

FILED
Court of Appeals
Division III
State of Washington
10/9/2018 8:00 AM

No. 356566

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In re the Marriage of:

PATRICK CRAIN,

Petitioner/Appellant,

and

SIRI CRAIN,

Respondent/Appellee.

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The present appeal is properly before the court regardless of Mr. Crain's choice not to seek discretionary review of a ruling on temporary orders.

Ms. Crain is correct that RAP 2.3 allows that “a party may seek discretionary review of any act of the superior court not appealable as a matter of right.” RAP 2.3(a). However, RAP 2.3 does not provide a guaranteed remedy, nor a mandatory one. Indeed, on its face this rule allows for the ability to *ask* the Court of Appeals to consider a matter; it does not guarantee that the Court of Appeals will actually do so. In fact, the rule goes on to state that if discretionary review is denied, then the party seeking the review may still pursue later review of the trial court’s decision or the issues pertaining thereto. RAP 2.3(d).

The case of *Lincoln v. Transamerica Inv. Corp.* is inapplicable to the present case. In that matter, the Supreme Court addressed a petitioner’s decision not to seek review only of a ruling regarding venue. 89 Wn.2d 571, 573 P.2d 1316 (1978). In that case, the issue was one of pure procedure – which county the matter should have been brought in. *Id.* It therefore was reasonable for the Supreme Court to consider that the appellants

had wholly failed to show any prejudice to them brought about by the case being heard in what they believed to be the wrong venue. *See id.*

Indeed, if the case had been transferred to a different venue in Washington, the same laws would have been applied to the case. Such is not the case here. In the present matter, Mr. Crain does not appeal a matter of pure procedure such as venue. On the contrary, Mr. Crain appeals from Judge Clarke's application of existing law to the facts of his case at trial. Mr. Crain has certainly been prejudiced by Judge Clarke's misapplication of existing case law, to the extent that he has been deprived of a substantial majority of the time he previously enjoyed with his daughter.

The mere fact that discretionary review exists does not bind every party to seek it if a motion for a temporary order is decided against that party. Were that the case, then RAP 2.3 would not explicitly make review of such orders optional by the Court of Appeals, retaining the ability for parties to seek review later, as an appeal of right at the conclusion of their case.

2. **Evidence at trial did support a claim of equal parenting time between the parties**

Despite Ms. Crain's contentions, at the time of trial there was ample evidence that the parties' 2014 Final Parenting Plan called for substantially equal time. As Ms. Crain acknowledges in her brief, the designation of custodian is not dispositive when determining where a child resides a majority of the time. In the case at bar, however, Mr. Crain relies not upon the designation of custodian, but rather on the actual residential provisions of the parenting plan, as well as the means by which the parties followed it.

The parenting plan entered in 2014 specifically provided that the parents would spend "approximately equal time" with Elliot in their care. *See Agreed Final Parenting Plan*, 13-3-01125-3, Spokane County (Mar. 31, 2014), hereinafter "2014 Parenting Plan." Although initially this parenting plan called for Mr. Crain to have two overnights in one week followed by three overnights the following week, this schedule evolved over time. Indeed, even Ms. Crain acknowledged in her testimony that by mutual agreement Mr. Crain began to receive additional time with Elliot. RP. 25, ln. 2-3. Ms. Crain further testified that she stopped

allowing Mr. Crain to exercise the additional residential time with Elliot in direct response to being served with Mr. Crain's objection to relocation. *Id.*, ln. 8-9.

Mr. Crain confirmed in his testimony both to the expansion of his time with Elliot and that Ms. Crain stopped allowing the mutually agreed extra time after she was served. RP. 84-85. Mr. Crain testified that when his time with Elliot expanded, it expanded both to allow him to pick Elliot up earlier when he picked her up on Sundays, RP. 84, ln. 1-11, and also so he kept her in his care for an extra overnight, RP. 84, ln. 11-13. This expanded residential time was consistent with the stated intent from the 2014 Parenting Plan, that the parents enjoy substantially equal residential time.

Indeed, Mr. Crain's testimony was that beginning in April of 2016, and only ending when he served Ms. Crain with his Objection to Relocation, he had Elliott from Sunday morning until Wednesday morning in one week (approximately three and a half days), and from Saturday afternoon until Tuesday evening in the next week (approximately three and a half days). Mr. Crain's spouse, Megan Crain, confirmed Mr. Crain's testimony regarding

the residential schedule changing beginning in April of 2016. RP. 115, ln. 7-25.

Only in taking a draconian approach of counting overnights can Ms. Crain credibly claim that Elliot resided with her a majority of the time. However, it is clear that in terms of meaningful, quality contact with Elliot, and actual parenting duties, Mr. Crain was equally as involved as Ms. Crain. This Court should decline to adopt a needlessly strict approach of counting overnights to determine where a child spends the majority of her time. Rather, the more sensible approach is to look at the schedule as a whole. Certainly, the best interests of a child are better served by evaluating the totality of the circumstances, rather than a calendar-like snapshot of where that child sleeps.

