

**FILED**  
**DEC 03 2010**  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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.	)	

---

SUPPLEMENTAL BRIEF AND MOTION  
FOR HEARING ON THE MERITS  
AFTER CONSOLIDATION OF APPEALS

---

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

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.	)	

---

SUPPLEMENTAL BRIEF AND MOTION  
FOR HEARING ON THE MERITS  
AFTER CONSOLIDATION OF APPEALS

---

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

**TABLE OF CONTENTS**

1. Statement of The Relief Sought ..... 1

2. Reference to Relevant Portions of Proceedings ..... 2

3. Statement of The Grounds For Relief Sought, With Supporting  
Argument ..... 7

I. LEGAL ARGUMENT ..... 9

    1. To effectively challenge the trial court on appeal, the  
    trial court’s decision must have been a manifest abuse  
    of its discretion. .... 9

    2. The trial court’s decision will not be disturbed on  
    appeal unless this court finds a manifest abuse of  
    discretion present, which is found only if the  
    discretion is exercised on untenable grounds ..... 11

II. ATTORNEY’S FEES ..... 12

III. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

**SUPREME COURT**

Chapman v. Perera,  
41 Wn.App. 444, 704 P.2d 1224,  
rev. den., 104 Wn.2d 1020 (1985) ..... 12

Clarke v. Equinox Holdings, Ltd.,  
56 Wn.App. 125, 783 P.2d 82, rev. den.,  
113 Wn.2d 1001, 777 P.2d 1050 (1989) ..... 12

In re Marriage of Burrill,  
113 Wn. App. 863, 56 P.3d 993 (2002),  
rev. den., 149 Wn.2d 1007 (2003) ..... 12

Weiss v. Glemp,  
127 Wn.2d 726, 903 P.2d 455 (1995) ..... 9

**COURT OF APPEALS**

In re Marriage of Stachofsky,  
90 Wn.App. 135, 951 P.2d 346 (1998) ..... 9

**STATUTES**

RCW 26.09.187 ..... 10

RCW 26.09.260 ..... 10

RCW 26.09.520 ..... 10

RCW 26.09.550 ..... 8, 12

COMES NOW the Respondent/Petitioner, LANCE A. LINDERMAN (hereinafter "Linderman"), by and through his attorney of record, Barbara J. Black, and pursuant to RAP 18.4 moves this court for a hearing on the merits of the two consolidated appeals of Appellant/Respondent HEIDY MCWAIN (hereinafter "McWain").

1. Statement of The Relief Sought

On April 5, 2010, Linderman previously filed a Motion on the Merits of the first matter appealed in this case, denial of adequate cause on her Petition to Modify the parenting plan. In an effort to avoid duplication of argument as much as possible, Linderman requests the court to review that brief in support of this consolidated appeal. After consolidation of the second appeal, pertaining to the trial on relocation after her Objection to Relocation/Petitioner for Modification was filed, he supplements his Motion on the Merits to include the additional matter. Linderman seeks the court to affirm the trial court's discretionary decision allowing Linderman's relocation, from the trial heard on March 29-31, 2010, finding no error or abuse of discretion, and finding that both McWain's consolidated appeals issues lack merit and are denied.

2. Reference to Relevant Portions of Proceedings

At the time of trial on relocation, the parties were using the Final Parenting Plan dated 04/18/03, which was entered at the time of dissolution. CP 1-6. Linderman, the father, is named the primary custodian of the female child, who was 12 years old at the time of relocation. In November, 2008, Linderman timely and properly filed a Notice of Relocation, advising that he and the child would be moving from Othello, Washington to Cottonwood, Idaho, an approximate 3+ hour drive from Othello. CP 557-560. Linderman filed his supporting declaration regarding the necessary statutory factors for the court to consider. CP 561-602. Counsel for Linderman filed a Memorandum in Support of Relocation, CP 603-612, and Linderman filed a supplemental responsive declaration. CP 613-622. All indicated that due to the geographical distance between the parties, there was no necessity to change any residential provisions of the existing parenting plan due to Linderman's move.

