

**FILED**

APR 08 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

GRANT COUNTY CAUSE NO. 01-~~3~~-00374-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

IN RE THE MARRIAGE OF	)	
	)	
LANCE A. LINDERMAN,	)	
	)	APPEAL NO. 283330-III
Respondent/Petitioner,	)	
	)	
and	)	
	)	
HEIDY (LINDERMAN) MCWAIN,	)	
	)	
Appellant/Respondent.	)	

---

REPLY BRIEF OF RESPONDENT ON  
CONSOLIDATED APPEALS

---

BARBARA J. BLACK  
ATTORNEY AT LAW  
WSBA #23686  
P.O. BOX 1118  
MOSES LAKE, WA 98837  
(509) 765-1688

**FILED**

APR 08 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

GRANT COUNTY CAUSE NO. 01-~~8~~-00374-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

IN RE THE MARRIAGE OF            )  
  )  
LANCE A. LINDERMAN,            )  
  )  
          Respondent/Petitioner,    )  
  )  
and                                    )  
  )  
HEIDY (LINDERMAN) MCWAIN,)    )  
  )  
          Appellant/Respondent.    )

APPEAL NO. 283330-III

---

REPLY BRIEF OF RESPONDENT ON  
CONSOLIDATED APPEALS

---

BARBARA J. BLACK  
ATTORNEY AT LAW  
WSBA #23686  
P.O. BOX 1118  
MOSES LAKE, WA 98837  
(509) 765-1688

**TABLE OF CONTENTS**

1.	<u>Assignments of Error</u> .....	2
2.	<u>Statement of the Case</u> .....	3
3.	<u>Standard of Review</u> .....	4
4.	<u>Argument</u> .....	4
5.	<u>Attorney's Fees</u> .....	8
6.	<u>Conclusion</u> .....	9

**TABLE OF AUTHORITIES**

Court of Appeals

*In Re Marriage of Pennamen*,  
135 Wn.App. 790, 146 P.3d 466 (2006) ..... 5-7

Statutes

RCW 26.09.191 ..... 6

RCW 26.09.260 ..... 5, 7

RCW 26.09.260(6) ..... 4, 7

RCW 26.09.405 -.550. .... 4

RCW 26.09.520 ..... 5, 6

RCW 26.09.550 ..... 8

RCW 4.84.185 ..... 8

Civil Rules

CR 11. .... 8

Other cases and statutory authorities cited in argument are contained in Respondent’s Motion for Hearing on the Merits filed on April 5, 2010 and in Respondent’s Supplemental Brief and Motion for Hearing on the Merits After Consolidation of Appeals filed on December 3, 2010 in this matter, and are incorporated by reference herein. In an effort to abridge this lengthy record, they will not be duplicated herein.

COMES NOW the Respondent/Petitioner, LANCE A. LINDERMAN (hereinafter "Linderman"), by and through his attorney of record, Barbara J. Black, and provides his summary in response to the two consolidated appeals of Appellant/Respondent HEIDY MCWAIN (hereinafter "McWain"). The background of the case has been previously set forth in the Respondent's two separate filings, Motions for Hearing on the Merits filed on April 5, 2010, and Supplemental Brief and Motion for Hearing on the Merits After Consolidation of Appeals on December 3, 2010, is incorporated by reference herein and shall not be repeated.

1. Assignments of Error

The trial court did not abuse its broad discretion in finding no adequate cause to proceed under McWain's Petition for Modification, filed separately from but on the same date as her Objection to Relocation/Petition for Modification of Parenting Plan, which required no finding of adequate cause, and properly denied the finding of adequate cause by properly weighing and considering the allegations and evidence before it as required in a threshold hearing, including whether there had been any change of circumstances of the nonmoving party (McWain), and finding none, dismissed the petition. The briefing and argument on this issue have been

previously set forth in Linderman's Motion on the Merits, filed on April 5, 2010, which shall not be repeated herein, is hereby incorporated by reference.

Upon consolidated appeal with the second matter on Relocation, the trial court did not err, interpret RCW 26.09.260(6) too narrowly, or abuse its discretion in denying McWain's Petition to Modify Parenting Plan/Objection to Relocation, and made specific findings under each and every factor of the Relocation Act statute, RCW 26.09.520 as required. The trial court did not abuse its discretion, nor base its decision on untenable grounds in further denying McWain's efforts at trial to insist on arguing factors involving "detriment" to the child under RCW 26.09.260, rather than the factors as set forth under the Relocation Act.

