

FILED

JUN 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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/Cross-Appellant

and

DANIEL D. MCKERNAN
Appellant/Cross-Respondent

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

Appellant/Cross-Respondent, *Pro Se*
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Appellant/Cross-Responent DANIEL D. McKERNAN, *Pro Se*, submits the following Reply Brief of Appellant/Cross-Respondent.

ARGUMENT

A. The Trial Court Abused its Discretion by Not Admitting a Counselor's Report and Refusing to Interview the Child in this Relocation Proceeding.

At trial, the father moved to admit as evidence a counselor's report to inform the court of the child's wishes about relocation (VRP 10, EXH #R101). This report was obtained in compliance with the Superior Court Commissioner's (Commissioner Ressa) Order of October 21, 2011 (Brief of Appellant, p. 7 & Appendix 1). This report was also filed with the Superior Court and served on the mother's attorney on November 2, 2011 (CP 63-65). The Trial Court Judge (Judge Price) ruled that he would admit the counselor's report for "illustrative" purposes only (VRP 13). The father argues on pages 7 through 9 of Brief of Appellant why this report should have been accorded more weight. His argument was that he was in compliance with a court order. The father appears *Pro Se* and as such he is admittedly unfamiliar with the court process and relied on the clear language of Commissioner Ressa's order and

complied with it. Rule ER 904(a)(6) would allow the admissibility of this document which relates to a material fact and has circumstantial guaranties of trustworthiness and the admission of which would serve the interests of justice. Although notice utilizing the exact wording prescribed in ER 904(b) was not given, as stated earlier, this report was filed with the court and served on the mother more than 30 days before trial. The obvious intention was that this report would be presented at trial, which was in compliance with Commissioner Ressa's order. The mother made no objection to this report prior to trial.

The father also moved that the child be interviewed by the court to ascertain his wishes as to his residential schedule (VRP 14) as allowed in RCW 26.09.210. The mother asserts this statute does not apply to relocation proceedings; that it only applies to parenting plans as indicated in the heading; however, as stated in the RCW, "Part headings not law." This case is a continuation of proceedings in the dissolution of marriage case and RCW 26.09.210 clearly applies here. Also, since RCW 26.09.187(3) states the court **shall** consider the wishes of a

child who is sufficiently mature to express reasoned and independent preferences as to his residential schedule it is incumbent on the court to ascertain the child's wishes and consider them. Since Judge Price's ruling on the counselor's report indicates that he did not give it much weight, if any, it is not clear he considered the child's wishes in his ruling. In his ruling to deny interviewing the child, Judge Price purported to know what the child would say (VRP 18-20). He also cited his opinion that interviewing the child would be a "hardship" for him and "incredibly intimidating and difficult" (VRP 20). Judge Price also would not consider a declaration from the child offered to demonstrate that he is sufficiently mature (VRP 16). The father contends that the child wanted to be heard and have his wishes known. The father knows his son very well and would not have brought this motion had he thought it would be too traumatic for the child. As the record indicates, the child is a boy who was 12 years old at the time and turned 13 only 4 months later. CJC Canon 2, Rule 2.2 requires judges to perform all duties of judicial office fairly and impartially. Comment [1] following this rule states "a judge

must be objective and open minded.” Because Judge Price denied the motion to interview the child based on his opinion that it would be a hardship and incredibly intimidating, and that he already knew what the child would say, indicates that he was not ruling objectively and with an open mind. He abused his discretion in declining to interview the child.

B. The Trial Court’s Written Findings Without a Detailed Oral ruling on Each Statutory Factor.

As to the written findings, Judge Price asked the counsel for the mother to draft the final documents on page 193 of the VRP. This was prior to his ruling and he indicated this has nothing to do with who the prevailing party may or may not be. This was a blow to the father, who appears *Pro Se*, as he believed it did indicate that Judge Price had already decided in favor of allowing the relocation – Spokane County Local Civil Rule 52 obligates the prevailing party to draft the final documents. On page 202 of the VRP, Judge Price said “I am not going to spend, Counsel and Mr. McKernan, 45 minutes here today going through all 10 factors on the record.” This was another blow to the father

as it indicated to him that he wasn't even worth 45 minutes of Judge Price's time. Just saying that he considered the relocation factors and leaving it to the parties to sort out after declaring the relocation will be allowed, especially in a case such as this one where everyone appears to agree that it is very close is an unacceptable choice given the facts of the case. As Judge Price was making his ruling, his demeanor and attitude toward the father changed and appeared to become prejudicial. The father was made to feel as if he were a defendant in a criminal proceeding who had just been found guilty. CJC Canon 2, Rule 2.3(A) requires judges to perform the duties of judicial office without prejudice. The father did provide input to counsel for the mother in the final papers; however, he did not agree with the findings or the ruling but did sign them because he understands that when the court makes a ruling, he is bound to compliance. Judge Price left no room for objection as he stated starting on the bottom of VRP page 211 when setting the presentment date that it was "not a date that I'm providing to either party to come in and reargue the case." This was clearly directed toward the father as the mother

was the prevailing party. The father was resigned to complying with the court's order and only filed this appeal after the child was back with him for the weekend almost three weeks after the trial and seeing the harm that was occurring to the child which the father contends is continuing. The issues are on the record in the notice of appeal and various motions filed with the COA in this case.

