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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

**NO. 35656-6**

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**IN RE:**

**PATRICK CRAIN,**

**APPELLANT**

**AND**

**SIRI CRAIN,**

**RESPONDENT**

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**RESPONSIVE BRIEF OF RESPONDENT**

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## STATEMENT OF THE CASE

On March 31, 2014, a final parenting plan was entered regarding the parties minor child, Elliott, who was under the age of three at the time of entry. **(CP 136-144)** Pursuant to the pre-school schedule of the parenting plan, Elliott resided primarily with Ms. Crain. **(CP 137)** Mr. Crain had residential time that alternated on a two-week basis, with the first week consisting of two overnights and the second week consisting of three overnights. **(CP 137)** The parenting plan specifically refers to the number of overnights Mr. Crain was awarded and stated “All other times, the child shall reside with the mother.” **(CP 137)**

Regarding the school schedule, no specific amount of residential time was awarded to Mr. Crain. **(CP 137)** Instead the plan stated that the child would reside with Ms. Crain and that Mr. Crain’s residential time was reserved, with the parties to engage in mediation prior to the child starting kindergarten. **(CP 137)**

Regarding the winter, spring and summer schedules, the plan stated that the child would reside with Ms. Crain and set out no specific residential time for Mr. Crain. Instead, the plan stated that Mr. Crain’s residential time was reserved, with the parties to engage in mediation prior

to the child starting kindergarten. **(CP 138)**

Under Section 3.12 of the parenting plan, the plan stated that the child was scheduled to spend an approximately equal amount of time with both parents, despite the specific schedule set forth in the pre-school schedule that awarded Mr. Crain only two overnights one week and only three overnights on the opposite week. Ms. Crain was designated as the custodian of the child for purposes of all state and federal statutes. **(CP 140)**

In December 2016, Ms. Crain was forced from her rental home when a fire caused her rental to lose power. **(CP 323)** As the power could not be immediately restored, Ms. Crain went to temporarily stay with her boyfriend in Hayden, Idaho. **(CP 323-4)** Ms. Crain gave notice of this temporary measure to Mr. Crain in January 2017. **(CP 324)** No notice of relocation was filed as Ms. Crain intended to return to her residence in Elk, Washington. **(CP 324)**

On February 9, 2017, Mr. Crain filed an objection to relocation and a motion to hold Ms. Crain in contempt for alleged violations of the parenting plan, including alleged violations of the relocation provision within the parenting plan. **(CP 324)**

The parties met in mediation but were unable to reach an agreement in mediation. (**RP 5, lines 12-17**)

On March 31, 2017, with power still not having been restored to the rental property, Ms. Crain filed a notice of intent to relocate the child. (**CP 324**) Mr. Crain having already filed an objection, Ms. Crain filed her response to the objection on April 12, 2017. (**CP 227-32**) Mr. Crain then amended his objection to relocation on April 25, 2017, (**CP 243-52**) and Ms. Crain filed her response to the amended objection on July 17, 2017. (**CP 306-12**)

On May 18, 2017, the Honorable Tony Rugel, Superior Court Commissioner found that the holding in **Ruff v. Worthley**, 198 Wn. App. 419 (2017) applied and that the pending objection to relocation filed by Mr. Crain should be dismissed in favor of a modification action requiring a showing of adequate cause. (**CP 278-9**) Comm. Rugel's specific finding set forth in the May 18, 2017 Order on Motion re: Relocation was that the "agreed plan recognizes the parties intended shared/equal time with Elliott." (**CP 278-9**)

On revision, the Honorable Harold D. Clarke, III, Superior Court

Judge. held that the plan entered into by the parties was not an equal plan or substantially equal plan and therefore the relocation act did apply. Judge Clarke reinstated the action based on the objection to relocation and reinstated the trial date. **(CP 300-1)** Judge Clarke's order was entered on June 29, 2017. Mr. Crain did not appeal the decision of Judge Clarke on this issue.

Trial was held before Judge Clarke beginning on August 14, 2017. During the trial, both parties presented testimony and evidence regarding the applicable relocation factors. At no point during the trial did Mr. Crain raise the issue of Judge Clarke's previous ruling regarding the Child Relocation Act, seek to stay the trial pending an appeal of that ruling or even make an objection in order to preserve the issue for appeal.

