IN THE UTAH COURT OF APPEALS,
450 S. State Street, Salt Lake City. Utah 84078
(801) 578-3900

MACAELA DANYELE DAY,	:	APPELLANT'S PRINCIPAL BRIEF
Appellee,	:	
vs.	:	Case No. 20190277
TYLER BARNES,	:	
Appellant.	:	

APPEAL FROM FINAL ORDER REGARDING RELOCATION

THE HONORABLE DAVID M. CONNORS PRESIDING
ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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INTRODUCTION

A Massachusetts resident seeks to return with her child after turning over custody to a Utah resident by coercion. This case was originally brought as a Uniform Child Custody Jurisdiction Enforcement Act action (hereinafter referred to as "UCCJEA"). This court in *Day v. Barnes,* 2018 UT App. 143, 427 P.3d 1272, ruled that the judge erred by imposing a burden upon Appellant to prove that the commissioner's recommendation was erroneous under Civil Rule 108. Upon remand, the judge relied upon his 2014 findings from a temporary order in the UCCJEA hearing – which had merged with a final order in the UCCJEA action – to rule against relocation. Appellant contends that the relocation hearing violated her

right to procedural due process.

STATEMENT OF ISSUES

1. Whether the relocation hearing denied Appellant due process? The standard of review is de novo. *Hogge v. Hogge*, 649 P.2d 51, 54 (UT 1982). This issue was preserved during the court's relocation hearing, (R. 2221, 17-25; R. 2222, 6-7; R. 2225-26; R. 2227, 1-18; R. 2228, 4-5, 9-10, R. 2228, 15-18, R. 2231, 1-17; R. 2564, 18-25, 2565, l. 1-10 and tacitly by motion. R. 1323.

2. Whether the court's findings of fact are legally deficient? The standard of review is clearly erroneous. *Robertson v. Robertson*, 2016 UT App. 55, ¶5, 370 P.3d 569. This issue was preserved when Appellant filed her objection to the Commissioner's recommendation, R. 2046-55.

3. Whether the court ruling on relocation was erroneous? The standard of review for a determination of custody is abuse of discretion. *Id.* at 573, ¶9. Since the issue challenges the Court's ultimate ruling, it is inherently preserved.

STATEMENT OF THE CASE

On May 1, 2013, Appellant filed a child custody petition under the UCCJEA. In 2012, Appellee had filed a custody action in Massachusetts where the child and Appellant had been living with her family. The commissioner determined that Massachusetts was the home state of the child. R. 432. The commissioner

indicated that he would consult with the Court in Massachusetts regarding convenient forum. Appellee dismissed his Massachusetts action. The parties agreed that Utah had subject matter jurisdiction. R. 600.

Argument before the commissioner regarding temporary custody occurred on October 1, 2013. On November 22, 2013, the commissioner entered his recommendation. He allowed Appellant one week of parent-time in Massachusetts every six weeks, and joint physical custody during her college breaks. Appellant objected.

On March 20 and 21, 2014, the judge held an evidentiary hearing. On April 25, 2014, the judge entered his written findings and temporary order. R. 1052.

On December 4, 2014, Appellant moved under Civil Rule 54(b) and the law of the case doctrine to modify the court's temporary order. R. 1323. Rather than ruling on the motion, the court scheduled a Rule 4-903 conference.

On February 24, 2015, the parties met for the conference. The custody evaluator, Dr. Matthew Davies, appeared and presented his prospective recommendations to the parties. The parties reached a stipulation. The stipulation was entered as a final order on June 18, 2015.

Appellant relocated to Utah in July of 2015 to become the primary caregiver under the terms of final order. She attended college through distance learning.

Due to continued wrangling with Appellee, on November 10, 2015, Appellant moved to relocate to Massachusetts.

On January 21, 2016, the commissioner heard oral argument on relocation. The commissioner denied Appellant's motion. Appellant objected.

On July 6 and 8, 2016, the judge held an evidentiary hearing on Appellant's objection. He denied the motion from the bench. On October 19, 2016, the court entered its written findings and order. R. 1959.

Appellant filed her notice of appeal on November 17, 2016. Appellee filed a notice of cross-appeal on December 1, 2016.

