2019

Macaela Day, Petitioner/Appellant, v. Tyler Barnes, Respondent/ Appellee : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS
450 South State Street, SLC, UT 84111
(801) 578-3900

MACAELA DAY, Petitioner/Appellant, vs. TYLER BARNES, Respondent/Appellee	PUBLIC Appellate Court No. 20190277

BRIEF OF APPELLEE

Appeal from the Second Judicial District Court, Davis County, from a final order denying a change in physical custody through a motion to relocate before the Honorable David M. Connors, District Court No. 134700668

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Oral Argument Requested
Non-Public Opinion Requested

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Introduction

A Massachusetts resident creates the appearance that she has moved to Utah in order to obtain joint physical custody of her child as provided in the parties' stipulated custody order. Two and a half months later, she gives notice of her intent to "relocate" back to Massachusetts attempting to use the relocation statute to obtain the sole physical custody of the child. The district court denies her motion and she appeals.

Jurisdictional Statement

This court has jurisdiction pursuant to section Utah Rules of Appellate Procedure, Rule 3 (a) and Utah Code Ann. § 78A-4-103(2)(h) of the Utah Code.

Statement of the Issues and Standards of Review

Ms. Day raised three issues on appeal.

1. Whether the relocation hearing denied Appellant due process? Mr. Barnes disagrees with Appellant's standard of review and states that this issue is a mixed question of fact and law. The standard of review for questions of fact is clearly erroneous and the standard of review for questions of law is de novo. *State v. Hales*, 2007 UT 14, ¶35, 152 P.3d 321.

2. Whether the court's findings of fact are legally deficient. Mr. Barnes agrees with the clearly erroneous standard of review.

3. Whether the court's ruling on relocation was erroneous. Mr. Barnes agrees with the abuse of discretion standard.

Determinative Provisions

Utah Code Ann. § 30-3-37	Appellant's Addendum A
Utah R. Civ. P. 106	Appellee's Addendum C
Utah R. Civ. P. 108	Appellant's Addendum B
Utah R. Jud. Admin.	Appellee's Addendum E

Statement of the Case

Nature of the Case and Course of Proceedings

This case first came before the Second District Court of Davis County, State of Utah on May 1, 2013 upon Ms. Day's Petition to Modify Custody in which she sought to move the case to Utah pursuant the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter, "UCCJEA"), Utah Code Ann. § 78B-12-101). No previous custody orders had been entered in any court between the parties. It was Ms. Day's request that Utah take jurisdiction of this matter and Mr. Barnes was not opposed to that (R.435-436). Accordingly, the Massachusetts case was dismissed on August 7, 2013 (R.584) and Utah signed an Order taking jurisdiction on June 24, 2013 (R.475-476).475).475).

After a hearing on October 1, 2013 regarding temporary orders, Commissioner David S. Dillon of the Second District Court, Davis County, State of Utah (hereinafter, "Commissioner" or "the commissioner") issued a Recommended Ruling on November 22, 2013 (R.732) and an Order on Recommended Ruling was entered on January 2, 2014 (R.895). The parties were awarded joint legal custody (R.906, 33). As to physical custody, if Ms. Day moved back to Utah the parties would have 50-50 joint custody with week-on week-off parent-time (R.908, B.1.). Otherwise, Mr. Barnes was awarded sole physical custody (R.906, 34).

Ms. Day objected to the recommendation and requested an evidentiary hearing (R.1016) that was held before District Court Judge, David M. Connors (hereinafter, "Judge Connors," "the judge" or "the district court") on March 20, and 21, 2014. Judge Connors' ruling in large part affirmed the commissioner's recommendation (R.1052).

On February 24, 2015, the parties met for a mediated, pretrial settlement conference pursuant to Utah Rules of Judicial Administration, Rule 4-903(3)(G) (R.1523) and reached a stipulation that was placed on the record. A final order was entered on June 18, 2015 (R.1530). The material terms of that Order were that Ms. Day was going to move to Utah in the first week of July 2015, and upon her return, she would assume the role of primary caregiver with final decision-making authority under a 50-50 joint legal and physical custody arrangement.

Upon Ms. Day's return, the parties were to have a one-week on, one-week off parent-time arrangement (R.1532, 8).

Ms. Day arrived in Utah on July 17, 2015. Two and a half months later, on September 30, 2015, Ms. Day gave notice of her intent to relocate (R.2362, 13). This was followed by a Motion to Relocate on November 10, 2015 (R.1550). On March 17, 2016, the commissioner heard oral argument on Ms. Day's motion, denied it and gave conditional custody to Mr. Barnes should Ms. Day decide to stay in Massachusetts (R.1893, 2). The Recommended Ruling and Order Adopting the Recommendation was prepared by the commissioner himself and entered on June 27, 2016 (R.1881).

On July 6 and 8, 2016, Judge Connors held an evidentiary hearing on Ms. Day's objection. Ms. Day's motion was denied and the written order was entered on October 19, 2016 (R.1959). As part of his ruling, Judge Connors also incorporated the transcripts and his findings from the March 2014 hearings. The Court also adopted the commissioner's findings, conclusions, and recommendations from the June 27, 2016, Recommended Ruling and Order (R.1881; R.2556, 25 to R.2557, 3; R.2557, 1-3).

Ms. Day filed a notice of appeal on November 17, 2016 (R.1974) and Mr. Barnes filed a notice of cross-appeal on December 1, 2016 (R.1976). This Court issued an opinion that the judge had misapplied Rule 108 of the Utah Rules of Civil Procedure and remanded the case.

Upon remand, the judge had the parties redo their closing arguments and then issued a new ruling on February 20, 2019, under the de novo standard that had been mandated by the first appeal. Appellant filed a timely notice of appeal on March 22, 2019.

Statement of Facts

This case concerns whether it is in the best interest of a child to be relocated from the State of Utah with Ms. Day. Currently, the child enjoys a stable, consistent environment in Utah with her father, Mr. Barnes (R. 2432-37; R.2446, 10-22) where she has spent the majority of her life (2016 Res. Ex 11). The child and Mr. Barnes reside with his family consisting of a mother and father and three of Mr. Barnes' other siblings (2016 Res. Ex. 19; R.2433, 7-18). The child is closely bonded with this family and her extended family (R.2433, 22 to R.2439, 7). The child's uncles and aunt play sibling-type roles in her life and she experiences a traditional family setting (R.2436, 1-25). If the child were taken out of her current situation it would create a great loss for her (R.2436, 16-25). The child regularly attends church and has many relationships there that carry into the week with play dates and other activities (R.2446, 19 to R.2447, 1-8). Mr. Barnes' home is in a cul-de-sac next to farmland in a safe neighborhood with a nice big fenced yard, a trampoline, a garden, fruit trees, and a horse barn down the street where the child and Mr. Barnes go for walks and to feed the horses (R.2451, 11-20). The child is generally very healthy and has relationships in Utah with a

pediatrician, an eye doctor and a dentist with whom she gets regular healthcare treatment (R.2442, 13 to R.2444, 21).

A. GENERAL BACKGROUND

The parties met in the summer of 2009 while they were both working at the Lagoon Amusement Park (R.3125, 13-14; 2014 Res. Ex. 7, ¶7). The relationship progressed quickly with the encouragement and assistance of Ms. Day's mother, Jaime Day, who brought her daughter from South Jordan to Layton three to four times per week to see Mr. Barnes behind his parent's back (R.2088, 24 to R.2089, 19; R.3125, 15 to R.3128, 13; 2014 Res. Ex. 7, ¶¶10, 21, 27). In December of 2009 and again in February 2010, Ms. Day and her parents helped Mr. Barnes run away from home and concealed him in their home while actively deceiving his parents as to his whereabouts (R.3021; R.3068; R.3130, 9-20; R.3132, 23-24; 2014 Res. Ex. 7, ¶¶32-41, 48-51; 2014 Res. Ex. 11, ¶18). Specifically, "Exhibit C" that is attached to Respondent's Exhibit 11 is a compilation of the texts between Mr. Barnes' mother and Ms. Day's mother in the days after Mr. Barnes ran away showing the extent to which the Day family can go in creating a web of lies and deception to support what they want to accomplish.

By early March 2010, Ms. Day was pregnant, R.3134, 10-13, and Mr. Barnes continued living with her and her family thereafter (2014 Res. Ex. 7, ¶¶58-63). The parties' child was born on December 6, 2010, in Bountiful, Utah (R.2874, 12; 2014 Res. Ex. 7, ¶68). In October 2011, soon after Mr. Barnes had turned 18, he,

Ms. Day, the child, Ms. Day's parents, and her maternal grandparents all moved to Massachusetts together (R.2874, 25; 2014 Res. Ex. 7, ¶¶80-83).

At the end of May 2012, out of frustration from being eclipsed in his parental role, and because of pressure to consent to Ms. Day's parents adopting his daughter, Mr. Barnes left the Day home in Massachusetts and several weeks later returned to his family in Utah (R.2875, 17 to R.2876, 14; R.3138, 16-24; 2014 Res. Ex. 7, ¶¶84-88).

Mr. Barnes had observed that Ms. Day did not want to be a mother to their child, but instead was committed to securing her parents as the child's parents thereby cutting him off from his daughter (R.2388, 10 to R.2389, 12; 2014 Res. Ex. 7, ¶¶74-79). As of the evidentiary hearings on Ms. Day's motion to relocate, she and her mother openly admit that the child still calls Jaime Day "mommy" and Aaron Day "daddy" (R.2386-2388; 2014 Res. Ex. 7, ¶98, 102). Mr. Barnes testified regarding his belief that if Ms. Day were to relocate with the child, Ms. Day's parents would take over as the child's parents and that he would be eliminated from her life (R.2491, 21-25 to R.2492, 1-13).

Mr. Barnes has always wanted to raise his daughter since learning of Ms. Day's pregnancy (R.2438, 9-17; *see also* 2014 Res. Ex. 7, ¶60). Soon after arriving in Utah, and to protect his parental rights and relationship to his child, he filed a paternity action that was finalized on October 5, 2012 (R.176, 2). On November 16, 2012, he filed a custody action in Massachusetts (R.176, 3).

Under the pressure of a temporary order hearing scheduled in Massachusetts for April 10, 2013, Ms. Day came to Utah to negotiate a settlement with Mr. Barnes (R.3180-85; 2014 Res. Ex. 7, ¶105-112). The parties met with a mediator on April 3, 2013 (R.3186). The result was a signed Stipulation awarding Mr. Barnes temporary custody with standard parent-time for Ms. Day based on the idea that she was soon graduating from high school and would come to Utah to live (R.16-19) This Stipulation was accepted by the Massachusetts court on April 10, 2013 (R.12-14).

Just a few weeks later, on May 1, 2013, Ms. Day filed a Petition in Utah requesting that Utah assume jurisdiction of the case, set aside the stipulation as being obtained under coercion, fraud, and duress, and award immediate custody to her (R.1). This Petition was shortly followed by an avalanche of declarations and documents containing false and malicious allegations that Mr. Barnes had repeatedly raped Ms. Day resulting in her conceiving the child, that he had also raped Ms. Day's mother, and otherwise impugning his character and fitness as a parent in every way possible by false and exaggerated claims (R.224-269).

B. RESULTS AND AFTERMATH OF THE 2013-2014 TEMPORARY CUSTODY HEARINGS

The parties appeared before Commissioner Dillon on October 1, 2013 on Ms. Day's Petition. The commissioner's Recommended Ruling gave Mr. Barnes primary physical custody of the child (R.875, 2). However, if Ms. Day would

move back to Utah, she was given the opportunity to enjoy 50-50 physical custody with Mr. Barnes on a week-on, week-off basis (R.888, B.1.). Ms. Day objected to the commissioner's Recommendation and the parties had a full evidentiary hearing before Judge Connors on March 20 and 21, 2014. At the end of the proceeding, Judge Connors gave oral findings and orders that were preserved in his written Findings of Fact and Order on Objection dated April 25, 2014 (R.1052). This ruling denied Ms. Day's objection and once again extended to her the opportunity to enjoy 50-50 custody if she came to Utah (R.1063, 1-2).