Post-trial, Judge Clarke issued a letter ruling allowing the relocation and directing the entry of a new parenting plan. **(CP 323-6)** The Final Order and Findings on Objection about Moving with Child and the new parenting plan were entered in September 28, 2017. **(CP 334-7, CP 338-45)**

In his memorandum decision, Judge Clarke found that the 2014 parenting plan allowed Ms. Crain nine overnights out of every fourteen

overnights during the pre-school years. (CP 324) After hearing the testimony of the parties and weighing their credibility, Judge Clarke concluded that the parties “orally agreed to modify the plan to add an overnight for Mr. Crain from April 2016 to February 2017, but the plan was not modified in writing.” (CP 324) That ten month period is the only period of time during which Judge Clarke found that the plan had been modified by the parties. (CP 323-26)

Judge Clarke found Ms. Crain’s testimony that she did not make the decision to move until she was served by Mr. Crain and determined that power had not yet been restored to her previous rental home to be credible. (CP 324) As a result, Judge Clarke concluded that notice was not legally required before the objection filed by Mr. Crain and therefore Mr. Crain’s pending motion for contempt on that issue was denied. (CP 324) (His contempt motion as to alleged violations of the medical decision-making provision was also denied.) (CP 324)

In weighing the relocation factors, Judge Clarke found that Mr. Crain did not meet his burden to establish detriment to the child that would outweigh the benefits to the child and Ms. Crain, as the analysis of the factors independently resulted in the conclusion that the factors either

weighed in favor of the relocation or were, at best, neutral. (CP 324-5)

#### ARGUMENT

An appellate court reviews a trial court's relocation decision for abuse of discretion. **In re Marriage of Horner**, 151 Wn.2d 884 (2004) A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. **In re Marriage of Crump**, 175 Wn. App. 1045 (2013). As set forth in **In re Jannot**, 110 Wn. App. 16, 22, affirmed in part, 149 Wn.2d 123 (2002):

**The abuse of discretion standard is not, of course unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.**

And as stated in **In re Marriage of Littlefield**, 133 Wn.2d 39, 47 (1997),

**A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported**

**by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.**

The trial court's challenged findings are reviewed for a determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. **In re Marriage of Griswold**, 112 Wn. App. 333 (2002). “The absence of a finding on an issue is presumptively a negative finding against the person with the burden of proof.” **George v. Helliard**, 62 Wn.App 378 (1991)

**Mr. Crain Failed to Seek Discretionary Review of Pre-Trial Ruling**

Mr. Crain asserts that Judge Clarke committed obvious or probable error when he revised the decision of Comm. Rugel and reinstated the action as an objection to relocation proceeding. The effect of that ruling was to create a presumption in favor of the relocation sought by Ms. Crain, a presumption that Mr. Crain would then have to overcome, versus a requirement that the original parenting plan only be modified pursuant to a finding of adequate cause, without a presumption in favor of either party.

**RAP 2.3** allows a party to seek discretionary review of any

decision of the superior court in which it is alleged that the superior court has committed obvious error rendering further proceedings useless or probable error that substantially alters the status quo or limits the freedom of a party to act. When Judge Clarke found that the relocation act did apply to the proceedings in this case, he limited the ability of Mr. Crain to argue that an adequate cause finding was necessary and that Ms. Crain was not entitled to the presumption that the relocation be allowed. It rendered his arguments regarding adequate cause moot and limited his arguments to an analysis of the relocation factors. Pursuant to **RAP 2.3**, Mr. Crain had the right to seek discretionary appeal. He chose not to do so and instead to proceed to trial at which the only argument advanced by Mr. Crain was that the relocation factors did not support the proposed relocation of the child.

In **Lincoln v. Transmerica Inv. Corp.**, 89 Wn.2d 571 (1978), the supreme court addressed the issue of a party's failure to seek discretionary review of the pre-trial ruling regarding venue. Post-trial, the party appealed, arguing that the venue ruling was incorrect. The supreme court ruled that the property remedy would have been to seek discretionary review and not wait until that party lost at trial and then appeal the court's

decision on venue. **Lincoln**, at 578. The same analysis applies here. Mr. Crain had the ability to seek discretionary review regarding whether or not the court should make the determination under the relocation act or pursuant to the major modification standards applicable to general modifications. Instead, he chose to proceed to trial and argue the relocation factors did not support the relocation and then raise this issue on appeal when he did not prevail. His failure to seek discretionary review should preclude him from seeking relief at this late date.

**Evidence Did Not Support the Claim of an Equal Parenting Plan**

Even if the court determines that Mr. Crain may still appeal the court's pre-trial determination that the CRA applies, he has the burden of proving that sufficient evidence existed to establish that the original parenting plan was an equal or substantially equal parenting plan. In his opening brief, Mr. Crain focuses attention on the fact that the designation of custodian section 3.12 states that the child is scheduled to spend an approximately equal amount of time with both parents. (CP 140) However, in **Jackson v. Clark**, a June 28, 2018 decision of the Division III Court of Appeals in Cause No. 35027-4, the appellate court ruled that

the designation of custodian is only one consideration when the court makes the factual determination regarding where the child has resided the majority of the time.