C. Findings, Order, and Evidence.

The father is challenging the trial courts ultimate conclusion. The father contends that a different conclusion would have been reached had the court properly considered the child's wishes by admitting the counselor's report as substantive evidence and or had they interviewed the child. The mother in the Brief of Respondent (starting on page 10) argues in support of the trial court's factual findings, rebutting the Issues Pertaining to Assignments of Error #4 starting on Brief of Appellant page 4. In reply to the rebuttals, the father will refer back to his positions stated in the Brief of Appellant and provide additional argument for Factor 8.

The father still contends there are no alternative arrangements available to foster and continue the child's relationship with and access to the non relocating father, ***short of denying the relocation***. The trial court adjusted the Parenting Plan to allow more time with the father during school breaks; nearly the entire summer break is with the father (VRP 207-208). This arrangement was the court's attempt to make up for the extended weekends and midweek residential time that the child enjoyed with the father (VRP 202-203) under the then existing Parenting Plan that are no longer possible given the relocation was allowed. This arrangement, given the testimony regarding each parents work schedule (VRP 122 mother testifies she has the same vacations as the child; VRP 94-96 indicates the father works extended hours during the summers) is unreasonable. Given the facts, the only acceptable choice regarding this factor (RCW 26.09.520(6)) which will foster and continue the child's relationship with and access to the non relocating father would have been to deny the relocation, giving the child time with the father during the school year and possibly giving the summers to mother; the

mother does not work during the summer and the father has historically worked extended hours during the summer. The Parenting Plan provisions here appear to be completely opposite of what would be reasonable.

D. Motion to Interview the Child.

Interviewing the child, which was a motion the trial court denied and is argued as an assignment of error, would be taking of additional evidence before the decision of a case on review which is allowed by RAP 9.11 on the following conditions:

1. *Additional proof of facts is needed to fairly resolve the issues on review* – The wishes of the child were not considered in this relocation case as required in RCW 26.09.187(3). It would not be fair to decide this case without considering the wishes of the child.
2. *The additional evidence would probably change the decision being reviewed* – The evidence obtained by granting this motion is pertinent to several of the relocation factors. It is likely that the findings on several of the factors would change, resulting in a changed outcome from the trial court's decision.
3. *It is equitable to excuse a party's failure to present the evidence to the trial court* – The evidence was excluded by the trial court and is argued as an assignment of error.
4. *The remedy available to a party through postjudgment motions in the trial court is inadequate or*

unnecessarily expensive – Postjudgment motions in the trial court would be inadequate; the appellant father believes the trial court is will only make findings which uphold its previous decisions.

5. *The appellate court remedy of granting a new trial is inadequate or unnecessarily expensive* – A new trial would be unnecessarily expensive.
6. *It would be inequitable to decide the case solely on the evidence already taken in the trial court* – The additional evidence proposed to be taken by granting the motion to interview the child is essential in getting to the merits of the case.

Under RAP 9.11, the appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence. The appellant father considered asking on appeal that this issue be remanded to the trial court, but believes the trial court would not be partial in findings of facts in this matter if directed by the COA to interview the child; he believes the trial court would make findings that support their previous decision regardless of evidence obtained in interviewing the child.

The mother argues that it would be traumatic for the child, a 13 year old boy to be interviewed by the appellate court panel. The father contends that it would not be traumatic and that the child wants to be heard and have his

wishes known. The child is very disappointed that the trial court would not let him tell them what he wanted. RCW 26.09.210 which allows the court to interview a child specifies that the interview takes place in chambers, so it would not be an intimidating courtroom experience before a panel of judges in the courtroom.

The motion to interview the child should be granted; however, if the COA can make a ruling that overturns the trial court's decision based on the arguments in the briefs and a review of the record, then interviewing the child may be unnecessary.

E. Cross Appeal.

It is unclear what the cross appeal is asking. The mother claims to have filed the cross appeal in part to seek modification of some of the changes to the Parenting Plan and to preserve her right to modify other portions should this court reverse the decision of the trial court. She is apparently satisfied now with the Parenting Plan and is not asking for any changes. She is simply asking that if the case is remanded, that the remand includes the Parenting

Plan. It appears that there may not even be a cross appeal as in the Brief of Appellant, under relief sought (pages 21 & 22), the father is already asking that the Parenting Plan be remanded to the superior court.

F. Costs.

Each party should pay their own costs. RAP 18.1 permits the appellate court to award fees if permitted by applicable law; in dissolution matters the applicable law is RCW 26.09.140. Under this statute, the court may award fees after considering the financial resources of both parties. Additionally when considering a fee request, the COA should consider the arguable merit of the issues on appeal (*In re Marriage of Griffin*, 114 Wn.2d 772,791 P.2d 519 (1990)). There is no justification for award of fees in this case.