This ruling was not appealed then and is not on appeal now (R.1016; R.1904, 9-27). The following pertinent findings made by Judge Connors after hearing the evidence, viewing the witnesses, and judging their credibility, along with those that he adopted from the Commissioner (R.1059, 11), are therefore settled facts for this case and any contrary facts contained in Ms. Day's brief should be disregarded:

- Evidence presented regarding rape of Ms. Day and her mother was "meager and uncorroborated" and incredible given that Mr. Barnes was allowed to continue living with the Day family for nearly two and a half years after the alleged incidents; no report of any rape was made to law enforcement until Mr. Barnes moved out of the home and commenced legal action to obtain custody; and no law enforcement agency or

prosecutor's office has made an arrest, issued a summons, or otherwise commended any criminal action against Mr. Barnes (R.1055, 6).

- The original Stipulation in April 2013 was not obtained by fraud, coercion or duress and Ms. Day's choice to give Mr. Barnes temporary custody was within the realm of reasonable strategies and advice when considering the unsettled status of Ms. Day's and her family's living situation at the time,[1] and "the potential for the proceedings to be sidetracked by the allegations of sexual improprieties between Mr. Barnes and Ms. Day's mother (R.1057-58, 9)."
- The Court found that both parties had made "questionable choices in the past," but that Mr. Barnes' running away, admitted pornography addiction, and acting out sexually from late 2009 through mid-2012 showed lower standards of moral behavior than Ms. Day, but also noted that it was "less clear whether those issues persist at the present time and whether they would directly affect Respondent's ability to function as a parent to the child at this time (R.1059, 12)."[2]

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[1] Ms. Day's family had stayed in 10 different locations by the time the child was two years and four months old. Five of those locations were from June 2012, shortly after Mr. Barnes left the Day home, until the child came to reside with Mr. Barnes in April, 2013. All of those places during that period were hotels and short stays with family. Essentially, the Day family did not have a home when Ms. Day gave custody to Mr. Barnes (R.2983-87). From February 2013 to April 2013, Ms. Day was living in Massachusetts and the child was moving from place to place with Ms. Day's parents (R.415, ¶¶11-15).

[2] Mr. Barnes admitted and took responsibility for some inappropriate behaviors during this time. However, he also testified that the environment in the Day home, particularly with Ms.

- The district court expressed concern about the rigidity he saw in Mr. Barnes on some questions regarding parent-time and warned him that this would be something the court would look at in making a final custody determination. (R.1059-60, 13). At the same time, the commissioner in his Recommended Ruling did note that Mr. Barnes "facilitated meaningful contact between the child and Petitioner to the point that Petitioner, when staying in Utah for the summer, exercised multiple-day visits each week. This reflects a genuine effort by Respondent to facilitate ongoing and meaningful contact between Petitioner and the child (R.900, 11; R.901, 16)."
- On the question of who had been the child's primary caregiver, the commissioner questioned Ms. Day's involvement stating that the maternal grandparents appear to have been involved in raising the child on an equal if not greater basis than was Ms. Day. (R.899, 11). As between the two parents, though, the district court found that Ms. Day had been the primary caregiver from the child's birth until April 2013 and that Mr. Barnes had been the primary caregiver from then to the time of the hearing in March 2014 (R.1060-61, 17).
- The district court recognized that Ms. Day's decision in April 2013 to give Mr. Barnes custody showed a "significant level of commitment . . . to

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Day's mother, was such that his behavior was within the culture of the home (R.2100; R.2546). This fact was also attested to by Ms. Day's former best friend, Kennedy Thompson (R.3088, ¶¶17 to R.3090, ¶4; R.3093, ¶4-17). *See also* p.20, footnote 3 for comments related to the current relevance of these historical moral issues to the present proceedings.

allowing the child to have frequent, continuing contact with [him] (R.1060, 14)."

- The district court expressed "significant concern about the ability of Petitioner to 'give first priority to the welfare of the child,' (Utah Code Ann. § 30-3-10.2)" where she had a clear path to share 50-50 custody of the child, yet she had not chosen to follow that path." The Court went on to state, "It appears to the Court that Petitioner at this moment may be giving greater priority to her schooling and her potential future as a dance instructor than to her role as a mother (R.1060, 15).
- The child is properly bonded with both parties (R.1060, 16).
- Both parties were raised in Utah, they met and started dating in Utah, the child was conceived and born in Utah and lived in Utah most of her first year and for most of the year before the 2014 hearing. Both parties have strong family ties to Utah and have extended family members living in Utah. These factors weigh in favor of the child remaining in Utah (R.1061, 18).
- The district court did not find any significant evidence of child abuse, spousal abuse, or kidnapping (R.1062-63, 21).
- With Mr. Barnes and his family, the child appeared to be comfortable in her surroundings, have a regular and consistent routine, was adequately

cared for, provided for, and was familiar and at ease with Mr. Barnes and his parents and others with whom she lived (R.900, 12).

- Any distress during parent-time exchanges appeared to be normal, did not continue for a significant period of time, and the child did not appear to be suffering emotionally from it (R.901, 14).

After the hearing, Ms. Day continued to maintain her primary residence in Massachusetts, although she did come to Utah for several months in the summer of 2014, during which time Mr. Barnes extended without question 50-50 parent-time with a week-on, week-off schedule (R.2269, 25; R.2270, 1-9), although he could have taken the position that joint custody was only available if she "move[d] to Utah" as was stated in the Order (R.1064, 2).

On December 4, 2014, Ms. Day filed a second request for a change of temporary custody which she styled as a Motion to Modify Temporary Custody. A hearing was held on December 16, 2014, before the commissioner. Ms. Day's motion was essentially denied, although the court did extend her parent-time in the upcoming weeks to accommodate the custody evaluator's need to observe the parties with the child (R.1395-1396).

C. FINAL SETTLEMENT AT 4-903 CONFERENCE

On February 24, 2015, after participating in a lengthy and detailed custody evaluation, the parties met for a mediated, pretrial settlement conference with the evaluator present pursuant to the Rules of Judicial Administration, Rule 4–

903(3)(G) (R.1530). The material terms of the stipulation and final order were that Ms. Day was going to move to Utah in the first week of July 2015, and upon her return, the parties would share joint physical and legal custody on a 50-50 basis, and where the parties could not agree on decisions regarding the child, Ms. Day would have the final say authority (R.1531, 1-2). Upon Ms. Day's return, the parties were to have a one-week on, one-week off parent-time arrangement (R.1532, 8). The stipulation also lengthened the time required for a notice of intent to relocate from 60 days to 90 days and shortened the distance within which the parties must reside to 20 miles instead of 150 as provided in Utah Code Ann. § 30-3-37 (R.1536, ¶26).

D. RELOCATION MOTION AND HEARINGS

Ms. Day arrived in Utah on July 17, 2015 to begin the new arrangement (R.2375, 9-11). On September 30, 2015, just two and a half months after her arrival, Ms. Day gave notice of her intent to relocate (R.2362, 2-14). This was followed by a Motion to Relocate filed on November 10, 2015.

1. HEARING BEFORE COMMISSIONER

A hearing was held on Ms. Day's Motion to Relocate before Commissioner Dillon on March 17, 2016. No transcript appears to have been ordered for this hearing. However, according to the commissioner's written recommendation, Ms. Day made the following arguments: That she should be allowed to relocate to Massachusetts because she had been the primary caregiver for 60% of the

child's life; she wants to live with her parents and grandparents who are Massachusetts residents; she has a scholarship in Massachusetts that will help her ultimately provide better support for the child by going into business as a dance teacher; her family would pay for Mr. Barnes' parent-time transportation; and she has been driven to this motion by ongoing conflict with Mr. Barnes (R.1885, 11.b.).

Because no transcript was provided for the hearing, we are left to the written documents that were before the Commissioner. The Declaration of Tyler Barnes in Response to Motion to Relocate contained the following responsive arguments: Mr. Barnes bargained in good faith with Ms. Day for the result of the 4-903 settlement conference with the child remaining here in Utah being a material aspect of that bargain (R.1714-1715); that Ms. Day had pushed for a long-distance joint physical custody arrangement throughout the case that he did not believe was in the best interest of the child (R.1716, 9); that upon returning to Utah in July 2015, Ms. Day sought to use her final say authority to force a long-distance joint physical custody arrangement (R.1716, 10 to R.1719, 15); that he believed she had not really relocated to Utah (R.1718-1720); that the conflict Ms. Day used to justify her relocation was mostly initiated by her attempt to circumvent the every-other-week aspect of the stipulated order so she could remain in Massachusetts (R.1720, 21); that Ms. Day's actions, and particularly her having taken the child out of state during her time, had deprived the child of the

opportunity to attend preschool, dance and ice skating lessons, disrupted her stability, interrupted care for a special condition she has with her eyes, and deprived her of the benefits of the week-on week-off schedule provided by the order (R.1720, 22). Mr. Barnes further argued that this was just another instance of Ms. Day placing her personal interests above her role as mother to the child (R.2008); that the child is a happy and well-adjusted little girl who is closely bonded with his family and who is being raised in a traditional family environment with sibling-like relationships where she is making many pleasant memories with family, extended family and friends (2016 Res. Ex. 19; R.1728, 47); and that his home has been her stable and consistent base of operations since April 2013 (R.1729).

Commissioner Dillon denied Ms. Day's Motion preparing his own Recommended Ruling with detailed findings of fact that were entered on June 27, 2016 (R.1881) and that were incorporated by Judge Connors in his pre-remand ruling on Ms. Day's Objection to the Recommended Ruling (R.1961, 4). Included were the following notable findings:

- All the reasons stated by Ms. Day were insufficient to show that the intended relocation was in the child's best interest but instead dealt more with her own self-interest (R.1885, 11b-c);

- The case of *Pingree v. Pingree*, 2015 UT App 302, 365 P.3d 713 is directly on point with strikingly similar facts that support a similar result (R.2224-2225, 11e);
- Similar to *Pingree*, this case also involved a bargain being struck between the parties and granting Ms. Day's motion would ignore the benefit of the bargain reached by Mr. Barnes in the settlement (R.1886, 11e; R.1887, 11g, h, j);
- When given the opportunity to be an equal co-parent with Mr. Barnes during the pendency of the case, Ms. Day chose not to move to Utah and take that opportunity and instead remained in Massachusetts and assumed a more limited parental role. As a result, Mr. Barnes has been the primary custodial parent of the child since April of 2012 (R.1887 11h);
- Relocation means something permanent. It is not transitory nor a brief stop by. It is more than unpacking bags and repacking them and moving again. It is a permanent change of location (R.1887, 11i);
- Even after it was agreed that Ms. Day would be the primary custodial parent, Mr. Barnes maintained that role for several more months until she relocated to Utah (R.1888, 11k);
- Despite some problems on both sides in working consistently together, things have worked fairly well with the parties being able to work through most problems that have arisen. The Court noted that there have not been

numerous enforcement hearings filed which gives an indication that things are working out between them. The problems are related to the age and continuing immaturity of the parties and the fact that Ms. Day has continually sought to remove the minor child to Massachusetts coupled with Mr. Barnes' attempt to prevent that (R.1888, 11m-n);

- The commissioner stated his belief that Ms. Day's Relocation was an attempt to force a long-distance relationship between the child and Mr. Barnes and that this relocation, after obtaining the primary caregiver designation, was Ms. Day's desire all along (R.1888, 11o);
- The minor child has lived in Utah for approximately 71% of her life. She was born here, her parents lived here when they established their relationship, she continued that residency for a period of time after the child's birth, after being in Massachusetts for a short time she came back to Utah in 2013 and has been here during the pendency of the case, as well as since the stipulated order was entered (R.1890, 11p);
- The minor child has established a substantial bond with her paternal grandparents and to sever that relationship would be detrimental to the child (R.1892, 11y);
- Mr. Barnes has about 90% of his extended family that lives primarily in Davis County with whom the child has a relationship as well (R.1890, 11q);

- The mother has extended family in Utah as well with whom the child has a relationship (R.1891, 11r);
- The child has friends in Utah at church and otherwise (R.1891, 11u);
- The child has an eye problem and has received specialized medical care in Utah for it. She also has an ongoing relationship with a pediatrician and dentist and there is no indication of medical care in Massachusetts or a patient-doctor relationship in Massachusetts (R.1891, 11v);
- The minor child is too young to express a preference regarding relocation (R.1892, 11w);
- Both parents and their extended families have a relatively strong bond with the child (R.1892, 11y);
- There is nothing to indicate that either parent suffers from moral character or emotional stability issues at this time. While this has been a consideration in the past, it does not play into the relocation analysis (R.1892, 11z).[3] There is no indication of a problem with drug or alcohol abuse by either parent (R.1892, 11bb);

[3] The commissioner's oral finding was more specific. With no transcript, we can look to the audio and find this: ". . .much has been said about the moral character and emotional stability of these two parents a lot of that in my mind is muddy water that's passed under the bridge. You folks have moved on, you've grown a couple of years and grown, I think, in maturity . . . but that moral character and stuff I don't have anything right now that indicates that that's a problem for either one of you and so I figure that's just neutral at this point." Audio from March 17, 2016 hearing before the commissioner.