The parties original parenting plan set out a specific schedule for the pre-school years: Except for two overnights with Mr. Crain one week and three overnights with Mr. Crain on the alternating weeks, the remainder of the residential time was with Ms. Crain. **(CP 137)**

Regarding the school schedule, winter vacation schedule and the summer schedule, the only certainty evidenced by the plan as written is that the child was to reside with Ms. Crain. That is clearly stated in each provision within the plan. **(137-8)** The specific residential time for Mr. Crain was reserved to be addressed at a future mediation. **(CP 137-8)** What that schedule would have been is unknown as the parties never reached the point of addressing it in mediation before this matter proceeded to trial.

Even the Order of Child Support entered in conjunction with the final parenting plan does not support the argument of the petitioner. The sole basis for deviation in that order was that Mr. Crain would be providing health, dental and vision insurance for the child. **(CP 152)**

When Judge Clarke made his determination that the parties did not have a shared parenting plan that would require the court to disregard the relocation act, he had before him the parties respective declarations regarding parenting of Elliott since the entry of the original parenting plan and the original parenting plan itself. The evidence did not support Mr. Crain's claim of a shared plan between the parties at that time.

At trial, both parties also presented testimony regarding their involvement in parenting of the child since birth as it was relevant to a number of relocation factors required to be considered by the court. Judge Clarke found that the parties followed that plan of nine overnights with Ms. Crain and five overnights with Mr. Crain in a fourteen day period, except for the period of April 2016 to February 2017. During that period, the court found that Mr. Crain had one additional overnight. (CP 324) That additional overnight, which was based on the parties agreement and not reduced to court order, ended five months before the matter proceeded to trial. (CP 324) Judge Clarke had the ability at trial to weigh the credibility of each party and lay witness that testified, as well as the exhibits submitted at the time of trial. The evidence at trial did not support Mr. Crain's claims that the parties had an equal or substantially equal

schedule with their child prior to trial, as reflected in the findings made by Judge Clarke.

In his opening brief, Mr. Crain repeatedly states that Judge Clarke made the determination that the parties modified the original parenting plan to allow Mr. Crain an extra overnight each week. That is a blatant misstatement of the finding of Judge Clarke. Judge Clarke's specific finding on the issue is set forth below:

Apparently the parties orally agreed to modify the plan to **add an overnight for Mr. Crain from April 2016 to February 2017**, but the plan was not modified in writing. (Emphasis added). (CP 324)

Judge Clarke's finding regarding the singular overnight follows his discussion of the schedule over a fourteen day period of time. At no point did Judge Clarke find that Mr. Crain ever had an equal amount of residential time and his finding regarding the one additional overnight in a fourteen day period was limited to the period of August 2016 to February 2017. (CP 324)

In fact, the testimony of both parties and Mr. Crain's wife, Megan Crain, was consistent with Judge Clarke's finding that Mr. Crain had only one additional overnight in a two-week period for a limited period of time.

Ms. Crain testified that Mr. Crain had one extra overnight every other week between the period of November 2016 and February 2017. **(RP 25, lines 1-25)**. She disputed that it began in April 2016. **(RP 25, lines 14-17)**.

When Mr. Crain testified that on the weeks that were scheduled to begin on Sunday, instead of returning Elliott on Tuesday evening, he began returning her to school on Wednesday morning in April 2016, approximately 12-13 hours later than the parenting plan directs. He agreed that stopped in February 2017. **(RP 84, lines 1-25)**. Mr. Crain further testified that the opposite week remained as set forth in the parenting plan. **(RP 84, lines 1-25)**.

Mr. Crain's wife, Megan Crain, testified that beginning in April 2016, Mr. Crain had an additional overnight on Tuesdays from Tuesday night to Wednesday morning return to school during one of the two week periods. **(RP 115, lines 7-25)**. She further testified the opposite week remained from Saturday afternoon until Tuesday evening. **(RP 116, lines 2-10)**. She went on to confirm that the change in the schedule ended in February 2017, when the parties returned to the written plan. **(RP 116,**

**lines 11-17).** Lastly, Ms. Crain confirmed that Mr. Crain had not had any additional days other than vacation time set forth in the parenting plan.

