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COURT OF APPEALS
DIVISION III
SPokane, WA

No. 305571

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

SANDRA L. MAINE (f/k/a MCKERNAN)
Respondent

and

DANIEL D. MCKERNAN
Appellant

BRIEF OF APPELLANT

Appellant, *Pro Se*
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Appellant DANIEL D. McKERNAN, *Pro Se*, submits the following Brief of Appellant.

II. Assignments of Error

1. The Trial court erred by not giving full consideration to the wishes of the child expressed in Counselor's Report (CP 63-65 and EXH.# R101) which was admitted as "illustrative only".
2. The Trial Court erred by denying the father's motion to interview the child.
3. The Trial Court erred by not articulating its findings regarding the relocation factors of the Child Relocation Act (CRA) in its ruling.
4. The Trial Court's decision to approve the relocation after considering the relevant relocation factors was manifestly unreasonable and based on untenable grounds.
 - a. Regarding Factor 1, The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life:

The trial court gave too much weight to relationships with the mother's extended family and the extended family of her husband residing in the vicinity of Kennewick and discounted the relationships between the child and his siblings and other significant persons in his life living in Spokane.

- b. Regarding Factor 2, Prior agreements of the parties:

The trial court did not acknowledge prior agreements.

- c. Regarding Factor 3, Whether disrupting the contact between the child and the person with whom the child

resides the majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation:

The trial court in denying the motion to interview the child limited evidence required to determine this factor, thus ignoring this section of the CRA.

- d. Regarding Factor 5, The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation:

The trial court's findings regarding the reasons and good faith of the relocating party was manifestly unreasonable considering the testimony and evidence presented at trial.

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

The trial court failed to take judicial notice of the importance of stability of school and extracurricular activities in the life of a child in junior high school and also minimized the importance of the father's influence in a young man's life as he matures into manhood.

- f. Regarding Factor 8, The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent:

The trial court's finding of an alternative arrangement in the form of a modified parenting plan is outside the range of acceptable choices; the only acceptable choice would have been a

finding that there are no alternative arrangements available to foster and continue the child's relationship with and access to the other parent.

Issues Pertaining to Assignments of Error

1. When considering the relocation factors from the Child Relocation Act, shouldn't the court allow all testimony and all available information to determine the detrimental effect of the relocation? (assignment of error #1 & #2)
2. When the court is ruling on whether to permit the relocation of a child, should the relocation factors of the CRA, be addressed in its oral articulations? (assignment of error #3)
3. When considering the relocation factors from the CRA, shouldn't the court's written findings be in agreement with the testimony and be reflective of its oral articulations? (assignment of error #4)

III. STATEMENT OF THE CASE

This case is an appeal of the Superior Court's ruling which approved the relocation of a child with his mother from Spokane to Kennewick. The child is a boy in the 7th grade who will be 13 years old on May 5, 2012. The *Decree of Dissolution* (CP 23-29) and *Parenting Plan (Final Order)* (CP 1-8) were filed on 1/12/2011. A *Notice of Relocation* (CP 30-33) was filed by the mother on 9/30/2011 and an *Objection to Relocation* (CP 34-42) was filed by the father on 10/7/2011.

A hearing before the Superior Court Commissioner was held on 10/21/2011 (a transcription of the recorded hearing is attached in Appendix A). The Superior Court Commissioner issued a *Temporary Order Re: Relocation* (CP 61-62) which restrained the relocation of the child pending a final hearing. The child remained in Spokane with the father while the mother moved to Kennewick.

A bench trial on the *Objection to Relocation* was held on January 3-4, 2012. The trial court's rulings – *Order on Objection to Relocation* (CP 80-85) and *Parenting Plan (Final Order)* (CP 86-94) were filed on 1/10/2012. The trial court's ruling approved the relocation to Kennewick and the child at that time moved to Kennewick.

A Notice of Appeal to the Court of Appeals, Division III (CP 95-95) was timely filed by the father on 1/25/2012. At that time the father also filed an emergency motion with the COA to stay the trial court's decision pending appeal and the COA Commissioner granted this motion and the child was returned to Spokane on 2/3/2012. The mother filed a motion to reconsider the Commissioner's ruling and the COA granted this motion and the child was again permitted to be relocated to Kennewick on 2/22/2012 where he has resided since that date.

V. ARGUMENT

Issues Pertaining to Assignments of Error #1 & #2

When considering the relocation factors from the Child Relocation Act, shouldn't the court allow all testimony and all available information to determine the detrimental effect of the relocation? (assignment of error #1 & #2):

RCW 26.09.002 states in part "In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." The CRA is codified in RCW 26.09.405 through 26.09.560. The CRA shifts the analysis away from *only* the best interests of the child to an analysis that focuses

on both the child and the relocating person¹; however, the best interest of the child is still the standard. These sections of the RCW are referenced in RCW 26.09.260 which is the statute that addresses modifications of parenting plans. The plain language of 26.09.260(6) states that “In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan...”

RCW 26.09.520 states in part “There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating parent...” 26.09.520 goes on to list eleven factors upon which to base this decision.

In weighing factors 1, 3, & 6², the court in its determination

¹ IN RE MARRIAGE OF HORNER, 93 P. 3d 124 – WASH: Supreme Court 2004

² Factor 1: The relative strength, nature, quality, extent of involvement, and stability of the child's

failed to consider all relevant information available. The father moved to admit as evidence a counselor's report (VRP 10). After an exchange between counsel for the mother (Mr. Gainer), the trial court judge (Judge Price), and the father (Mr. McKernan) (VRP 10-12), Judge Price ruled that upon objection from Mr. Gainer, he would admit the counselor's report for illustrative purposes only (EXH.#R101 and CP 63-65) (VRP 13). Mr. McKernan suggested that the counselor's report was in compliance with Commissioner Ressa's order of October 21, 2011 (CP 61-62, *Temporary Order re: Relocation of Children*). The order in fact stated under the heading It is Further Ordered – "Counselor or GAL to meet with child and report child's wishes re relocation." Also this order stated under Findings "Oral Findings Incorporated." The transcript of the recorded hearing before Comm. Ressa on October 21, 2011 is included in Appendix 1. On page 12 of this transcript, Comm. Ressa stated "I think it is important and appropriate for Matthew to have some way to get his wishes to the Court...I'm going to order

relationship with each parent, siblings, and other significant persons in the child's life.

Factor 3: Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation.

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

that either a counselor or guardian *ad litem* (GAL) interview Matthew to inform the Court of what Matthew's wishes are in this case." On pages 14 and 15 of this transcript, further clarification was made concerning a counselor interviewing Matthew. Because there would not be time for the GAL selection, Comm. Ressa ruled that any counselor that insurance would cover would be good enough and that the interview should be done by "whoever can do it faster." Comm. Ressa said "that person could interview Matthew for purposes of this move; have input from the mother; have input from the father, and give a recommendation to the Court about either best interests or just generally tell the Court what Matthew wants and the Court will give what weight the Court thinks that it's due." Mr. McKernan arranged for a counselor to interview Matthew for the purpose to "generally tell the Court what Matthew wants" and filed this report with the court on November 2, 2011 (CP 63-65) and a copy was served on Mr. Gainer.

Judge Price ruled there was a procedural problem with the Counselor's Report (EXH.# R101 & CP 63-65); it is not a declaration or an affidavit; he said "frankly, it's just a piece of hearsay".

