the child in Australia.

F. The trial court failed to adequately consider the statutory factor contained in RCW 26.09.520(1).

RCW 26.09.520(1) requires a court to consider in child relocation proceedings, “The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life.” Here, the court found that the “children are closely bonded with maternal and paternal aunts and grandparents and, to a lesser degree, uncles and extended family. Those relationships can and should be maintained.”¹⁴⁰ However, it discussed no mechanism for maintaining the relationship given the distance to Australia and travel logistics. There is no finding that the Respondent’s new partner has any significant relationship with the children. Other than Respondent, all significant persons in the children’s lives are in Washington. The trial court failed to adequately consider this factor. As stated above, the Relocation Order and Parenting Plan designate no country of habitual residence, and it is questionable whether any enforcement mechanism

¹³⁹ CP 1762; Relocation Order at ¶ 2.3.1.

¹⁴⁰ CP 1762; Relocation Order at ¶ 2.3.1.

exists. As the two orders are written, the Respondent can take the children to Australia and simply not return, severing their ties with their Father, contrary to the trial court's intention and contrary to the children's best interests, which include, of paramount importance, maintaining the relationship with their Father. In the daughter's case in particular, the parenting evaluator opined that it is important for her to and her Father to work on their relationship.

G. The counselor did not testify to the father's overall parenting skills.

The Relocation Order states that "Evidence provided by the children's counselor confirms challenges [Father] has with the daughter and his overall parenting skills." The daughter's counselor, Janet Tatum, offered no testimony as to Father's "overall parenting skills." She instead spoke to a strained relationship between Father and daughter arising only since her parents' separation, stated that it is not at all uncommon for a child to be angry with one parent during divorce proceedings, and stated that a parenting coach would be helpful in repairing the relationship. The trial court's finding that the counselor confirmed challenges with Father's "overall parenting skills" is not supported by substantial evidence.

H. Because the maternal grandparents were granted residential time with the children under the parenting plan agreed to in September, 2013, and entered in December, 2013, they should have been given notice of relocation.

With certain exceptions not applicable here, the relocation statute requires that “a person with whom the child resides a majority of the time shall notify *every other person* entitled to residential time or visitation with the child under a court order if the person intends to relocate. Notice shall be given as prescribed in RCW 26.09.440 and 26.09.450.”¹⁴¹ The parenting plan entered in December, 2013, clearly stated that the children would have residential time with the maternal grandparents, “one week every summer separately (one week each child).”¹⁴² Because this order entitled the maternal grandparents to residential time, the statute required that the Respondent provide the same notice of relocation to the grandparents that she provided to the Father. The trial court erred.

I. The Respondent would not be a “single parent” if she remained in Washington.

Black’s Law Dictionary defines “single” as “Unmarried.”¹⁴³ The Relocation Order states, “If [Respondent] remains in Washington, she is a single parent with two older children and an infant,”¹⁴⁴ and “The alternative to relocation for [Respondent] is to remain in Washington as a

¹⁴¹ RCW 26.09.430 (emphasis added).

¹⁴² CP 920.

¹⁴³ Black’s Law Dictionary (8th Ed. 2004) at 1418.

¹⁴⁴ CP 1763, Relocation Order at ¶ 2.3.5.

single parent of three children, one an infant.”¹⁴⁵ That Respondent would be a single (unmarried) parent is not supported by any evidence. Foster expressly testified that if Respondent were to remain in the U.S., he still planned to marry her, and that in that case the two of them would simply have a long-distance marriage.¹⁴⁶ Respondent’s own testimony on what she would do if she remained in Washington was that she could live with her mother and the children, not that Foster would refuse to marry her and break off the engagement.¹⁴⁷ The trial court’s findings that Respondent would be a *single* parent if she were to remain in Washington is not supported by substantial evidence.

J. The Father acknowledged his drinking problem and took responsibility for the 2013 DUI charge.

The Court expressed its concern that the Father “minimizes his vulnerability to alcohol and personal responsibility for his recent DUI charge,” adding, “This jeopardizes both his relationship with and the safety of the children.”¹⁴⁸ Yet the Father openly admitted in court that he has a drinking problem and stated that since the DUI incident, he has not had another drink.¹⁴⁹ The parenting evaluator in her parenting evaluation in the underlying dissolution action found Father was “strongly

¹⁴⁵ CP 1764, Relocation Order at ¶ 2.3.9.

¹⁴⁶ RP 120 (John Foster, Apr. 21, 2014).

¹⁴⁷ RP 545 (Kathryn Rostrom, Apr. 23, 2014).

¹⁴⁸ CP 1763, Relocation Order at ¶ 2.3.4a.