An Objection to Relocation/Petition for Modification of Parenting Plan was filed by McWain on 12/11/08, which had only to do with the Relocation matter. CP 20-44. To complicate this matter, on that same date, McWain filed a separate Petition for Modification of Parenting Plan, for which the denial of adequate cause is the basis and subject of the first appeal.

CP 45-52. Further confusing the matter, that document contained an annotation added to the caption under the modification header which stated “Pursuant to Objection to Relocation.” CP 45. The court treated this Petition as a separate action, rather than one “pursuant to objection to relocation” as desired by McWain, and required it to have a separate hearing on adequate cause. Once that matter was finally noted for an adequate cause hearing, the court found no adequate cause to proceed. CP 118-119. The court also denied McWain’s Motion for Revision on the denial of adequate cause. CP 120-121.

There were other issues raised by McWain in an effort to persuade the court to find adequate cause to modify the parenting plan regarding the transportation provisions. However, Linderman had testified at trial that the parties did not abide that provision in the parenting plan requiring McWain to provide all the transportation, and that he had provided much of the cost and the actual transportation to encourage the child’s time with her mother. RP 387, lns 2-23.

At the hearing to restrain or allow the temporary relocation, based on Linderman’s Notice of Relocation (CP 557-560) and McWain’s initial Objection to Relocation/Petition to Modify (CP 20-44), after proper consideration of all the relevant factors pursuant to the Relocation Act under

RCW 26.09.520, the court made the finding that there was a likelihood that on final hearing the court would approve the intended relocation. CP 63-66. The court allowed the temporary relocation and made findings that, due to the geographical distance between the parties, there were no temporary changes needed to the existing final parenting plan dated 04/18/2003 based upon Linderman's relocation which would affect McWain's residential time in any way. CP 63-66. An Order Allowing Temporary Relocation was entered on 1/23/09. CP 67-69. An Order Denying Respondent's Motion for Revision of this decision was entered by the court on 04/10/09. CP 110-111.

Prior to trial, Linderman filed a pre-trial statement with the court, setting forth the lengthy, complicated and disorganized history of the matter to date, and requesting the court for some clarity in an effort to define exactly what issues it would hear at trial, based upon the multiple filings of McWain. CP 648-668.

The 3-day trial on relocation took place on March 29-31, 2010. The trial court allowed Linderman's relocation, CP 453-457, and made very specific findings on each of the relocation factors. CP 454-456. In particular, the court found that the mother's objection to the father's relocation was caused at least in part by her desire to modify the existing parenting plan. CP 455. The court also found that the mother's argument that the court

should analyze this case under RCW 26.09.187 was not valid, as that statute applies in a dissolution matter when a final parenting plan is initially established. CP 455. At trial, the court very clearly inquired of counsel whether it was the position of McWain that any time someone moves, she felt she could “start over” and believed it opened the door for a modification action without necessity of an adequate cause hearing, and looking at factors under RCW 26.09.187 as initially comparing the parents to each other and deciding where the child should live. RP 488, lns 16-24. The trial court indicated that counsel for McWain was “comparing apples and oranges” by trying to use final parenting plan factors from a dissolution in a relocation action. RP 489, lns 9-17, 24-25, RP 490, lns 1-8. The court gave a long opinion from the bench, addressing modification statutes that were cited to the court by counsel for McWain which did not apply, and explained why they did not apply. RP 527, lns 1-25, RP 531, lns 1-18.

During the pendency of the matter, it became clear that the GAL was inexperienced in Title 26 matters, and, in fact, had never previously been assigned nor written a GAL report under RCW 26.09. On that basis, and based upon her conduct during her appointment, Linderman moved to remove the GAL from her duties. CP 642-643. He gave very specific reasons and, as required, he cited his basis for doing so. CP 644-647.