Linderman's briefing and argument on this issue has been set forth in Respondent's Supplemental Brief and Motion for Hearing on the Merits after Consolidation of Appeals filed on December 3, 2010, and shall not be repeated herein.

2. Statement of the Case

The statement of the relief sought, reference to relevant portions of the proceedings, and statement of the relief sought, with supporting argument, has been previously provided to this court under Linderman's Motion on the Merits filed April 5, 2010, and shall not be repeated herein. The response to

the additional argument provided in McWain's consolidated appeal is contained in Linderman's Supplemental Brief and Motion for Hearing on the Merits after Consolidation of Appeals filed on December 3, 2010. It may contain some cumulative argument from the first brief filed, but has been previously provided to this court and will not be repeated herein.

3. Standard of Review

The standard of review on a modification of a parenting plan is an abuse of discretion. However, McWain has also alleged that the trial court has made an error of law by applying the wrong statute, which is reviewed *de novo*, under an error of law standard.

4. Argument

The language in RCW 26.09.260(6) clearly references the court's ability to adjust portions of the residential aspects of a parenting plan **pursuant to a proceeding to permit or restrain relocation of a child**, and further, describes the procedure used in actions for relocation as contained under RCW 26.09.405 -.550. It does not address or allow a separate proceeding for a modification of a parenting plan when a relocation is **not** being pursued, but it does not "open up" that possibility to include a modification attempt simply because a relocation is being pursued, without

a separately-filed petition for modification, and a finding of adequate cause to proceed therewith.

In *In Re Marriage of Pennamen*, 135 Wn.App. 790, 146 P.3d 466 (2006), the court provided a discussion about conflicting proceedings when a party's petition to modify custody in a parenting plan under RCW 26.09.260 is filed separately but *in response to* a Notice of Relocation, and *in conjunction with* his Objection to Relocation under RCW 26.09.520. In *Pennemen*, the court denied both parties' motions, by making no finding of adequate cause to proceed in the father/objecting party's modification pleadings under RCW 26.09.260 and dismissing his petition, and also finding no basis to allow a temporary relocation prior to a trial on the mother/relocating party's pleadings under RCW 26.09.520. The trial proceeded on the relocation issue only, and after consideration of the 10 relocation factors, the mother's relocation bid was also denied at trial, essentially leaving the parties in the same status as before the filings, i.e., mother's relocation with the child was denied, with no change in custody.

On appeal, the mother alleged that collateral estoppel precluded the court from considering her past drug use, because the court had already ruled on this issue when it denied the father's RCW 26.09.260 petition to modify which had alleged these circumstances, and cited the court's ruling that there

was “no nexus between her drug use and statutory requirements for modifying the parenting plan.” On the contrary, however, the court found that under the Relocation statute, RCW 26.09.520 at factor (4), it is required to consider whether a parent is subject to the limitations of RCW 26.09.191, and if so, whether there is a nexus between mother’s drug use and her ability to parent the children in the context of whether to allow the relocation under RCW 26.09.520. In so ruling, that court stated:

“These are two different issues. RCW 26.09.260 limits the circumstances in which a court may modify a parenting plan. The key issue for the commissioner was whether the children’s present environment was so detrimental to their well-being that the benefit of a change in the parenting plan would outweigh the harm from moving the children out of the mother’s home. (RCW 26.09.260(2)(c).) This is different from a relocation proceeding, where the key issue is whether the future detrimental effects of allowing relocation outweigh the benefits of the move. (RCW 26.09.520.) In one case, the court is changing custody. In the other, custody remains the same. This is a significant difference.” (Citations added.)

*Pennamen* at 806.

Because the *Pennamen* court felt that the mother’s drug use fell under the limitations contained at RCW 26.09.191, it weighed in favor of denying relocation because it contributed to the uncertainty of a stable future environment for the children. The court stated that this is a different inquiry from the one the court must make when it takes the significant step of moving

the children out of the home to which they are accustomed, and found that the court properly considered these facts to restrain the relocation *even though it determined a major modification of the parenting plan was unnecessary*. Id.

