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COA No. 738241
Snohomish County Superior Court No. 13-3-00814-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JESSE FINKEN,
Petitioner-Appellee,
v.

BRIANNE SHERMAN (FORMERLY FINKEN),
Respondent-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George Bowden, Judge

APPELLANT'S OPENING BRIEF

Brianne Sherman

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in applying the parenting plan factors in RCW 26.09.187 when relocation was at issue, which caused the final parenting plan and order to be entered in error.
2. The trial court erred in finding a limiting factor under RCW 26.09.191 (3) when substantial evidence does not support a finding that the mother's emotional or physical impairment interferes with her parenting functions as defined by RCW 26.09.004.
3. The trial court erred in entering a judgment against the mother for \$2,506.55.
4. The trial court erred in granting the father sole decision-making authority.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court applied the wrong statutory factors when determining whether the child should remain in Arizona with his mother as the primary residential parent.
2. Whether the outcome of the trial have been materially different had the trial court applied the correct factors.
3. Whether the trial court erred in finding a limiting factor under RCW 26.09.191(3)
4. Whether the trial court erred in calculating the amount of airfare the mother owed for transporting the child to and from Washington under the temporary order entered by Commissioner Waggoner.
5. Whether the trial court erred in granting the father sole decision-making.

III. INTRODUCTION

In this dissolution, the parties separated in 2012, but were able to co-parent without filing for a dissolution or creating a parenting plan in writing. Both parties considered moving to Arizona and it was only when

the father decided to stay in Washington that he filed for a dissolution to stop the relocation. However, the mother petitioned the court to relocate and her petition was granted on April 15, 2013. When the parties finally went to trial in June 2015, custody of their four-year-old child was the only issue other than a small debt to Ms. Sherman's mother.

IV. STATEMENT OF THE CASE

A. HISTORY OF THE MARRIAGE

Brianne Sherman and Jesse Finken were married in Lynnwood, Washington on April 1, 2008. They separated in January 2012. CP 87. They have one child, Corbin, who is now 5 years old. RP 42. Ms. Sherman also has a daughter from a previous marriage, Makayla Sherman-Schatz, who lives primarily with her father. RP 5. The parties' short marriage was plagued with infidelity. Mr. Finken admitted to being a sex addict and had multiple affairs. RP 44, 45, 76. When Ms. Sherman first learned that Mr. Finken was unfaithful he promised to change his ways and she forgave him. During their marriage, the couple hosted parties where alcohol was served and both parties drank to excess on occasion. RP 80, 84, When C.F. was born on April 25, 2011, Ms. Sherman became a stay at home mother, while Mr. Finken worked. RP 116.

When C.F. was about six months old, Ms. Sherman learned that Mr. Finken was again engaged in an extra-marital affair. RP 76. During

their initial separation, the couple decided to attend counseling at a sexual addiction treatment center in Bellevue for Mr. Finken's sexual addiction, but eventually the couple permanently separated. RP 45. On one occasion, Mr. Finken and Ms. Sherman got into a disagreement in the morning and Mr. Finken went to a casino "and hung out looking for a woman to pick up," which resulted in him being charged with a DUI. RP 79.

B. HISTORY OF PARENTING

During the first seventeen (17) months of C.F.'s life, Ms. Sherman stayed home with C.F. and took care of him most of the time. Even after they separated, the couple agreed that it was important to them that Ms. Sherman remained a stay-at-home mom and Mr. Finken agreed to pay Ms. Sherman's bills, so she could take care of C.F. and not have to put him in daycare. RP 87. In fact, Ms. Sherman did not go to work until Mr. Finken was injured in a motorcycle accident and it became necessary. Even then she worked at night in order to care for C.F. during the day. RP 87, 116-17. When Ms. Sherman took an office job, Mr. Finken and Ms. Sherman worked out a schedule where C.F. was cared for during the day by both parties' families. RP 167. The couple did not file for divorce or have any parenting plan for the first year of their separation and the parties worked together to ensure that C.F. had time with both parents and extended family. RP 87-88. However, Ms. Sherman remained the custodial parent.