The arguable issues presented by the father in this case are not frivolous. Had the trial court interviewed the child and then impartially considered his wishes the findings on the relocation factors would have been different and the final decision of the trial court would likely have been to deny

the relocation. A superior court commissioner heard this case at a hearing for a temporary order and restrained the relocation pending a final hearing (CP 61-62) finding there is a likelihood the relocation would be denied. The trial court ruled in favor of the relocation. Commissioner McCown, COA Div. III agreed that there were debatable issues presented on appeal and stayed the trial court's decision in rulings on 2/1/2012 and 2/3/2012. Commissioner McCown's ruling was reversed by the appellate court panel on 2/22/2012. I present this background here to emphasize that the issues of this case have been reviewed by different people and different decisions have been made which shows that this case is properly before this court.

Concerning the parties' needs and abilities to pay fees, the financial affidavits will show that the father has no ability to pay fees; he is living paycheck to paycheck, keeping up on household expenses, child support and helping his older child with college expenses and has no savings. He is acting *Pro Se*, not because he enjoys it, but because he has no money to pay an attorney. The mother contends that he has not incurred any fees because he is

acting *Pro Se*, but this is not true; the filing fee for the appeal was \$280, the court transcript cost \$1,070, the clerk's papers cost \$51.50, copies and postage cost about \$75 so far and there are other miscellaneous expenses. This adds up to more than \$1,500 which is a fairly substantial amount for the father. The mother also contends the financial impact of the relocation to the father is minimal (Brief of Respondent page 8). The financial impact may be minimal by some standards, but it is not minimal to the father. Because of the relocation, the father is required to make a 150 mile round trip to the halfway point between Spokane and Tri-Cities 4 times each month (VRP 204). Fuel costs alone come to about \$120 per month which is a significant amount for the father.

If anything, the mother's financial affidavit should reveal her ability to pay her fees and the father's; however the father is not asking for her to pay his fees. The record indicates that in the divorce decree (CP 23-29) the mother was awarded a disproportionate split of assets and this money is available to her.

G. Conclusion.

RCW 26.09.002 states that 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 father has only considered what is in the child's best interests in all his actions before the court. The wishes of a 13 year old boy should be accorded much weight in determining best interests. The mother, by her testimony (VRP 123) indicates her own happiness is her motivation for opposing this action and dragging the boy away from his father and siblings and everything he has known his entire life against his will.

This case is not about the father or about the mother but it is about a young man who cannot understand why he had no say in where he lives. I tell him I'm sorry, that I tried but that I had no money for a lawyer. His hope now lies with the appellate court.

During the trial, I felt that the trial court judge (Judge Price) resented that I was in his courtroom unrepresented by counsel and that my case was prejudiced because of this. CJC Canon 2, Rule 2.3(A) requires judges to perform the

duties of judicial office without bias or prejudice. To further illustrate the prejudice of Judge Price's court toward me, I call your attention to "*Appellant's Reply to Respondent's Reply to Motion for Accelerated Review*" filed with this court on April 2, 2012. On page 2 of this *Reply*, the father asks for additional assistant from the COA. Judge Price's court reporter did not file the VRP when due and did not inform the father who ordered the VRP according to the timeline prescribed in RAP 9.5(a)(2)(b). In the *Declaration* attached to this *Reply*, the father declares he left voice mail messages for the court reporter to call him concerning the VRP. The voicemails were ignored and the delay in obtaining the VRP cost valuable time in preparing briefs for this case. CJC Canon 2, Rule 2.12(A) says "A judge shall require court staff, court officials, and others subject to the judge's direction and control to act with fidelity and in a diligent manner consistent with the judge's obligations under this Code". This blatant disregard for the court rules by the court reporter, an officer of the court who should now these rules is unacceptable and is frustrating to me. I have been reminded many times that as a *Pro Se* party that I am held

to the same standards as an attorney, yet a court reporter under Judge Price appears to not care about timeframes or notification requirements prescribed by court rules and did not even afford me the common courtesy of returning my telephone calls. I have discovered the unique employment relationship between judges and court reporters and I feel that the court reporter's attitude toward me was a reflection of Judge Price; the court reporter treated me like someone who doesn't matter because she observed this attitude in Judge Price.

The trial court decision should be overturned. All the relief sought starting on page 21 of the Brief of Appellant should be granted and the parties should pay their own costs.

June 6, 2012

Respectfully submitted,



Signature

Appellant, *Pro Se*

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STATE OF WASHINGTON
By _____

Proof of Service

No. 305571

COURT OF APPEALS, DIVISION 3 OF THE STATE OF WASHINGTON

IN RE: The Marriage Of)	
)	DECLARATION OF SERVICE
SANDRA L. MAINE (f/k/a MCKERNAN))	
)	
Respondent)	
VS.)	
)	
DANIEL D. MCKERNAN)	
)	
Appellant)	

Daniel D. McKernan certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

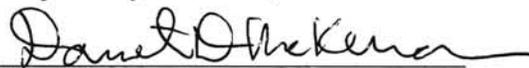
On June 6, 2012 I forwarded by U.S. Mail with postage properly affixed to the attorneys of record for the respondent Sandra L. Maine a true, correct and complete copy of *Reply Brief of Appellant/Cross-Respondent* to:

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June 6, 2012

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