- Because of both parent's reliance on extended family for surrogate and day-to-day care, it would be beneficial to continue the existing arrangements (R.1892, 11aa);
- Past relinquishment of custody is not currently relevant to the Court (R.1892, 11cc);
- The parties are similarly situated financially (R.1893, 11ee).

2. EVIDENTIARY HEARING

On March 30, 2016, Ms. Day filed an objection to the commissioner's Recommendation (R.1913) and a full evidentiary hearing was held before Judge Connors on July 6 and 8, 2016. The following evidence presented at trial supports the Court's findings of fact and its denial of Ms. Day's Motion.

Mr. Barnes' presentation of evidence began with a description of the opportunities and stability that he provides for his daughter when she is here in Utah (*See Supra* St. of Facts, pg. 5, ¶1; R.2432-39). He also described his relationship with and commitment to the child as well as his personal and ongoing development as a father (R.2438). Even Jaime Day testified that Mr. Barnes loves his daughter (R.2429, 5-6).

Much of the evidence then focused on the reasonableness of Ms. Day's request that she be allowed to relocate to Massachusetts with the parties' child. Mr. Barnes testified and provided exhibits to show that, upon arrival in Utah, Ms. Day immediately began attempting to restructure the parent-time to her

liking by stretching out the parent-time periods. She prepared a proposed calendar that started with two 25-day periods and ended with two 30-day periods in November and December 2015 (Res. Ex. 2). Ms. Day made a number of other proposals as well including a two-month on, two-month off schedule based on some conversation she claims to have had with the custody evaluator (*See e.g.*, Res. Ex. 1, 3, 4, 6). In one email she stated her motive—that she would not have to move to Utah if she could expand the periods (*See* Res. Ex. 4). Ms. Day testified that she believes the ordered parent-time schedule is just a suggestion (R.2391, 21-25).

When Mr. Barnes resisted these changes to the ordered parent-time, Ms. Day attempted to use her final say authority to force her desired parent-time schedule (R.2462, 24 to R.2464, 5; Res. Ex. 3). On September 9, 2015, Ms. Day refused to return the child at the agreed-upon time after consulting with her attorney (R.2463, 4-7; Res. Ex. 5). She later tried to justify her actions by reference to her primary custody authority (Res. Ex. 6). On the witness stand, she denied these actions but was impeached (R.2360-61, 15-25). In October 2015, Mr. Barnes' counsel raised the final say and parent-time violation issues with Ms. Day's attorney. Respondent's Exhibit 14 shows the thread of communication (starting on page 5 and working backward) in which her attorney not only affirms her actions but also threatens Mr. Barnes with contempt for not cooperating (Res. Ex. 14, p. 3). It was in this communication, just after threatening contempt on Mr.

Barnes for his refusal to submit to Ms. Day's improper parent-time demands, that Ms. Day's counsel suggested the parties take a high conflict parenting course. While that may not have been a bad thing, it was a red herring at the time because the immediate problem was his failure to properly advise his client regarding the court-ordered parent-time schedule (R.2464, 24 to R.2465, 7; Res. Ex. 14, p. 1-3). On the witness stand, when Ms. Day and her father testified about their having considered filing a contempt action against Mr. Barnes, neither could remember what violation Mr. Barnes had committed, but it was, in fact, this baseless claim of contempt (R.2232, 4-7; R.2354, 18-35). Ms. Day did testify, however, that there were at least 4-5 times that Mr. Barnes made changes and adjustments to the parent-time schedule to accommodate her (R.2392, 4-18).

On July 3, 2015, at the end of her out-of-state parent-time, Ms. Day was to return the child by 6:00 p.m. so Mr. Barnes could have his July 4th holiday with the child (R.2366, 1-4). However, Ms. Day was staying in Massachusetts and she scheduled the flight for her mother and the child to come in late on July 3rd. *Id.* As he had done previously, Mr. Barnes accommodated this later return time (R.2368, 18-25; R.2369, 1-10). However, as the time approached for the exchange Ms. Day insisted on her mom keeping the child overnight as Mr. Barnes had also previously allowed (R.2366, 1-22). This time, however, Mr. Barnes told her he wanted to pick her up that night so he could get started on the family's July 4th activities the next day. *Id.* Ms. Day refused and Mr. Barnes told her he would be

there to pick up the child and if her mother did not cooperate, he would have to request a civil standby for the exchange (R.2366; R.2297, 23-25). Ms. Day used this as a basis for her need to relocate (R.2297, 10-25).

On July 30, 2015, the day after Ms. Day had enjoyed a nearly two-week parent-time, she again created a situation of conflict that she then tried to use as a justification for her desire to relocate with the child (R.2375 to R.2382; 2016 Res. Ex. 16). She contacted Mr. Barnes by text and repeatedly demanded she be allowed to come to his home and that he have the child there when she got there. *Id.* Mr. Barnes, not appreciating her approach, asked her not to come. *Id.* She came anyway and then blamed him for the "conflict" even though he allowed her to see the child in spite of her behavior. *Id.*

Ms. Day's determination to be away from Utah while she was supposed to be here participating in a week-on week-off joint custody parent-time arrangement also created tension. Mr. Barnes presented Respondent's Exhibit 13 to demonstrate the time Ms. Day was away from Utah during the first six months she was supposed to be living in Utah (July 6, 2015, to January 6, 2015) (R.2445, 8 to R.2461). This Exhibit shows that Ms. Day was outside the state for at least 100 of those days (54%), and possibly as much as 153 days (83%)(R.2461, 8-14). Note that this Exhibit 13 was prepared before the hearing and bolded day totals are those for which Mr. Barnes was certain that Ms. Day was not in Utah and non-bolded days are those for which he was less certain. In her testimony, Ms. Day

confirmed she was not in Utah during the 14 days from August 6th to 20th of 2015, and she did not dispute the days Mr. Barnes was certain of (R.2505 19-25; R.2506, 1-8). With these additional days, the evidence shows that Ms. Day was out of Utah for at least 62% of the time for which she was supposed to be living in Utah (Res. Ex. 13). Regarding the other dates of uncertainty, Ms. Day could only give her word as to her presence in the state (R.2502, 2-25; R.2503, 1-10) even though, as mentioned before, she had been in possession of this summary for six months (R.1652, 16; R.2458, 12 to 2459, 7-10). During this period, Ms. Day only participated in parent-time exchanges a handful of times (R.2364, 20-23).

Defendant's Exhibit 13, under the heading "Situation," shows that for many of these periods the child was with Ms. Day for parent-time outside Utah for periods longer than 1 week. These longer periods would have been accommodations Mr. Barnes made to Ms. Day (Res. Ex. 13).

Ms. Day's absence from Utah, as well as the child's absence for non-local parent-time, resulted in the child being deprived of the opportunity to attend preschool, ice skating classes, and dance classes in the Fall of 2015 (R.2445, 13-25; R.2446, 1-9; 2461, 15-18). Ms. Day also did not follow through on replacing eyeglasses in a timely fashion thereby delaying the child's critical eye appointments to address her eye condition (R.2371, 16 - R.2373, 1-3). In the winter and summer of 2016, the problems continued and the child was not registered for Kindergarten until the last minute, even though Mr. Barnes had

agreed to a school in Farmington (R.2448 to R.2449, 19; R.2473, 18 to R.2474, 1)-a fact that Ms. Day's brief misrepresents as being Mr. Barnes' fault (Op. Br. p.28, Item 62; p.29, Items 4, 7).

Defendant's Exhibit 11 provided the Court with a clear breakdown of the time the child had been in the primary physical care of each party as of the date of the evidentiary hearing. According to Exhibit 11, Ms. Day had had the child 11% of her life, Mr. Barnes had had the child 42% of her life, and they have shared physical care of her 44% of her life ((Res. Ex. 11; R.2453, 19-25; R.2454, 1).

Defendant's Exhibit 12 shows the child's contacts with Utah vs. Massachusetts as her primary base of operations. Of the child's 66 months of life at the time of the hearing, 49 of those had been in Utah (74%) and 16 had been in Massachusetts (26%) (Res. Ex. 12). In Utah, the child has a long-standing relationship with her dentist, pediatrician, and eye doctor and appears to be thriving (R.2443, 1-25; R.2444, 1-21).

Evidence at the hearing showed Ms. Day has continued to put her own pursuits above her role as a mother. Ms. Day testified that even if she were not granted relocation with the child, it was her intent to move to Massachusetts without the child (R.2250, 19-21). Ms. Day testified that it has been her dream to teach dance ever since she was little (R.2249, 1-2). When asked if she was aware that she had always been offered the opportunity to participate in 50/50 physical custody in Utah, she became confused and uncertain about that, and rather than

responding to the question, she began talking about how it had always been her goal to get her dance education in Massachusetts (R.2396, 10 to 2397, 20). Upon further questioning, she confirmed her lack of awareness about her joint physical custody opportunities that had existed throughout the case (R.2397, 17-20). This is some of the most revealing evidence of the 2016 hearings! It confirms just how uninvolved Ms. Day is in this case and how little importance she places on her role as a mother.

Ms. Day indicated at two different times in her testimony that at the 4-903 conference she had been planning a possible relocation back to Massachusetts and that, in the meantime, she was going to take online classes (R.2274, 1-13; R.2319, 2-11). She also admitted that many of the reasons she gives for relocation, such as family and educational opportunities, were known to her at the time of the 4-903 conference (R.2318, 13-25; R.2319, 1-2).

Ms. Day admitted that she has had some high-quality virtual parent-time and that most of the time these take place in the privacy of the child's room and she can take as long as she wants (R.2384, 10-25; R.2385, 1-2). Mr. Barnes testified that he gets poor quality virtual parent-time when the child is with Ms. Day (R.2469; R.2487, 9-19). Ms. Day admitted that the child has not always been made available for virtual parent-time with Mr. Barnes (R.2385, 12-18). In apparent recognition of her doubt about her ability to provide consistent virtual parent-

time if the child were with her, Ms. Day proposed that the schedule be less structured if she were granted custody (R.2383, 11-25; R.2384, 1-9).

Additional relevant testimony is as follows: Ms. Day and her family say they did not have money to file a contempt action (R.2294, 14-16) or file a parenting plan (R.2287, 17-20), but that they have money to pay Mr. Barnes travel expenses for parent-time (R.2428, 20-25). Mr. Barnes' testified that he does not feel secure in Ms. Day's proposal that she would pay his travel costs (R.2491, 11-20). Ms. Day paints a picture of church member support for her family that sounds like they are very dependent on help with cooking, yard work, finances, and childcare (R.2418, 12-25; R.2419, 1-7).

Ms. Day's brief creates an incomplete or incorrect picture of the evidence in many ways. Many of these aspects have already been responded to. While this brief cannot respond to every item, some of the most important areas of correction are as follows:

- Regarding item 28 on page 25, Ms. Day makes a vague statement about Mr. Barnes disrespecting her final say authority, and when pressed, cannot think of any examples. There were only 3 incidents that the final say came up: a dance-focused preschool, the kindergarten, and parent-time. Mr. Barnes raised concerns about the first two and then relented but Ms. Day never followed through in registering her (R.2445, 16-18; R2488, 19-22),

and the parent-time dispute (to which Mr. Barnes also gave way) has been shown to be an improper use of her authority (*Supra*, p.21-22).

- Regarding item 16 on page 30, Ms. Day cites page 2480-81 of the record to show that Mr. Barnes had no evidence that Ms. Day had proposed longer parent-time periods so she could remain in Massachusetts and not relocate to Utah in 2015. However, that is not what the transcript shows (R.2480-81). The evidence provided by Mr. Barnes is irrefutable and uncontroverted (*Supra*, p.20-21).
- Regarding item 17 on page 30, Mr. Barnes' threat to take Ms. Day back to court was because she refused to return the child for 5 days after her parent-time had expired (Res. Ex. 6).