On July 27, 2018, this court issued an opinion which required remand, finding that the judge had misapplied Civil Rule 108.

Upon remand, the judge heard oral argument. The court issued its ruling on February 20, 2019. Appellant filed a timely notice of appeal on March 22, 2019.

STATEMENT OF THE FACTS

A. THE RELOCATION RULING.

The female child, A.D., was born on December 10, 2010. R. 34. During the presentation of Appellant's first witness at the evidentiary hearing, the court ruled that it would not receive evidence that had occurred prior to its temporary order entered on April 25, 2014. Faced with the court's ruling, Appellant's asked the

court if it would at least allow the transcript of the hearing held on April 25, 2014, to be made part of the relocation record. R. 2221, 17-25; R. 2222, 6-7; R. 2225, 1-2; R. 2226, 12-25; R. 2228, 4-5, 9-10, R. 2228, 15-18, R. 2231, 1-17; R. 2564, 18-25, 2565, l. 1-10. The judge agreed. In the judge's final order on relocation, he incorporated by reference his prior findings and rulings filed on April 25, 2014. R. 1961-62.

In the UCCJEA matter, the commissioner's initial recommended ruling either found or acknowledged that: (1) the child had lived for 28 ½ months in Appellant's home; (2) the parties allowed Appellee to gain physical custody of the child seven months before the recommendation was issued "for one reason or another"; and, (3) Appellant had a significant role in caring for the child (R. 737-38).

The findings entered on April 25, 2014, stated that: (1) Appellee's had a history of lower standards of moral behavior than Petitioner and the testimony in that regard was significant, R. 1059, 1064; (2) the court was concerned about Appellee's overly restrictive approach to parent-time, R. 1060; (3) because of the parties' and the child's ties to Utah, the child should remain in Utah, R. 1062, ¶18; and, (4) because Appellant elected to finish her college education in Boston while living with her parents, she did not give first priority to raising her child, R. 1060,

¶15.

B. THE EVIDENCE AT THE UCCJEA EVIDENTIARY HEARING

At the evidentiary hearing held on March 20, 2014, Appellant testified about how she had felt coerced by Appellee's and his family's threats, and her lawyer's ineffectiveness in deciding to turn over custody of the parties' child to Appellee, R. 2946-47; R. 2951, l. 9-25; R. 2952, l. 1-4. She stated that: (1) in the fall of 2012, Appellee had filed a law suit in Massachusetts to try and gain custody of the child, R. 2950, 15-180; (2) her attorney had informed her that Appellee's family was going to take legal action against her mother, and that her mother would go to jail if she did not sign over custody, R. 2947, 18-20, R. 2951, 24-25; (3) Appellee had told Appellant that his family was going to try to have Appellee's mother prosecuted for molesting him if she did not sign over custody; (4) Appellant's mother had told Appellant that Appellee had forced her to have sex with him several times, R. 2945, l. 21-25; (5) Appellee told Appellant approximately ten times in 2013 that his father was going to try to have Appellee's mother prosecuted for having sex with him, R. 2946, l. 17; (6) Appellant was worried about Appellant's threats of prosecuting her mother, R. 2979, l. 23-25; R. 2980, 1-5; (8) Appellant's mom is her best friend, and the child also has a close relationship with Appellant's mom, R. 2954, l. 7-8; (9) during a mediation in April of 2013, when

Appellant's lawyer told her forcefully that unless she signed over custody, Appellant's mother would be prosecuted, Appellant became frightened, went along with her lawyer's advice, and signed over custody, R. 2954, l. 17-21; (10) Appellant's lawyer was on Lortab during the mediation, and it seemed to Appellant that her lawyer "was not all there," R. 2955, l. 13-25; (11) deleted (12) Appellee's family tried to pressure her to sign over custody of the child, R. 2959, l. 20-25); (13) Appellee's father is an attorney, and despite being represented by counsel, Appellee's father talked to her about settling the case prior to the mediation, R. 2997, l. 5-14; (14) Appellee had lied about her mother molesting him, about him not raping her, and about how he had sexually assaulted her mother in public, R. 2957, l. 1-12; and, (15) Appellee has a pornography addiction, R. 2938, 8-13.