This report was obtained as ordered by Comm. Ressa and is

in complete compliance with her order. Concerning the procedural problem; the report identifies the counselor, including address and telephone number; has the date the interview took place and a paragraph describing the circumstances of the interview. The report is signed by the counselor. It is not titled as an affidavit or declaration but the elements are included except for the statement "I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." The counselor is a professional, licensed in the State of Washington, and as such, the signature on the document certifies the truthfulness of the report. There was no allegation that the report was not truthful. This report although not in the form of an affidavit or declaration is essentially an affidavit or declaration and should have been admitted and given more weight at trial.

The best interests of the child were not served in the trial court's decision to not consider the counselor's report. The child (Matthew) desired that his wishes be known and considered. The father contends that by complying with the order from Comm. Ressa that the trial court should have consider the report with more weight and attempted to persuade Judge Price (VRP 12).

Because Matthew was very adamant in wanting his wishes to

be known, Mr. McKernan moved at trial for the court to interview Matthew (VRP 14). Some instruction from Judge Price and arguing of the motion occurred through page 18 of the VRP. In the arguments, the counselor's report was discussed. Even Mr. Gainer was not totally opposed to the court interviewing Matthew. The points discussed from the counselor's report begged clarification which could very easily have occurred by interviewing Matthew. On page 18-20 of the VRP, Judge Price articulated his reasoning in deciding the motion to interview Matthew. Judge Price purported to know what Matthew would say and denied the motion. In his argument, Mr. McKernan cited RCW 26.09.210, which allows the court may interview the child in chambers to ascertain the child's wishes as to residential schedule. Also, RCW 26.09.187(3) states that the court *shall* consider the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his residential schedule. The court would not consider a declaration from Matthew, offered to demonstrate that he was sufficiently mature. Matthew's declaration is attached in Appendix 2 if this court would be interested in reading it.

Judge Price should have interviewed Matthew. The web site for the Spokane County Superior Court shows that Judge Price

was the Family Law Judge in 2006; he was the Chief Criminal Judge from 2007 through 2011; and his current assignment as Family Law Judge. This current assignment began on January 3, 2012 and this case was his first family law case in a long time. His claim to know what Matthew would say is unfounded because in the time since he has presided over the family court, there has been a cultural shift; with the rise of the internet and social media, young people are at a different maturity level than in the past and Judge Price may have been enlightened had he interviewed Matthew. By not interviewing Matthew, the trial court ignored RCW 26.09.187(3).

By not considering the counselor's report and not interviewing Matthew, the trial court did not address the best interest of the child in regards to factors 1, 3, and 6 of the CRA, referred to previously. These factors pertain directly to the child. How the child feels regarding these factors should be given great weight, especially when the child is sufficiently mature as Matthew is.

Issues Pertaining to Assignments of Error #3

When the court is ruling on whether to permit the relocation of a child, should the relocation factors of the CRA, be addressed in its oral articulations? (assignment of error #3)

On page 202 of the VRP, Judge Price, in his ruling stated he would not spend 45 minutes going through the relocation factors but that he had considered the relocation factors and granted the mothers request to relocate Matthew. In RE Marriage of Horner, 93 P. 3d 124 – Wash; Supreme Court 2004 ,in the court's ruling, they said:

When this court considers whether a trial court abused its discretion in failing to document its consideration of the child relocation factors, we will ask two questions. Did the trial court enter specific findings of fact on each factor? If not, was substantial evidence presented on each factor, and do the trial court's findings of fact and oral articulations reflect that it considered each factor? Only with such written documentation or oral articulations can we be certain that the trial court properly considered the interests of the child and the relocating person within the context of the competing interests and circumstances required by the CRA.

The findings contained in the "*Order on Objection to Relocation/Modification of Parenting Plan*" (CP 80-85) were not made by the trial court. On page 193 of the VRP, The trial court (Judge Price) asked the counsel for the mother (Mr. Gainer) if he would draft the final documents. In his oral articulations starting on VRP page 194 leading up to his decision on VRP page 202, it is obvious that Judge Price thought this was a close case. Comm. Ressa, in her ruling to temporarily restrain the relocation of Matthew (Appendix 1, page 12) stated "I find this case to be a very, very close case." Because Judge Price did not articulate findings

regarding the relocation factors, Mr. Gainer fabricated findings on his own to justify the ruling made by Judge Price. The evidence and testimony presented at trial could easily have justified a ruling to deny the relocation. If the counselor's interview would have been given the proper weight and if the trial court would have interviewed Matthew, because this case was so close, the final decision would very likely have come down in favor of denying the relocation. Also in her ruling (Appendix 1, pages 9-11), Comm. Ressa articulated findings on the relocation factors which is a sharp contrast with Judge Price's ruling (VRP 202) where he made a blanket statement that he considered the relocation factors.

Issues Pertaining to Assignments of Error #4

When considering the relocation factors from the CRA, shouldn't the court's written findings be in agreement with the testimony and be reflective of its oral articulations? (assignment of error #4)

Regarding Factor 1

The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life:

This factor addresses the child's relationships and by refusing to give the proper weight to the counselor's report (CP 63-65) and by refusing to interview the child, the trial court did not get to the

child's best interest regarding this factor. Also, the trial court gave too much weight to relationships with the mother's extended family and the extended family of her husband residing in the vicinity of Kennewick and discounted the relationships between the child and his siblings and other significant persons in his life living in Spokane. The clear language of this factor is in the present tense; it is speaking of the current (pre relocation) situation the child is in. The family was living in Spokane and testimony showed that In addition to his father, he has two siblings, an older brother and an older sister who all reside in the family home in Spokane which was retained by the father, although the older brother is attending college in Pullman but his permanent residence remains Spokane. There is testimony from both the mother and father regarding the mother's extended family in the Tri-Cities/Othello area and the extent of the families' involvement through the years. There were regular family gathering several times a year, notably for holidays and a couple of times during the summer. The nature of Matthew's relationships with the mother's extended family would continue in the same frequency as it always has if the relocation is denied. The extended family of the mother's husband are new relationships and should not be considered significant persons in Matthew's life

related to this factor; there was no relationship with them prior to relocation. On the other hand, the significant persons in Matthew's life are his brother and sister and the neighborhood and school friends with whom he has grown up with and has had near daily contact with his whole life. These are the significant relationships in Matthew's life and if he had been permitted to, he would have personally made this known.

Regarding Factor 2

Prior agreements of the parties:

The trial court did not acknowledge prior agreements. There were agreements between the mother and father concerning Matthew remaining in Spokane. First is the final *Parenting Plan* filed on January 12, 2011 (CP 1-8). Testimony by Mr. McKernan (VRP 42) was that agreement was reached to settle all the issues in the divorce. This would include the *Parenting Plan*. The record will show that the divorce case did not go to trial as the issues were agreed to by the parties. Judge Price in his ruling noted that the *Parenting Plan* provides for much in the way of agreement of the parties (VRP 195-196). After Judge Price granted the mother's request for relocation (VRP 202), starting at the bottom of VRP 202 he states that "with Matthew in Kennewick, the current *Parenting*

Plan is impractical to follow. In fact, it cannot be followed” and he continues, acknowledging that the current *Parenting Plan* has residential time for the father that is very uncommon. This residential time with the father was an agreement and since it is only possible if Matthew remains in Spokane, implicit in the agreement is that the mother would not move Matthew from Spokane. Also, Mr. McKernan testified that the mother promised she would not move from Spokane until Matthew graduated from high school (VRP 52). This testimony was not rebutted and the promise as well as the *Parenting Plan* should be construed as an agreement and considered as such with regard to relocation factor

2.

Regarding Factor 3

Whether disrupting the contact between the child and the person with whom the child resides the majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation:

By refusing to give the proper weight to the counselor’s report (CP 63-65) and by refusing to interview the child, the trial court did not get to the child’s best interest regarding this factor.