After two days of evidence, the Court denied Ms. Day's Motion and added the following notable written findings and conclusions to the commissioner's detailed findings that the court adopted:

- "Despite the June 18, 2015 Order designating Petitioner as the custodial parent if she moved to Utah, Petitioner has never emotionally relocated back to Utah; in fact, based on the evidence presented, it is unclear whether Petitioner has ever physically relocated to Utah with an intent to remain in Utah for any extended period (R.1961, 8);"

- Ms. Day's desire to relocate is primarily based upon her desire to complete her education and has very little to do with what is in the best interest of the child. While it will benefit Ms. Day, and perhaps ultimately the child, it does not support a finding that relocation is in the best interest of the child (R.1961, 9);

Additionally, in its oral ruling, the Court stated emphatically that the June 18, 2015, stipulated order giving Ms. Day final say on certain issues did not allow her to override the agreed-upon week-on week-off parent-time schedule (R.2560, 22-25; R.2561, 1-5).

E. APPEAL AND REMAND

Ms. Day successfully appealed the aforementioned ruling on the basis that the trial court should not have imposed a burden of proof on her under Rule 108 of the Utah Rules of Civil Procedure to demonstrate that the commissioner's recommendation was erroneous. *Day v. Barnes*, 2018 UT App. 143 ¶20, 427 P.3d 1272. In providing guidance for the district court on remand, this Court stated "that the district court is not necessarily required to rehear the evidence. Nothing in the district court's order or Day's arguments on appeal indicate that there was some error in the presentation of evidence." *Id.* at ¶21. The judge invited the parties to provide a memorandum to address the need for additional evidence (R.2679). After reviewing the parties' submissions and holding a telephone

conference, the court decided not to take new evidence but instead wanted the parties to redo their closing arguments. This was done on December 21, 2018 (R.2731-2). The court issued its decision on February 20, 2019, denying Ms. Day's Motion to Relocate (R.2738-48).

Summary of the Argument in Response to Appeal

Ms. Day's claim that she has been denied due process of law because the district court was not willing to re-hear the evidence from the 2014 evidentiary hearings on temporary orders fails because it was not appealed in 2014, there was a final order issued in 2015 that resolved the parties' case, the due process issue was not raised in Ms. Day's first appeal to this Court, this Court then remanded the case with a statement that the district court need not hear any new evidence, and the district court relied on that direction in not hearing any additional evidence.

Ms. Day's second issue purports to be a general attack on the findings themselves and the sufficiency of them but is instead a list of evidence Ms. Day thought the court should have given more weight. Consequently, Ms. Day fails to effectively address the actual findings the court did make and the underlying evidence that was there to support those findings. As a result, she has not carried her burden of showing that the findings were insufficient or not supported by

the evidence. Even so, a review of the district court's findings shows a well-reasoned view of the facts that were before it.

Ms. Day's third argument generally claims that the court abused its discretion in denying Ms. Day's Motion to Relocate. However, when taking a view of the current issues and facts of this case, it is clear that the district court was well within its discretion to deny Ms. Day's motion.

Argument in Response to Appeal

I. MS. DAY'S DUE PROCESS ARGUMENT FAILS BECAUSE IT WAS NOT RAISED IN THE FIRST APPEAL, THE COURT ONLY USED ITS KNOWLEDGE AND RECORD OF THE CASE TO INFORM AND SUPPORT ITS DECISION, AND BECAUSE THE COURT HAD BROAD DISCRETION TO REFUSE TO REHEAR OLD EVIDENCE

Ms. Day's claim that the relocation hearing denied her due process fails for several reasons. First, this issue was not raised in her first appeal and goes beyond the scope of that appeal. Ms. Day's new direction is particularly problematic where this Court clearly stated that on remand the judge need not take new evidence because no arguments had been made in Ms. Day's brief to suggest "that there was some error in the presentation of evidence." *Id.* at ¶21. This Court went on to say that the district court may elect . . . to rule on the motion based on the record it has already received . . . ." *Id.* The lower court has now relied on that statement in how it handled the case on remand. "A party cannot use the accident of a remand to raise in a second appeal an issue that [she]

could just as well have raised in the first appeal." *United States v. Parker*, 101 F.3d 527, 528 (1996)(*cited in State ex rel. Dep't of Labor v. Riemers*, 2010 ND 43, ¶ 11, 779 N.W.2d 649).

Second, Ms. Day mistakenly views the district court's findings and ruling as being based on res judicata concepts such as a substantial and material change of circumstances (Op. Br. p.33-34). If the court were doing that it would be saying that Ms. Day failed to meet a threshold determination and therefore fails to reach the best interest test. *See Hogge v. Hogge,* 649 P.2d 51 (Utah 1982)(requiring an initial showing of a substantial and material change in circumstances, and second and thereafter, a change is in the best interest of the child). However, a reading of paragraph 3 of the court's Conclusions of Law shows that it is using its previous record and knowledge of the evidence from the 2014 hearings, having heard the witnesses and judged their credibility, to "*further inform*[] *and support*[] the Court's present conclusion that the requested move to Massachusetts is not in the child's best interest (R.2299) (*emphasis added)*." The inserted footnote to paragraph 3 of the Conclusions of Law also shows the judge is using prior evidence and analysis to inform and support his present opinion after hearing the additional evidence of the 2016 hearings (R.2300, fn.3).

The fact that the 2014 hearings were focused on a temporary order or that an incorrect standard was applied with the hindsight provided by this Court in

its prior decision in this case does not prevent the judge from applying his knowledge of the case and its evidence to the new situation or standard that is before him. It is ridiculous to assume that a court must rehear evidence with each new issue that comes before it in order to provide due process. If the Court of Appeals did not require the district court to rehear the evidence of the 2016 objection hearings on relocation, why would it have to rehear the evidence from the 2014 objection hearings?

Third, the court was well within its authority to refuse to rehear witnesses and other evidence it had already heard. Ms. Day has a history of trying to retry her old, stale, false and unsuccessful evidence with every new pleading, hearing, or appeal. This pattern prompted the following statement from the judge at the beginning of the July 6, 2016, evidentiary hearing on Petitioner's Motion to Relocate:

> What I am concerned with here, you're essentially arguing that every time we have a hearing in this case we've got to go back to day one and reconsider all of the original factors that we've already considered one, two, three or four times already, and so every hearing is a new hearing where we try to take a second or a third or fourth or fifth bite at the apple at convincing the Court on certain underlying issues that have already been discussed and addressed by the Court (R.2226, 24 to R.2227, 6).

As noted, the 2014 ruling and its findings were not challenged by an appeal and were followed by a final custody order entered between the parties on June 18, 2015 (R.1530).

A district court has broad discretion to manage a civil case. *Dahl v. Harrison*, 2011 UT App. 389, 205 P.3d 139, 144, ¶19. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, . . . undue delay, wasting time, or needlessly presenting cumulative evidence." Ut. R. of Evid. 403.

The evidence Ms. Days seeks to revisit is six to ten years old. During most of this time, the parties were just teenagers. Many of these facts have been found against Ms. Day in the 2014 hearings (R.1052). This evidence is full of redundant, immaterial, impertinent and scandalous material in violation of Rule 10h of the Utah Rules of Civil Procedure that Ms. Day has tried to use over and over to prejudice the factfinder and to intimidate and harass Mr. Barnes who has objected to it in many forms throughout the proceedings (R.339; R.463; R.1334; R1733-35). As time passes, this evidence's probative value is exceeded by its potentially prejudicial effect. Ut. R. of Evid. 403. The judge has heard these witnesses, judged their credibility, and formulated his opinion about the evidence that was presented which he formalized in written findings (R.1052). In fact, in the hearing on December 21, 2018, he demonstrated that he was very familiar with the evidence and his findings (R.2772, 22 to R.2779). In that hearing and in the evidentiary hearings in 2016 it was obvious that he considered more

recent matters to be more relevant to the relocation question before him which was well within his discretion (R.2390, 19 to R.2391, 5; R.2784).

II. THE COURT'S FINDINGS WERE ENTIRELY SUFFICIENT TO SHOW ITS RATIONAL IN REACHING THE DECISION IT DID

A. APPELLANT'S ATTEMPT TO CHALLENGE THE FINDINGS FROM THE 2014 HEARING IS OUTSIDE THE SCOPE FOR WHICH THEY WERE INCLUDED IN THE RECORD ON RELOCATION

Before discussing the sufficiency of the court's findings, it is important to note the limits of our analysis. One serious flaw in Ms. Day's challenge to the findings is her assumption that because the court made the transcripts and findings from the March 2014 hearings a part of the record for the relocation hearings, those findings are now subject to review by this Court (Op. Br. 36). In the original ruling on this issue, Mr. Barnes' counsel expressed concern about the use Ms. Day might try to make of these materials and the court responded as follows:

> I will allow a transcript of the prior proceeding to be made a part of the record . . . not for purposes of reopening any potential appeal of the order that was entered back in 2014 case . . . but only for purposes of shortening this hearing in the sense of not replowing ground that we already plowed in that case, and . . . as I've said, [I] intend to limit today's hearing to issues that have arisen since that 2014 time frame, which have specific relevance to the motion for relocation that is before the Court at this time.
>
> In addition to the transcript of that hearing, it is of course a part of the record of the Court, but it should be clear that the ruling and order that were entered by the Court, the findings of this Court from that 2014 case should also be made part of the record. (R.2231, 1-17).

The district court was consistent with this position during the December 21, 2018, supplemental closing argument hearing (R.2761, 16 to R.2762, 10; R.2784, 16-22; R.2797; R.2801, 22-23). Notwithstanding this clear limitation on the use of the transcript, there are large sections of Ms. Day's brief that not only ignore that ruling but in many cases also ignore the findings of the court from the 2014 hearings as if they were never made. In fact, most every document Ms. Day has filed in the case since the 2014 hearings have selectively ignored the findings of the court from 2014 and Mr. Barnes is left to point that out over and over again. In reality, this entire appeal is essentially an effort to force the court to give Ms. Day a do-over back to 2013. As to Ms. Day's improper challenge to the 2014 findings, the second to last paragraph of page 37 of her brief to the end of the partial paragraph on page 40, almost all of pages 46-49, and many items sprinkled into pages 42-45 should be disregarded (Op. Br. pp37-49).

B. MS. DAY HAS FAILED TO PROPERLY MARSHAL THE EVIDENCE AND THEN SHOW WHY THAT EVIDENCE FAILS TO SUPPORT THE FINDINGS

The burden is on Ms. Day to show that the Court's findings, when viewed in the light most favorable to the court below, *Taft v. Taft,* 2016 UT App 135, 379 P.3d 890, 915, ¶70, are so inadequate that this Court cannot determine if its conclusions were rationally based, *Barnes v. Barnes,* 857 P.2d 257, 259 (UT App. 1993). While the marshaling requirement was relaxed by *State v. Nielsen,* 2014 UT 10, ¶33-44, 326 P.3d 645, the need to appropriately marshal the evidence that

supports the Court's findings is nonetheless critical to showing that it was insufficient to support the court's findings. *Id.* ¶40. "The pill that is hard for many appellants to swallow is that if there is evidence supporting a finding, absent a legal problem – 'a fatal flaw' – with that evidence, the finding will stand, even though there is ample evidence that would have supported contrary findings." *Taft,* 2016 UT App 135, ¶19 (*quoting Kimball v.* Kimball, 2009 UT App 233, ¶20 n.5, 217 P.3d 733). Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact." *Taft,* 2016 UT App 135, ¶19 (*quoting Ostermiller v. Ostermiller,* 2010 UT 43, ¶20, 233 P.3d 489). If an error in the Court's findings does exist, Ms. Day has the burden to show that it is prejudicial, and to the extent she fails to do so, it will be deemed harmless and no appellate relief is available. *State v. Evans*, 2001 UT 22, ¶20, 20 P.3d 888." In other words, Ms. Day must show a reasonable likelihood that without the error, there would have been a different result. *See Morra v. Grand County*, 2010 UT 21, ¶ 36, 230 P.3d 1022; *State v. Johnson*, 2009 UT App 382, ¶ 37, 224 P.3d 720; *State v. Davis*, 2007 UT App 13, ¶¶ 15-21, 155 P.3d 909. "Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made." *Hall v. Hall,* 858 P.2d 1018, 1025 (Utah Ct.