**(RP 116, lines 18-20)**

At best, Mr. Crain established at trial that for a period of approximately ten months, he had additional residential time consisting of an extra overnight beginning on Tuesday evening at 7:00 pm and ending Wednesday morning return to school, every other week. As that increased his time for that period, (the length of which was disputed at trial), to three overnights one week and three overnights the following week for only ten months, that did not establish a shared parenting plan since the entry of the previous order. Ms. Crain remained the person with whom the child resided the majority of the time.

In his opening brief, Mr. Crain asks the court to not look at the issue of overnights but then argues that the one additional overnight in a two week period that increased his time by approximately 13 hours every other week should serve as the basis for the court's determination that a shared schedule existed. Even if it had existed during that limited period, that did not establish a shared schedule over the entirety of the period since the entry of the previous parenting plan.

### **Mr. Crain's Objection to the Plan Itself**

Mr. Crain's brief spends a great deal of time discussing that he feels the parenting plan does not allow him enough residential time with the parties child. However, he did not appeal the specific provisions of the plan or the findings of the court on the CRA factors; rather he appealed the issue of whether or not the relocation factors should have been used in making the court's determination. Given that at the time of trial both parties were residing in different states and the child was school-age at the time of trial, both had proposed parenting plans that differed from the original pre-school schedule.

Additionally, Mr. Crain's time under the school schedule had not even been set. The parenting plan reserved the schedule beyond that the child would reside with Ms. Crain. Of course, Mr. Crain would have some residential time but it is not possible for Mr. Crain to claim that his time was reduced by 75% given the amount of residential time that he was to have under the schedule was yet to be determined. Had there been no relocation and the parties continued to reside in different cities as they were before Ms. Crain's relocation, it is likely the school schedule would have resulted in a reduction of Mr. Crain's time given geographic issues.

At the time of the entry of the original parenting plan, both parties resided in the Chattaroy area but Mr. Crain subsequently moved to Deer Park, Washington and Ms. Crain moved to Elk, Washington. (CP 323). Mr. Crain subsequently relocated again to Spokane and was residing in Spokane at the time of trial. (RP 71, lines 12-13)

In weighing the relocation factors, Judge Clarke determined that both parties have a loving relationship with their daughter but that Elliott would be more detrimentally affected by spending less time with Ms. Crain than she would by spending less time with Mr. Crain. (CP 324-5) That was one factor he considered among many, taking into account the testimony of the parties and their historical involvement in parenting. It was well-supported by the evidence presented at trial.

### CONCLUSION

Mr. Crain had the ability to seek discretionary review of the issue that he now appeals; whether or not the Child Relocation Act applies in this case. He chose not to do so and proceed to trial. He should be barred from raising the issue after having not prevailed at trial.

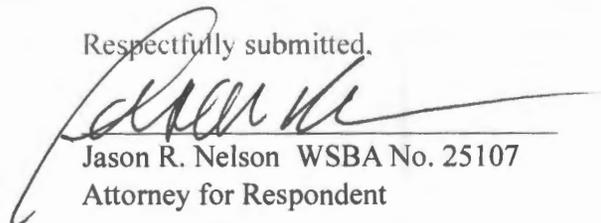
Further, the court's determination that the Child Relocation Act applied was supported by the evidence, given that the parties original

parenting plan did not allow equal residential time between the parents. The plan itself set out a schedule whereby the child resided primarily with Ms. Crain and the testimony at trial was clear that the parties followed that schedule but for a less than one-year period, the exact length of which is in dispute.

Lastly, Mr. Crain's objections to the residential schedule are primarily based on what he claims is a 75% reduction in his residential time once the school schedule began. However, the school schedule, winter vacation schedule, spring vacation schedule and summer schedule were all reserved in terms of the amount of residential time the child would spend with Mr. Crain. The only certainty in the original plan was that that the child would reside with Ms. Crain, as repeatedly stated throughout the plan itself in each section for which the schedule with Mr. Crain was reserved.

Ms. Crain requests that the court deny the appeal sought by Mr. Crain and that she be awarded her attorney fees incurred in responding.

Respectfully submitted,

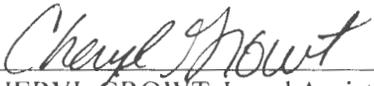


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**DECLARATION OF SERVICE**

I, Cheryl Growt, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this 24th day of July, 2018, I sent out via messenger service a copy of this brief to be delivered to petitioner's attorney Robert Cossey, 902 N. Monroe Street, Spokane, WA 99201.

Signed at Spokane, Washington on this 24th day of July, 2018.

  
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CHERYL GROWT, Legal Assistant