

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. ALYCE L. PENNINGTON

CASE NO. SP20130478

COURT REPORTER:

DATE: December 16, 2015

Courtroom - 769

JOSHUA ROBINETTE

Petitioner

VS.

ASHLEE P ELLSWORTH

Respondent

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**RULING**

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**UNDER ADVISEMENT RULING**

This matter was heard for Relocation trial on October 5, 2015, October 19, 2015 and November 3, 2015. During the proceedings, the Court heard from the parties as well as witnesses. The Court has considered the evidence, including the demeanor and credibility of the witnesses, reviewed the exhibits as well as the case history, and considered the parties' arguments and stipulations.

After due deliberation, the Court makes the following findings and enters the following orders:

**Jurisdictional Findings**

**THE COURT FINDS** that Mother and Father have one minor child in common: William Robinette (born 11/2011). The parties and the minor child have resided in Arizona continuously for at least the six months preceding the filing of the pending petition. This Court, therefore, has jurisdiction as Arizona is the "home state" of the minor child. *See* A.R.S. § 25-1031. Further, the Court has jurisdiction pursuant to A.R.S. § 25-402.

**THE COURT FURTHER FINDS** that the federal Parental Kidnapping Prevention Act does not apply and that no international law concerning the wrongful abduction or removal of children applies.

**Best Interests: A.R.S. § 25-408**

Analysis of the relocation issue is statutorily controlled. *See* A.R.S. § 25-408. Because Mother proposes moving to Colorado with William, Mother bears the burden of establishing that the relocation is in the

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child's best interest. *See Pollock v. Pollock*, 181 Ariz. 275, 277, 869 P.2d. 633, 636 (1995) and A.R.S. § 25-408(G). If the Court approves the relocation, the Court must "make appropriate arrangements to ensure" that both parents continue to have a meaningful relationship with William. *See id.*

In evaluating Mother's relocation request, this Court must consider the factors in A.R.S. § 25-408(I), which includes the legal decision making factors under A.R.S. § 25-403. When weighing these factors, "no single factor is controlling" and all "should be weighed collectively." *Pollock*, 181 Ariz. at 278, 869 P.2d at 636. The Court must make specific findings regarding the relevant factors and the Court's reasons for deciding that relocation is or is not in the child's best interests based on those findings. *See Owen v. Blackhawk*, 206 Ariz. 418, 421-22, ¶ 12, 79 P.3d 667, 670-71, ¶ 12 (Ct. App. 2003) (when findings weigh both in favor of and against relocation, trial court must explain its consideration of the applicable factors to show that the trial court did not focus too much attention on one relevant factor to the exclusion of other relevant factors).

Those factors, as well as the Court's findings, are as follows:

1. *The factors prescribed under A.R.S. § 25-403, which are as follows:*

1. *The past, present and potential future relationship between the parent and the child.*

The parties reached at an agreed-upon parenting time when the child was age two which began in February 2014 with Father increasing parenting time over a short period of time resulting shortly thereafter with the parties sharing equal parenting time. The Court issued temporary orders in this matter as to parenting time prior to the parties reaching such an agreement. Since 2014 the parties have shared equal parenting time with the minor child although Mother has had some slight additional time as the parties reached agreements when Mother was not working and Father was working that Mother would at times care for the child. The Court is hopeful that both parties will continue to have a close and loving relationship with the child as that is in the child's best interest.

2. *The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.*

Both parents have new spouses or significant others and each of those new partners have other children with whom William is bonded and close. There are is significant extended family in the Pima County area. Mother's parents, both biological and step, are in this area. Mother's in-laws are present, Mother's siblings are present in Tucson and Father's siblings and parents are present in Tucson as well as additional members of Father's family. The child has a warm relationship with all extended family and does spend time on a regular basis with all the family members.

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3. *The child's adjustment to home, school and community.*

The child is adjusted to home school and community in Tucson with both parents.

4. *If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.*

The child has just turned 4 in November and his wishes will not be obtained through an interview. The Court finds that the testimony of the witnesses provided the Court sufficient evidence as to the adjustment in best interest of the child.