App. 1993). The court's written findings can be supplemented by its oral findings. *See Barnes,* 857 P.2d at 261.

The Appellant appears to have a hard time "setting aside [her] own prejudices and fully embrac[ing] [her] adversary's position...," *Taft,* 2016 UT App 135, ¶19 and the perspective of the judge. She is so fixated on her version of the 2014 facts that she cannot see the limited weight of those facts when compared to the current, practical, common-sense basis for the district court's findings and conclusions. As a result, she has done exactly what *Ostermiller* cautions against--rehearsing those selections from the record that she believes supports a different result. *Ostermiller,* 2010 UT 43, ¶20.

C. THE COURT WAS NOT ASKED TO DETERMINE WHICH PARENT SHOULD BE AWARDED CUSTODY, BUT TO DECIDE IF RELOCATION WAS IN THE BEST INTEREST OF THE CHILD

In the second full paragraph of page 3 of the Ruling and Order on Petitioner's Objection to Commissioner's Recommendation (After Remand)(hereinafter Remand Ruling), the court correctly and effectively states its true mandate in a relocation hearing:

> Pursuant to Utah Code Section 30-3-37(4): "In a hearing to review the notice of relocation, the court shall, in determining *if the relocation of a custodial parent is in the best interest of the child*, consider any other factors that the court considers relevant to the determination." (emphasis added). Accordingly, the ultimate question before the Court is whether the requested relocation is in the best interest of the child.

The court went on to note that some of the "other factors" the court might consider are those relative to custody found in Utah Code Ann. §§ 30-3-10(1)(a) and 30-3-10.2(2) as well as Rule 4-903 (4) of the Utah Rules of Judicial Administration. Section 30-3-37 does not require the court to review all those factors as Ms. Day suggests (Op. Br. 41). The key point is that the Court should not be focusing on which parent should get custody as it would in a custody modification case. Instead, it is determining if relocation is in the best interest of the child, and once that determination is made, what other orders need to be put in place to effectuate that decision.

D. THE COURT'S FINDINGS SHOW A REASONABLE AND RATIONAL ANALYSIS OF THE RELOCATION QUESTION THAT WAS BEFORE IT

In light of the rules for reviewing findings laid out in Section B above, it is apparent that there are many sources to which we can turn for a full understanding of the district court's thinking on this case. In addition to the Remand Ruling (R.2738), we can consider the court's findings in its April 25, 2014 Findings of Fact and Order on Objection (R.1052), it's oral findings, and reasonable inferences from stated and unstated findings. Additionally, in support of the court's findings, the Statement of Facts is incorporated herein by reference (*Supra* p.5-30). From these sources, the district court's reasoning is easily discernible:

- In April of 2013, the parties stipulated to a change in primary physical custody to Mr. Barnes in Utah and Ms. Day returned to Massachusetts while the child remained here (R.2742, 8). While Ms. Day claims she was coerced, the district court found otherwise in 2014 which finding has been incorporated into the Remand Ruling.[4]
- Notwithstanding the custody action pending in Massachusetts, Ms. Day filed a case in Utah in early May 2013 and sought Mr. Barnes agreement to bring the matter to Utah (*See* R.21 where Ms. Day argues many of the same factors the court found about Utah being the proper base for the child)(R.2742, 8).
- Although there have been visits to Massachusetts, the child has continuously resided in Utah since April 2013 with Mr. Barnes (Res. Ex. 12; R.2742, 9).
- Although Mr. Barnes was awarded primary physical custody of the child after two days of evidentiary hearings in March of 2014 (R.1063, 1), Ms. Day was given the offer of 50-50 joint custody if she

[4] After summarizing Ms. Day's evidence on this issue (R.1057) the court stated, "This Court independently finds that the evidence of alleged fraud, coercion, or duress was not persuasive, and does not appear to have been a driving force in Petitioner's decision to agree to the Stipulated Agreement. Furthermore, while the Court recognizes that reasonable minds could differ as to choices of legal strategy in any given stage of a legal proceeding, the legal advice given to Petitioner by her lawyer at the time was at least within the range of reasonable strategies and advice. Given the then unsettled status of Petitioner's and Petitioner's family's living situation and given the potential for the proceedings to be sidetracked by the allegations of sexual improprieties between Respondent and Petitioner's mother. (R.1057, ¶9)."

returned to Utah (R.1065, 5; R.2742, 10). This same offer had been extended to her by the commissioner in November 2013, but as of March 2014, she had not taken advantage of that opportunity which caused some question in the Court's mind at the time about her priorities in relation to her child (R.1060 2).

- The parties were able to reach an agreement in their custody case and a final order was entered by the Court on June 18, 2015 (R.1530). The agreement was that Ms. Day would be moving to Utah, and upon her move to Utah, she would assume the role as primary caregiver for the child under a 50-50 joint custody arrangement (R.1531, 1-2; R.2743, 11). However, despite this opportunity and agreement, the evidence showed that Ms. Day never actually relocated back to Utah with the intent to remain here for any extended period of time (*Supra* p.21; R.2743, 12). The reasonable inference from this finding is that she never fulfilled the conditions for becoming a primary caregiver or for receiving 50-50 custody.
- While Ms. Day's Motion to Relocate was not filed until November 10, 2015 (R.1550; R.2743, 14), she actually gave notice of her intent to relocate on September 30, 2015, just two and one-half months after she arrived in Utah (R.1552, 9).

- Ms. Day's motion to relocate was denied by the commissioner (R.1893, 1; R.2743, 15-16) with the direction that if Ms. Day chose to move to Massachusetts, Mr. Barnes would be awarded primary physical custody (R.1893, 2).
- At the time of the evidentiary hearing on July 6 and 8 of 2016, the child was five and a half years old and had lived in Utah for about four of those years (R.2744, 18). Three of those years were with Mr. Barnes as the primary physical custodian (Res. Ex. 12).
- The child is not old enough to express her wishes, concerns, or preferences (R.2744, 19) and there was no material evidence to suggest that the child has not appropriately bonded to both parents (R.2744, 25).
- The child is far more connected to Utah than Massachusetts given that both parties were raised here, met and dated here, the child was conceived and born here, both parties have strong immediate and extended family ties here (R.1062, 18; R.1729; R.2433, 22 to R.2437, 21), and for all but about one and a half years of the child's life she has lived in Utah (R.2741-44, 1-5, 8-9, 18; Res Ex. 12). The child also has an eye condition for which she receives treatment from a doctor here in Utah (R.2744, 20). In other words, Utah is home base for the child and Massachusetts is an outpost.

- A joint physical and legal custody in Utah, so long as both parties remain in Utah, would be in the child's best interest and this has been the court's opinion since the 2014 hearings and remains the court's opinion now (R.2746, fn.3).
- Given the court's finding in paragraph 21 of the Remand Ruling about its belief that the "parties are fundamentally good people who will likely have productive and successful lives as they continue to mature (R.2744, 21), along with other statements made by the court during the course of the proceedings, it is reasonable to infer that the court has taken into consideration all the various moral accusations and claims made in the 2014 hearings,[5] that his opinion has not changed regarding that evidence which he believed was not inconsistent with Mr. Barnes having primary custody should Ms. Day choose to remain in Massachusetts, and that for the most part those allegations of relative moral fitness are not very relevant at this time. The court also incorporated its findings on these issues from the 2014 hearings.[6]

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[5] See also the comments made by the commissioner, *Supra* fn.3, p.19.

[6] "While, the Court recognizes that the Evidentiary Hearing was not a Trial of the rape or sexual assault allegations, the evidence presented on both issues was meager and essentially uncorroborated. Sexual assault on Petitioner's mother was alleged to have occurred in February 2010, shortly after Respondent ran away from home the second time, and was welcomed a second time into the home the Petitioner shared with her parents and extended family. Respondent was allowed to continue to live with Petitioner's family for nearly two and a half

- Notwithstanding the court's optimism for the future of the parties, it is clear that both parties are still dependent on their parents and other extended family members for assistance in raising the child (R.2744, 21-22).
- While there have been periods of drama, the parties have been able to work together to make many shared decisions and to work out parent-time issues with the minor child (R.2744, 23).
- Fleshing out paragraph 24 of the court's findings in the Remand Ruling, and making some reasonable inferences, the court is saying that it listened to the parties evidence in both 2014 and 2016, considered the many various aspects of the case, has felt comfortable with his findings and decision in 2014 about Mr. Barnes having primary custody in Utah should Ms. Day choose to live in Massachusetts, and that it did not hear anything in the 2016 hearings or in the arguments of counsel on December 21, 2018 that makes it

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more years after the incident. No report of the alleged assault was ever made to law enforcement authorities while Respondent was living with Petitioner's family. Similarly, the rape or rapes of Petitioner were alleged to have occurred in [sic] beginning in late 2009 and at least through March of 2010 which was when Petitioner became pregnant with Respondent's child. Again, however, Respondent was allowed to continue to live with Petitioner and her extended family for nearly two and a half more years. No report of any alleged rape was made to law enforcement agencies until after Respondent moved out of Petitioner's home and commenced legal action to obtain custody of the child. No law enforcement agency or prosecutor's office has made an arrest, issued a summons, or otherwise commenced any criminal action against Respondent as to the alleged rape of Petitioner or the alleged sexual assault of Petitioner's mother (R.1055, ¶6).

feel like it would be in the best interest of the child to relocate to Massachusetts or that there needs to be a change in custody from Mr. Barnes if Ms. Day decides to stay in Massachusetts (R.2744, 22).

- Of particular concern to the court is the fact that Ms. Day has for many years failed to take advantage of the opportunities afforded her to obtain joint custody and have final decision-making authority regarding the child so she could pursue her schooling and future as a dance instructor in Massachusetts. This has clearly been a priority choice over her role as a mother (R.2745, 26). While Ms. Day's brief takes issue with the court having borrowed language from Utah Code Ann. § 30-3-10.2(2)(b) for this finding, it is clear what the judge is trying to say. It is hard to overstate the consequences of her choice when considering the significant impact this continued decision has had on her ability to participate in her child's life on a regular and consistent basis, the impact on the child and her bond with Ms. Day, the difficulties it has created for the child, the fact that Mr. Barnes has carried forward as the primary caregiver during this time.[7] Her actions have spoken volumes. This finding is also relevant to Utah

[7] Ms. Day believes the Court should have given more weight to her reasons for wanting to be in Massachusetts. Regardless of how well-intended her reasons may be, in the words of the commissioner, Ms. Day's choice resulted in her "realiz[ing] a more limited parental role" with Mr. Barnes being the primary custodial parent during the pendency of the proceedings (R.1888, ¶11h) and thereafter.

Code Ann. §§ 30-3-10(2)(m) "who has been the primary caretaker of the child," (q) "the relative strength of the child's bond with the parent," and (r) "any other factor the court finds relevant."

- The court's statement in paragraph 27 of the Remand Ruling sums up Ms. Day's case for relocation. She really did not have much of anything that went to the best interest of the child to relocate but focused more on what she wanted and her priorities which only remotely inure to the benefit of the child, especially in light of the real and immediate consequences for the parties and the child mentioned in the prior bullet point (R.2745).

Did the district court have a rational basis for its decision? Absolutely! Did it provide sufficient findings to ascertain that rational basis? Absolutely!

A few other points are in order. First, Ms. Day's brief criticizes the findings for not mentioning Ms. Day's offer of paying for all travel costs suggesting that is one of the factors the court must consider (Op. Br. 43). However, the court only considers this if it finds that relocation is in the best interest of the child. Utah Code Ann. § 30-3-37(5). Furthermore, Ms. Day's evidence was consistently in conflict regarding her and her families' financial abilities and the lack thereof. Generally, when it seemed to suit her to be poor, she claimed poverty and vice versa (R.2294, 14-16; R.2287, 17-20; R.2428, 20-25; R.2491, 11-20).

Second, Ms. Day's brief criticizes the court for not considering Mr. Barnes' father's alleged unethical behavior in communicating with Ms. Day directly just prior to the mediation in 2013 (Op. Br. 44). However, it should be noted that Mr. Barnes had a Massachusetts attorney representing him and the only pending case was in Massachusetts. His father was acting as a father and grandfather.