Despite her numerous present protestations that the final parenting plan would have required modification when Elliot became school age, Ms. Crain never filed a Petition to Change Parenting Plan. RP. 27, ln. 8-13. It is incongruous for Ms. Crain to now argue the necessity of a parenting plan modification – regardless of her relocation – when she took no steps of any kind to pursue such a modification. Rather, based solely upon the presumption of the Child Relocation Act, RCW 26.09.405 *et seq.*,

Ms. Crain sought to modify the parenting plan and establish a school schedule only after having unilaterally relocated to another state.

Ms. Crain's argument with respect to the child support order is also not controlling. Ms. Crain argues that because the only basis for deviation of child support was the provision of insurance for the child, that this somehow supports that Elliot spent the majority of her time in Ms. Crain's care. *Responsive Brief of Respondent*, p. 14. However, this is no more than a red herring. No parent is required to pursue a deviation as to child support, and thus the choice not to do so is not evidence of any intention. In the case at bar, the most clear evidence of the parties' intentions when they entered the 2014 Parenting Plan is the plan itself, which clearly states that the parties intended for Elliot to spend "approximately equal time" in each parent's care. More important, however, is that the parents followed through with that intention by expanding Mr. Crain's residential schedule.

Ms. Crain also wishes to rely on the fact that the parenting plan was ultimately not modified in writing to support her contention that the time from April of 2016 until February of 2017 – the time period wherein Judge Clarke made findings that the

change occurred – simply does not matter. However, the statute does not support this contention. Indeed, Ms. Crain does not cite any statute or case law in her brief to support her theory that this time period must simply be ignored because it was not formalized. Indeed, there is no case law to support Ms. Crain’s position that the deviation had to exist “over the entirety of the period since the entry of the previous parenting plan” in order to be relevant to the relocation request. This is simply not the law as it stands today. The truth of the matter is, these parents exercised substantially equal parenting time with their child, and this only ended when Ms. Crain made the choice to retaliate against Mr. Crain for filing and serving his Objection to Relocation.

3. Objections to the parenting plan itself

Ms. Crain’s brief concludes by discussing the parenting plan itself, and claiming that Mr. Crain has not appealed the specific provisions of the parenting plan itself. On the contrary, Mr. Crain’s Notice of Appeal explicitly appeals the Final Order and Findings and the Parenting Plan which were entered on September 28, 2017. Mr. Crain’s brief is, of necessity, focused on the applicability of the Child Relocation Act because its application caused a wholesale change in the Court’s approach to

this case. But for applying the Child Relocation Act and according Ms. Crain a presumption that she be permitted to relocate, there is no way to know what Judge Clarke's decision would have been.

The relocation factors themselves are the crux of this matter, and cannot be separated from the final parenting plan or the findings. But for Judge Clarke applying the relocation factors, there would be no findings on those factors. But for Judge Clarke's findings as to the relocation factors, the relocation may not have been permitted to proceed. And but for the relocation, there is no reason to believe that Mr. Crain's parenting time would have been reduced. On the contrary – Ms. Crain failed to seek to reduce or modify Mr. Crain's time in any way or for any reason other than that caused by her unilateral relocation.

B. CONCLUSION

Mr. Crain was not required to seek discretionary review of a ruling on temporary orders. He is not barred from doing so at this time. Indeed, counsel for Ms. Crain did not object to Mr. Crain arguing against the application of the relocation factors at the time of trial. Significant time was also spent at trial determining whether and for what period the parties had substantially equal

residential time with Elliot. Mr. Crain asks that this Court reverse Judge Clarke's ruling, and order that the Child Relocation Act does not apply in this matter. He further asks that this Court overturn Judge Clarke's final parenting plan and order that the 2014 Parenting Plan be placed back into effect. In the alternative, this case should be remanded to Judge Clarke for further proceedings, so final orders may be entered without the wrongful application of the Child Relocation Act to this case.

Respectfully submitted this 8 day of October, 2018



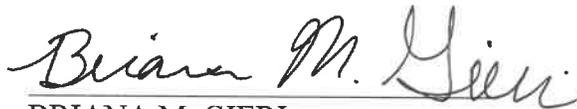
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AFFIDAVIT OF SERVICE

I, BRIANA M. GIERI, upon penalty of perjury under the laws of the State of Washington, declare that on the 8th day of October, 2018, I served by messenger (to be sent the following day) and by email (sent immediately) a copy of the Appellant's Reply Brief to the following persons at the included addresses:

Siri Crain, Appellee
C/O Jason Nelson
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DATED this 8th day of October, 2018.



BRIANA M. GIERI
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ROBERT COSSEY & ASSOCIATES

October 08, 2018 - 6:40 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35656-6
Appellate Court Case Title: In re the Marriage of: Patrick Crain and Siri Crain
Superior Court Case Number: 13-3-01125-3

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