¹⁴⁹ RP 711-12 (Dale Rostrom, Apr. 23, 2014).

motivated” “to manage and maintain his sobriety.”¹⁵⁰ Furthermore, when questioned about the removal of the restrictions in the Parenting Plan, he testified that he does not intend to resume drinking.¹⁵¹

Also there was no evidence that the safety of the children was ever in jeopardy due to Father’s drinking.

K. It was procedurally incorrect for the trial court to enter a permanent parenting plan after a Notice of Intended Relocation had been filed, and to conduct relocation proceeding using the statutory relocation factors respecting a permanent parenting plan that had not been entered at the time of the Notice of Intended Relocation.

A permanent parenting plan must include residential provisions for the child or children.¹⁵² Before entering a permanent parenting plan, the court shall determine the existence of any information and proceedings relevant to the placement of the child that are available in the judicial information system and databases.¹⁵³

Respondent’s Notice of Intended Relocation, along with her proposed parenting plan, was filed with the trial court on November 25, 2013.¹⁵⁴ Pursuant to RCW 26.09.480, the Father timely filed his Objection to the relocation 15 days later, on December 10, 2013.¹⁵⁵ Despite this, the trial

¹⁵⁰ CP 1925.

¹⁵¹ RP 793 (Dale Rostrom, Apr. 24, 2014).

¹⁵² RCW 26.09.184(6).

¹⁵³ RCW 26.09.182.

¹⁵⁴ CP 1792-94 and CP 13-22.

¹⁵⁵ CP 96-101.

court entered the Permanent Parenting Plan on December 30, 2013. Under these circumstances, with a child relocation matter is pending, courts should not enter a final parenting plan regarding those children.

At the relocation trial in April, 2014, the trial court went ahead and considered the 10 relocation factors enumerated in RCW 26.09.520 as though a permanent parenting plan had been properly entered prior to Respondent's giving her Notice of Intended Relocation. Instead, the trial court should have used the criteria for *establishing* the residential provisions in a permanent parenting plan found under RCW 26.09.187(3).

L. The trial court erred when it incorrectly stated its own prior conclusion.

The trial court concluded “that the children’s relationship is more stable with and dependent upon [Respondent] than [Father]... [Respondent] is better able to support the children emotionally and developmentally, and has provided that support consistently... [Father] is not as able as [Respondent] to appropriately communicate, nurture, and manage the children’s developmental needs.”¹⁵⁶ It then restated its conclusion incorrectly, as follows: “Given the court’s conclusion that [Respondent] is better able to manage and nurture the children, *and to foster a continuing and positive relationship between [Father] and the*

¹⁵⁶ CP 1762, Relocation Order at ¶ 2.3.1.

children...”¹⁵⁷ The trial court’s prior conclusion made no mention of Respondent’s ability to foster a positive relationship between the children and their father. There was also no evidence to support the conclusion (or finding).

M. The trial court did not properly separate the issue of the children’s relocation from whether Respondent would relocate without the children.

When determining whether to permit relocation of children following an objection, the trial court must separate the issue of whether the parent giving notice of intended relocation would relocate without the children.

The applicable statute reads, in relevant part:

In determining whether to permit or restrain the relocation of the child, the court *may not admit evidence* on the issue of [1] whether the person seeking to relocate the child will forego his or her own relocation if the child’s relocation is not permitted or [2] whether the person opposing relocation will also relocate if the child’s relocation is permitted.¹⁵⁸

Here, the trial court heard testimony from Respondent as to what she would do if the court did not allow the children to relocate (“I could go live with my mom with the children”¹⁵⁹).

The trial court’s findings mention twice what Respondent’s situation will be if she remains in Washington: “If [Respondent] remains in Washington, she is a single parent with two older children and an

¹⁵⁷ CP 1763, Relocation Order at ¶ 2.3.3 (emphasis added).

¹⁵⁸ RCW 26.09.530 (emphasis added).

¹⁵⁹ RP 545 (Kathryn Rostrom, Apr. 23, 2014).

infant,”¹⁶⁰ and “The alternative to relocation for [Respondent] is to remain in Washington as a single parent of three children, one an infant.”¹⁶¹ This is an impermissible consideration of whether Respondent will forego her own relocation if the children’s relocation is not permitted.

N. Father did propose becoming the children’s primary residential parent and the evidence supports him in that role.

The trial court erred when it stated that the Father did not propose he become the children’s primary resident.¹⁶² The father so proposed in his objection to relocation.¹⁶³ Additionally, the evidence supports him in that role. The parenting evaluator, Wendy Hutchins-Cook, expressly stated in her report, “Both parents are capable of providing the basic parenting functions.”¹⁶⁴ As recounted above, Father was the one who left work to be a stay-at-home parent.¹⁶⁵ When Respondent traveled for business, he stayed home as the exclusive caregiver.¹⁶⁶ He did most of the meal planning, grocery shopping, and cooking for the family.¹⁶⁷ He provided the childrens’ afternoon activities, initiated their outdoor time, and

¹⁶⁰ CP 1763, Relocation Order at ¶ 2.3.5.