Appellant also testified as follows: (1) Appellant had run away from home because his parents had verbally abused him, R. 2938, l. 25, R. 2939, l. 1; (2) Appellee's parents put him in a mental health facility twice, R. 2982; and, (3) Appellee had wanted to commit suicide, R. 2994, l. 4-8. The commissioner's recommendation omitted these facts. R. 821.

Appellant cared for the child when she was not at college, R. 2948, l. 14. Appellee paid little child support, R. 2958, l. 13-15. When she was at classes her maternal grandmother and great aunt tended the child, R. 2949, l. 25; R. 2950, l. 1-

2. The parties moved to Massachusetts when the child was one year old, R. 1958, l. 5-9. Appellee had no contact with the child for at least six months after he had moved back to Utah, R. 1958, l. 5-9. Appellee paid about $100 in child support over the year before the mediation, and paid nothing in the way of medical insurance premiums or out-of-pocket medical expenses, R. 2958, l. 17.

Appellant also testified that: (1) Appellee had raped her 20-30 times, R. 2936, l. 2-6; (2) Appellee touched her butt about 100 times without permission, R. 2936, l. 18; (3) Appellant found Appellee naked in bed with her best friend, R. 2937, l. 18-22; (4) Appellant found Appellee looking at pornography every night for two years, R. 1993, 12-25; (5) Appellant observed Appellee walking naked in her residence, R. 2942, l. 4-7; (6) Appellant observed Appellee groping her mother's breasts, R. 2942, l. 12-25; (7) the State of Massachusetts had expressed an interest in prosecuting Appellee, R. 2989, l. 21-25 - R. 1299, l. 1-4.

Appellant wanted to facilitate a close relationship between the child and Appellee, R. 2959, l. 15. She was denied her full, one week parent-time due to having to use up two travel days to travel from Massachusetts to Utah, R. 2961, l. 7-14. Appellee intruded into Appellant's virtual parent-time, R. 2961, l. 19-21. Appellee denied her parent-time when the child was visiting Massachusetts, R. 2967, l. 7-15. Appellant wanted to complete her college degree so she could

support the child, R. 2969, l. 14-15. Appellee did not communicate with her about the child when he returned to Utah, R. 2969, l. 16-25; R. 2970, l. 1-13.

Appellant also testified as follows: (1) her mother had told her that Appellee had taken advantage of her multiple times, R. 3392, l. 20-25; (2) she described her home as not sexually charged, R. 3393, l. 8-17; (3) Appellee raped her repeatedly, R. 3394-96; (4) Appellee never tried to arrange for parent-time when he had moved to Utah, R. 3396, l. 14-20; and, (5) she did not report the rapes because she was trying to fix him and because she was scared of him, R. 3397, l. 8-12.

At the UCCJEA hearing, Jaime Day, Appellant's mother, testified as follows: (1) Appellee would flirtatiously swat her butt, R. 3007, l. 23-25; R. 3008, l. 1-19; (2) Appellee touched her breasts without consent, R. 3008, l. 22-25; R. 3009, l. 1-2; (3) Appellee filed a police report against her for allegedly molesting him, R. 3009, l. 19-24; R. 3013, l. 1-2; (4) while she was sleeping in her bed one night, Appellee got on top of her, told her that she needed to feel what it was like to be loved like she had never been loved before, then threatened her with prosecution if she told anyone what he did, R. 3015, l. 15-25; R. 3016; (5) her attempts to push Appellee off failed, R. 3016; (6) she has seen psychotherapists about the rape incident, R. 3016, l. 24; (7) Appellee invited her to watch pornography with him, R. 3017, l. 13-18; (8) she observed Appellee walking naked daily, R. 3017, l. 22-25;