In April 2013, Ms. Sherman relocated to Arizona. At first, Mr. Finken was going to join her and C.F., but he got a job in Washington and decided to stay. RP 86. Soon after Ms. Sherman decided to move to Arizona, Mr. Finken filed for divorce. There was a hearing on temporary orders held on April 15, 2013 and Commissioner Waggoner granted Ms. Sherman's request to relocate. CP 107-08. The temporary order allowed the father to have ten (10) days per month with the child in to be in Washington and required each party to handle one half of the transportation of the child for the ten (10) day visit in Washington with the child. *Id.*

While in Arizona, Ms. Sherman met Troy Bailey to whom she is now engaged. RP 26. Then in April 2014 Ms. Sherman suffered a mini-stroke called a Transient Ascemic Attack and has been unable to work since that time. RP 167, 178-179.

A dissolution trial was held on June 18, 2015. RP 1. Ms. Sherman testified that although she is not an alcoholic she decided to quit drinking any alcohol to support her fiancé who is in recovery. RP 32. Ms. Sherman attends a Christian based recovery group called Celebrate Recovery. It is for recovery from anything, not just addiction. She attends to support her fiancé and to deal with her PTSD. RP 31-32. Ms. Sherman and her fiancé also attended a parenting class through the program called Love and

Logic. RP 131-32. Judy Sherman, Ms. Sherman's mother testified that on her most recent visit with C.F., after Ms. Sherman had attended the parenting class, C.F. was noticeably better behaved. RP 114-15. Jennifer James, an Assimilation Leader at Celebrate Recovery, also testified about how well-behaved C.F. is in his mother's care. RP 155. Ms. James testified that she was a recovering alcoholic herself, that she has three people she sponsors, and she is very familiar with the addiction process and the nature of an addict. RP 154. Ms. James did not think Ms. Sherman has a problem with alcohol. RP 152. Ms. James further testified that C.F. is a happy little boy and has become more well-behaved over the seven months she had known Ms. Sherman. RP 149, 155. Michael Hunt testified that Ms. Sherman, her fiancé, and C.F. usually attend the Maricopa Community Church twice a week – once on Sunday for church and then on Tuesday for Celebrate Recovery. RP 161. Mr. Hunt attended Ms. Sherman's birthday party and her home was clean and inviting. RP 163.

Even Mr. Finken's sister, Christy Moffett, described C.F. as a happy child. RP 25. Ms. Moffett's only criticism was that when C.F. visits Washington he is used to having nutrient shakes in the morning instead of eating whole meals. RP 22. Ms. Sherman's older daughter, Makayla, lives in her neighborhood and when C.F. visits, he is able to see Makayla with whom he gets along well. RP 19.

Mr. Bailey testified that he spends a lot of time with C.F. playing guitar together, making up songs, flying kites, and camping for example. RP 129-30. The court found that C.F. has a relationship with Mr. Bailey. CP 85. Mr. Bailey also supports Ms. Sherman and C.F. RP 180. When Mr. Bailey experienced a relapse in February and March of 2015, Ms. Sherman immediately removed herself from the home and took C.F. to go stay with a friend. RP 35-37. Mr. Bailey testified that he experienced that relapse because he did not complete some of the steps in recovery, but that he was committed to going through all the steps this time. RP 145.

At his mother's home in Arizona, C.F. has a weekly and a daily schedule and is required to perform small chores such as picking up his toys. His mother makes breakfast for him every morning, but gives him a choice of three different breakfasts. He is rewarded for good behavior. RP 169-70. The mother keeps a whiteboard that C.F. checks off when he has finished each chore. If he completes his chores without asking he is rewarded with ice cream after dinner. RP 170. The mother also testified that C.F. has a lot of playdates and the family attends a church where C.F. can play with other children in the children's ministry. RP 171. C.F. has a regular bedtime and before bed the mother and he discuss what he enjoyed that day or why he was disciplined that day. Then the mother and C.F. say prayers together before bed. RP 171-72. The mother allows C.F. to speak

to his father on the phone whenever the father calls. However, the testimony at trial showed that the father does not attempt to call very often and did not even call C.F. on his birthday. RP 93-95; Exh. 9, CP 179-80.

The father presented no evidence that the detrimental effect of the relocation outweighed its benefits. The only evidence presented by the father was testimony that it takes C.F. a little while to adjust after his flight and that the transition caused some behavioral changes; that C.F. has a large extended family in Washington; and that Ms. Sherman was arrested for a DUI in 2013. No experts testified about whether Ms. Sherman was an alcoholic, but Ms. James did testify that, in her experience with addicts, it was her opinion that Ms. Sherman did not have a problem with alcohol. C.F. was not with Ms. Sherman when she was stopped and there was no evidence presented that it adversely affected the child. In addition, Mr. Finken was also arrested for a DUI in 2012.