5. *The mental and physical health of all individuals involved.*

Evidence was presented that the stepfather (Mother's Husband) has had anxiety and one of the major reasons for the move is because his anxiety was about his job and he has chosen to leave a job in Tucson to begin a job November 2015 in Colorado.

6. *Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent?* [This paragraph does not apply if the Court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being the victim of domestic violence or child abuse.]

The Court does have some concerns about Mother's likelihood to allow the child frequent meaningful and continuing contact with Father as there were allegations and testimony as to Mother denying Father time at least on 2 occasions which did not appear warranted by the Court.

7. *Whether one parent intentionally misled the Court to cause an unnecessary delay, to increase the cost of litigation or to persuade the Court to give legal decision-making or parenting time preference to that parent.*

Not applicable.

8. *Whether there has been domestic violence or child abuse pursuant to A.R.S. § 25-403.03*

There were allegations that there was a bruise on the child's bottom caused either by stepfather or some other issue at Mother's home about which the parties have argued as to the cause. Father believes it was from a spanking given by the stepfather. Father did testify that Mother indicated the bruise may have been from the child falling on a brick. There has been spanking in Mother's home both by Mother and stepfather. Father disagrees with corporal punishment and had argued with Mother about these issues on many occasions. Stepfather had a domestic violence incident against a previous partner which he resolved by diversion.

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9. *The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.*

Not applicable.

10. *Whether a parent has complied with chapter 3, article 5 of title 25, Arizona Revised Statutes.*

Both parties have completed parent education.

11. *Whether either parent was convicted of an act of false reporting of child abuse or neglect under A.R.S. § 13-2907.02.*

Not applicable.

In addition to the foregoing, the Court must also consider any history of domestic violence or child abuse (A.R.S. § 25-403.03), any substance abuse issues (A.R.S. § 25-403.04) and any sexual offender issues (A.R.S. § 25-403.05).

a. *Domestic Violence or Child Abuse*

Although as stated above there is some concern about spanking and a bruising that was exhibited in Exhibit 12, the Court finds that there has been no domestic violence or child abuse.

b. *Substance Abuse*

There are no allegations as to substance abuse against either party.

c. *Sex Offender*

There are no allegations relating to sex offenders.

2. *Whether the relocation is being made or opposed in good faith and not to interfere with or to frustrate the relationship between the child and the other parent or the other parent's right of access to the child.*

The Court does not find that either party is making or opposing the proposal for the move to interfere with the relationship between the child and the other parent. The Court is concerned however that Mother's Husband indicated he was unable to find any other work in Arizona and Mother and her Husband testified that the reason for the move was that stepfather was able to find a job making more money in Colorado, that there are is a better quality of seasons in Colorado, that there is less crime, that the schools are better in Colorado. Mother's testimony and some of the exhibits further indicated that she believes the child should always remain with the Mother. Father testified that he is knowledgeable about employment in Tucson and that he disputes that the stepfather could not find a job in Tucson. Further Mother could obtain employment in Tucson to supplement stepfather's income which would result in better financial security. Mother is planning on not working upon her move to Colorado.

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3. *The prospective advantage of the move for improving the general quality of life for the custodial parent or for the child.*

Mother and stepfather testified that the advantage for the move for the Mother and William is the financial advantages of stepfather's new job, that Mother will not have to work, that the schools are better, the seasons, less crime as stated above. The Court does not find that this is a convincing advantage for the child.

4. *The likelihood that the parent with whom the child will reside after the relocation will comply with parenting time orders.*

Mother testified that she would comply with the Court's orders as to parenting time if she were to move with the child. The Court finds that on the whole Mother has complied with the parenting time orders as has Father.

5. *Whether the relocation will allow a realistic opportunity for parenting time with each parent.*

The testimony presented that the drive from Colorado to Tucson is significant and will be an economic burden on both parties as the parties have agreed to exchange the child in New Mexico. The Court therefore is concerned that the relocation will not allow a realistic opportunity for each parent to have parenting time because of the required travel, because of the cost, and because the child will start school soon which will limit opportunities for parenting time.