Regarding Factor 5

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

The reasons and good faith of the person seeking the relocation

(the mother) are questionable. The mother testified (VRP 98) that she started looking for a job in Spokane in January 2011. On VRP 99 she testified that she only looked for jobs in Spokane until September 2011, applying at approximately 75 locations in that period. Also acknowledged is the presence of her extended family (sister, brother, nieces, nephew, parents/step parents) all in the Tri-Cities/Othello area. The mother contends that her moving was predicated on finding a job in Tri-Cities as there were none to be had in Spokane. Mr. McKernan contends that the reason for her move is more because of the extended family in Tri-Cities/ Othello and also the extended family of her husband in the same area. Upon cross examination the mother clarified that her job search in Spokane consisted of submitting 1 or 2 job applications per week with some weeks possibly not applying anywhere (VRP 126-128). On VRP 125, in cross examination of the mother, Mr. McKernan had the mother refer to interrogatories she had answered. [REDACTED]

[REDACTED] In cross examination, referring to page 9 of the interrogatories, which was a request for production of documents, i.e. copies of job applications, the mother affirmed that she could not produce the documents but listed eleven places she applied for employment, saying that she really

applied at about 75 places but couldn't remember them all. She also admitted that she applied at the Othello School District, the town where she was born and raised and where her mother, step father and brother still live but she did not list this on the interrogatories and on VRP 128 she testified that when she completed the interrogatories she forgot she had applied there.

[REDACTED]

[REDACTED]

[REDACTED]

Mr. McKernan contends that the mother's job search in Spokane was cursory at best, even if the number of applications is the 75 that she claims. Her testimony that she did not remember applying at the Othello School District is questionable. The rate of pay she receives from her employment at the Kennewick School District [REDACTED] it is hard to believe that she could not find something comparable in Spokane, which is the second largest City in Washington. Also, as the mother testified the job is part time (6-hours per day) and she has all the school breaks off (VRP 121-122) which I assume includes summer. Claiming that this part time seasonal job [REDACTED] is the primary reason for her relocation does not ring true and with the

presence of extended family on both her and her husband's sides points to that as being the real reason which does not speak well to the mother's good faith.

Regarding Factor 6

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

In evaluating this factor, the trial court would have come to a different conclusion had the counselor's report (EXH.#R101) been given due consideration and if the trial court had interviewed Matthew. The record shows that Matthew is a 13 year old boy, in junior high school, seventh grade to be exact. It is a well known fact that this is a tough age for adolescent kids and peer acceptance is critical to their development. Even Comm Ressa in her ruling (Appendix 1, page 10) acknowledge "Junior high is a very difficult time for, I think anybody; certainly for young boys." This should have been an area where the trial court should have taken judicial notice of the importance of stability of school and extracurricular activities in the life of a child in junior high school. Matthew is also at a stage in his development where the father's presence is critical to his development into manhood. The trial

court failed to recognize this fact which will be to Matthew's great detriment if the relocation and separation from his father continues.

Testimony from the father on VRP 32 – 33 was that Matthew enjoys many activities with his father and brother. Admitted at trial as EXH.#R104 are pictures of Matthew enjoying some of these activities with his father and brother.

Regarding Factor 8

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

The trial court's finding of an alternative arrangement in the form of a modified parenting plan is outside the range of acceptable choices; the only acceptable choice would have been a finding that there are no alternative arrangements available to foster and continue the child's relationship with and access to the other parent.

VI. CONCLUSION

The father is pursuing this appeal of the trial court's decision with the best interest of Matthew in mind. He is not pursuing this out of selfish desires or vindictiveness toward the mother. He knows that Matthew's desire is to return to Spokane; to come back home. He misses his brother and sister and his friends and school. Being away from his father is hard on Matthew; typically when it is time to return to Kennewick after the weekend in Spokane, Matthew is

reluctant to go but he knows that he has no choice. Being apart from each other Matthew and his father communicate regularly through text messaging. Admitted into evidence at trial was a text message exchange (EXH.#112) between Matthew and his father (VRP 50) as evidence that we text message back and forth to say goodnight. This particular text message exchange was on the night that the mother filed her intention to relocate. Matthew cannot understand why the court did not let him tell what he wanted.

MOTION

The appellant moves that the Court of Appeals (COA) would interview Matthew to ascertain his wishes as to his residential schedule, as allowed in RCW 26.09.210. The trial court denied this motion and this denial is argued in this appeal as an assignment of error.

RELIEF SOUGHT

1. Overturn the trial court's decision granting the mother's request for relocation.
2. Order the return of Matthew to Spokane, to reside with the father immediately with re-enrollment in his former school as soon as possible.
3. Suspend current child support immediately and remand to the

Superior Court the *Parenting Plan* and *Child Support Order* with instructions that the father will be designated the parent with whom the child resides the majority of the time and that the revised *Child Support Order* shall incorporate the child support worksheet (CP 9-13) filed on January 12, 2011 by reference. The *Decree of Dissolution* filed on January 12, 2011 (CP 23-29) contains in section 3.7 the following statements:

The husband has provided a disproportionate split of assets in lieu of maintenance. However, for the purposes of calculating child support a portion of said split is characterized as maintenance.

The *Order of Child Support* filed on January 12, 2011 (CP 14-33) contains in section 3.3 A. the following statement:

The net income of the obligee is imputed at \$2,693.00 because:
Agreement by the parties.

And

Other: Mother is also imputed an amount of disproportionate split of assets in lieu of maintenance but is treated as maintenance for the purposes of the worksheet.

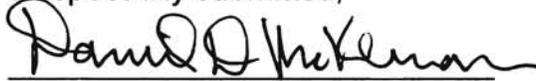
The final decree property settlement as stated included a disproportionate split of assets and a portion of said split was characterized as maintenance for the mother and also an agreed amount as imputed income. Because this was a property settlement, it should not be modifiable; based on the principal dissolution tenet that judgments must carry some degree of finality.

COSTS

Each party should pay their own costs.

April 27, 2012

Respectfully submitted,



Signature

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VII. APPENDICES

Transcription of Superior Court Commissioner Hearing . . . A-1

Declaration of Matthew McKernan A-2

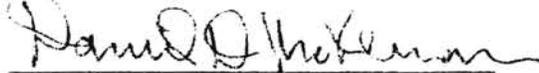
First Interrogatories Propounded to Mother A-3

COSTS

Each party should pay their own costs.

April 27, 2012

Respectfully submitted,



Signature

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VII. APPENDICES

Transcription of Superior Court Commissioner Hearing . . . A-1

Declaration of Matthew McKernan A-2



No. 305571

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

Appendix 1

Transcription of Superior Court Commissioner Hearing

**SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE**

In re the Marriage of:

SANDRA LEA MAINE (f/k/a McKernan),

Petitioner,

and

DANIEL DAVID McKERNAN,

Respondent.

NO. 10-3-01766-4

HEARING SM.
**TRANSCRIPT OF RULING OF
OCTOBER 21, 2011**

Date of Hearing: October 21, 2011

Honorable Commissioner Michelle Ressa

Appearing for petitioner

Gary J. Gainer
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Appearing for respondent

Daniel McKernan
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Prepared by: Gary A. Smith

Court: This is cause No. 10-3-01766-4. Sandra Maine, who's present today with Mr. Gainer, and Daniel McKernan is present today representing himself.

This is a case that starts a final *Parenting Plan* in January of this year. The mother filed a *Notice of Intent to Relocate* on September 30th. The father filed a timely objection and this is the hearing, to decide whether the relocation, on a temporary basis, will be restrained.