R. 3018, l. 1-6; (9) Appellee reported that his father was mentally abusive, R. 3020, 10-11; (10) Appellee ran away from home, R. 3021, l. 4-7; (11) she felt that her family needed to protect Appellee, R. 3021, 14; (12) the police took him to a juvenile mental health facility, R. 3021, 22-25; (13) she encouraged Appellee to cultivate a better relationship with his parents, R. 3023, l. 2; (14) she would drive Appellee to his parent's home, R. 3023, l. 12-13; (15) Appellee would talk about sex daily, R. 2077, 12-14, R. 3023, l. 14-25; R. 2524, 1; (16) Appellee told her that Appellant's vagina needed to be tightened, R. 3025, l. 1-7; (17) she took Appellee to a physician who prescribed anti-depression medications, R. 3026, 1-10; (18) Appellee got in bed with Appellant's best friend while Appellant was nine months pregnant, R. 3026, l. 17-22; R. 2527, 1-9; (19) Appellee sexted with the best friend, R. 3027, l. 10-16; (20) Appellant was ridiculed by her Utah friends for getting pregnant, R. 3028, l. 17-20); (21) Appellant was a nurturing mother, R. 3029, l. 9-25; (22) Appellee did not help care for the child, R. 3030, 11-23; R. 3031, l. 1-6; R. 3033, l. 17-25; 3034, l. 1-4; (23) the child adjusted well to living in different places, R. 3031, l. 7-13; (24) the child and Appellant lived with Appellant's parents and maternal grandparents, R. 3031, l. 20-21; (25) Appellee's mother threatened getting a protective order against her, R. 3032, 7-25; (26) she did not report the sexual assault by Appellee to the police because Appellee's threats intimidated her,

R. 3311, l. 3-13; (27) Appellee concocted a story to protect himself about the rape by suggesting that a burglar had broken into the home and had raped her, R. 3317, l. 10-12; R. 2640, 19-23; (29) the atmosphere in the Day home was wholesome, R. 3321, l. 2125; (30) her husband was very angry when he had heard about Appellee raping her, wanted to report the incident to the police, and to kick Appellee out, R. 3322, l. 8-24; the Days didn't because they were afraid of Appellee's threats, R. 3323, l. 2-7; (32) she had withheld the truth about the rape from her husband due to Appellee's threats, R. 3325, l. 7-15; and, (33) she asked Appellee not to blackmail her, R. 3391, 8.

At the UCCJEA hearing, Carrie Tippetts, Jaime's mother, testified as follows: (1) Appellee lived in her household in Utah and Massachusetts, R. 3041, l. 2; (2) Appellee reported that his parents were abusive, R. 3044, l. 23-24; (3) Appellee refused to return home, R. 3045, l. 2-6; (4) Appellee asked Appellant's parents about their sex life, R. 3048, l. 3-5; (5) Appellee's parents came to her home a few times to visit the baby, R. 3050, l. 1-10; R. 351, l. 24; (7) Appellee staged a false break-in to the residence, R. 3053, l. 1-7; R. 3055, l. 14-19); (8) Appellee had no interest in the baby, R. 3056, l. 6; R. 3058, l. 16-25; R. 3059, l. 1-8; (9) Appellee said that he approved of Appellant's parents raising the child, R. 3061, l. 23-24; (10) Appellee would get angry and destroy household property, R.

3062, l. 14; (11) Appellee called Jaime a bitch and a slut, R. 3063, l. 1-10; (12) she caught Appellee in bed with Appellant's best girl friend and walking around naked, R. 3064, l. 1-9; (13) Appellee did not want his parents raising the child, R. 3064, l. 24-25; (14) Appellee made sexual references when changing his daughter's diaper, R. 3065, l. 16-21; and, (15) Appellee regularly would threaten the family, R. 3066, l. 1-13.

Appellant's father, Mr. Aaron Day, testified as follows: (1) he tried to help Appellee as a father would, R. 3073, l. 9-11; (2) Appellee reported that he was addicted to pornography, R. 3073, l. 13; (3) Appellee reported that Eric Barnes was emotionally abusive, R. 3074, l. 6; (4) Appellee's parents permitted him to run away, R. 3074, l. 18; (5) Appellee would talk about sex regularly, R. 3076, l. 1-7; (6) Jaime told him about Appellee raping her, R. 3076, l. 20-21; (7) because Appellee threatened his family, he did not report the rape to the police, R. 3077, l. 9-14; (8) he tried to help Appellee find a job, taking him on the road, and talking to him about his pornography addiction, R. 3077, l. 17-25; (9) Appellee asked not to be on the birth certificate, R. 3079, l. 3-4; (10) Appellant helped care for the baby, R. 3079, l. 16-17; (12) he was afraid that if he reported Jaime's rape to the police, Appellee would lie about it, R. 3081, l. 3-6; and, (13) Appellee did not want to raise the baby, R. 3081, l. 15-16.