Third, to the extent that this Court finds any deficiency in the district court's findings, such should be considered harmless error. Harmless error is "an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings. *State v. Evans*, 2001 UT 22, ¶20, 20 P.3d 888. This would especially apply to any error in relation to the 2014 proceedings given their remoteness to the current relocation issue that is before the Court.

III. SINCE MS. DAY FAILS TO DEMONSTRATE THAT THE FINDINGS WERE INADEQUATE AND UNSUPPORTED BY THE EVIDENCE WHEN TAKEN IN THE LIGHT MOST FAVORABLE TO THE DISTRICT COURT, SHE CANNOT NOW CLAIM THE COURT ABUSED ITS DISCRETION IN DENYING HER MOTION TO RELOCATE

"Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal principles." *Connell v. Connell,* 2010 UT App 139, ¶45, 233 P.3d 836 (quoting *Childs v. Childs,* 967 P.2d 942, 944 (Utah Ct. App. 1998)). Trial court decisions are entitled to a "presumption of validity." *Trubetzkoy v. Trubetzkoy,* 2009 UT App 77, ¶8, 205 P.3d 891. Appellate courts will

only find abuse of discretion where "there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such inequity has resulted as to manifest a clear abuse of discretion." *Kimball v. Kimball,* 2009 UT App 233, ¶13, 217 P.3d 733.

Mr. Barnes again questions the sufficiency of Ms. Day's marshaling effort and incorporates his arguments in relation thereto herein (*Supra, p.36-38*)

The discussion of the court's rationale in reaching its decision from the prior issue is incorporated herein by reference and shows that the court reasonably exercised is broad discretion with a proper understanding of Utah Code Ann. § 30-3-37 and its purposes and limitations.

Ms. Day's brief claims that she "showed incredible loyalty to her daughter by relocating to Utah for a year after the UCCJEA matter was settled by taking her college classes on line [sic]" citing to R.2269, 16-19. However, that location in the transcript appears to be an incorrect citation. Furthermore, the statement is entirely untrue. There was no period that exceeded a few summer months that Ms. Day was in Utah, including 2015 when she was supposed to have moved here (2016 Res. Ex. 11).

In this issue, Ms. Day again reverts to trying to challenge the findings and order from the 2014 hearings that were not appealed and that have already been addressed. Such arguments should be entirely disregarded.

Conclusion, Request for Attorney Fees, and Request that File be Sealed

In light of the foregoing, it appears that Ms. Day was given full due process with regard to her Motion to Relocate and that the Court has made sufficient findings supported by adequate evidence determining that relocation is not in the best interest of the child. It appears that the district court acted well within its discretion in all matters and this Court should affirm its decision.

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, a party may be awarded attorney fees when an appeal is frivolous in that it is "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." If the Court finds this appeal to be frivolous, Mr. Barnes respectfully requests that his attorney fees be awarded.

Because this case involves many issues that would be troubling to the child that is the subject of the action if she were to come upon it in a future day, Mr. Barnes asks that the file be sealed.

DATED this 3rd day of October, 2019.

/s/ Eric B. Barnes
Attorney for Appellee

Certificate of Compliance with Rules 24(f)(1) and 21(g)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(5) because this brief contains 12,562 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

3. This brief complies with Utah R. App. P. 21(g) regarding non-public information.

DATED this 3rd day of October, 2019.

/s/ Eric B. Barnes
Attorney for Appellee

Certificate of Service

This is to certify that on the 3rd day of October, 2019, I served a true and correct copy of the Brief of Appellee upon counsel for the Appellant, Theodore R. Weckel JR. via email pursuant to Utah Supreme Court Standing Order No. 11 to the following email address: tweckel@hotmail.com.

/s/ Eric B. Barnes
Attorney for Appellee

Addendum A

Effective 7/1/2017

30-3-10 Custody of children in case of separation or divorce -- Custody consideration.

(1) If a married couple having one or more minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining any form of custody, including a change in custody, the court shall consider the best interests of the child without preference for either parent solely because of the biological sex of the parent and, among other factors the court finds relevant, the following:

(i) the past conduct and demonstrated moral standards of each of the parties;

(ii) which parent is most likely to act in the best interest of the child, including allowing the child
frequent and continuing contact with the noncustodial parent;

(iii) the extent of bonding between the parent and child, meaning the depth, quality, and nature
of the relationship between a parent and child;

(iv) whether the parent has intentionally exposed the child to pornography or material harmful to
a minor, as defined in Section 76-10-1201; and (v) those factors outlined in Section 30-3-10.2.

(b) There is a rebuttable presumption that joint legal custody, as defined in Section 30-3-10.1, is in the best interest of the child, except in cases where there is:

(i) domestic violence in the home or in the presence of the child;

(ii) special physical or mental needs of a parent or child, making joint legal custody
unreasonable;

(iii) physical distance between the residences of the parents, making joint decision making
impractical in certain circumstances; or

(iv) any other factor the court considers relevant including those listed in this section and
Section 30-3-10.2.

(c) The person who desires joint legal custody shall file a proposed parenting plan in accordance
with Sections 30-3-10.8 and 30-3-10.9. A presumption for joint legal custody may be rebutted
by a showing by a preponderance of the evidence that it is not in the best interest of the child.

4. (d) A child may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the child be heard

   and there is no other reasonable method to present the child's testimony.

5. (e) The court may inquire of a child and take into consideration the child's desires regarding

   future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the child's custody or parent-time otherwise. The desires of a child 14 years of age or older shall be given added weight, but is not the single controlling factor.

(f) If an interview with a child is conducted by the court pursuant to Subsection (1)(e), the interview shall be conducted by the judge in camera. The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with a child is the only method to ascertain the child's desires regarding custody.

2. (2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.
3. (3) If the court finds that one parent does not desire custody of the child, the court shall take that evidence into consideration in determining whether to award custody to the other parent.

(4)
(a) Except as provided in Subsection (4)(b), a court may not discriminate against a parent due
to a disability, as defined in Section 57-21-2, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.
(b) The court may not consider the disability of a parent as a factor in awarding custody or modifying an award of custody based on a determination of a substantial change in circumstances, unless the court makes specific findings that:
(i) the disability significantly or substantially inhibits the parent's ability to provide for the physical and emotional needs of the child at issue; and

(ii) the parent with a disability lacks sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the child at issue.
(c) Nothing in this section may be construed to apply to adoption proceedings under Title 78B, Chapter 6, Part 1, Utah Adoption Act.

5. (5) This section establishes neither a preference nor a presumption for or against joint physical custody or sole physical custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.
6. (6) When an issue before the court involves custodial responsibility in the event of a deployment of one or both parents who are servicemembers, and the servicemember has not yet been notified of deployment, the court shall resolve the issue based on the standards in Sections 78B-20-306 through 78B-20-309.

Amended by Chapter 67, 2017 General Session Amended by Chapter 224, 2017 General Session

Addendum B

30-3-10.2 Joint custody order -- Factors for court determination -- Public assistance.

1. (1) The court may order joint legal custody or joint physical custody or both if one or both parents have filed a parenting plan in accordance with Section 30-3-10.8 and it determines that joint legal custody or joint physical custody or both is in the best interest of the child.
2. (2) In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody;
(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent;
(d) whether both parents participated in raising the child before the divorce;
(e) the geographical proximity of the homes of the parents;
(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form
an intelligent preference as to joint legal or physical custody;

7. (g) the maturity of the parents and their willingness and ability to protect the child from conflict

   that may arise between the parents;

8. (h) the past and present ability of the parents to cooperate with each other and make decisions

   jointly;
(i) any history of, or potential for, child abuse, spouse abuse, or kidnaping; and
(j) any other factors the court finds relevant.

3. (3) The determination of the best interest of the child shall be by a preponderance of the evidence.
4. (4) The court shall inform both parties that an order for joint physical custody may preclude

eligibility for cash assistance provided under Title 35A, Chapter 3, Employment Support Act.

5. (5) The court may order that where possible the parties attempt to settle future disputes by

a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody or joint physical custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

Amended by Chapter 142, 2005 General Session

Addendum C

Rule 4-903. Uniform custody evaluations.

Intent:

To establish uniform guidelines for the performance of custody evaluations.

Applicability:

This rule shall apply to the district and juvenile courts.

Statement of the Rule:

(1) Custody evaluations shall be performed by professionals who have specific training in child development, and who are licensed by the Utah Department of Occupational and Professional Licensing as either a (a) Licensed Clinical Social Worker, (b) Licensed Psychologist, (c) Licensed Physician who is board certified in psychiatry, or (d) Licensed Marriage and Family Therapist.

(2) Every motion or stipulation for the performance of a custody evaluation shall include:

(2)(A) the name, address, and telephone number of each evaluator nominated, or the evaluator agreed upon;

(2)(B) the anticipated dates of commencement and completion of the evaluation and the estimated cost of the evaluation;

(2)(C) specific factors, if any, to be addressed in the evaluation.

(3) Every order requiring the performance of a custody evaluation shall:

(3)(A) require the parties to cooperate as requested by the evaluator;

(3)(B) restrict disclosure of the evaluation's findings or recommendations and privileged information obtained except in the context of the subject litigation or other proceedings as deemed necessary by the court;

(3)(C) assign responsibility for payment from the beginning of the evaluation through the custody evaluation conference, as well as the costs of the written report if requested;

(3)(D) specify dates for commencement and completion of the evaluation;

(3)(E) specify any additional factors to be addressed in the evaluation;

(3)(F) require the evaluator to provide written notice to the court, counsel and parties within five business days of completion (of information-gathering) or termination of the evaluation and, if terminated, the reason;

(3)(G) require counsel and parties to complete a custody evaluation conference with the court and the evaluator within 45 days of notice of completion (of information gathering) or termination unless otherwise directed by the court so that evaluator may issue a verbal report; and

(3)(H) require that any party wanting a written custody evaluation report give written notice to the evaluator within 45 days after the custody evaluation conference.

(4) The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time

arrangements that are in the child's best interest. Unless otherwise specified in the order, evaluators must consider and respond to each of the following factors:

(4)(A) the developmental needs of the child (including, but not limited to, physical, emotional, educational, medical and any special needs), and the parents' demonstrated understanding of, responsiveness to, and ability to meet, those needs.

(4)(B) the stated wishes and concerns of each child, taking into consideration the child's cognitive ability and emotional maturity.

(4)(C) the relative benefit of keeping siblings together;

(4)(D) the relative strength of the child's bond with the prospective custodians, meaning the depth, quality and nature of the relationship between a prospective custodian and child;

(4)(E) previous parenting arrangements where the child has been happy and well adjusted;

(4)(F) factors relating to the prospective custodians' character and their capacity and willingness to function as parents, including:

(4)(F)(i) parenting skills

(4)(F)(ii) co-parenting skills (including, but not limited to, the ability to facilitate the child's relationship with the other parent, and to appropriately communicate with the other parent);

(4)(F)(iii) moral character;

(4)(F)(iv) emotional stability;

(4)(F)(v) duration and depth of desire for custody and parent-time;

(4)(F)(vi) ability to provide personal rather than surrogate care;

(4)(F)(vii) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes;

(4)(F)(viii) reasons for having relinquished custody or parent-time in the past;

(4)(F)(ix) religious compatibility with the child;

(4)(F)(x) the child's interaction and relationship with the child's step-parent(s), extended family members, and/or any other person who may significantly affect the child's best interest;

(4)(F)(xi) financial responsibility;

(4)(F)(xii) evidence of abuse of the subject child, another child, or spouse;

(4)(G) factors affecting a determination for joint legal and/or physical custody as set forth in Utah Code 30-3-10.2; and

(4)(H) any other factors deemed important by the evaluator, the parties, or the court.

(5) In cases in which specific areas of concern exist such as domestic violence, sexual abuse, substance abuse, mental illness, and the evaluator does not possess specialized training or experience in the area(s) of concern, the evaluator shall consult with those having specialized training or experience. The assessment shall take into consideration the potential danger posed to the child's custodian and the child(ren).

(6) In cases in which psychological testing is employed as a component of the evaluation, it shall be conducted by a licensed psychologist who is trained in the use of the tests administered, and adheres to the ethical standards for the use and interpretation of psychological tests in the jurisdiction in which he or she is licensed to practice. If psychological testing is conducted with adults and/or children, it shall be done with knowledge of the limits of the testing and should be viewed within the context of information gained from clinical interviews and other available data. Conclusions drawn from psychological testing should take into account the inherent stresses associated with divorce and custody disputes.