The father presented no evidence that the child was not cared for, that relocating would be detrimental, or that it was not in the best interest of both the child and the mother.

In the trial court's July 7, 2015 Findings of Fact and Conclusions of Law, it simply incorporated the parenting plan which incorporated its June 18, 2015 oral ruling by reference. See Findings of Fact and Conclusions of Law (FFCL) 2.19, CP 35; Parenting Plan (PP) Section VI,

CP 26. The parenting plan made Mr. Finken the custodial parent. PP 3.12, CP 23. In the court's oral ruling, it did not even mention the relocation factors, but instead went through the factors for determining the residential provisions under RCW 26.09.187(3). The court found that it was not in the best interest of the child to remain in Arizona. CP 90. The Court recognized that the court commissioner did allow the mother to relocate to Arizona and to take the child with her two years prior to trial. CP 89. But then the Court went on to say that it does not mean that "when the case come up for trial and the issue is a Parenting Plan that it forecloses the Court from reviewing that [relocation] decision and either confirming it or changing it." CP 89-90.

V. ARGUMENT

A. STANDARD OF REVIEW

This court reviews trial court decisions dealing with the welfare of children for abuse of discretion. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). This court also reviews a parenting plan for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) citing Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Abuse of discretion occurs "when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124

(2004) citing State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Horner, 151 Wn.2d at 894.

When reviewing a relocation decision this court determines whether the trial court's findings reflect consideration of the appropriate factors. In re Marriage of Kim, 179 Wn. App. 232, 244, 317 P.3d 555 (Ct. App. Div. 3 2014) citing Horner, 151 Wn.2d at 896.

B. THE TRIAL COURT ERRED IN FINDING THAT THE MOTHER HAD ANY EMOTIONAL OR PHYSICAL IMPAIRMENT THAT INTERFERES WITH HER PERFORMANCE OF PARENTING FUNCTIONS BECAUSE IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In the final parenting plan the trial court imposed a limiting factor on the mother based on her involvement or conduct that may have an adverse effect on the child's best interest because of a "long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 26.09.004." PP 2.2, CP 18-19.

Parenting Functions means those aspects of the parent-child relationship in which the parent makes decisions and performs

functions necessary for the care and growth of the child. Parenting functions include:

- (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
- (b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
- (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
- (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
- (e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
- (f) Providing for the financial support of the child.”

RCW 26.09.004.

There was no evidence presented at trial that the mother had an emotional impairment or that her physical impairment interfered with her parenting functions. In fact, the court itself found that the child had a stronger relationship with the mother and that relationship created more stability for the child. CP 83. The court also found that the mother was capable of meeting the child's day to day needs and was capable of adequately performing parenting functions. CP 83. The evidence showed that the mother did meet C.F.'s day to day needs, C.F. had a consistent and nurturing relationship with the mother, C.F. regularly attended a children's program at the mother's church, which taught him social skills, the mother

read books to C.F., and arranged playdates with other children at least weekly.

Section 3.10 notes that the mother is restricted from consuming alcohol or allowing the child around anyone consuming alcohol during her residential time. PP 3.10, CP 22. Although that restriction was based on the trial court's finding that the mother had a long term impairment from alcohol abuse, alcohol or drug abuse was not the reason for the limiting factor in 2.2. PP2.2, CP 19. Instead, the court erroneously based it on an emotional or physical impairment that interferes with the mother's parenting function. Neither the evidence, nor the court's own findings bear this out.

In any event, even though the mother denies being an alcoholic, she still attends Celebrate Recovery every week and has given up drinking all together. Ms. James, who is very familiar with the behaviors of addicts, and who sponsors three recovering addicts, testified that in her opinion Ms. Sherman is not an alcoholic. There was no testimony presented that Ms. Sherman was unable to perform her parental duties at any time. She has not placed C.F. in danger, she has not neglected him, and the testimony showed that in the past, if she planned to drink, she would make sure there was someone to supervise C.F.

Therefore, the trial court abused its discretion in finding a limiting factor because it is not supported by the record or its own findings in its oral ruling, which was incorporated by reference into the parenting plan. Because the court's decision to grant the father sole decision-making authority was based on the limiting factor, that decision was also erroneous and should be reversed.

C. THE PARENTING PLAN, INCLUDING THE PROVISIONS MAKING THE FATHER THE PRIMARY PARENT AND GIVING HIM SOLE DECISION-MAKING, SHOULD BE VACATED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY APPLYING AN INCORRECT LEGAL STANDARD.

In 2000, the legislature passed the child relocation act, RCW 26.09.405-.560 (relocation act or the act), which shifts the analysis away from the best interests of the child to an analysis focusing on the best interests of the child and the relocating person. Laws of 2000, ch. 21, § § 1, 14; Horner, 151 Wn.2d at 886-87. RCW 26.09.520 provides the legal standard for determining a relocation issue. The trial court must consider the 11 factors listed in the relocation statute to determine whether the detrimental effect of the proposed relocation outweighs its benefits. Id. at 894-95. The act creates a rebuttable presumption that the relocation will be allowed, which may be rebutted when the objecting party proves that "the detrimental effect of the relocation outweighs the benefit of the change to

the child and the relocating person, based upon the [11 child relocation] factors." RCW 26.09.520. These factors are not listed or weighted in any particular order. Id.; Horner, 151 Wn.2d at 887. The trial court must find by a preponderance of the evidence that relocation would be more detrimental than beneficial, and it must make findings on the record regarding each of the factors. Horner, 151 Wn.2d at 895-97.

It does not matter that the relocation issue is raised at a dissolution trial instead of its own hearing. See Kim, 179 Wn. App. at 239-40. In *Marriage of Kim*, the mother petitioned for relocation and was denied by the commissioner, but the trial court addressed the issue in the dissolution trial. Id. at 237.

Before the relocation statute was enacted, the court could find that relocation of a child was directly relevant to particular factors in RCW 26.09.187 (3). See In re Marriage of Combs, 105 Wn. App. 168, 175-76, 19 P.3d 469 (2001). But, since the enactment of the Relocation statute, codified at RCW 26.09.405- .560, it supersedes the parenting plan criteria in RCW 26.09.187 if there are countervailing considerations. Kim, 179 Wn. App. at 243.

One significant difference between RCW 26.09.187 and RCW 26.09.520 is that the relocation statute expands the general "best interest

of the child” standard and requires the court to consider the importance of the interests of the relocating person. Id; Horner, 151 Wn.2d at 895.

Here, as the custodial parent, the mother filed a notice of intent to relocate in April 2013. CP 161. The mother petitioned to relocate because the weather provided a healthier environment for both her physical disabilities and her depression, which was tied to the weather. Arizona also provided the mother a better opportunity to support herself and C.F. because the cost of living was much less. RP 39. On April 15, 2013 a hearing was held before the court commissioner. The court allowed the mother to relocate with C.F. CP 106-07. Other than a small debt to the mother’s mother, custody of C.F. was the only issue at trial. Therefore, the entire trial was about where the child should reside. Even the trial court recognized that it was reviewing the commissioner’s decision to grant relocation, but then it did not apply the relocation factors. The trial court also incorrectly used the “best interest of the child” standard by itself when it found that it was not in the child’s best interest to live in Arizona. The court should have considered the best interest of both the child and the mother, as the relocating person, in the context of the other factors.

The trial court should have started with the rebuttable presumption that the relocation was permitted. The burden was on the father to prove that the detrimental effect of the relocation outweighs the benefit of the

change to the child and the relocating person, based upon the 11 child relocation factors. Instead, the court incorrectly applied and analyzed the parenting plan factors. Because the trial court did not make specific findings as to the relocation factors on the record, its decision must be reversed.

D. HAD THE TRIAL COURT APPLIED THE CORRECT STANDARD THE MOTHER WOULD HAVE BEEN GRANTED PERMISSION TO PERMANENTLY RELOCATE WITH C.F.

Non-constitutional error requires reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) (citations and internal quotation marks omitted).

The mother correctly identified the relocation issue and the statutory factors in her trial brief. She then presented evidence at trial to support each of the eleven factors under RCW 26.09.520. The father did not rebut, or even address, any of the relocation factors. Instead, he ignored them and focused on the parenting plan factors in RCW 26.09.187 (3)

When determining whether to grant relocation of a child the court should consider the following eleven factors:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
- (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
- (10) The financial impact and logistics of the relocation or its prevention; and
- (11) For a temporary order, the amount of time before a final decision can be made at trial.

RCW 26.09.520.

The evidence at trial showed, and the court found, that C.F. was a happy, healthy four-year-old. The court found that C.F. was thriving in his mother's care in Arizona, that he had a relationship with his mother's fiancé, and that he had ample opportunity for playdates. The court also found that the mother was better able to care for C.F. in Arizona because

she was not as hindered by her medical problems. Given the testimony at trial and the court's own findings, the father did not prove that the detrimental effect of the relocation outweighed the benefit of the change to the child and the relocating person. The statute itself states that the factors are not weighted and that no inference is to be drawn from the order in which they are listed. RCW 26.09.520. The trial court did not analyze, or even mention, at least seven of the eleven factors. Had the trial court analyzed the correct factors the outcome would have been materially different.

1. Child's relationship with each parent, siblings, and other significant persons.

The trial court found that the child had a stronger relationship with his mother. CP 83. In addition, the testimony presented by Mr. Finken showed that C.F. had a lot of extended family in Washington, but did not present any evidence of taking care of C.F. himself. While C.F. lived in Washington, Mr. Finken's parents cared for C.F. and even when C.F. visits he spends a lot of time with his father's siblings and with his grandparents. The father testified that he has never lived on his own other than a short time while he was in the navy. The father testified about his job (RP 45-46), about rumors he has heard about things going on in Arizona (RP 48-49), about C.F. misbehaving while in his care (RP 51), about C.F. staying up until midnight when in his care (RP 88-89), and

about how his residential time was re-adjusted to cut down on transportation costs (RP 54, 85-86). But, the father did not testify about his relationship with the child, what kinds of activities they do together (other than one anecdote about how C.F. acted out at the park when it was time to head back to Arizona), or whether the child has a schedule. The only testimony from the father about the child's wellbeing was that the father preferred to place him in preschool, so he could engage with other children – something he is already doing in Arizona through playdates and at the Children's Ministry at the mother's church.

2. Prior Agreements.

The Court found that there were no prior agreements of the parties, but both parties testified that at first they both agreed to move to Arizona. And both parties testified that they agreed to double visitation time to lessen the cost of air travel.

3. Whether disrupting contact with the mother would be more detrimental than disrupting the contact with the father.

The court failed to analyze or make any findings about this factor. However, the testimony at trial shows that C.F. was with his mother the majority of the time since his birth. She was the primary care giver, the primary disciplinarian, and the primary source of routine. C.F.'s mother testified that she plans activities for her and C.F. every day. Some of those activities involve chores. C.F. has his own living room for his toys, but he

is expected to return the toys to his living room from around the house, to empty his hamper, and to make his bed. If he performs all of those things in one day without being asked, he earns a reward. C.F. is also expected to help with small cleaning chores. On Tuesdays, he assists his mother in preparing a meal to bring to Celebrate Recovery. Wednesdays are set aside for cleaning. Sunday is set aside for church, where C.F. has an opportunity to engage with other children. The rest of the days are open for playdates with other children or to do an activity with his mother or with Mr. Bailey.

In contrast, the testimony at trial did not show that the father established any discipline or routine. In fact, the father testified that during his residential time C.F. always wants someone there playing with him and paying attention to him, which supports the mother's testimony there she consistently engages him. RP 50-51. There was no testimony from the father that he set a bedtime for C.F. In fact, on one visit the father allowed C.F. to stay up until midnight the night before he was to return to Arizona. RP 51, 88. The father presented no testimony about who took care of C.F. during the day, what kinds of activities he was engaged in, whether he was asked to do chores or take on any age-appropriate responsibilities. From the testimony at trial, it appeared that C.F. spent little time with his father and spent most of it with his father's relatives. RP 22, 51. The father testified that it was a struggle to call because he would have to call

through the mother, but there was no evidence that the father suggested an alternative. He did not offer to provide C.F. with a cell phone and he gave no credible examples of when he tried to call and was unable to speak to his son. RP 93-94. In fact, evidence showed that on C.F.'s birthday, the father merely asked the mother, in a text message, to convey a message to C.F. and did not call until the day after his birthday. RP 94-95; Exhibit 9, CP 179-80.

Based on the difference in C.F.'s schedule and stability, during the parties' respective residential time, it would be more detrimental to disrupt contact with the mother than with the father because it would cause a setback in his development. Evidence at trial actually bore this out. Mr. Bailey testified that when C.F. first returns from visiting his father, he is more demanding and disrespectful, his sleep schedule is thrown off and he sometimes wets the bed after going for periods of not wetting the bed. RP 132.