¹⁶¹ CP 1764, Relocation Order at ¶ 2.3.9.

¹⁶² CP 1764.

¹⁶³ CP 100-101, ¶ 3.9: “The objecting party requests a modification of the relocating party’s proposed parenting plan/residential schedule, *including a change in the residence in which the children reside a majority of the time.*” (emphasis added).

¹⁶⁴ CP 1925.

¹⁶⁵ RP 709 (Dale Rostrom, Apr. 23, 2014).

¹⁶⁶ RP 718 (Dale Rostrom, Apr. 23, 2014); RP 313 (Kathryn Rostrom, Apr. 22, 2014).

¹⁶⁷ CP 1924, Parenting Evaluation of Wendy Hutchins-Cook.

enjoyed active time with the children.¹⁶⁸ He participated with one or both children in camping, soccer, kayaking trips, 4-H, and bicycling,¹⁶⁹ as well as swimming and karate.¹⁷⁰

O. With the children in Australia, a residential plan cannot be made allowing Father to maintain a close bond with them.

The current parenting plan, aside from telephone and Skype communication, allows for Father to spend up to two weeks at a time with the children in Australia, and to spend limited amounts of time with them during their longer school breaks;¹⁷¹ essentially this means they can vacation together. Although better than nothing, this is no substitute for the bonds that come from regular weekly residential time, sleeping under the same roof, sharing meals, and accompanying children to and participating in their regular weekly extracurricular activities. Father testified that he has only two weeks of vacation time a year and beyond that would have to take unpaid leave from work, something he cannot well afford to do given his income level.¹⁷²

¹⁶⁸ *Id.*

¹⁶⁹ RP 534-36 (Kathryn Rostrom, Apr. 23, 2014).

¹⁷⁰ RP 727 (Dale Rostrom, Apr. 23, 2014).

¹⁷¹ CP 1771; CP 1768-69.

¹⁷² RP 777-78 (Dale Rostrom, Apr. 24, 2014).

P. The trial court erred when it concluded the youngest child’s relationship is more stable and dependent on Respondent and that he depends on her to provide secure and stable routine.

The trial court erred when it concluded Respondent provides a more stable and secure routine for the youngest child and that his relationship is more stable and dependent on her. In fact the evidence is the opposite—it is the Respondent who, in the last year and a half or so, found a new lover, asked the boy’s father a month later to leave the family home, almost immediately petitioned to dissolve her marriage, petitioned to relocate the children to a foreign country, and then whisked the youngest child and his sister to Australia. It is difficult to imagine how such impulsive behavior could be characterized as providing a secure and stable routine.

The evidence regarding the relationship included Aunt Cindy’s testimony that she believed it would be more harmful to the youngest child to disrupt his relationship with his mother than the relationship with his father.¹⁷³ The parenting evaluator’s report stated that the Respondent “is likely stronger with her attention to, comfort with, and ability to manage and support the emotional lives of the children.”¹⁷⁴ The evidence does not support a conclusion that the Respondent is stable, dependable, and provides secure routine.

¹⁷³ RP 277 (Lucinda Frank, Apr. 22, 2014).

¹⁷⁴ CP 1925.

Q. Father is entitled to attorney fees on appeal.

RAP 18.1(a) allows appellate attorney fees to a party who has the right to attorney fees under applicable law. RCW 26.09.140 allows courts to award attorney fees to a party in a marital dissolution proceeding based on need and ability to pay. Here, Respondent has the superior ability to pay and Father has a need for fees. Respondent has historically earned \$255,000 a year compared to Father's \$60,000. Based on this, Respondent has a superior ability to pay and Father has the need for fees. A financial declaration will be filed in accordance with RAP 18.1(c).

VI. Conclusion

In conclusion, the Relocation Order and Parenting Plan should be reversed and remanded to the trial court to enter an Order on Relocation that concludes Father met his burden of proof that the detrimental effects of the relocation on the children outweighed the advantages of relocation to the children and Respondent and, therefore not permit the children's relocation to Australia. It should then inquire of Respondent whether she still intends to relocate to Australia without the children. If so, then the trial court should modify the parenting plan to provide the children remain with Father as their primary residential parent and to establish a residential schedule for the children to still see Respondent on a regular basis.

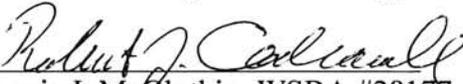
Alternatively, this Court should reverse the trial court's decision and conduct new proceedings so it fully understands the Convention and Australian law on Washington's continuing enforceability and modification of the Parenting Plan. It should then use its ingenuity to develop safeguards to protect Washington's jurisdiction will continue within the confines of the Convention and Australian law and coerce Mother into not challenging Washington's jurisdiction. Once the children return to the United States for their winter break, they should be temporarily restrained from returning to Australia until all the safeguards the trial court develops are implemented. Then, and only then, should the children be allowed to return to Australia.

