NO. 104074-1

SUPREME COURT OF THE STATE OF WASHINGTON

ARYNN HAUK,

Petitioner

v.

BRANDON WUESTHOFF

Respondent.

AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

Jill N. Hogberg, WSBA No. 46786
NORTHWEST JUSTICE PROJECT
132 W. 1st Ave.
Colville, WA 99114
Telephone: (509) 381-2396
Facsimile: (509) 684-4541
jill.hogberg@nwjustice.org

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I. INTRODUCTION

The Child Relocation Act governs a parent's ability to relocate with their child. In Washington, a rebuttable presumption in favor of relocation is afforded to the parent requesting relocation, so long as the other party does not have substantially equal residential time, in which case, the presumption does not apply. Washington courts are tasked with calculating whether a party has substantially equal residential time based on time designated in the parties' existing parenting plan, absent circumstances not relevant here.

Time, however, does not exist in a vacuum. Time existed in the past; time exists in the present; and time will exist in the future. In the context of parenting plans, and specifically, phased-in parenting plans, the question of whether a parent has substantially equal residential time based on time designated in their parenting plan, can turn on whether the Court calculates time based upon the current phase the parties are in at the time relocation is requested, or whether future time—that is, time not

yet exercised, but presumed to be exercised at some point during the child's minority, is included in that calculation.

Complicating matters is the fact that not all phased-in parenting plans are alike: some are self-executing, such as where phases change automatically with a child's age or other benchmarks, and some require compliance with or completion of certain criteria in order to move to the next phase. This includes situations where limitations have been placed on a parent under RCW 26.09.191, where the court has built in phases that a parent will build up to over time, upon meeting the requirements of a given phase.

Should a parent who is in Phase 1 or Phase 2 of a four-or five-phase plan that eventually results in 50/50 residential time with the child, be deemed to have substantially equal residential time because they will eventually share custody, assuming they've met all necessary conditions? The majority in the case presented answered: "yes". Does it make a difference whether

the objecting parent currently has two overnights out of fourteen? Or four, five, or six overnights? The majority answered: "no".

These answers, based upon statutory interpretation that extends beyond the facts of just this case, which will impact future relocation cases, presents a public issue which needs to be addressed by this Court.

II. IDENTITY AND INTEREST OF AMICI

The Northwest Justice Project (NJP) has a significant interest in the outcome of this case as it directly aligns with NJP's mission to combat injustice, strengthen communities, and to promote the well-being of low-income individuals and families across Washington State. As Washington's largest publicly funded legal aid program, NJP provides critical assistance in cases affecting basic needs including family safety and security, with a significant portion of its work dedicated to family law. Many of these cases involve domestic violence and/or other restrictions under RCW 26.09.191, such as substance abuse or neglect. NJP's representation often results in phased-in parenting

plans, some of which result in equal or substantially equal residential time over the life of the plan. Some of these cases become subject to the Child Relocation Act (CRA), and therefore, subject to RCW 26.09.525.

This case addresses interpretation of RCW 26.09.525(2)(b); specifically, the calculation of residential time in a phased-in parenting plan for purposes of determining whether the presumption in favor of relocation under the CRA should apply.

Pursuant to RAP 13.4(h), NJP submits this amicus curiae Memorandum in Support of the Petition for Review. Amici are interested in this case being reviewed because it raises issues of significant public interest and public policy. The availability of the presumption in favor of relocation in cases involving phased-in parenting plans is an issue of significant importance to NJP and its clients, many of whom have such plans to protect their children from domestic violence, substance abuse, and other

harms. Further detailed interests are set forth in the Motion for Leave to File Memorandum of Amicus Curiae.

III. STATEMENT OF THE CASE

Amici incorporates the facts set out in the Statement of the Case presented in the Petition for Review.

IV. ARGUMENT

A. The Petition for Review presents issues of substantial public interest under RAP 13.4(b)(4); the Court should accept review.

Petitions for review will be accepted if they involve an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

Whether a case presents an issue of substantial public interest is a three to five factor test.[1] The first three factors are

[1] For purposes of this Memorandum, NJP focuses solely on factor 1—whether the issue is of a public or private nature. This is done avoid redundancy between this Memorandum and the Petition for Review; NJP agrees with and supports legal analysis presented in the Petition for Review not otherwise addressed herein.

often determinative and require the Court to analyze: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *In re Marriage of Horner*, 151 Wn.2d 884, 891–92, 93 P.3d 124, 128 (2004). A fourth factor, the "genuine adverseness and the quality of advocacy of the issues[,]" may also be considered. *Id.* Finally, a fifth factor may be considered, which is the "likelihood that the issue will escape review because the facts of the controversy are short-lived". *Id*. at 892, (citing *Seattle v. State*, 100 Wn.2d 232, 250, 668 P.2d 1266 (1983) (Rosellini, J., dissenting).