Kennedy Thompson, Appellee's girlfriend, testified as follows: (1) Appellant has never reported that Appellee raped her, R. 3086, l. 7-8; (2) Appellant did not want Appellee to touch her because he had gotten her pregnant, R. 3087, l. 11-12; (3) the Day household joked about sex about six years ago and sex jokes were still going on, R. 3089, l. 17; R. 3090, l. 7-8; (4) she heard Appellee participate in sex talk with others, R. 3091, l. 21-22; (5) the Day household had a sexually permissive environment, R. 3093, l. 8-11; (5) she made out with Appellee while Appellant was sleeping and then got into bed with him, R. 3094, l. 12-14, 24-25; (6) she made out with Appellee a handful of times, R. 3095, l. 4; (7) Appellant is a relatively private person, R. 3096, l. 11-12; and, (8) Appellant and Jaime showered in the same room with her, R. 3097, l. 4-6.

Appellant's grandfather, Tom Day, testified as follows: (1) the attorney who represented Appellant at the mediation, Ms. Ragsdale-Pollock, had only consulted with Aaron day, R. 3100, l. 10-12; (2) Jaime might be a flight risk and Jaime and Aaron were financially challenged, R. 3102, l. 1-6; R. 3103, l. 21; (3) a few days after speaking with Ms. Ragsdale-Pollock, he realized that Jaime was not a flight risk, R. 3105, l. 3-4, 16; (4) he had no concern if Appellant got custody, R. 3105, l. 22-24; (6) Aaron Day only makes $30-35,000.00 net income annually, R. 3106, l. 16-17; (7) Ms. Ragsdale-Pollock had advised him to resolve the case was by

stipulating that Appellee get temporary custody, R. 3382, l. 23; (8) he never told Eric Barnes that he would train Appellant to be a mother, R. 3383, l. 4-13; and, (9) he had no idea whether Appellant wanted to give up custody, R. 3383, l. 22-24.

Carolyn Barnes, Appellee's mother, testified as follows: (1) the child was doing fabulously while living with her and Eric, R. 3110, l. 1-6; (2) she took the child to see an ophthalmologist about an eye problem, R. 3110, l. 12-20; (3) Appellee is passive-aggressive, R. 3112, l. 8; (4) since Appellee was not at home all day on Mondays and Fridays, she cared for the child on those days, R. 3113, l. 4-5; (5) the child has a close bond with her, R. 3113, l 13-15; (6) when Appellee is home he takes care of the child, R. 3113, l. 20-21; (7) she coaches Appellee on how to care for the child, R. 3113, l. 23; (8) Appellee schedules doctor's appointments for the child, R. 3114, l. 1-4; (9) Appellee moved back to his parents' residence in June of 2012, R. 3115, l. 7-8; R. 3116, l. 18-19; R. 3116, l. 18-22; (10) Appellee has a good relationship with her, R. 3117, l. 1-3; (11) Eric calls Appellee out, R. 3117, l. 15; (12) the child loves all members of the Barnes household, R. 3117, l. 21; (13) on April 1, 2013, Appellant had told her that she had been caring for the child for two days, R. 3133, l. 6-7; R. 3122, l. 15-16; (14) Appellant told her that she was willing to give Appellee 60-70% of parent-time, R. 3122, l. 24; R. 3123, l. 1-2; (15) the parent time established by the commissioner worked well for the

child, R. 3124, l 18; (16) at the start of the parties' relationship, she was concerned because Appellant and Jaime coming to see Appellee behind her back, R. 3125, l. 22-23; (17) Jaime was acting as Appellee's confidant, R. 3127, l. 4-7; (18) