In re the Marriage of Katare

No. 85591-9

MADSEN, C.J. (dissenting)—The majority sets an unfortunate precedent by permitting improper profile evidence to be admitted on the question of whether a parent may travel with his children to his country of origin without an individualized showing that the evidence applies to him. The majority also concludes that sufficient evidence supports the travel restrictions imposed in the parenting plan in this case. I strongly disagree. Based on the record, I believe Mr. Brajesh Katare has been denied important opportunities to share his family and his culture with his children because of Indian roots.

Procedural History

This case went through multiple appeals and remands. On Mr. Katare's third appeal, the Court of Appeals affirmed the trial court's third try at restricting Mr. Katare's international travel with his children.

I find both the reasoning of the trial court and the procedure followed by the Court of Appeals very disturbing. The first obvious problem is that the trial court's decision to restrict Mr. Katare's travel with his children started at the wrong end; it started by focusing on the consequences of an abduction and not with the primary question of whether Mr. Katare was likely to abduct his children. At least by the time the trial court

found for the *second* time that Mr. Katare did not pose a serious risk of abduction the trial court should have concluded that travel restrictions were not necessary. Instead, in each of the three hearings on the matter, the trial court continued to focus on whether adequate remedies existed should Mr. Katare abduct his children rather than the threshold question.

Similarly, after the trial court's second finding that Mr. Katare did not pose a serious threat of abducting his children, the Court of Appeals should have reversed the trial court and directed that the travel restriction be removed from the parenting plan because imposing restrictions on a parent who does not present a likely threat of abduction is an abuse of discretion even if obtaining the return of a child from the parent's country of origin may pose a challenge (also highly debatable here).

In addition to the central question of whether Mr. Katare ever posed a serious risk of abducting the children is the matter of the profile evidence admitted at the third hearing. The Court of Appeals determined that ultimately the trial court did not rely on this profile evidence, and thus its admission was harmless. But the trial court's written decision shows that it did rely on the improper profile evidence.

Mr. Katare challenges the trial court's consideration of the profile evidence as unconstitutional racial profiling. Unlike the Court of Appeals, which concluded this evidence was inadmissible, the majority says it is admissible. The majority fails to properly define the contours of admissibility, however, leaving in place far too broad a rule. The majority also concludes that even to the extent that the profiling evidence might involve racial profiling, sufficient risk factors not concerning race or national origin are

established that justify the travel restrictions in this case, and accordingly affirms the Court of Appeals. A close examination of the factual findings of the trial court shows that this is not true.

In the end, the profile evidence has no place in this litigation because it was never individualized to Mr. Katare himself. The travel restrictions should be stricken because the findings are inadequate to support the conclusion that he poses a serious risk of abduction. Finally, although the trial court entered findings that the law of India does not provide an expeditious, available legal remedy for children improperly abducted under our nation's laws, the trial court's findings on this point are contradicted by the very sources on which the court relied. For these reasons, I respectfully dissent.

Analysis

I agree with the Court of Appeals determination in *Katare v. Katare*, 125 Wn. App. 813, 105 P.3d 44 (2004) (*Katare* I) that under RCW 26.09.191 a trial court may impose travel restrictions as a component of a parenting plan if the court makes explicit findings that *a parent's conduct* justifies the imposition of the restrictions and that the restrictions are "reasonably calculated to address the identified harm." *Id*. at 826. The abuse of discretion standard applies, and a trial court's parenting plan, or a travel restriction included therein, will not be upheld if it is manifestly unreasonable or based on untenable grounds or reasoning. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The starting point for inquiring into the propriety of the travel restrictions is RCW

26.09.191(3), which lists factors that may justify limitations on parenting plans:

> (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:
> (a) A parent's neglect or substantial nonperformance of parenting functions;
> (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
> (d) The absence or substantial impairment of emotional ties between the parent and the child;
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
> (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

The only relevant subsection is (3)(g). Both RCW 26.09.191(3)'s first sentence and RCW 26.09.191(3)(g) expressly provide that the best interests of the child control whether restrictions may be placed on a parent's residential time with his children. Importantly, the statute also provides that the particular factor or condition that justifies the restriction must be *adverse* to the *children's* interests. And when a limitation is placed in a parenting plan, the trial court must find a nexus between the parental conduct that is found to support the limitation and an actual or likely adverse impact of the conduct on the children that justifies the restriction. *In re Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (1996).

Specific to the circumstances here, if the ground for restrictions relates to possible

abduction of the child, then, as a Wisconsin court has stated, the best interests of the child standard, because of its breadth, "permits a full consideration of concerns both about a parent's intention in abducting a child and about the lack of a remedy should that occur." *Long v. Ardestani*, 241 Wis. 2d 498, 528, 624 N.W.2d 405 (2001).

In light of these governing principles, and following a close examination of the findings and evidence regarding the likelihood of abduction, the only possible conclusion in this case is that the trial court's determination that Mr. Katare poses a serious threat of abduction constitutes an abuse of discretion. In addition, the findings about the adequacy of remedies under the law of India also constitute an abuse of discretion. Finally, admission of the profile evidence in this case constitutes an abuse of discretion and its admission was not harmless because, contrary to the majority, the trial court's decision is not justified by other findings.

Likelihood of Abduction

It is important to bear in mind throughout this review that when the original findings were entered in this case the trial court twice expressly found they were insufficient to establish that Mr. Katare posed any serious risk of abducting his children.

Turning to the third hearing, the findings that purportedly justify the imposition of a travel restriction are divided into two categories in the trial court's final order: the facts that were "brought forth during the June 2003 dissolution trial" and "additional findings based on the evidence presented on remand" in 2009. Clerk's Papers (CP) at 153-54. Turning to the first of these, the trial court found that Mr. Katare maintains ties to India

because he "was born and raised in India," he has family that lives in India, and "[h]e is now engaged to marry an Indian woman who lives and works in the Seattle area and has applied for a green card." CP at 153.

Reliance on a person's place of birth to support a finding that the parent is likely to abduct his child is improper. A person's place of birth and family ties do not show whether a parent is likely to abduct his child. Some individuals born in this country and having ties only to this country abduct their children. Conversely, many individuals who have significant ties to a foreign country have no intention of absconding with their children to that county.

Where a person was born, where their family resides, and who they have chosen to marry are factors that should not be considered unless there is an explicit showing that these factors represent harm to "the children's physical, mental, or emotional health." *See Watson*, 132 Wn. App. at 233-34 (nexus requirement); *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 771-72, 932 P.2d 652 (1996) (same; "parental conduct may only be restricted if the conduct 'would endanger the child's physical, mental, or emotional health'" (internal quotation marks omitted) (quoting *In re Marriage of Cabalquinto*, 43 Wn. App. 518, 519, 718 P.2d 7 (1986))). Absent a showing of this necessary nexus between factors said to support a restriction in a parenting plan and the children's best interests, such findings are irrelevant. There is no such showing here, and these first findings are irrelevant to a determination of whether Mr. Katare is likely to abduct his children.

To the contrary, evidence presented to the trial court demonstrated that the Katare children have a deep need to understand their Indian family, culture, and heritage during their childhood after age six, as their identities and self-concepts are forming, and visits to India will serve this need. By ignoring such considerations, the trial court failed to properly consider the best interests of the children as required. "Visitation rights are to be determined with reference to the needs of the child rather than the . . . preferences of the parent." *In re Marriage of Cabalquinto*, 100 Wn.2d at 329, 669 P.2d 886 (1983). Similarly, when considering travel restrictions, a court must have in mind the needs of the child. But here the trial court was so focused on the possibility of abduction that it failed to make the proper assessment of the children's best interests.

The trial court also found that "in the months leading up to the mother filing a petition for dissolution . . . the father threatened to take the children to India without the mother" and the "mother found an application for an Indian PIO [(person of Indian origin)] card . . . on the father's computer." CP at 153-54. Mr. Katare did consider relocating his family to India in 2002 in order to take advantage of a one-to-two-year long job opportunity with his United States employer and, as a part of that attempt to relocate his family, he sought PIO cards for his children.

Ms. Lynette Katare, however, strenuously objected to the relocation because she felt that she would have no life or opportunities if she were to move to India. Thus began a long, difficult disagreement between Mr. and Ms. Katare in which, it is asserted, Mr. Katare threatened that he and the children would relocate to India while his wife stayed in

the United States. However, this dispute, which ensued months *before* the initiation of divorce proceedings, does not indicate that Mr. Katare is now likely to abduct his children. Indeed, Mr. Katare has complied with all court ordered requirements, and there is simply no ground to assume that he would not do so in the future based on statements made before the dissolution proceedings even commenced.

In fact, Mr. Katare did not move his children to India without their mother. Instead, he proposed a one-to-two-year living arrangement in which Ms. Katare could stay in the United States due to her objections to relocation while he and the children lived in India. Moreover, since their predissolution dispute, Mr. Katare has not made any similar threats or suggestions of relocation. Thus, to the extent that his threat to relocate to India prior to his divorce was considered by the court to be an indicator of future attempts to abscond with his children, Mr. Katare has disproved its prediction through his actions and strict adherence to the trial court's orders.

The trial court found that during the course of discovery Mr. Katare sought copies of his children's visas, passport applications and immunization records—documents that, the court speculates, might assist him in seeking an Indian PIO for his children. CP at 153-54. However, at the time Mr. Katare made these requests, there were no travel restrictions in place. The requested documents could legitimately be requested by Mr. Katare simply for the purposes of traveling with his children to visit their grandparents and extended family in India prior to inclusion of the travel restriction in the parenting plan. Therefore, Mr. Katare's discovery requests is not a tenable basis upon which to

impose travel restrictions.

The trial court also made note of the fact that Mr. Katare has the "means and potential to relocate to India for employment." CP at 154. This finding, however, sheds no light on whether Mr. Katare will abduct his children. Unless there is evidence that Mr. Katare formed an intention to abduct his children and relocate to India, it makes no difference whether it would be financially possible for him to do so, i.e., his ability to do so is irrelevant to the determinative factor of whether he has such an intention in the first place.

The trial court also found, at the time of the original hearing, that because the Katare children were too young to seek help should abduction take place, the consequences of abduction to India are grave and irreversible. Whatever relevance that finding may have had in 2003, by the time of the third hearing in 2009 the Katare children were old enough that they had the ability to use a telephone or access the Internet to let authorities or their mother know if they have been abducted. The trial court's finding at the latter time that they were still too young is completely undercut by its additional finding that the court did not "place weight on the mother's attempts to paint her children, who are in gifted programs at school, as incapable of making phone calls or dealing with money." CP at 155. The court continued, "Her portrayal of the vulnerability of the children was unconvincing to the court." *Id*.

The next set of findings relating to likelihood of abduction are based on the court's receipt of additional evidence presented on the second remand (the third hearing). *Id*. at

154. They are as follows: a finding that "emails [sent] between the parties after the first trial" indicate that "the father . . . harbors resentment against the mother" and show "anger, abuse, unreasonableness, and poor judgment"; a finding that the facts demonstrate Mr. Katare's willingness to punish his children, with one e-mail given as an example; a finding that Mr. Katare expressed his contempt for the legal system in his correspondence; and a finding that Mr. Katare spent significant time in India since 2003. *Id*. at 154-55.

The trial court's finding that Mr. Katare harbors resentment toward Ms. Katare that could manifest itself in abduction is pure speculation. The trial court's findings establish no basis for concluding that because Mr. Katare resents Ms. Katare, he is likely to abduct the children. The court also found that Mr. Katare addressed Ms. Katare in a condescending and humiliating manner, and doing so while the court is involved shows heightened risk to the children. Again, missing from this finding is any relation to the likelihood of abduction. The e-mails Mr. Katare sent were sent to Ms. Katare, and not the children, and we are not concerned in this case with how Mr. Katare deals with his former wife except insofar as how it relates to whether the bests interests of the children are served or disserved by the travel restrictions. RCW 26.09.191(3)(g); *Marriage of Watson*, 132 Wn. App. at 233-34. The trial court may be right that Mr. Katare did not behave in a civil manner at all times, but there must be evidence and findings tying his behavior to a risk of abduction and this tie is absent.

The trial court's findings that Mr. Katare is willing to punish his children is

evidenced by one e-mail sent from Mr. Katare to Ms. Katare on November 1, 2005, which the trial court included to support its finding. The e-mail reads as follows:

> Convey my love and wishes to A and R as today is Diwali. Tell them I love them and they will have their diwali gifts whenever they visit their daddy's home. They are stored in their play room. Tell them that I will explain what diwali and its significance is [sic] when they grow up.

CP at 154-55. Mr. Katare's e-mail expresses a desire to be with his children and to teach them about their cultural heritage—something that is in the best interests of children raised in multicultural families. Evidently, however, the court interpreted this e-mail as a father's withholding of gifts that should have been made available to the children immediately, and delaying of an explanation out of spite or manipulative design. Apparently, Ms. Katare did not view it this way because her e-mail response was to say she would pass the message on to the children, to thank him for sharing, and to wish him "Happy Diwali." Ex. 37.

In general, it is not uncommon for a parent of a child to provide a room, furnishings, and toys or other possessions at the parent's home and not to send everything to other parent's residence. There is nothing improper about a parent who shares a cultural heritage with the child to want to teach the child about that heritage. More specifically, here Mr. Katare explains that Diwali is a five-day holiday celebrated in the home with traditional activities and special food and clothing, and a hotel room while exercising visitation rights is not the same. This e-mail may not exemplify what the trial court believes is the best way to share an important holiday with one's children, but it

does not exemplify an improper one and it most certainly does not support the weight given it by the trial court. And again, this finding is not tied to the question whether abduction is likely, as is necessary.

The trial court's finding that Mr. Katare harbors contempt for the legal system is based on an e-mail message in which Mr. Katare tells Ms. Katare that if she had not taken the children to Florida, "[I] mean," he says, "legally abducted" them, then they would not be going through what they were going through. Ex. 15. Mr. Katare obviously disagreed with the decision made by the court to allow Ms. Katare to travel with their children to live in Florida. However, as Mr. Katare has explained in a host of other e-mails, decisions of the court that he might disagree with have not shaken his faith in the system as a whole. Mr. Katare made this particularly clear in an e-mail to Ms. Katare explaining that although he disagreed with particular rulings, "I am sure [the] legal system [will] . . . realize . . . mistakes of reqwarding [sic] your bad behavior. It is only a matter of time." *Id*. Further, in a number of e-mails, Mr. Katare has defended the legal system, saying that it is not to be "ma[d]e a joke of" and pledging "[he] will not violate any court order ever." *Id*.

Much more importantly, Mr. Katare's actual conduct has reflected the commitment to the law that he has expressed in his correspondence with Ms. Katare. He has, as promised, never violated any order issued by the court during the course of his divorce proceedings. In the face of this contravening evidence, the trial court's finding concerning Mr. Katare's contempt for the law, which is premised upon an extrapolation

from a single, one-line e-mail, does not support the trial court's restrictions.

Finally, the trial court's finding that Mr. Katare "has spent significant time in India" since the 2003 proceedings, CP at 155, does not reasonably indicate that Mr. Katare presents any risk of abduction. As acknowledged by the trial court, even while in India Mr. Katare "kept to the visitation schedule with his children." *Id*. That Mr. Katare returned to the United States while in India in order to comply with a court-ordered visitation schedule not only weighs against the trial court's speculative fear that he will permanently abscond to India, but also shows the lengths to which Mr. Katare will go to see his children while respecting the rulings of the court. Once again, any nexus between Mr. Katare's conduct of spending significant time in India and any likelihood of abduction is utterly lacking.

As can be seen, the findings of fact that purportedly address the appropriate question of whether or not Mr. Katare is likely to abduct his children are not supported by substantial evidence and therefore do not justify the trial court's travel restrictions, or they address matters that are irrelevant or have no apparent nexus to the need for the travel restrictions as required under RCW 26.09.191(3). Accordingly, using these factual findings to support the restrictions constitutes an abuse of discretion. *See Wicklund*, 84 Wn. App. at 770 n.1; *Littlefield*, 139 Wn.2d at 47.

Not only do the specific findings in this case not support the determination that Mr. Katare is likely to abduct his children, the same is true when measured against factors that other courts have considered when assessing the likelihood of abduction. In general,

if the likelihood of abduction is high, courts generally impose restrictions to prevent abduction, but when abduction is unlikely, then courts decline to impose preventive measures. *Compare Soltanieh v. King*, 826 P.2d 1076 (Utah 1992) (where evidence showed that noncustodial parent had no respect for United States laws, did not want his daughter raised under United States standards of education, dress, social relations, political philosophy, and religion, and viewed his daughter and her mother as his property and believed himself justified in doing anything necessary to remove his daughter to Iran, made threats, and had had no contact with his daughter for many years, the chance of abduction was high and warranted restrictions), *with Abouzahr v. Matera-Abouzahr*, 361 N.J. Super. 135, 824 A.2d 268 (2003) (where noncustodial Muslim parent from Lebanon came to the United States for superior medical education and training, married an American Catholic, became a United States citizen, permitted his daughter to be raised in a secular household and to attend Catholic CCD (Cofraternity of Christian Doctrine) classes, lived in the United States for 16 years practicing a medical specialty and teaching at medical schools, brought his mother to live with his wife and child, and no evidence showed any disrespect of the United States or its culture, values, and laws, and nothing indicated he thought his daughter would have greater values, opportunities, or happiness in Lebanon and instead his words and deeds showed the opposite, and he made no effort after the divorce to sneak his daughter out of the country despite opportunities to do so, the record did not support restriction despite the fact that Lebanon was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction[1]).

The cases are extremely fact specific, of course, and therefore no case from any jurisdiction even hints at a rule for determining the likelihood that a parent will abduct a child. *Long*, 241 Wis. 2d at 526. However, other jurisdictions have suggested the following factors as relevant considerations when imposing travel restrictions: (1) whether a parent has expressed an intention to abduct his or her own children; (2) whether a parent has had the opportunity to abduct his or her children and whether they attempted to take advantage of that opportunity; (3) whether a parent expresses a disregard for the safety of his or her children; (4) whether a parent has cooperated with the trial court's prior orders; (5) and whether a parent shows marked disapproval of or hostility toward United States cultural, education, political system, values, and religions as they apply to the child. *Larisa F. v. Michael S.*, 120 Misc. 2d 907, 466 N.Y.S.2d 899 (N.Y. Fam. Ct. 1983); *Long*, 241 Wis. 2d 498; *Al-Silham v. Al-Silham*, No. 94-A-0048, 1995 Ohio App. LEXIS 5159, 1995 WL 803808 (Ohio Ct. App. Nov. 24, 1995 (unpublished)); *Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10 (Minn. App. 1992); *Abouzahr*, 361 N.J. Super. 135.

Each of these factors weigh against the trial court's determination following the third hearing that Mr. Katare is likely to abduct his children. As explained, any statements that could possibly be construed as threats of abduction occurred long ago and have not been made in any recent years. Mr. Katare has also had custody of the children on many occasions and has never, despite having the opportunity to do so, attempted to

[1] *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

abduct his children or relocate them to India. He has complied with every court order and has not shown any disregard for the safety of his children. He has exhibited no hostility toward the United States or to his children being raised in this country. To the contrary, he obtained his masters degree here, obtained United States citizenship, has lived and worked in the United States for many years, and continues to maintain residence in the United States while being successfully employed at a company where he has advanced his career over many years. His case is far more like *Abouzahr*, 361 N.J. Super. 135, than *Soltanieh*, 826 P.2d 1076.[2]

Because of the lack of factual support for the trial court's determination that Mr. Katare poses a serious risk of abduction of his children, this court should reverse the

[2] The majority believes that I mistakenly compare this case to *Abouzahr*. The majority says that the cases are factually different because unlike Mr. Katare, the father in *Abouzahr* made no specific threats to abduct his child. Majority at 13 n.6. I disagree.

The only reference to "threats" in the trial court's findings in this case is in the following finding of fact:

> - In the months leading up to the mother filing a petition for dissolution of their marriage, the father threatened to take the children to India without the mother. Third parties interviewed by the parenting evaluator stated that they heard the father make similar threats.

CP at 153. Thus, the findings say only that before the divorce proceedings began, the father "threatened" to "take the children" to India. Notably, at that time he and the mother disagreed about his taking a temporary job assignment in India. In addition, in the findings of fact in both the first and second proceedings, the trial court found that Mr. Katare was unlikely to abduct his children. The record does not support the trial court's alteration of its earlier findings that he was not likely to abduct his children.

There are no other findings about threats of abduction or that show that Mr. Katare intended to abduct the children. Thus, contrary to the majority, this case is factually similar to *Abouzahr*.

Moreover, and also contrary to the majority at 15 n.7, there are no findings of "repeated threats" to abduct and *none* of the court's findings support its conclusions. This is not a case where the evidence cumulatively supports the trial court's order although separately the findings do not. This is a case where *none* of the findings support the trial court's conclusions.

Court of Appeals and remand this case to the trial court for deletion of the travel restrictions from the parenting plan. This should end this case.

Available Remedies if Abduction Occurs

In the interest of a full assessment, I turn now to the question whether there are adequate remedies if Mr. Katare should, in fact, abduct his children and take them to India to permanently relocate.

At the outset, I note the trial court's primary focus in these proceedings has been on the difficulty it believed exists in returning the children to the United States if they are abducted. Indeed, the trial court's focus on the consequences of abduction as opposed to the likelihood of abduction can be identified at every stage of the proceedings. The court's 2003 and 2005 assessments of likelihood of abduction highlight the inappropriate consideration given to the consequences of abduction instead of the determinative question of whether Mr. Katare is likely to abduct. In 2003, the trial court was

> not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of abducting the children. Nonetheless, if I'm wrong on this the consequences are incredibly serious . . . . I'm going to impose some restrictions . . . designed to address this issue . . . everything that has been brought to this Court . . . I think indicates that, there is not a serious risk of abduction.