The court also found that the GAL's report and recommendations had nothing to do with the relocation of Linderman, that the GAL was not operating within the statute, and that the court would not be following the law if he followed her recommendations in this matter. RP 533, ln 12-25, 534 ln 1-2. The court also questioned the GAL's belief that "parenting time should be fairly equal with both parents," acknowledging the great geographical distance between the parties and their lack of communication, and stated that the GAL's recommendations were not appropriate under our statutory structure. RP 535, lns 1-7, 13-16.

The court also found that he could simply order there would be no changes to the parenting plan, because none were necessary, but that he was impressed with Linderman's good faith in offering additional residential time in the parenting plan. RP 550, lns 17-22.

The court found that this was not a modification case, but rather a relocation case, and that the court must utilize the factors set forth under RCW 26.09.520 from the Relocation Act. CP 455. The court found that, based upon the father's move, the existing parenting plan did not require any changes to continue to foster the child's relationship with her mother. CP 456. Finally, two minor changes were made at trial to the residential provisions of the existing parenting plan (CP 446-452) which were sought by

McWain, based not upon necessity, but only upon the stipulation of Linderman at trial. CP 456. McWain's subsequent Motion for Reconsideration was denied. CP 520.

This appeal followed. CP 505-520.

3. Statement of The Grounds For Relief Sought, With Supporting Argument

The consolidated appeal of the trial court's discretionary decision denying McWain's change of custody upon Linderman's relocation is also without merit. The court has broad discretion, and has not erred or abused its discretion in its decisions to deny any finding of adequate cause to proceed on the first separately-filed Petition for Modification, or in its finding on allowing Linderman's relocation, which had no effect on McWain's residential time with the child in any way. It is imperative for the court to note that both McWain's first Petition for Modification and her second Petition for Modification/Objection to Relocation were filed the same day, and were supported by identical pleadings from McWain. The two matters were consistently linked in every motion and argument brought by McWain to the court.

Procedurally, the multiple noting and renoting of matters, including reconsideration and revision and filing of three separate Petitions to Modify

(only two of which are before this court on appeal), this matter became very complicated and totally intertwined by McWain with the other Petition for Modification filed at the same time. The case continues to require unjustified amounts of time and money, and Linderman seeks an award of his fees on the appeals based on intransigence, and RCW 26.09.550, as previously cited in his first brief.

McWain was residing in California at the time of Linderman's relocation, and she subsequently moved to western Washington state during the pendency of the matter without notifying the father. RP 390, Ins 19-25, RP 391 Ins 1-11. Her residential parenting time under the court-ordered parenting plan was not affected by Linderman's move from Washington to Idaho in any way. This was recognized by the court early on, and the Temporary Motion to Relocate was granted over McWain's Objection to Relocation/Petition for Modification. CP 67-69. Because Linderman, the custodial parent, was relocating, only the matter under the Relocation Statute, RCW 26.09.405-550, did not require a Hearing on Adequate Cause to be held. Statutorily, the matter has adequate cause to proceed, and the temporary relocation matter was held on affidavits and argument only. The other matter, however, was determined to be a separate Petition for Modification, and as such, it required a separate finding on Adequate Cause

to proceed. Quite simply, the court properly considered the matter separately, and denied the adequate cause to proceed. No error was committed.

During temporary hearings, after the court had already ruled on and allowed the child's relocation, McWain brought several motions to change the child's custody under several different theories, all without basis. When she finally noted a hearing on adequate cause under her Petition to Modify and was denied again, the first appeal resulted. When her bid for custody and/or changes to the parenting plan to make "major *or in the alternative* minor modifications" attempt failed at the trial on relocation, the second appeal resulted.

## **I. LEGAL ARGUMENT**

1. To effectively challenge the trial court on appeal, the trial court's decision must have been a manifest abuse of its discretion.