Mr. McKernan, you have the burden of proof today. You will start. You have 10 minutes to argue your side, or less. Mr. Gainer will then respond and you will have a chance, if you have any time left, to speak after him.

Mr. Gainer, you indicate on the status sheet there's a hearsay objection and that you've given me a redacted copy of the declaration. The Court can't consider, Mr. McKernan, statements from child-

TRANSCRIPT OF RULING - Page 1

HEARING SM

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ren. If it's child hearsay, it's an out-of-Court statement. You heard a little bit about that in the prior hearing. When someone provides an out-of-Court statement by someone who can't testify or doesn't testify –

McKernan: In the redacted statement, it wasn't an out-of-Court statement by the child. It was an overheard conversation I heard.

Court: You heard the child say, though.

McKernan: I heard the child say it.

Court: Unless it falls within one of the exceptions of the hearsay rule - I don't know if you know what those are or could argue those for me – then I couldn't consider it.

McKernan: In this case I can I, I guess, as I'm going through my argument, there will be instances where you will object to what I say and I guess I'll just have to –

Court: Okay. The rules are, un– well, I don't think it's unfortunate – but the rules are the same, because tomorrow you could have a lawyer sitting here and then you would have different rules for that person.

McKernan: I've done a little research and I know that according to RCW 26.09.210, the Court's allowed to hear the child's wishes.

Court: Right. Directly from the child.

McKernan: Correct. That wasn't possible at this hearing. I didn't know the procedure to bring that forward, but his wishes could be heard here.

Court: Well, let me ask you this, Mr. Gainer. Do you think there's a dispute about what the child wishes, even though everybody knows me well enough to know that I don't let 12 year olds decide where they're going to live?

Gainer: It's my understanding that the child is saying things to each of the parents that the parents want to hear.

Court: Okay. That's pretty common too, and that's why I don't let children write declarations for one of the parents, because then I would probably get two really different ones and a child that's put in the middle. So I think, Mr. McKernan, you've done a very decent job in that you're not a lawyer, going through the factors, because a lot of people even skip that step. So you've laid those out for me and I read them. This is the argument about why you think I should restrain the temporary relocation and Mr. Gainer will argue his position. Okay? Go ahead.

McKernan: Okay, your Honor.

Court: And I'm not somebody who cares. My preference is you are comfortable enough to say what you need to say, and if standing makes you uncomfortable then don't do it.

McKernan: Thank you, your Honor. I'll sit.

Court: I will take no disrespect from it.

McKernan: The case before the Court is about a 12 year old boy, Matthew, and what is in his best interest. I wrote this all down ahead of time.

Court: Go ahead.

JWM
TRANSCRIPT OF RULING - Page 2
Hearing

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McKernan: 10 minutes is a short time to address all the issues of this case and that the submitted motions, pleadings and declarations are adequate to determine what is in Matthew's best interest.

The divorce of his parents was finalized nine months ago on January 12th and it was a process that took about a year and a half and it wasn't always amicable. It caused much turmoil in Matthew's life. Some of the turmoil is discussed in the filed documents. After nine months things have normalized and Matthew has adjusted to his new life and things are stable.

Now his mother, the petitioner, has notified the Court and his father, the respondent, of her intent to relocate Matthew from Spokane to Kennewick. This relocation, if allowed, will devastate Matthew. He will be torn from his school and the neighborhood he had grown up in. It would also separate him from his brother, sister and father, who all live in the family home he has known since he was born and which his father retained in the divorce, and it will tear him from everything else he has known his entire life.

The respondent acknowledges the *Notice* was given within five days of when the petitioner accepted an offer of employment in Kennewick in accordance with RCW 26.09.440; however, the *Notice* only provided 20 days notice of the intended relocation. The short notice substantially prejudiced the respondent and has limited the time to prepare for this hearing. The respondent had no time to raise funds to retain counsel and he brings this objection and motion for temporary orders without benefit of counsel. The respondent asks the Court to look at the totality of the circumstances of this case and if there is some piece of paper that wasn't filed or it was filled out incorrectly, that in that event the Court will rule around the issues the subjects of the case.

I discovered two issues of paperwork while reviewing the filed papers and I've asked in my declaration for correction or revision to these documents. One is in the objection to relocation, the box on the first line was not checked and it should have been, and if that would have been checked, it would have included in the relief requested that to establish an order of child support. And then two, I could have included granting a modification of child support in the motion and declaration for temporary orders. As I said on page six of my declaration, I asked for those revisions to be filed back and I don't know if that's acceptable to the Court as a means of revising documents.

In objecting to the relocation the respondent articulately states reasons for objecting, which clearly address the criteria set forth in RCW 26.09.520. A ruling that restrains the relocation of Matthew, for which there's a really strong basis, will necessitate a revised *Parenting Plan*, which changes the residence in which Matthew resides the majority of the time, which is allowed under RCW 26.09.260(6). This subsection also requires no further adequate cause in the proposed relocation. Approval of the *Parenting Plan* that changes the residence in which Matthew resides the majority of the time is cause for modification of child support.

Respondent has prepared proposed temporary orders for restraining relocating of Matthew pending a final hearing and approval of the temporary *Parenting Plan*, and a temporary order of child support to supersede the *Order of Child Support* signed by the Court on January 12th of this year. In the proposed temporary order of child support, the respondent states the child support worksheet approved by the Court on the 12th of January and filed separately is incorporated by reference. In the proposed order of child support the respondent also suggests a transfer payment which deviates from the standard calculation. If relocation is restrained and the respondent's proposed *Parenting Plan* is approved, then the respondent will be the obligee regarding child support transfer payments and the deviation suggests it is a dramatic reduction from the standard calculation.

Also before the Court is the petitioner's motion for clarification regarding child exchange under the current *Parenting Plan*. Respondent has addressed this issue in his declaration. As declared, the issue was not about exchanging the child for residential time with his mother. It was the mother attempting to limit the time he would spend with his father.

Court: Just argue to me.

McKernan: Okay. It was about the mother attempting to limit the time Matthew would spend with his father. The respondent understands that the mother may not always be able to pick up Matthew at the specified time and that she can designate someone else to get him; however, if the mother is not even going to be home during the entire time period Matthew is scheduled to be with her, and he does not want to be with the person designated to take him from his father – in this instance it was the mother's husband – this is not just a matter of picking him up to bring him to his mother. The *Parenting Plan* says Matthew will reside with his mother other than the times designated, when he resides with the father. The *Parenting Plan* does not address residing with a third party, which the mother attempted to force against the wishes of Matthew. She was not going to be home and his father was available and wanting Matthew to remain with him. The petitioner appears to have had a change of heart on the issue, as evidenced by developments this week. The petitioner entered *Notice of Intended Relocation* indicates her intent to move on October 23rd. She, in fact, started her job in Kennewick on October 17th, which was this past Monday. On Sunday she contacted the respondent and asked if, to avoid conflict, could Matthew stay with the respondent through this week. The respondent quickly answered in the affirmative and Matthew has been with him all this week expressing his –

Court: Leave that part out.

McKernan: Okay. And he was with respondent all this week with the petitioner in his mother's absence. As she declared by the - as also declared by the respondent, petitioner would prefer that Matthew spend as little time with his father as possible.

Court: Wait. What did you say?

McKernan: that's as I declared in my declaration.

Court: As you declared. Okay. I didn't read the mother saying that. I did read you saying that. Yes.