Therefore, had the trial court analyzed this factor it would have weighed in favor of the mother relocating.

4. Whether either parent is subject to a limitation under RCW 26.09.191.

Here, both parents received a DUI during C.F.'s lifetime and both parents, as a married couple, hosted parties with alcohol at their home. Even if the trial court only found a limiting factor for the mother, this

factor does not carry more weight than any of the other factors. And, as argued below, in section V.D, the trial court erred in applying a limiting factor against the mother under RCW 26.09.191 (3) because there is no evidence to support it and it contradicts the court's own finding.

5. The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation

The trial court did not analyze this factor. The mother sought to relocate to Arizona for two reasons. First, it was better for her health, so she could remain an active parent. Second, the cost of living is lower in Arizona, so she could support herself. There was essentially no testimony about why the father opposed the relocation other than the cost of the airline tickets, his testimony that she had a history of drinking alcohol while they were married, and that her fiancé had two short relapses while C.F. was in Arizona. Had the trial court analyzed this factor it would have weighted in favor of the mother relocating because there was essentially no testimony in opposition.

6. The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

The trial court did not analyze this factor. There was no testimony presented that the child had any special needs. In fact, the evidence

showed that the child had already been living in Arizona for two years with the mother and the impact of the relocation was that the child was thriving emotionally and physically. He had a schedule, a routine, steady even-handed discipline, and a large network of other children to engage with. The father presented no testimony or other evidence that the relocation would have a harmful impact on C.F. Therefore, had the trial court analyzed this factor, it would have weighed in favor of the mother relocating.

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

The trial court did not analyze this factor. The testimony at trial showed that the mother has a pool in her backyard, she stays home with C.F. and participates in activities with him every day, and C.F. has an active social life. In Washington, C.F.'s father could not stay home with him and he would be placed into preschool. There was also very little testimony about daily activities. Had the trial court analyzed this factor it would have weighed in favor of the mother.

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

The trial court did not analyze this factor. But the testimony at trial showed that not only were alternative arrangements available, the parties

utilized them. For example, the father adjusted his days to have C.F. for 20 days in a row to lessen the transportation costs and allow him more consecutive time with C.F. In addition, the father had phone access to C.F. and he presented no evidence that the mother ever prevented him from calling or refused to allow C.F. to talk. Had the trial court analyzed this factor it would have weighed in favor of the mother.

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

The trial court did not analyze this factor. Although the father testified that he was starting a good job the Monday after the trial, he originally agreed to relocate as well. RP 86. His original reason for not wanting to relocate, was because he took a job in Washington, but he later became unemployed again. At that point, he had no reason not to relocate, but chose to stay. In addition, the father lives with his parents, so he has no real property that he is attached to. The father has no other children that live in Washington. The father has also demonstrated that he has the skills and the experience to obtain a good paying job. The father did not present any evidence that he would not be able to find work in Arizona.

Had the trial court analyzed this factor, it would have weighed in favor of the mother relocating with C.F.

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

The mother testified at trial, and the trial court found, that the mother is disabled and unemployable. It would not be feasible for her to move back to Washington away from her fiancé, who is also her sole means of support. As argued in section V.B above, the court should consider the interest of both the child and the relocating parent. Preventing the relocation had the practical effect of irreparably harming the mother-child bond because the mother does not have the means to frequently fly to Washington to visit her son. However, unless she flies to see him at her own expense, she is limited to only spending time with him during Holidays and in the summer.

In contrast, the evidence presented at trial showed that the father was capable of making competitive wages and he lives with his parents. The father presented no testimony about why he could not move to Arizona. Even if the father did not move, he has ample funds to travel and visit his son in Arizona frequently. The father presented no evidence of a mortgage, a car payment, or any other fixed expense that would prevent him from traveling back and forth. Had the trial court analyzed this factor, it would have weighed in favor of the mother.

11. For a temporary order, the amount of time before a final decision can be made at trial.

This was not a temporary order, so this factor does not apply.

Here, eight out of the ten relevant factors weigh in favor of the mother. Therefore, it is reasonably probable that, had the error not occurred, the outcome of the trial would have been materially affected. Had the trial court analyze the correct factors, the relocation would have been granted because there is a rebuttable presumption that the relocation will be granted and the father did not enough evidence to overcome that presumption. Namely, he did show that the detriment of relocating outweighed its benefits, especially given the fact that the relocation statute is concerned with what is in the best interest of both the child and the relocating parent.