6. *The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child.*

If the child does not move with Mother, the child will certainly miss Mother, stepfather and his brother. By not moving he will not lose the contacts with his Father, and that large extended family in the Tucson area. The child has resided in the Tucson area all of his life. The Court is also concerned whether Mother's move will be permanent and the Court suspects that Mother may return to the Tucson area at some point.

7. *The motives of the parents and the validity of the reasons given for moving or opposing the move including the extent to which either parent may intend to gain a financial advantage regarding continuing child support obligations.*

The Court does not find that either party is motivated by a financial gain.

8. *The potential effect of relocation on the child's stability.*

The Court is concerned that a relocation to Colorado will affect the child's stability as the Court has stated above has concerns that the move will not be long term especially given this Court's ruling. Further the Court is concerned that the relocation would greatly impact in a negative fashion the relationship between

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the child and Father. Father has been a very active Father, involved Father and has enjoyed equal time with the child for the majority of the child's life.

**THE COURT FINDS** that given all the factors noted above, Mother has not met her burden of showing that moving to Colorado with William is in the child's best interests.

**IT IS THEREFORE ORDERED** denying Mother's request to have William live with Mother in Colorado.

#### Parenting Time

The issues for the Court are limited as the parties have agreed to Thanksgiving and Christmas and holidays when both parents are in Tucson. The Court therefore orders that until Mother leaves the state, the parties shall continue with the current equal time parenting plan. In the event Mother returns to reside in Tucson and provides Father notice that she is again residing in Tucson, the parties shall resume the previous parenting plan. Once Mother moves from Tucson to Colorado, the child shall remain with Father and Mother shall have spring break, fall break according to the Vail School District Elementary School schedule even though the child is not currently in school. This will be so that the child can begin preschool and kindergarten and get used to the schedule which will shortly be put into place because of kindergarten and preschool. The parties shall meet in New Mexico as agreed upon the day after school is released for the spring and fall breaks and will meet again 2 days before school resumes in New Mexico to exchange the child back to Father. For summer break, again the Vail School District Elementary School schedule will prevail and the child will enjoy summer time with Mother from the first Saturday after school is released and be returned to Father at least 2 Saturdays before school begins. Again the parties have agreed to meet in New Mexico. The parties shall agree in advance as to the time for the exchanges in New Mexico for each of these exchanges. The Court confirms the parties' agreements as to Thanksgiving and Christmas.

William will attend school in Arizona at the home school that the child would be assigned to from Father's residence. This is presumptive and if the parties reach a different agreement in writing that shall prevail.

In the event Mother is planning a trip to Tucson after she moves to Colorado, the parties are encouraged to communicate significantly in advance to allow the Mother to have time with the child in Arizona when she travels to Arizona. This shall be by mutual agreement and Mother should make sure that she notifies Father significantly in advance so that the parties can reach an agreement. Mother is admonished that Father may have

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advance plans including vacation, or activities with the child which may interfere with the parties' reaching a mutual agreement as to her having time in Arizona. Father is admonished to be as flexible as possible so that the child could see Mother if she does travel to Arizona.

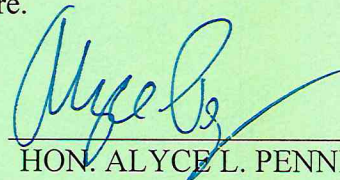
While the child is with each parent after Mother moves to Colorado, the parties shall ensure that the child has daily phone contact with the other parent and at least 3 times per week Skype or other visual phone contact with the other parent. In the event the parents are unable to reach an agreement as to the time for this contact, it shall be at 6:30 PM according to the time of the place for the child currently is.

The Court expects that there should be a modification of child support but that was not brought before the Court at this time. The Court encourages the parties to reach a stipulation or agreement as to the revised child support or seek a review by this Court.

The parties are admonished that neither parent shall engage in corporal punishment of the minor child nor permit anyone else who is caring for the minor child to engage in corporal punishment against the child.

Both parties shall notify the other within 48 hours of a change of address or phone number and shall notify the Court within 5 business days of a change of address.

IT IS FURTHER ORDERED signing this under advisement ruling as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.



HON. ALYCE L. PENNINGTON

cc: Christopher W Caine, Esq.  
Jacob M Amaru, Esq.  
Clerk of Court - Under Advisement Clerk

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