McKernan: So one example to point out concerned is the two days a week when Matthew is scheduled to be with his father after school. The *Parenting Plan* says on these days Matthew is with the father at 3:00 p.m., which was agreed to because it coincides with the release time from his school. Matthew walks less than two blocks to his father's house after school. On days when school's released early, the mother is insistent that the father does not get Matthew until 3:00 p.m., even though the father is available and willing to have Matthew. This shows – to me this shows the petitioner's uncooperativeness as opposed to the respondent's cooperativeness, which is displayed in the agreement to a disproportionate split of marital assets in the divorce, which was very skewed in the petitioner's favor in order to avoid a contentious trial and finalize things for the family's sake.

Court: Right, and I'll tell you what I'm going to do with that. I'm not going to consider anybody's interpretation today of whether the *Decree* was fair, because both of you signed it saying it was. And so I think that's why Mr. Gainer redacted Mr. Harkins' letter, was for one it puts you at jeopardy of having to disclose everything that you and Mr. Harkins discussed, because you've opened up your

attorney-client privilege with him. I don't want you to argue to me that the *Decree* wasn't fair. I understand that you have a position that you were being generous, but the *Decree* is signed by you saying it is fair.

McKernan: It's also signed stating that it's a disproportionate split of assets, whether that's fair or not fair, but it is a disproportionate split of assets.

Court: I got it. It doesn't really connect for me for the relocation, so I think what you're saying is that it shows your willingness to work with the mother and you're saying that she doesn't work with you, is what your position is.

McKernan: Okay. Yes.

The petitioner says her reason for moving is that she couldn't find a suitable job in Spokane, which is the second largest city in Washington, and after about a month of looking in Kennewick, the city where her family lives and she visits often, she finds a job there. The respondent asserts that the real motive in her moving is that she just wants to move to Kennewick because her family is close, and possibly to reduce the time Matthew is with his father. She's only thinking of what she wants and is not considering what is in Matthew's best interest.

Matthew's in junior high attending the neighborhood school with kids he has known since kindergarten. At this time in a young man's life peer acceptance is critical in his emotional and social development. Relocating him from his established and stable environment where he is popular and involved in sports, especially during the middle of the school year, and placing him in a new school have long-term negative consequences to his development and character. If this relocation is allowed, - well, I won't say that part, but I'm -

Petitioner also states in her response to the objection to relocate Matthew that if the relocation is allowed, it will not unduly affect the respondent's contact and relationship with the child. This is such an unbelievable statement. Currently Matthew is with the respondent on four days each week. Matthew enjoys every moment he is with his father. His father is devoted, dedicated and attentive to Matthew when they are together. Reducing his time to only every other weekend, five hours which will be driving, will drastically affect the respondent's contact and relationship with Matthew, this at a time in Matthew's development when a father's influence is critical as a boy develops into manhood.

Relocation of Matthew would also remove him from his older brother and sister, who reside in the family home with their father.

Your Honor, I'm pleading for Matthew's sake for this relocation to be restrained pending final hearing and hopefully, if you can't find that course that the likelihood that on the final hearing that the Court would not approve the intended relocation and that there's no circumstances sufficient to warrant relocation prior to final determination of - let's see, as pointed out in the respondent's declaration - okay, I guess I can't say the stuff about the text message that was supposedly -

Court: No.

McKernan: Okay. As this case moves forward during the final hearing on this matter, the Court should hear Matthew's wishes as allowed under RCW 26.09.210. He did ask me if he could write a letter and I said I don't think it would be a good idea at this time, but he was pretty insistent and I know you don't want to see it, but he did do a declaration which I never filed, but I -

Court: Thank you for not filing it.

McKernan: Okay. And if I have time left on, I'll reserve it.

Court: You do have about 30 seconds, so –

McKernan: I want to reserve it.

Court: Okay. Go ahead, Mr. Gainer.

Gainer: Thank you, your Honor. I'll remain seated too.

Court: I don't mind at all.

Gainer: Thank you very much. No disrespect.

I think we have, obviously, a very articulate father. He and I have been able to have conversations and he's, I think, done an outstanding job, really following the - as good a job as lawyers that are in the same situation.

What we have is a *Decree* that includes a *Parenting Plan* that provides for every other weekend and some midweek visitation after school. As you know. You looked at that.

Court: Yes.

Gainer: that's not four days a week. That's every other weekend and then midweek visitations.

We're moving to Kennewick, not to New York, and so there is at least a reasonable opportunity to maintain a fairly decent *Parenting Plan* between here and there. But the underlying issue that we're dealing with today is that it is presumed that the Court will permit the relocation of children. The Court may restrain relocation and modify the *Parenting Plan* if the objecting party rebuts the presumptions by demonstrating at a hearing that the detrimental effect of the relocation outweighs the benefit of the change to the children and the relocating person.

In just for whatever purpose it is that there was a notation in the petition that recited a variety of things that the parents had as their qualities, and I don't know if you would have made note of that, but it was rather, I think, remarkable and I would speak to the good faith of Mr. McKernan that he said a variety of nice things about his ex-wife: that she was a good mother; that she provided a secure, solid home for the child; that he was well-nurtured and it goes on with those kinds of, I think, very nice things, and to his credit.

The other thing to his credit and, I think, both of their credits, you saw the academic and now the recent employment history of Mrs. McKernan, and you and I, we all can struggle with getting the cart before the horse on relocation issues. Do you ask way ahead of time that I'd like to find a job and I'd like to get a house and I'd like to find a school and those kinds of things? Or do you line that all up and have it locked chock-a-block down in and then give notice that there's going to be a relocation?

I think the best approach is probably somewhere in the middle of that, that you can't go about all of those finalizing things and then ask for permission. You've got to have it pretty much lined up. This went further than that because of the recent history with Mrs. McKernan. She went to school for a while. She graduated from Eastern with some rather significant honors. She has a degree as of last January in communications disorders. Now that's a wonderful position, wonderful job, has great opportunities, but you have to find just the right spot. She looked in Spokane and environs for the past several months, eight months, or so, without any luck at all. There was just no sniffing. She then

made contact with the Kennewick School District and not only was a job available, but she applied to that. There were no – there had to be credentials checked out. They were checked out and the day after she got the word that the credentials were acceptable and that she would be offered the job, she gave notice. So she did it as quickly as she could and it was a job that was – it didn't just fall in her lap, but it was fortuitous in the sense that she had looked other places, but she did not want to be any further away than absolutely necessary. You couldn't really be much closer, I guess, unless it was Cheney or maybe Deer Park, but she did not want to find a job in Seattle, Yakima or wherever.

The other good news was that her husband Steve, who is here in the Courtroom, is a truck driver and he was able to find a job in the Tri-Cities with a transfer of credentials that, in fact, improved his position, which was pretty remarkable.

And then, I think, fortuitously she has a lot of relatives in the Tri-Cities. She insists that that was not her reason for looking. She wanted to find a job in Spokane. I believe that. She did all that she could to try to find one here, could not, found a job in the Tri-Cities – a good job, pays good money, has good benefits and fortunately she has family there, which is great. Extended family. Wonderful thing. And then her husband, fortuitously, was able to get a job down there.

So I guess the bottom line is that they went ahead. They went ahead and looked for a house. They found a place that they can live in. It's two blocks from the Horse Haven Middle School where Matthew would go to school. Two blocks, and the programs there are outstanding, and there's nothing to refute that. It's just a quality school.

Sure there's always going to be some disruption to a child's life by relocation. There's no denying that. The question is whether it's going to be of a degree that it's going to offset staying with the primary custodial parent. The primary custodial parent has found an opportunity and is exercising that and would like to have the Court's blessing in doing so.