1. <u>Interpretation of a statute which determines whether a parent is entitled to the presumption in favor of relocation, is a public issue.</u>

In *Horner*, this Court determined that the issue presented on appeal was of a public nature because "it concerns the interpretation of RCW 26.09.520 and because the Court of Appeals opinion was not limited to the *Horner* facts, but

contained an interpretation of the statute." *Id.* at 892. Here, the issue presented is also one of statutory interpretation of the CRA. Specifically, the issue involves interpretation of RCW 26.09.525(2)(b), and how Washington courts must calculate "substantially equal residential time" for purposes of determining whether a relocating parent is entitled to the presumption in favor of relocation. This is clearly a public issue.

2. <u>Interpretation of a RCW 26.09.525(2)(b) in a manner that will deny the presumption in favor of relocation to parents with more than 45% of the residential time while the other parent is subject to limitations under RCW 26.09.191 and has not completed requirements necessary to exercise substantially equal residential time under a phased-in parenting plan, is a public issue.</u>

Overwhelming evidence demonstrates that exposure to domestic violence is harmful to children.[2] Children are often at

[2] *See* William G. Austin & Leslie M. Drozd, *Intimate Partner Violence and Child Custody Evaluation, Part 1: Theoretical Framework, Forensic Model, and Assessment Issues,* 9 J. CHILD CUSTODY 250, 280 (2012); Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations,* Battered Women's Justice Project, June 2012.

greater risk of exposure to domestic violence after parental separation.[3] Likewise, it is understood and accepted that exposure to a parent's substance abuse problems, neglect, or other limiting factors under RCW 26.09.191, present risks of harm to children. One of the most common ways the courts attempt to protect children in these situations[4] (outside of domestic violence protection orders), is to enter a phased-in parenting plan that requires a parent to undergo evaluations and treatment for things like domestic violence, substance abuse, and/or mental health or psychological issues. Experts resoundingly recommend against immediately entering shared parenting plans where domestic violence has been found, but

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[3] *Parenting Plans after Family Court Findings of Domestic Violence: Promoting Safety, Accountability and Healing for Victims, Perpetrators, and Children*, National Council of Juvenile and Family Court Judges, at 4 (2022) (citing Peter G. Jaffe et al., *Growing Up with Domestic Violence: Assessment, Intervention & Prevention Strategies for Children & Adolescents* (Hogrefe & Huber 2011)).

[4] Situations giving rise to findings under RCW 26.09.191, including: domestic violence, substance abuse, neglect, etc.

instead recommend ordering evaluations, no contact and/or supervised visits, and proof that benchmarks have been reached in treatment before expanding residential time with the child. [5] Similarly, experts recommend phased-in or "step-up" parenting plans where substance abuse impacts parenting.[6]

When courts enter phased-in parenting plans, they are giving effect to these recommendations. Sometimes, based upon the facts and circumstances of the case, a court will order a phased-in plan that requires evaluations and treatment, but upon proof of completion/compliance, builds up to an equal, shared residential schedule in the future.

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[5] *A Judicial Guide to Child Safety in Custody Cases*, National Council of Juvenile and Family Court Judges, Family Violence Department, at 33-34 (2008); *See* Daniel G. Saunders, Ph.D., Karen Ohme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns* (Revised 2007) VAWnet.org: Applied Research, Oct. 2007, at 8-9.

[6] *See* Association of Family and Conciliation Courts, Substance Use and Parenting: Best Practices for Family Court Practitioners, 31, (Stephanie Tabashneck, Psy.D., Esq., ed. 2021)

The lower court's ruling in *Hauk* leaves no room for consideration of limiting factors and/or requirements yet to be met, when calculating residential time under a phased-in parenting plan for purposes of relocation. According to the majority:

> RCW 26.09.525(2)(b) states that "[i]n determining the percentage, the court must ... base its determination on the amount of time *designated in the court order*."(Emphasis added.) And the CRA's definition of court order includes "a temporary or permanent parenting plan," not the phase designated in the court order at the time the relocation motion is filed. RCW 26.09.410(1). Thus, contrary to Hauk's argument, the CRA supports the trial court's calculation of residential time by looking to the applicable parenting plan and not just the phase of the parenting plan applicable at the time the relocation motion is filed.