Effective November 1, 2016

Addendum D

The Order of Court is stated below:
Dated: June 15, 2015 05:01:52 PM **/s/** David S. Dillon District Court Commissioner

Dated: June 18, 2015 09:16:26 AM **/s/** David Connors District Court Judge

Theodore R. Weckel, USB No. 07111
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IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
FOR DAVIS COUNTY, FARMINGTON DEPARTEMENT

MACAELA DANYELLE DAY, Petitioner, vs. TYLER BARNES, Respondent.	STIPULATED ORDER RE: PARTIES' RULE 4-903/MEDIATION CONFERENCE HELD ON FEBRUARY 24, 2015 Case No. 134700668 Judge: Connors Commissioner: Dillon

THIS MATTER CAME ON for a Rule 4-903/mediation settlement conference on February 24, 2015. The Petitioner was present and represented by Theodore R. Weckel, Jr. The Respondent was present and was represented by Douglas D. Adair. Dr. Matthew Davies attended the conference and presented his recommendations in private to the parties, their counsel, the maternal grandmother (by consent), Ms. Jaime Day, the paternal grandparents (by consent), Mr. & Mrs. Eric Barnes, and the mediator, Mr. Orson West. At the conclusion of Dr. Davies' remarks, the parties participated in mediation for the remainder of the day. The parties were able to reach a mediated settlement for most of the material issues of the case. The parties, their counsel, the grandparents, and Mr. West then appeared before the Honorable David S. Dillon and read the following terms of the stipulation into the record. Commissioner Dillon thereafter accepted the terms of the parties' stipulation as follows (the page and line numbers

stated in parenthesis are taken from the transcript of the record):

1. The Petitioner shall be designated as the primary caregiver for the child upon her relocation to Utah (p. 7, l.20). The Petitioner anticipates relocating to Utah the first week of July, 2015 (p. 3, l. 1).

2. The parties shall enjoy joint legal and physical custody of their child as of July 6, 2015 under a 50-50 joint custody arrangement (p. 4, l. 24).

3. The parties shall discuss and consult with each other on all major issues involving the best interest of their child in good faith, such as health, education, religion, and other important matters (p. 4, l. 2).

4. The parties will always take into consideration the best interest of the minor child when making decisions, and they will make reasonable decisions (p. 5, l. 5).

5. If the parties cannot agree on an issue involving the child, the Petitioner shall have the final decision-making authority, subject to the dispute resolution procedure in paragraph six (p. 12, l. 5-11).

6. Should an impasse arise between the parties regarding a decision involving the child, either party may request to resolve the issue through a counselor (p. 6, l. 3). If the matter cannot be resolved through a counselor, either party may request mediation (p. 6, l. 5). If an agreement still cannot be reached after mediating in good faith, either party may redress the court (p. 6, l. 6). If the court determines that one of the party has prevailed, the prevailing party shall be awarded his or her attorney fees (p. 12, l. 10). All costs associated with counseling and mediation shall be shared equally by the parties (p. 7, l. 19).

7. Until the Petitioner relocates to Utah, the Petitioner shall enjoy two weeks of parent-time with the child, and the Respondent shall enjoy four weeks of parent time with the child during each six week cycle (p. 7, l. 22-24). The six week cycle shall begin as of February 24, 2015. Travel costs for transporting and accompanying the child shall remain pursuant to prior court order.

8. Once the Petitioner relocates to Utah, the parties shall enjoy a one-week on, one-week off parent-time arrangement subject to the statutory holiday schedule or as the parties can mutually agree otherwise (p. 3, l. 12). Solely for purposes of this stipulated order, Petitioner shall be designated as the custodial parent and enjoy the holidays specified in Utah Code Section 30-3-35. Solely for purposes of this stipulated order, Respondent shall be designated as the non-custodial parent, and shall enjoy the holidays specified in Utah Code Section 30-3-35. Exchanges will occur every Monday morning and at a time as agreed to by the parties (p. 3, l. 11). The party picking up the child shall do so at the delivering party's residence or at another mutually agreed place. Each party shall pay for their own travel expense.

9. After the Petitioner returns to Utah, the parties shall have a midweek parent-time of at least three hours, and if mutually agreed to, the midweek time can be longer (p. 2, l. 9). Since the Respondent is a full time student, and his course schedule changes each semester, Respondent shall be able to designate each semester as to when his mid-week parent-time shall occur (p. 2, l. 9).

10. The parties shall meet or communicate with each other each August, January, and April, and together create a parent-time/activity calendar for the child, using a Google calendar (p. 2, l. 11-16). Both parties shall be responsible for inputting the agreed upon schedule

to the calendar, and providing a copy of the calendar to each other (p. 2, l. 11-16). Both parties shall consult with each other and exchange information as to the contents of the calendar (p. 2, l. 16). The calendar shall include the statutory holiday parent-time schedule pursuant to U.C.A. Sections 30-3-5 and as set forth in Exhibit A (p. 3, l. 16).

11. The parties shall have a weekly parenting meeting, which shall occur on Sunday at 9 P.M. or at a time that the parties mutually agree (p. 2, l. 15-18). The meeting may be by telephone, text, email, or in person as the parties agree (p. 2, l. 15-18). The parent who is in possession of the child shall initiate the meeting (p. 2, l. 18-19). If the parties cannot meet, they shall reschedule the meeting within 24 hours (p. 2, l. 20). Either party may call a "time out" in terms of party communication for a 24 hour period (p. 2, l. 23).

12. In 2015, Respondent shall enjoy parent time during the 4th of July holiday. In 2015, Petitioner shall enjoy the 24th of July holiday (p. 3, l. 9-14).

13. The parties are to contact Dr. Davies for a recommendation for a parenting coordinator for the child. The Petitioner will arrange for the meeting with the parenting coordinator (p. 3, l. 20-23).

14. Payment for the child's health insurance and out of pocket expenses shall be shared by the parties pursuant to Utah Code Section 78B-12-212 and as set forth as Exhibit B (p. 3, l. 24-25).

15. During the week in which a party has physical custody of the child, said party shall be responsible for arranging for day care for the child (p. 4, l. 2-6). If possible, the parents should have a family member provide day care free of charge (p. 4, l. 2). If a parent cannot have a family member provide day care during his or her parent-time, he or she shall contact the other

party to determine whether the other parent can and will provide day care through a member of his or her family (p. 4, l. 5-6). If neither party can provide day care, the parties shall share in any day care expense incurred pursuant to Utah Code Section 78B-12-214 and as set forth as Exhibit C.

16. The parties shall work together in having the child participate in extracurricular activities (p. 4, l. 11-18). The parties shall not schedule such activities during the other parent's parent-time unless mutually agreed upon (p. 4, l. 11-18). The parties shall each share in the cost for such expenses if the activity is agreed upon by the parties jointly. However, if a party cares to have the child participate in an activity to which the other parent does not agree, the registering parent shall bear the costs for that activity solely and be responsible solely for transportation to and from the activity (p. 4, l. 11-18).

17. Petitioner shall have the right to elect dance activities for the child, while Respondent shall have the right to elect sports activities for the child (p. 4, l. 11-18). However, these rights do not eliminate each parties' right to confer with each other in good faith about such activities, and do not allow the parties to schedule activities during each other's parent-time unless mutually agreed.

18. The parties shall each be listed at the child's school as primary contacts (p. 4, l. 20-21. Either party shall have the right to check the child out of school upon notification to the other party (p. 4, l. 22-23).

19. Both parties are mutually restrained from speaking in a disparaging way about the other parent whether to each other, to third parties, or through social media such as Facebook (p. 6, l. 7-11).

20. The parties shall use their best efforts to prohibit third parties from disparaging each other (p. 6, l. 7-11).

21. The parties hereby adapt the recommendations of Dr. Davies regarding "gate opening" behaviors as reflected in the corresponding parenting plan (p. 6, l. 12-13).

22. The parties shall alternate each year the right to claim any and all tax benefits, including but not limited to the earned income tax credit for the child on their individual income tax returns. The Respondent shall be able to claim such benefits in even numbered calendar years, e.g., in 2014 where he has custody of the child for 183 overnights, while Petitioner shall have such right to claim these in odd numbered years where she has 183 overnights. However, if it is cost effective for either parent to buy out the other parties' right to these tax benefits, he or she shall be able to do so by notifying the other parent of his or her desire to do so and paying the other party the cumulative tax benefit associated with claiming the child on his or her tax return.

23. The parties shall create a parenting plan, given that they shall enjoy joint custody. Should the parties need to modify the parenting plan, they agree to confer with Dr. Davies if it is ethical for him to do so. Otherwise, the parties agree to mediate any unresolved issue for the parenting plan, and to pay the cost for such mediation.

24. Child support shall be waived by the parties as of July 1, 2015. Petitioner shall have 30 days to find a job upon relocating to Utah. In the event that either party wishes to petition the court at any point in the future and request that child support be paid for one reason or another, the court will entertain that request, because a waiver of child support is not the parent's to waive. It's the child's right to receive support.

25. The parties agree to reside within 20 miles of each other.

26. Should either party desire to relocate from each other at a distance which is greater than 20 miles, he or she shall provide 90 day notice to the other party. Neither party shall be able to relocate with the child unless a court has issued an order to that effect, whether it be pursuant to U.C.A. Section 30-3-37, or by way of a temporary order through the filing of a petition to modify custody. Until such an order is issued by the court, the child shall remain in Utah with the other parent. Either party shall have the right to object to a Commissioner's recommendation regarding relocation, and to obtain an evidentiary hearing on the issue of child custody before a judge.

27. Respondent reserves as the only remaining issue changing the surname of the child to Barnes.

The Court's signature will appear at the top of this document.

CERTIFICATE OF SERVICE

I certify that I served a copy of this Amended Order upon Douglas D. Adair by email and consent on the 26th day of May 2015.

/s/ Theodore R. Weckel

Addendum E

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

FARMINGTON DEPARTMENT, STATE OF UTAH

MACAELA DANYELLE DAY, Petitioner, v. TYLER BARNES, Respondent.	))))))))	RECOMMENDED RULING AND ORDER ADOPTING THE RECOMMENDATION Civil No. 134700668 Judge: David M. Connors Commissioner: David S. Dillon

THE COURT, having reviewed the file, having reviewed the documents filed by the parties for the schedule relocation hearing, having heard the argument of counsel, having considered the applicable case law including that cited by the Court, having considered the applicable statutes, having considered the applicable rules, having assigned the responsibility to prepare the Court's recommendations, having received and reviewed the objection of the opposing attorney to the proposed order from the March 17, 2016 hearing, having assigned the parties to obtain an audio recording of the hearing to attempt to resolve the language objections to the proposed order, finding that no resolution has been reached, and desiring this matter be resolved prior to retirement and a hearing on Petitioner's objections to the Court's

recommendations scheduled in early July, the Court now has prepared it's own recommended Order:

FINDINGS

1. This is a Parentage action which concerns a female minor child who was born to these two parents, in Utah, on December 6, 2010.

2. After the minor child's birth both parents and the child lived in Utah. The parents and minor child then moved to Massachusetts where they ultimately separated. Respondent (hereinafter "Father") moved back to Utah while Petitioner (hereinafter "Mother") and the minor child remained in Massachusetts. Thereafter, while Mother remained in Massachusetts, the parties reached an agreement which awarded them joint legal custody of the minor child, with Father being awarded the primary physical custodial role and, as a result, the minor child's residential state was changed to Utah.

3. Mother contested custody jurisdiction and the efficacy of the stipulation reached by the parties. Ultimately, the Utah court asserted custody jurisdiction under the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act. At that point temporary orders were entered, after hearing, which pertinent orders included:

a. an award of joint legal custody of the minor child to both parties; ;

b. Father was awarded primary custody of the minor child in Utah; and

c. Mother was awarded parent-time which took into consideration Mother's residence in Massachusetts. The Court, however, awarded Mother an opportunity to share equal time with the minor child if she moved to Utah in an area close enough to logistically exercise that equal time.