It is notable that McWain filed her first (separate) Petition to Modify Parenting Plan by alleging that essentially all the RCW 26.09.260 factors applied, by checking most of the boxes in the standard form, and then later arguing that it was a petition for both a major and a minor modification, and then arguing that, absent the requisite finding of adequate cause for a major modification, they could utilize their “fall back” position for a minor modification, which should then otherwise be considered by the court under RCW 26.09.260(6). This was argued at trial again, even after her petition was dismissed by the court when no adequate cause was found to support it or allow it to proceed, and is also raised on appeal. There were no RCW 26.09.191 limitations for the Linderman court to consider, and the other relocation factors clearly weighed in favor of allowing the relocation of Linderman and the child. The trial transcript confirms that there was no error or abuse of discretion by the court in making this decision.

The balance of the argument on the consolidated appeals in this matter is contained in Linderman’s Motion on the Merits filed on April 5, 2010, and in Respondent’s Supplemental Brief and Motion for Hearing on the

Merits after Consolidation of Appeals filed on December 3, 2010, incorporated by reference herein. In an effort to attempt to streamline the record, it will not be repeated herein.

5. Attorney's Fees

As contained in his two previously-filed briefs, Linderman seeks an award of costs and attorney's fees on appeal of these matters, including bringing a frivolous appeal pursuant to RCW 4.84.185 (citations contained therein), and Sanctions under RCW 26.09.550 for abuse of the process in the Relocation Act, and also under CR 11. That rule provides:

. . .that every pleading filed by counsel constitutes that to the best of that attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that it is (1) well grounded in fact; (2) warranted by existing law or a good faith argument for extension, modification or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. . . . If a pleading, motion or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or legal memorandum, including a reasonable attorney fee.

CR 11.

Linderman also seeks fees and costs under the theory of intransigence, as briefed and cited extensively in his two previous filings and incorporated by reference herein, which includes the filing of repeated and unnecessary motions, and making the trial unduly difficult and costly, making unsubstantiated and exaggerated allegations against Linderman, causing him to incur significant attorney's fees, and pursuing meritless appeals for the purpose of delay and expense. As cited in his brief filed April 5, 2010, an award of fees and costs is justified to address the huge unnecessary financial expense to Linderman, after a 3-day trial on these issues. The trial court concurred that there were meritless arguments at trial and duplicated filings of pleadings which unnecessarily complicated this matter and resulted in huge and unjustified litigation costs.

6. Conclusion

Linderman seeks to have the court review his previously-filed briefs from April 5, 2010 and December 3, 2010, and hereby incorporates them by reference into his argument and his position herein. The two separate petitions filed by McWain were filed for the same reason; to wit: in an effort to make modifications to the existing parenting plan - including a change of primary custody - without any findings of adequate cause to proceed on the first petition, and without any substantial changes in circumstances, and on

the second cause, without any changes being necessary in relation to the consideration of a geographical relocation of the custodial parent pursuant to the hearing and trial on Relocation by Linderman.

Denial of a finding of adequate cause on the first petition was not abuse of discretion by the court. Refusal to make a major or minor modification to the parenting plan under the Relocation Act statutory factors on the second petition because the evidence did not support any need for changes was not an abuse of discretion. Finally, the court applied the proper statutory analysis under the Relocation Act, RCW 26.09.520 and by considering RCW 26.09.260(6), and in denying McWain's requested changes, did not commit any error of law.

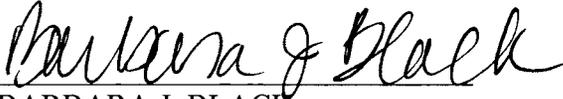
The multiple and repeated filings of modification petitions by McWain, the confusion of the arguments and use of inapplicable theory, statutory citation and authority by counsel for McWain has ballooned this matter into a very difficult to manage mess at every level, and supports Linderman's requests for an award of his costs and fees.

On the consolidated appeal, Respondent Linderman requests the court to affirm the trial court's decisions (1) finding no adequate cause to proceed on the major and minor modification petition(s) of McWain, and (2) the decision to allow Linderman's relocation, from the three (3) day trial heard

March 29-31, 2010, finding no error or abuse of discretion, and finding that Appellant McWain's consolidated appeals issues lack merit and are denied.

Respectfully submitted this 6<sup>th</sup> day of April, 2011.

Attorney for Respondent/Petitioner  
Lance A. Linderman

  
BARBARA J. BLACK  
WSBA #23686