A manifest abuse of discretion is present if the court's discretion is exercised on untenable grounds or for untenable reasons. In re Marriage of Stachofsky, 90 Wn.App. 135, 951 P.2d 346 (1998). An appellate court can sustain a trial court judgment on any theory established by the pleadings and proof, even if the trial court did not consider it. Weiss v. Glemp, 127 Wn.2d 726, 730, 903 P.2d 455 (1995). The trial court record as reflected in the verbatim report of proceedings provides a basis replete with support for the

trial judge's decision, which was not error or abuse of discretion. As well, the court's lengthy findings, both orally at trial and contained in the written order on the required relocation factors, supports the fact that the judge fairly considered and weighed each factor as required. There is simply no basis to allege otherwise.

In her assignments of error, McWain again complains that the trial court would not hear her petition to modify "concurrently" with the relocation matter, although that petition had been dismissed, not having established any adequate cause to proceed. Although the court accurately stated the statute under which it was required to proceed in deciding a relocation matter, RCW 26.09.520, and made it very clear to counsel for McWain that it was proper and necessary to do so, McWain ignores this statute and complains that the court felt it was "restricted" to which statute it was required to use. She alleges error because it did not consider any or all of the parenting plan modification factors under RCW 26.09.260, which do not apply, nor did it consider the statute required to be used on an *initial determination to establish* a parenting plan, RCW 26.09.187, which also does not apply, but which was argued throughout by counsel for McWain. At no point did counsel for McWain ever consider the trial court judge may be correct in his explanation of which statute was required to be used in this matter.

McWain's allegations of error and abuse of discretion are not supported in the record of this matter. This consolidated appeal of both the first Petition for Modification without adequate cause and the second petition in her Objection to Relocation should be denied.

2. The trial court's decision will not be disturbed on appeal unless this court finds a manifest abuse of discretion present, which is found only if the discretion is exercised on untenable grounds.

The Court of Appeals must consider whether the decision by the trial court appears just and equitable, or whether it was based upon a manifest abuse of discretion. This is only found if the discretion is based upon untenable grounds, meaning that, after hearing all the evidence, a reasonable person would have found differently. In re Marriage of Stachofsky, 90 Wn.App. 135, 951 P.2d 346 (1998).

On the basis of the record provided, which now includes a verbatim report of proceedings after a three-day trial on Relocation, it is clear that the trial court judge properly considered the appropriate factors in this matter, and properly disallowed or refused to consider arguments on a separate petition to modify the parenting plan which had already been dismissed. There is no basis for McWain to demand the trial court hear argument on a petition which has been previously dismissed by the court, much less *appeal* that refusal, and assign "error" for having so refused in her second brief after

consolidation. It is these types of arguments that support Linderman's position that the court should apply RCW 26.09.550, Sanctions, which should be ordered by the court in this matter.

## **II. ATTORNEY'S FEES**

There has now been a consolidated appeal of the two separate matters brought by McWain to the Court of Appeals. In his first brief, Linderman requested his costs and attorney's fees on appeal for what he believes to have been a completely unnecessary and improper use of court time and resources, citing his legal basis and support for doing so, defining intransigence in his brief. His position in that regard is strengthened on this consolidated appeal, which we believe continues to be frivolous. Linderman incorporates by reference herein his request for additional fees, costs and sanctions in this appeal, in addition to that contained in his initial brief and Motion on the Merits filed 04/20/10, with supporting legal argument therein.

## **III. CONCLUSION**

Based upon the record in this case, it is clear that the trial court has made no error of fact or law, nor any abuse of discretion. Based upon a review of the record herein, no error or abuse can be found. For those reasons, McWain's appeal should be dismissed, the findings of the trial court

should be affirmed, and Linderman should be awarded his attorney's fees and costs on appeal.

Respectfully submitted this 2<sup>nd</sup> day of December, 2010.

Attorney for Respondent/Petitioner  
Lance A. Linderman

  
BARBARA J. BLACK  
W.S.B.A. # 23686