4. Mother filed an objection to the recommendations of the Commissioner.

5. Judge David M. Connors held an evidentiary hearing on Mother's objections. Judge Connors ruled on the issues on March 26, 2014. The Order entered by Judge Connors, in pertinent part, awarded primary physical custody of the minor child to Father as long as he remained living with his parents who were living in Utah. Further, it was ordered that if Mother chose to move to Utah and live with extended family, then she would be entitled to share in an equal parent-sharing arrangement. If she chose to remain in Massachusetts then a limited parent-time award would result.

6. Mother chose not to return to Utah to live during the pendency of the action.

7. To assist in the question of the child's best interests the parties underwent a custody evaluation. The Court scheduled a custody evaluation settlement conference for the parties to meet with the custody evaluator and conduct mediation. This conference was held on February 24, 2015. During the conference parties reached a stipulation which was stated on the record and approved by the parties.

8. A Stipulated *Order Re: Parties' Rule 4-903 Mediation Conference Held on February 24, 2015* was filed on June 18, 2015. That order, conforming to the parties' stipulated agreement, contained the following pertinent terms:

a. Mother was designated as the "primary care giver for the [minor] child upon her relocation to Utah. The [Mother] anticipates relocating to Utah the first week of July, 2015;"

b. The parties were to share joint legal and physical custody of the minor child on a "50-50 joint custody arrangement" which was to occur once Mother relocated to Utah;

c. The parties "will always take into consideration the best interest of the minor child when making decisions, and they will make reasonable decisions;"

d. "The parties agree to reside within 20 miles of each other;" and

e. The parties are to provide 90 days advance notice of any intent to relocate with the minor child for a distance greater than 20 miles; and neither party is able to relocate without court order allowing it.

9. On November 10, 2015 Mother filed a Motion to relocate to Massachusetts. This Motion was amended on January 20, 2016.

10. Father opposed Mother's motion to relocate.

11. The Court heard oral argument on the question of Mother's intended relocation on March 17,2016. During the hearing the Court relied upon documents filed by the parties, oral argument of counsel, applicable statutes, applicable rules, the cases of Pingree v. Pingree, 2015 UT App 302 and a case Mother cited, without briefing, of McComb v. Conrad, 715 S.E.2d 662, 394 S.C. 416 (S.C. App. 2011). At the hearing the commissioner made factual findings which included a review of the facts, the stated cases and the applicable statute and rules. The Court found:

a. Utah Code Ann. §30-3-37 states, in pertinent part, the following:

> "(4) In a hearing to review the notice of relocation, the court shall, in determining if the relocation of a custodial parent is in the best interest of the child, consider any other factors that the court considers relevant to the determination. If the court determines that relocation is not in the best interest of the child, and the custodial parent relocates, the court may order a change of custody;"

b. Mother's filed documents, and oral argument, indicate that she wishes to leave Utah for Massachusetts for the following reasons: she has been the primary custodial parent for 60% of the minor child's life; she wishes to live with her parents and her grandparents who are Massachusetts residents; she has a scholarship to attend college in Massachusetts and that once she graduates she will be able to start a business allowing her to better support the minor child; both she and Father are supported by their parents and that she wants to return to her parents home for that support; her extended family have offered to pay for Father's parent-time

transportation if relocation occurs; and she and Father are not getting along;

c. The Court found that those stated reasons are insufficient to show that the intended relocation is in the minor child's best interests but dealt more with Mother's self interests;

d. Mother's relies on the South Carolina decision of McComb v. Conrad which, she argues, stands for the proposition that relocation of a primary custodial parent for education purposes, to further education and potential economic benefit for a child, is appropriate;

e. The Court cited and reviewed Pingree determining that the facts were similar to the instant case. In Pingree, Ms. Pingree, the temporary custodial parent, expressed a desire to leave Utah during the pendency of the case. This was denied by the trial court. The parties went through a custody evaluation which resulted in a stipulated settlement providing that Ms. Pingree would be awarded permanent custody in a joint physical and joint custodial award. Shortly after entry of the stipulated decree Ms. Pingree once again provided notification of an intended move out of the state of Utah for economic and professional reasons.

In the instant case the Court notes an expressed desire by this Mother to live with the minor child in Massachusetts which has been present since the matter began. Here, the parties underwent a custody evaluation. A stipulated joint legal and joint physical custodial arrangement was ultimately reached with the minor child residing in Utah. Shortly after the matter was

resolved this Mother filed notification of an intent to relocate with the minor child to Massachusetts.

In Pingree, the appellate court determined that the intended relocation was not in the child's best interest. The commissioner did not recommend the relocation and the trial judge, when hearing an objection to the commissioner's recommendation, upheld the recommendation indicating "I'm not going to disturb custody, a joint custody, a joint physical custody, because one parent wants to leave and disrupt that, where the child has lived in Salt Lake her whole life. She has family. She has school. She has social contacts. She has continuity here and I'm not going to do it for four years and then bring her back for four years, I'm not going to do it under section 30-3-37."

The Pingree appellate court also considered that there had been a negotiated settlement regarding other terms between the parties. It was determined that Ms. Pingree's intended post-decree relocation would deprive Mr. Pingree of the benefit of the bargain he struck.

In this case, it is clear that negotiations resulted in a bargain being struck. Upon Mother's relocation to Utah custody would be changed while equal parent-time would be awarded to Father. To allow Mother's relocation would be to ignore the benefit of the bargain reached by Father in the settled final order;

f. At Mother's relocation hearing the commissioner considered many factors including

who the minor child's primary custodial parent had been during her life. The Court found that, when given the opportunity to be an equal co-parent with Father during the pendency of the case the Mother chose not to move to Utah to realize that benefit. This opportunity was given by both the commissioner in the initial temporary order, and by Judge Connors at Mother's objection hearing. Mother, instead of coming to Utah, remained in Massachusetts and realized a more limited parental role. Thus, during the pendency of this case, Father was the primary custodial parent of this minor child;

g. The parties adopted the custody evaluator's recommendations at the custody evaluation settlement conference when they stipulated to Mother becoming the primary custodial parent of the minor child upon her relocation to Utah;

h. Father agreed to the change in custodial designation when Mother relocated to Utah;

I. The Court believes that relocation means something permanent. It is not transitory nor is it a brief stop by. It is more than unpacking bags and repacking them and moving again. It is a permanent change of location;

j. Based upon Mother's promise to relocate permanently back to Utah, Father had an expectation that he would receive the benefit of the bargain for his stipulated agreement to change the primary custodial designation from himself to Mother;

k. Both Mother and Father have provided primary care for the minor child during her

life, each one for lengthy periods of time. Even after it was agreed that Mother would become the primary custodial parent Father maintained that role for several more months until Mother relocated to Utah;

l. Father, as the noncustodial parent. has exercised his parent-time on a consistent basis. There have been some glitches but, overall, that parent-time has occurred, and has occurred on a regular, consistent, basis;

m. The parents have had problems in working consistently to allow the other parent to maintain a relationship with the minor child. The Court notes problems on both sides, but overall, the Court notes that things have worked fairly well. The problems that exist are primarily due to the age and continuing immaturity of these parents and the fact that Mother has continually sought to remove the minor child to Massachusetts coupled with Father's attempt to stop any such move;

n. It appears that Mother and Father have worked through most problems that have arisen between them. The Court notes that there have not been numerous enforcement hearings filed by the parties which gives the Court an indication that, though not perfect, things have nevertheless worked out fairly well between them;

o. The Court believes that Mother's relocation is an attempt to try and force a long distance relationship between the minor child and Father. The Court believes that this relocation,

after obtaining the primary custodial designation, has been Mother's ultimate desire all along;

p. For most of the minor child's life she has lived in the State of Utah. Mother argues that she has been the primary custodial parent for 60% of the time. That may be so, but with whichever parent the child has lived, the Court notes that the minor child has lived in Utah for approximately 71% her life. There is no question that the minor child has lived primarily in Utah during her life; as she was born here, her parents lived here when they established their relationship and continued that residency for a period of time after the minor child's birth. After being in Massachusetts for a short time she came back to Utah in 2013 and lived in Utah primarily while this case was pending. Additionally, she has lived in Utah since the stipulated order was entered;

q. Both Mother and Father are supported by their parents. The Court believes that consideration must be given to the fact that this minor child has lived with her paternal grandparents during the pendency of this action throughout the time that Father was the primary custodial parent and was required, by the temporary order, to live with his parent. The minor child has established a substantial bond with these grandparents and to sever the relationship between the minor child and her paternal grandparents would be detrimental to the minor child. Further, Father's extended family lives primarily in Davis County, Utah - where he indicates approximately 90% of his extended family lives - and there are multiple cousins and extended

family members that the minor child has presumably associated with on her Father's side. The minor child would, presumably, have had contact with the extended family during her life while living with Father;

r. Mother now lives in Utah and has since she relocated in the summer of 2015. Mother lives with her grandparents in Layton. She apparently has other extended family members locally as well. The minor child has also established a relationship with her maternal grandparents as Mother has lived with them since the entry of the stipulated order. The minor child would lose the benefit of this association as well if she is relocated to Massachusetts;

s. Mother has family members in Massachusetts comprised of her parents, a set of grandparents, and an aunt;

t. The child has not attended school so this is a not a factor in the Court's analysis;

u. The minor child has friends in Utah, she has attended church here, she has friends from her church;

v. The minor child has had an eye problem the treatment of which has resulted in some disagreement between the parents. The minor child has received specialized medical care in Utah regarding this problem. The minor child also has a pediatrician and dentist here in Utah with whom she has an ongoing relationship. There is no indication of medical care being provided in Massachusetts or a resulting patient-doctor relationship there;

w. The minor child is too young to express a preference regarding relocation;

x. As the minor child has no siblings this is not a factor in considering this relocation motion;

y. Both parents have a relatively strong bond with the minor child. It appears that the minor child has a good bond with the extended families for each parent;

z. The Court finds nothing that would indicate that either parent suffers from moral character or emotional stability issues at this time. While a consideration in the past, this was an issue in determining initial custody. It does not play into the relocation analysis;

aa. Each parent does, and will for the foreseeable future, rely upon extended family to help them with surrogate, and day-to-day care, for the minor child. Continuation of the existing arrangements, which would presumably include child care, would be beneficial for the minor child;

bb. The Court does not have any information indicating that there is a problem with drug or alcohol abuse by either parent;

cc. While there is evidence of relinquishing custody of this minor child previously the Court believes that to be in the past. The parties have each moved on and the Court considers that this is a non-factor and is not currently relevant regarding Mother's request to relocate;

dd. Neither parent has remarried and the question of step-parents would be a non-issue in

the Court's relocation analysis; and

ee. It appears that both parents are in a similar financial condition. They both rely on their parents for supplemental support, they are both attending college, and both parents are struggling to meet their ongoing needs in an independent basis.

RECOMMENDED RULING

Based upon these findings, the Court now makes the following Recommended Ruling:

1. It is not in the minor child's best interests to relocate out of the State of Utah, but instead, the minor child's best interests would be served by remaining in Utah;

2. If Mother decides that she wishes to move back to Massachusetts, then the minor child would remain in Utah and Father would be designated as the primary custodial parent with parent-time would being awarded to Mother under the provisions of Utah Code Ann. §30-3-37;

3. In the event that Mother chooses not to move back to Massachusetts then there will be no change in the current custodial order;

4. No award of attorney fees will be awarded to either party;

5. Father's request that an automatic award of attorney fees be made in the event Mother seeks relocation in the future is denied; and

6. The order that Mother's attorney prepare the order is vacated. This Recommended Order will become the Order of the Court when countersigned by Judge David M. Connors.

DATED this _____ day of June, 2016.

Recommended by:

6/27/16

David S. Dillon
Commissioner

So Ordered:

6/27/16

David M. Connors
Judge

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH

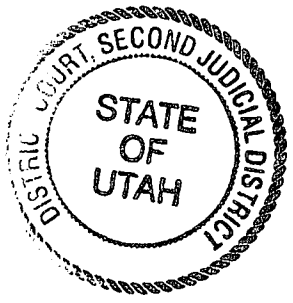
CERTIFICATE OF MAILING

I hereby certify that on the 27th day of June, 2016 a true and correct copy of the foregoing Recommended Ruling And Order Adopting the Recommendation was mailed, postage prepaid to the following:

Theodore R.Weckel Jr.
261 E Broadway Suite 300
Salt Lake City, UT 84111

and

Eric B. Barnes
47 North Main St.
Kaysville, UT 84037



Robin Sill,
Domestic Judicial Assistant