Hauk v. Wuesthoff, 565 P.3d 660, 665 (Wn.App 2025). The majority's holding requires courts to calculate residential time by "looking to the applicable parenting plan and not just the phase of the parenting plan applicable at the time the relocation motion is filed," without exception. *See id*.

Respondent argues in his Answer to Petition for Review that the *Hauk* method of calculation is only applicable in "self-executing" phased-in parenting plan cases, not in phased-in parenting plans requiring conditions to be met before moving to a new phase. *See* Ans. 31. Respondent reasons that the *Hauk* method of calculating residential time would not apply in these cases because:

> the 'amount of time designated in the court order' cannot be calculated for future phases that are dependent on the parents meeting specific conditions. In those instances, only the time unconditionally designated to each parent will be considered, which may be represented by the phase the parents are then following.

(Ans. 32). But this is not supported by the opinion of the appellate court. To interpret RCW 26.09.525(2)(b) and RCW 26.09.410 in such a way as to exempt phased-in parenting plans with limitations or conditions involved in their phases, is to do exactly what Respondent argues the Court cannot do: read into statutes qualifications that are not there. *See* Ans. 24 (*citing Custody of Smith*, 137 Wn.2d 1, 12, 969 P.2d 21 (1998), *aff'd sub*

nom. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (quoted source and internal quotations omitted)). Specifically, this interpretation would require the Court to read "time designated" as "time unconditionally designated"; RCW 26.09.525(2)(b) does not contain the word "unconditionally", and the majority's holding is clear: the Court is required to consider all time granted under a phased-in parenting plan, including future time until the age of majority—not just the time exercised under the current phase of that plan. *See Hauk* at 665.

Under the *Hauk* ruling, a parent who has limitations under RCW 26.09.191 for domestic violence and/or substance abuse (or other limiting factors) could be ordered to obtain evaluations and complete recommended treatment in order to move through the phases of their parenting plan, which would eventually end with equal time. Without having completed those requirements (i.e. being in an early phase of their plan), that parent could then object to the intended relocation of their child, even though they

do not have substantially equal residential time, nor have they completed the requirements placed on them for their child's safety. However, because their parenting plan *eventually* provides for equal time in the future, that parent shall be deemed to have "substantially equal residential time" for purposes of RCW 26.09.525(2)(b), such that the primary residential parent, who may have up to 100% of the residential time at the time relocation is sought, would be denied the presumption in favor of relocation they are entitled to under the CRA.

Resolution of this issue of statutory interpretation, which goes beyond the facts of this case, is a public issue. This Court should accept review. RAP 13.4(b)(4).

V. CONCLUSION

The Petition for Review presents this Court with issues of substantial public interest, namely the interpretation of a statute that has broad public application, including for clients of NJP, who often have phased-in parenting plans for the protection of their children, and will face interpretation of RCW

26.09.525(2)(b) in relocation matters if their parenting plans eventually, in future phases, designate substantially equal residential time. Pursuant to RAP 13.4(b), this Court should accept review.

Respectfully submitted this 16th day of June, 2025

NORTHWEST JUSTICE PROJECT

DocuSigned by:
Jill Hogberg
F2FB3A3AE5434A8...

Jill N. Hogberg, WSBA No. 46786
132 W. 1st Ave.
Colville, WA 99114
Telephone: (509) 381-2396
jill.hogberg@nwjustice.org

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 2,243 words and is in compliance with RAP 18.17(b).

DATED this 16th day of June, 2025

DocuSigned by:
Jill Hogberg
F2FB3A3AE5434A8...

Jill N. Hogberg, WSBA No. 46786
NORTHWEST JUSTICE PROJECT
132 W. 1st Ave.
Colville, WA 99114
Telephone: (509) 381-2396
Facsimile: (509) 684-4541
jill.hogberg@nwjustice.org

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I electronically filed the foregoing with the Clerk of the Court by using the Washington State Supreme Court's portal, which will send a notice and copy of the electronic filing to all counsel of record.

DATED 16th day of June, 2025

/s/ Lisa Irwin
Lisa Irwin, Legal Assistant
745 North Grand Avenue, Ste. 101
Pullman, WA 99163
Ph: (509) 381-2355
Fax: (206) 260-8931
lisa.irwin@nwjustice.org

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Comments:

Sender Name: Lisa Irwin - Email: lisa.irwin@nwjustice.org
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Address:
745 N Grand Ave Suite 101
Pullman, WA, 99163
Phone: (509) 381-2355

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