Verbatim Report of Proceedings (VRP) (July 7, 2003) at 10; *see also* CP at 168 (findings & conclusions, paragraph 2.20.2, to the same effect).[3]

[3] The court inserted in the parenting plan the following:

> 2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children,

In 2005, following the second hearing (after the first remand), the court amended paragraph 2.2 of the parenting plan as follows:

> "OTHER FACTORS (RCW 26.09.191(3)). Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, and the fact that India is not a signator to the Hague Convention on International Child Abduction, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children. The risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g)."

In re Marriage of Katare, noted at 140 Wn. App. 1041, 2007 WL 2823311, at *2.

As with its earlier findings, the trial court's evidentiary hearing on the final remand from the Court of Appeals also exhibits the disproportionate consideration of the consequences of abduction. For example, upon Mr. Katare's motion to exclude the expert testimony of Michael Berry, the trial judge denied the motion specifically to "allow him to talk about the difficulty in retrieving abducted children [from India]." VRP (Jan. 14, 2009) at 5. Mr. Berry's testimony concerning the difficult of retrieving children from India constituted a substantial portion of the court's evidentiary hearing on remand as well as the court's findings of fact.

> the parties' backgrounds, ties to their families and communities, and history of parenting, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children, including: location of exercise of residential time, surrender of his passport, notification of any change of his citizenship status, and prohibition of his holding or obtaining certain documents (i.e. passports, birth certificates) for the children. The mother shall retain the children's passports.

CP at 168.

In its findings following the last of the hearings on the matter, the court entered numerous findings on the availability of adequate remedies, including (1) that "Exhibit 11, at 6.11(3) . . . show[s] the legal impediments to obtaining the return of [a] . . . child . . . in India"; (2) that "Exhibit 25 at p.113 show[s] the . . . impediments to . . . the return of an improperly retained child through the court in India"; (3) that "Exhibit 32, p.8, shows that child abduction is not a crime in India"; (4) that "India is not a signator to the Hague Convention"; (5) that "India has its own laws giving it broad authority to rewrite parenting orders"; (6) that "there is no guarantee of enforcing a U.S. parenting order in India"; (7) that "proceedings in India do not include summary proceedings"; (8) that "proceedings [in India] can take from six months to a year"; and (9) that "the custody order of a foreign state is only one of the factors which will be taken into consideration by a court . . . in India." CP at 155-56.

Questions regarding foreign law are issues of law that are reviewed de novo on appeal and any trial court finding concerning foreign law must be supported by substantial evidence. *State v. Rivera*, 95 Wn. App. 961, 966, 977 P.2d 1247 (1999); *Bryne v. Cooper*, 11 Wn. App. 549, 553, 523 P.2d 1216 (1974) (citing *State v. Jackovick*, 56 Wn.2d 915, 355 P.3d 976) (1960)).

The trial court's finding that "proceedings in India do not include summary proceedings" cites exhibit 25. CP at 156. Exhibit 25, however, explicitly states that Indian courts may "'exercise summary jurisdiction in the interests of the child.'" Ex. 25 (quoting *Dhanwanti Joshi v. Madhave Unde* (1997) 1 S.C.C. 112, at *11 (India),

available at http://judis.nic.in/supremecourt/helddis.aspx). It also explains alternative measures for timely return of children to their home country:

> [A] parent from whom a child has been abducted can petition one of the 'State' High Courts to issue a writ of habeas corpus against the abductor ordering the production of the minor in court. This instigates a legal mechanism, similar to the [Hague] Convention, for returning an abducted child to his[/her] country of residence . . . it . . . allows the petitioner to take advantage of the relative speed and superior authority of the High Court [and] . . . [o]nly circumstances, of which the court is satisfied beyond reasonable doubt, indicating that a return order would inflict serious harm on the child, would merit refusal of an order.

Ex. 25. Unfortunately, exhibit 25 also inaccurately states that summary proceedings are not available in India, citing the Supreme Court of India's decision in *Dhanwanti*. But *Dhanwanti* explains that Indian courts must initially determine whether to "conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody." *Dhanwanti*, 1 S.C.C. 112, at *9.

The trial court also found that "Exhibit 11, [section] 6.11(4) . . . shows that India has its own laws giving it broad authority to rewrite parenting orders of other states." CP at 156. However, section 6.11(4) of exhibit 11 does not include a single reference to the authority of Indian courts to "rewrite parenting orders" and instead outlines the ways in which Indian courts are actually obligated to follow the parenting orders of other states:

> Sections 13 and 14 of the Code of Civil Procedure obliges the courts to give conclusive weight to foreign judgments, . . . on the following conditions:
>
> - the originating court had jurisdiction;
> - the merits of the case were considered . . . ;
> - international law was correctly applied; and
> - the order was not contrary to Indian law.