The research that was done, as far as the sports activities and the extracurricular activities for the boy, indicate that it will be a fine fit and that it will be a very limited transition issue for him and he'll be just fine. He'll do very well.

And I think the other part about this past week, she found that she needed, in order to keep this job and not offend her new boss, she needed to go to work this Monday instead of next Monday, and so she calls father and says, "will you be able to take care of," and he says, "yes," and that's how it was, I think to both of their credit. That's a pretty positive thing. It's not all that common. And I think that sort of thing can be expected to continue in the future. Any time that he wants to drive down and spend time with the boy at school or after school or athletic events or anything else, he's more than welcome to do that. But I think that there's no – there certainly isn't any damage being done, other than the usual minor transitional kinds of things with a moving child. There's certainly no damage being done that would be outshadow the benefits of staying with the primary custodial parent.

There was one other thing. I agree that it was a side issue and I'm not sure how you want approach it, but Steve, the stepdad, is available to provide transportation. That unfortunately triggered an issue a couple of weeks ago, but because it was not specifically provided in the *Parenting Plan* that was entered last spring, her was refused the opportunity to provide transportation. So I think it was clearly noted that that was an acceptable appropriate thing as long as the child is not put in a precarious

situation. Nice guy. Drives trucks all the time. Knows how to take care of kids on the road. There's certainly not a jeopardy to that.

McKernan: I'm objecting to any kind of –

Court: I understood.

McKernan: It wasn't that situation.

Court: But there is no objection to transportation. What he was objecting to is when mom's not home why couldn't the child stay.

Gainer: She was at home. She just had to work longer than she thought.

Court: I know, and I know that it came in a reply and that she didn't get to tell me that's not true or I really wasn't there. So I'll address it in my ruling, though.

Gainer: Okay.

Court: Okay. Mr. McKernan.

McKernan: The statements that they alluded to about the parenting was in the declaration in support of the *Parenting Plan*, which listed the performance of parenting functions, and we both do perform parenting functions. And regarding the four days he's with me, he's with me each week. It's like I didn't say he's with me the whole day. I said he's with me on four days each week, and he is. The first week I have him on a Sunday and a Monday morning, and then a Tuesday afternoon/evening and a Thursday afternoon/evening. The next week, Thursday afternoon/evening, or Tuesday afternoon/evening, Thursday afternoon/evening, Friday all day and Saturday all day, so he is with me on four days every single week and by moving to the Tri-Cities, that will no longer be the case.

Monday mornings when I have him he wakes up. I wake him up and we interact before he goes to school and it's a wonderful time I have with him, which I would no longer have.

I don't know what else to say. I know I don't know how I'm going to tell Matthew if the relocation is allowed. I don't know how I'm going to tell Matthew.

Court: Okay. Thank you.

Well that kind of segues into how I usually start a case that has facts like this. Not all relocations are like this. There are some that it's obvious that one parent is trying to remove the other parent from the child's life. A lot of cases it's obvious that the one parent that's moving has no regard for what's in the best interest of their child, so it makes those cases a little bit easier. This situation, these facts are the absolute hardest hearings that this Court does, which is why I put you last today, so we could have some extra time if we needed it.

There is no answer here. There is no good answer, and it makes complete sense that the two of you can't agree, therefore needing a hearing. That goes to one of the factors. I think it's factor five about good faith of the person proposing to move and the good faith of the person objecting.

Ms. Maine, I don't find anything in your *Notice of Relocation* that makes me suspect that you're trying to take Matthew away from his dad. And there's nothing, Mr. McKernan, in your objection that makes me think that you're objecting just to get back at the mom. So that's a really good thing on both of your parts, but it makes, then, the decision that much harder, because I don't know Matthew. I don't know the two of you, and it would always be the Court's preference that the child's parents

decide what's best for him. But it makes complete and reasonable sense to me that the two of you believe differently in this scenario.

This is a natural and extremely unfortunate consequence of the break-up of a family, because once that occurs, the parents no longer have to consider the other person when they're making life decisions. If you were married, obviously either you'd both move to Kennewick together or you wouldn't go to Kennewick because of his job here. That's what you do when you're married, but when you're not married, you don't have to consider each other anymore, and yet you have this child that wants to be connected to both of you, so there's nowhere in the law, Mr. McKernan, that allows me to order her to stay.

McKernan: I am not asking ^{you to order} her to stay.

Court: I know, but I'm just saying there's nowhere in the law. And that's how I always start when I talk about the legal piece of relocation is kind of the end of the relocation statute, where it tells me that I cannot consider, under 26.09.530, the Court is not allowed to consider whether the other person will forgo their opportunity to relocate. In this case, that piece makes it really easy for the Court not to play fast and loose with that, because you've already done it. You started your job. You're going and you're hoping that your son goes with you. And why I say I can't play fast and loose with it is because a lot of times the person hasn't already left yet. So if I order that the child stay, maybe they'll stay and then I get what I really want, is for the child to be able to stay connected with both parents. But this case is exactly what the law was saying, that the parent, as an adult, as a person who has the right to travel in this country, gets to move and the Court has to assume that's going to occur. And so that's why these factors under .520 come into play, because Mr. McKernan has the burden of showing the intended relocation should not be permitted, even though there's a rebuttable presumption that it should. So he has the burden of telling me that the detrimental effect of the relocation is outweighed by the benefit of the change to the child – I'm saying it backwards. He has to prove the opposite of that. He has to prove that it's more detrimental for the child to move than the presumed benefit of the change to the mother and to Matthew. So that presumption is in the mother's favor, and I go through the 11 factors to determine whether under a temporary basis, the Court will grant an order permitting or restraining the relocation of the child. So I'm going to give you my thoughts on the 11 factors.

The first factor is the relative strength, nature and quality, extent of involvement and stability of the child's relationship with each parent, siblings and other significant persons in the child's life. I think you both acknowledge that Matthew has lived in Spokane his whole life, had until the dissolution, lived in the home that the father continues to live in, obviously has the two siblings, has his school, has his neighborhood, has his church, has his sports activities, has his friends and family that is here. I'm confident that he has a relationship with the relatives that are in the Tri-Cities area as well, but there isn't enough evidence for me to suggest that those are the significant persons in a child's life. Those people are here: the school, the neighborhood, the church, the siblings, the mother, the father, and from what both of the parents describe to me, there is a strong and stable relationship with each of the parents. The final *Parenting Plan* entered just in January of this year does have what Mr. McKernan describes as four time a week where he has residential time with Matthew. It's not overnights and nobody really gets all day with school-aged children, because they're in school from usually 9:00 to 3:00, but two times every week for five hours a night, two out of the five nights every week, sometimes three out of the five nights on the every-other week, Mr. McKernan and Matthew have residential time. And then it's the opposite for the mother. Sometimes she has three nights a

week; sometimes she only has two. And then they alternate the weekends. So as far as his awake-time, it's a fairly even split of time, but I still think the mother still has the rebuttable presumption according to the other things that are listed in the *Parenting Plan*.

But this factor, in this Court's opinion, falls in favor of the father in this way: siblings, the neighborhood, school, the other significant persons in the child's life, other than the mother, are all here in Spokane. So that factor, in this Court's opinion, weighs in favor of the father.

Factor two doesn't apply. There aren't any prior agreements of the parties about moving or not moving.