E. EVEN IF THE FACTORS IN RCW 26.09.187 WERE THE APPROPRIATE FACTORS, THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING THEM

Even if the parenting plan factors were the appropriate factors to use, which the mother does not concede, the trial court's decision is manifestly unreasonable because it is outside the range of acceptable choices, given the facts and the applicable legal standard. Horner, 151 Wn.2d at 894.

RCW 26.09.187(3) requires the court to consider the following seven factors in determining a child's residential schedule:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

In its oral ruling, the trial court did analyze each of these factors. The court found the following: Factor one weighed in favor of the mother (CP 83); Factor two did not apply because there was no agreed parenting plan (CP 83); Factor three did not weigh in favor of either party (CP 83-84); Factor four did not weigh in favor of either party (CP 84-85); Factor five weighed slightly in favor of the father because C.F. has more extended family in Washington (CP 85-86)); Factor six did not apply because the child is not old enough to express a view (CP 87); and Factor seven did not weigh in favor of either parent. (CP 87).

By the trial court's own findings, five of the seven factors indicated that the parents should have equal residential time, one of the factors weighed in favor of the father. But, the most important factor, and the one the legislature intended to have the most weight, weighed in favor of the mother. Therefore, even if the court applied the correct factors, it did not apply them correctly.

The father may argue that the limiting factor against the mother supports that trial court's decision to make him the primary parent. However, this argument fails because, as argued in Section V.E above, the limiting factor is not supported by evidence.

F. THE TRIAL COURT SHOULD HAVE DIVIDED THE PRIOR LONG-DISTANCE TRANSPORTATION COSTS ACCORDING TO THE PARTIES' AGREEMENT OR THEIR PROPORTIONATE INCOME AS CALCULATED BY THE CHILD SUPPORT WORKSHEETS

At trial, the father testified that the parties agreed to double visits, where the child would visit the father for twenty-one (21) days in a row instead of visiting two times for ten (10) days each. RP 85-86. The father testified that the parties agreed to this because it was easier for him to pay for the entire trip instead of paying for two trips. RP 85-86. The trial court should have considered the parties' agreement before entering a judgment against the mother.

RCW 26.19.080(3) mandates that long-distance transportation costs be shared by the parents in the same proportion as the basic support obligation. The court does not have any discretion and must enforce that provision. “To hold otherwise would render the language in the statute meaningless.” Murphy v. Miller, 85 Wn. App. 345, 349-50, 932 P.2d 722 (Ct. App. Div. 1 1997). Even if the trial court did not abuse its discretion in not considering the parties’ agreement, it abused its discretion by failing to apply RCW 26.19.080(3) to the transportation costs incurred before trial.

Here, the trial court applied RCW 26.19.080(3) to transportation cost moving forward, but did not apply it retro-actively. PP 3.11, CP 22. The temporary order, issued on April 15, 2013, allocated the cost of transportation by splitting it in half and the final economic table was reserved for trial. A temporary order cannot violate a statute. Therefore, the trial court was obligated to calculate all of the transportation cost, both before and after trial, and to assign those costs proportionately.

Here, the father presented airline tickets from April 2014 to June 2015 totaling \$4,076.60.¹ See Exh. 6, CP 161-178. After trial, the court determined that the father’s proportionate share was .725 and the mother’s

¹ This amount represents the total of the tickets presented in Exhibit 6, not father’s calculation on the front page.

proportionate share was .275. Order for Support, CP 12. When each parent is assigned their proportionate share, the mother was only responsible for \$1,121.07.

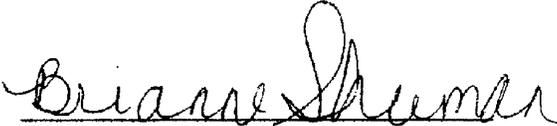
Therefore, the judgment entered against the mother in the amount of \$2,506.55 should be vacated because the parties agreed that the father would pay for the whole cost of a double trip. In the alternative, this court should correct the judgment to reflect the mother's proportionate share according to the economic worksheet.

VII. CONCLUSION

For the foregoing reasons, this Court should vacate the parenting plan and the judgment against the mother and remand for a new trial. This court should also re-instate the temporary order allowing the mother to relocate to Arizona with the child.

DATED this 27 day of June, 2016.

Respectfully submitted,


Brianne Sherman, Pro Se Appellant