> [T]he Supreme Court of India [has also] . . . elucidated in detail . . . the validity and enforcement of foreign court orders sought to be enforced in India.

Ex. 11.

The trial court found that abduction proceedings in India can take 6 to 12 months. For this finding, the trial court cites only section 6.11(3) of exhibit 11. CP at 156. Exhibit 11, section 6.11(3), however, only describes the experience of the authors of the text without citation to any authority. *Id*. This anecdotal and unsubstantiated finding is insufficient to justify the trial court's restrictions. An analysis of recent Indian case law shows that courts of India may return children abducted from the United States in a very short period of time. *See V. Ravi Chandron v. Union of India & Ors.*, Writ Pet. No. 112/2007 (Supreme Court of India Nov. 17, 2009).

In short, India's laws provide a summary procedure. Whether to utilize it may involve more discretion than we are accustomed to in Washington, but it was an error on the trial court's part to say that it does not exist. From this, the conclusion can only be drawn that the trial court's findings on the law of India are inaccurate.

Next, the trial court correctly found that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abductions. CP at 156. However, the mere fact that a county is not a signatory to this agreement is not in and of itself sufficient to justify travel restrictions absent a contemporaneous showing of a parent's intention to abduct the child and relocate to that country. "[T]he difficulty of obtaining the return of a child in the event of an abduction (because the other county is

not a signatory to the Hague Convention or for other reasons) is [only] one factor courts have considered in imposing restrictions . . . [but] in no case . . . is it the only factor." *Long*, 241 Wis. 2d at 527 (citation omitted). Other jurisdictions have specifically rejected such an argument. *See, e.g.*, *Al-Zouhayli*, 486 N.W.2d 10 (decision whether to order supervised visitation depends on the facts and circumstances in the case and the unwillingness of a noncustodial parent's country of national origin to enforce a trial court's order is not controlling).

Further, because India has established mechanisms outside the Hague Convention that allow for summary proceedings for return of abducted children to their home country, the importance of this finding is lessened. In any event, absent indication of a contemporaneous showing that a parent intends to abduct his children and relocate to another country, the fact that a country is not a signatory to the Hague Convention is simply irrelevant. Here, no such showing has ever been made.

Profiling Evidence

Lastly, I turn to the issue of whether the profile evidence should have been allowed in this case. The trial court entered a number of findings about "red flags" in relation to risk factors submitted as part of the profile evidence. The court found that Mr. Katare's behavior in 2002 and his e-mails, his bitterness toward Ms. Katare, and the lack of resolution of difficulties between the parties "show that he meets the criteria for

several Profiles and 'red flags' which indicate a risk of abduction by the father, which is against the best interests of the children." CP at 156.

The profile evidence was presented through the testimony of Mrs. Karate's expert, Mr. Berry, and several publications admitted into evidence during his testimony. Among other things, the various risk factors, or psychological profiles to which Berry testified, included such things as the existence of strong emotional or cultural ties to the country of origin, friends or family living in that country, a history of instability in marriage, and a lack of strong ties to the child's home state.

The Court of Appeals decided that the trial court abused its discretion by admitting this profile evidence because there was no foundation for the testimony and Ms. Katare did not establish that it met the Frye standard for admissibility for novel scientific evidence. *Katare v. Katare*, noted at 159 Wn. App. 1017, 2011 WL 61847, at *11 (Jan 10, 2011) (unpublished). The Court of Appeals said the evidence is analogous to profile evidence that is inadmissible in a criminal case because its probative value is outweighed by prejudicial effect. *Id.* Such evidence identifies a group of people as being more likely to commit a crime and is inadmissible when it is used to show that a person committed a crime because he shares characteristics with known offenders. *Id*. at *12.

The majority concludes, however, that such evidence is admissible, analogizing to the "risk assessments [used] to predict the future dangerousness of sexually violent predators." Majority at 18. The analogy is inapt, however.