Factor three is whether disrupting the contact between the child and I'm just going to call it the mother in this case – would disrupting the contact between the child and the mother would be more detrimental to the child than disrupting the contact between the child and the father. What an awful thing to have to decide and talk about, because if you ask Matthew, he doesn't want his contact with either of you disrupted. He wants things to stay the same. He probably wants you to be together. And I now have to make the call, based solely on what you've told me about him, because this is the first time I'm reading about him, what's more detrimental to him? Not living in the same town as his mom or not living in the same town as his dad? What have read, for this element, we have a tie. Because the rebuttable presumption is in place, I think ties go to the mother, so that factor falls in her favor.

Number four doesn't apply, because neither of you are subject to any limitations.

Factor five I've already talked about. You both act in good faith. The mother is acting in good faith to seek the relocation. The father is acting in good faith to oppose the relocation.

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

You've both described to me this boy who is popular, who is intelligent, who does well in school, who does well in sports, who seems to have come out of this divorce with not too many noticeable scars at this point, as far as his social activities, his educational abilities, and his relationship with both of you. So I have to look at the likely impact of the relocation or its prevention will have on him, and it will disrupt his school, meaning that he'll start a new school next week. That will disrupt it. Whether it will have an impact that's so detrimental so that I should not deny the move, isn't necessarily able to be proven today. We don't know what will or will not happen in the new school. Junior high is a very difficult time for, I think, anybody; certainly for young boys. But both of you are telling me that this is a child who can and will likely adjust and has no special educational needs that have to be met here in Spokane.

On a final determination, though, as far as this factor goes, when I read the mother's declaration and I read the father's declaration, the mother says this move will not unduly affect the father's relationship, and I find that to be so completely false; the midweek time, the school and sports involvement, the special events and activities, the few hours here and there time will be impacted immensely and it sounds like that is the kind of relationship that the father and Matthew enjoy. So this Court finds that the impact that the relocation will have on the child's emotional development weighs in favor of the father.

Number seven is the quality of life, resources and opportunities available to the child and the relocating parent, and the current and proposed geographic locations. This is where I think the father's arguing that the mother should be able to find work in Spokane, and I don't think that's borne out by any evidence at all. She testifies in her declaration about her attempts to find work here, her emotional response today is also very convincing to me that this is not the ideal, that the preference would be to be working right alongside her husband here in Spokane, child doesn't change schools, things stay somewhat stable for him and I'm convinced that the quality of life, resources and opportunities for the child are the same whether he's in Spokane or Kennewick, but the opportunity available for the mother is there in Kennewick, not here in Spokane. So while I find that's a pretty equal element, if there's a tie, it goes to the mother, given the rebuttable presumption.

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Number eight is the availability of alternative arrangements to foster and continue the child's with and access to the other parent. This element doesn't play in too much in this kind of a case, where the move is just to Kennewick. But when I say that, I also repeat what I just said about that couple of hours in the morning on a Monday, the school, the sports involvement, the showing up for lunch, maybe the volunteering. I'm not saying that that's what Mr. McKernan does, but you aren't able to participate in any of that anymore when you're two or three hours away. So there aren't alternative arrangements that can continue to allow for the kind of time that the January 12th Parenting Plan authorized. So that element falls in favor of the father.

The alternative to relocation, whether it is feasible and desirable for the other party to relocate also, I don't think the mother suggests that it would be feasible, or she doesn't suggest that it would be desirable for the father to relocate. It says that it could be possible. Father indicates that it's neither of those things in his declaration, given his current employment and the fact that he lives in the family home that the two older children continue to, at times, reside there as well, and that the feasibility or the desirability of moving is not there.

Financial impact would be the same whether I permit the move or deny the move, because one parent will be in Kennewick and one parent will be in Spokane, and there will be the cost of transportation either way.

And then the final factor is for a temporary order, the time before a final decision can be made at trial. My understanding is that trials are happening now December, January, February. That's not the best time to be changing schools or changing back schools, whichever is the case whatever way this case turns out. But January is typically a semester break for most schools and could be a more natural break to change the child's school then versus now.

So then I go to 26.09.510 that I can grant a temporary order restraining the relocation of the child if I find a couple of things. One of them is the required notice piece, which Mr. McKernan has argued as well, that with such a short notice, he wasn't able to get an attorney and prepare as he would want to for this hearing. Like I said in the beginning, I think that he did a very adequate job of going through the factors. A lot of *pro se* people don't even use the right forms, let alone go through the factors. But because this is such a close case, the lack of counsel is likely to very much prejudice Mr. McKernan.

I don't think Ms. Maine could have given more notice. I think she did that reasonably and her lack of 60 day notice wasn't intentional, as far as trying to prevent Mr. McKernan from having the other requisite time to object or respond.

So with what I just said about the 11 factors, with what I find is substantial prejudice without having a full 60 days to respond, and that there is a likelihood that on final hearing, that the Court would not approve the relocation, that on a temporary basis I am restraining it.

That doesn't mean that this is the end of the discussion and, of course the trial Judge is going to hear the final hearing to determine whether the move will still be permitted, and the fact that I've denied it on a temporary basis only should suggest and should be suggested by this record that I find this case a very, very close case, but also find that Mr. McKernan has rebutted the presumption and shown that there is a likelihood that the Court will not approve the intended relocation based on the factors that I have discussed.

I think it is important and appropriate for Matthew to have some way to get his wishes to the Court, but not through one of the parents. I don't think that's appropriate, because I believe that if Ms. Maine sat down with him and asked him to write a declaration, I would probably get something a little different than if it was sitting down with the father. So I'm going to order that either a counselor or guardian *ad litem* interview Matthew to inform the Court of what Matthew's wishes are in this case. Both parents need to be speaking with him in this way, however; that he's not the decision-maker. I've heard from 12 to 13 to 14, and I've heard even very reputable police officers in this town tell children that they get to decide where they're going to live when they hit a certain age. That age is 18. So nobody should be suggesting to him that he's the decision-maker here. The law does allow for him to provide his opinion to the Court and it will be taken into consideration, but he's not the deciding factor and his opinion isn't given the weight of determining whether the relocation will occur or not.

So for a temporary order, Ms. Maine needs to obviously continue her residential time with her son on an every-other weekend basis while she is in Kennewick while we're pending trial. There shall be reasonable phone contact for reasonable durations and neither parent can interrupt that contact with the other parent.

Your holiday schedule should remain the same as it was under your prior *Parenting Plan* if you haven't had your trial by then. I'm going to ask Mr. Gainer to work with the Family Law Department to indicate that this is a trial that if at all possible, should be done by that Christmas break so if the school will change, it can be changed on a more natural break for Matthew.

One thing I wanted to say to you, Mr. McKernan, and I know that you have some emotion about the stepfather, maybe about how that relationship came about or the timing of it. Mr. Maine nor Ms. Maine can take away that you are Matthew's father. You're always his father, whether he lives here, whether he's in Kennewick, wherever he lives, and that's the same with Ms. Maine. Of course, what I'm hearing you both say is that you agree that transportation can be done by a spouse, and if we need to put that as part of this temporary order, that's appropriate, or by a designee from the other parent.

If there was a way to get out of this hearing, Ms. Maine, without one of you having this response, I would have done it. There isn't a way to do that.

So Mr. McKernan, do you have a proposed order?

McKernan: Temporary order for the relocation of a child?

Court: Yes.

McKernan: And also a temporary order of child support? Is that under consideration also?

Court: No. You and Mr. Gainer, I'm sure, will be able to work that piece out on a temporary basis.

McKernan: shall I submit it?

Court: You'll have to have Mr. Gainer look at it first and work on it with you.

Gainer: Your Honor, maybe there can be some consideration. I think we need to know what the work schedule presently is so we know that there's one-on-one care. I don't want to make a big deal out of that.