No matter what the outcome, Father should be awarded his attorney fees and costs on appeal pursuant to RCW 26.09.140 and RAP 18.1 because Mother has superior resources to pay and Father has the need for fees and costs.

DATED this 11th day of July 2014.

Respectfully submitted,

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APPENDIX A

Family Law (Child Abduction Convention) Regulations 1986

Statutory Rules 1986 No. 85 as amended

made under the

Family Law Act 1975

This compilation was prepared on 24 July 2007
taking into account amendments up to SLI 2007 No. 213

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

16 Obligation to make a return order

(1) If:

(a) an application for a return order for a child is made; and

(b) the application (or, if regulation 28 applies, the original application within the meaning of that regulation) is filed within one year after the child's removal or retention; and

(c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);

the court must, subject to subregulation (3), make the order.

(1A) For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:

(a) the child was under 16; and

(b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and

(c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and

(d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and

(e) at the time of the child's removal or retention, the person, institution or other body:

(i) was actually exercising the rights of custody (either jointly or alone); or

(ii) would have exercised those rights if the child had not been removed or retained.

(2) If:

(a) an application for a return order for a child is made; and

(b) the application is filed more than one year after the day on which the child was first removed to, or retained in, Australia; and

(c) the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment;

the court must, subject to subregulation (3), make the order.

(3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:

(a) the person, institution or other body seeking the child's return:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) each of the following applies:

(i) the child objects to being returned;

(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

(4) For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.

(5) The court is not precluded from making a return order for the child only because a matter mentioned in subregulation (3) is established by a person opposing return.

APPENDIX B

Family Law Act 1975

No. 53, 1975 as amended

Compilation start date: 1 July 2014

Includes amendments up to: Act No. 62, 2014

About this compilation

This compilation

This is a compilation of the *Family Law Act 1975* as in force on 1 July 2014. It includes any commenced amendment affecting the legislation to that date.

This compilation was prepared on 4 July 2014.

The notes at the end of this compilation (the endnotes) include information about amending Acts and instruments and the amendment history of each amended provision.

The notes at the end of this compilation (the **endnotes**) include information about amending laws and the amendment history of each amended provision.

Uncommenced amendments

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in the endnotes.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If a provision of the compiled law is affected by a modification that is in force, details are included in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled law has expired or otherwise ceased to have effect in accordance with a provision of the law, details are included in the endnotes.

70J Effect of registration on exercise of jurisdiction

(1) A court in Australia that is aware that an overseas child order is registered under section 70G must not exercise jurisdiction in proceedings for the making of a Subdivision C parenting order in relation to the child concerned unless:

(a) each person:

- (i) with whom the child is supposed to live; or
- (ii) who is to spend time with the child; or
- (iii) who is to have contact with the child; or
- (iv) who has rights of custody or access in relation to the child;

under the overseas order consents to the exercise of jurisdiction by the court in the proceedings; or

(b) the court is satisfied that there are substantial grounds for believing that the child's welfare requires that the court exercise jurisdiction in the proceedings.

(2) If a court exercises jurisdiction in proceedings for a Subdivision C parenting order in relation to a child who is the subject of an overseas child order, the court must not make a Subdivision C parenting order in relation to the child unless it is satisfied:

(a) that the welfare of the child is likely to be adversely affected if the order is not made; or

(b) that there has been such a change in the circumstances of the child since the making of the overseas child order that the Subdivision C parenting order ought to be made.

Subdivision C

s. 70F	ad. No. 37, 1991
	rs. No. 167, 1995 am. No. 143, 2000 rep. No. 46, 2006
s. 70G	ad. No. 167, 1995
s. 70H	ad. No. 167, 1995
Note to s. 70H.....	ad. No. 69, 2002
s. 70J.....	ad. No. 167, 1995
	am. No. 46, 2006
Heading to s. 70K.....	am. No. 46, 2006
s. 70K.....	ad. No. 167, 1995
	am. No. 46, 2006
s. 70L.....	ad. No. 167, 1995
	am. No. 46, 2006

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 July 11, 2014, I arranged for service of the foregoing Appellant's Opening Brief, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Craig Jonathan Hansen Hansen Law Group, P.S. 12000 NE 8 th Street, Suite 202 Bellevue, WA 98005	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
J. Michael Gallagher The Old Vine Court Bldg. 300 Vine Street., Suite 4 Seattle, WA 98121	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

DATED at Edmonds, Washington this 11th day of July, 2014


Lindsey M. Matter

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