Our precedent concerning the use of profile evidence limits its admissibility to

instances in which it is used to create an individualized assessment of risk. Here, the trial court's findings do not constitute an individualized assessment of risk. Rather, as explained, at the time the profile evidence was admitted in the third hearing, the trial court examined Mr. Katare's behavior in 2002, finding that Mr. Katare meets the profile of an abductor based upon "his behavior in 2002 as shown in Exhibits 39 and 40 and his emails in Exhibit 15, his bitterness . . . and the lack of resolution . . . between the parties." CP at 156. However, the trial court had already reviewed each of these pieces of evidence in the 2003 trial, and at that time concluded that they did not indicate that Mr. Katare posed any risk of abducting his children.[4]

Accordingly, the trial court's current finding from the 2009 findings and conclusions can be described only as her inappropriate recognition of Mr. Katare's similarity to "a group more likely to commit [a] . . . crime" and, therefore, is an impermissible use of profile evidence. *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992).

That the court relied on this evidence is apparent as well. First, contrary to the Court of Appeals' belief that the trial court appropriately based its decision on its finding that Mr. Katare's testimony and conduct alone justified the travel restrictions, as

[4] The majority believes that the trial court properly individualized the risk factor evidence to Mr. Katare and believes I must show what proper individualization would entail. Majority at 18 n.8. The majority misses my point. The trial court applied profile factors to specific evidence that it had already considered and from which it had already concluded that Mr. Katare did not pose a serious risk of abducting his children. Once the profile evidence was admitted (and it took up the vast part of the third hearing), the court reached the opposite conclusion. Under these circumstances, I do not see how the court could possibly have engaged in a proper individualization of the profile evidence to Mr. Katare.

explained above the trial court instead indicated it relied on all the findings, including the findings based on the profile evidence. Moreover, Mr. Katare's testimony and conduct do *not* support the travel restrictions, as also explained. Finally, since the trial court applied the profiles to evidence that had previously been considered and found to be insufficient to show that Mr. Katare presented a risk of abduction, the only conclusion that can be drawn is that the trial court in fact considered the profile evidence and this is what made it possible for the trial court to enter its contrary finding on this factual question in 2009.

Finally, much of the briefing from the parties and amici in this court concerns the propriety of racial profiling in child abduction cases. The claims of Mr. Katare and amici weighing in on his side are not without merit. Many of the risk factors identified in the profiling evidence that was admitted in this case will invariably exist with parents from specific racial or ethnic backgrounds. For example, in any culture where family ties are important, the risk factor based on strong emotional or cultural ties to family living in that the country of origin will exist. Rather than condemn parents for strong cultural ties and familial ties to their countries of origin, we should, and do, generally speaking, celebrate these qualities rather than use them to restrict a parent's interactions with his children. It is especially important to avoid basing decisions on such factors when the fact is that we are a nation of many racial and ethnic backgrounds, and we have the good fortune to have many children of mixed race and cultural heritage.

And finally on this subject, although I believe that the profile evidence was

improperly considered in this case for the reasons explained, I also believe that courts must absolutely refrain from engaging in any racial or ethnic profiling that involves conclusions based on race or ethnicity or country of origin. I have previously spoken strongly on this point, and I continue to believe there is no place in our judicial system for such discrimination. *See State v. Monday*, 171 Wn.2d 667, 682-85, 257 P.3d 551 (2011) (Madsen, C.J., concurring).

In summary, the profile evidence that was in fact relied on by the trial court should not have been admitted in this case because there was no individualization of the risk factors to Mr. Katare. Instead, the trial court superimposed the risk factors over the evidence previously considered and reached a different result based to a significant degree on the profile evidence. Although the Court of Appeals seems to have established a nearly *per se* rule of inadmissibility, I would leave the door open for risk factor-evidence that is individualized to a parent in proceedings involving conditions and restrictions in a parenting plan. In no event should profile evidence that is racial profiling be permitted.

Conclusion

The fact that the Court of Appeals did not simply reverse the trial court's imposition of travel restrictions is distressing in this case, when it was obvious after the second hearing on the matter that Mr. Katare did not pose a serious risk of abducting his children, as the evidence showed and as the trial court held. I am positive, however, that Mr. Katare finds it more distressing to be condemned as a potential abductor without

sufficient evidence and even more distressing that he cannot take his children to India, where, among other things, their paternal grandparents live. Mr. Katare has demonstrated that he will comply with all court orders and this is backed up by the record which shows that he has never failed to comply with any court imposed conditions in the years since this litigation began. He has been an attentive father who has fully and compliantly implemented his visitation rights, even traveling from India during a temporary assignment there to visit with his children. He is not an "occasional" parent, but a father with a rich Indian heritage and family in India that he seeks to share with his children.

I would reverse the Court of Appeals and remand this case to the trial court with directions that it remove the restriction in the parenting plan that presently prevents him from international travel with his children. I dissent.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice Charles K. Wiggins