Court: No, that's an appropriate request from your client, to know when Mr. McKernan is working and who is watching Matthew if he were at work when he is home from school, because he's only 12, and I don't know your work schedule or hours of it. Nobody raised that today. So that could be a basis, I suppose, for Ms. Maine to come and ask me to rethink what I have just done. I don't know.

Gainer: I guess just a question to him would be fine with me, if you want to inquire it. The reason I raise it is because we did not realize what the schedule was until we found out last week, when the child was here, that dad worked nights. The child was left alone then.

Court: Well I don't know that. That was not part of the record today.

Gainer: But he could say so, one way or the other, if that's the case.

McKernan: I'm a manager for the Department of Transportation and my work schedule is fairly flexible, or I have people that work for me that I can not have to be at work all the time.

Court: All right. So you need to keep the mother completely informed of your schedule and if you are at work, letting her know who is watching the child.

McKernan: A 12 year old can be at home for the three hours after school till I get home.

Court: Well the law doesn't say what's appropriate. You guys know your son. You know what he's capable of, what he's not capable of. I'll tell you the statistics on juvenile crime and when all of that occurs.

Gainer: Your Honor, there's a place for a finding regarding the required notice. Was your finding that under the circumstances, that notice was provided in a timely manner?

Court: The notice was provided as soon as Ms. Maine could provide it, but the lack of the 60 days substantially prejudiced Mr. McKernan's ability to have counsel and respond.

Gainer: The form notice doesn't –

Court: Doesn't have that piece in it?

Gainer: The form document doesn't provide one of those for us, so we'll just have to longhand it in there.

Court: Okay. I'm happy to do that.

Gainer: Did you do a *Parenting Plan*?

McKernan: I did and it was filed with the objection.

Gainer: I think we can use the form to do that, Judge, if you'd like. You indicated, it sounded like, the mother would have alternating weekends and –

Court: And that based on that this order was just entered in January, I don't see any reason to change holidays or anything else. So did you change anything else?

McKernan: I changed who the child resides with the majority of the time. I changed the custodial designation.

Court: But did you leave the winter vacation, spring vacation, things like that?

McKernan: I left those. What I did is on the time with the residential schedule I just mirrored what she had put in her proposed *Parenting Plan*.

Court: I don't want there to be confusion, so Mr. Gainer, why don't we just use a two page blank order here and indicate the every-other weekend schedule, an exchange point or however the parties are going to do that, whether it's one person driving all the way.

McKernan: That's what I would suggest. That way it would just be one day a week, rather than Friday afternoon and Sunday evening, it could be just whoever is going to get the child should come and get him.

Court: You mean, so she would come all the way here on Friday and you would go all the way there on Sunday?

McKernan: Correct. That's what I am proposing.

Court: I don't know if that works on Friday, when you're working. So do you have a preference, Ms. Maine, about whether you would meet in Ritzville or whether you would come all the way here?

Maine: Your Honor, mine said half way, but we'll do whatever he wants, I guess.

Court: I'm genuinely interested in what you would want to do; drive once or drive twice?

Maine: I want to meet half way.

Court: On Friday and on Sunday.

Maine: Yes.

Gainer: Your Honor, is it appropriate to designate a primary custodial parent? We don't have –

Court: No. That's why I don't want to enter a new temporary *Parenting Plan*. I don't think that's necessary, given that this is a very temporary order restraining the relocation of this child pending a trial. So you have a final *Parenting Plan* from January that has certain things in it, like holidays and decision-making, that remain the same. The designation of custodian, because Matthew, at least on this temporary basis, will be residing primarily with Mr. McKernan, and there should be an adjustment in the child support provisions for now. I'm not doing that hearing today, because I didn't know if it was necessary. I'm assuming that Mr. McKernan will work out what language needs to be in there as far as stopping any collection of child support from him during this temporary phase.

Gainer: I think that's probably the right way to do it, is just stop everything until we can figure out what's going on. I', going to ask for a trial before Christmas, of course, and hopefully within the next 30, 40 days, and if we get a guardian *ad litem*, that's going to be the tricky part, is getting a guardian –

Court: Well, so then maybe the parents would want to agree to a counselor. If he has medical insurance –

McKernan: I do have insurance. Is there a list of counselor the Court approves, or just any family counselor?

Court: No. There isn't a counselor list the Court approves. Most people have to start with who their insurance approves.

McKernan: Okay.

Court: And that person could interview Matthew for purposes of this move; have input from the mother; have input from the father, and give a recommendation to the Court about either best interests or just generally tell the Court what Matthew wants and the Court will give what weight the Court thinks that it's due.

Gainer: With respect, I think we might be able to the guardian *ad litem* list; find somebody on there that could do a short meeting with the parents and with the child. I don't know if a counselor is any better qualified than any of our –

Court: No. I think it's whoever can do it faster.

McKernan: Is guardians *ad litem* able to bill insurance?

Court: No. The parents would have to pay.

McKernan: Is the counselor covered by insurance?

Gainer: I don't – do you know if there's a list available for counselors that are covered by your policy?

McKernan: I've got a very liberal policy that almost any provider –

Court: Are you a state employee?

McKernan: Yes. I'm a state employee.

Court: So you have what –

McKernan: A uniform plan.

Court: Most plans have their provider lists on-line, so you'll be able to find somebody.

Gainer: Okay. By the first part of the week we'll have resolved that issue and the designated counselor will spend time with the mom and the dad and then with the child, and then write a short report to you recommending what the child has to say.

Court: For the trial Court.

Spokane County # 10-3-01766-4
McKernan VS McKernan
Respondent's Exhibit # R-103
Disposition _____

No. 305571

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

Appendix 2

Declaration of Matthew McKernan

**Superior Court of Washington
County of Spokane**

In re Marriage of:

Sandra Lea Maine (f/k/a McKernan)
Petitioner(s),

and

Daniel David McKernan
Respondent(s).

No. 10-3-01766-4

**Declaration of
Matthew McKernan
[Name]
(Optional Use)
(DCLR)**

This declaration is made by:

Name: Matthew McKernan

Age: 12

Relationship to the parties in this action: Child

I Declare:

that I don't want to move from spokane. I
have lived here my entire life. I know every
kid in the 7th grade. I have gone to school
with most of them since kindergarten. I
love my neighborhood and I would be very
sad to move. I have been so stressed out
lately that it has been giving me many
stomach aches. I would miss my dad, brother,
and sister very much because I know I

wouldn't get to see them very much at all. I don't think it is fair that my mom wants to move and keep me away from my dad. I don't want to hurt my mom's feelings but I feel more comfortable with my dad than with my mom's husband. Me and my dad do a lot of things together when I am with him. My dad is always reminding me how awesome I am, and how much he loves me. I can tell he really enjoys spending time with me. I couldn't imagine living anywhere else.

(Attach Additional Pages if Necessary and Number Them.)

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Spokane Valley, [City] WA [State] on 10/13/11 [Date].

Matthew McKernan

Signature of Declarant

Matthew McKernan

Print or Type Name

Do not attach financial records, personal health care records or confidential reports to this declaration. Such records should be served on the other party and filed with the court using one of these cover sheets:

- 1) Sealed Financial Source Documents (WPF DRPSCU 09.0220) for financial records
- 2) Sealed Personal Health Care Records (WPF DRPSCU 09.0260) for health records
- 3) Sealed Confidential Report (WPF DRPSCU 09.270) for confidential reports

If filed separately using a cover sheet, the records will be sealed to protect your privacy (although they will be available to all parties in the case, their attorneys, court personnel and certain state agencies and boards.) See GR 22(C)(2).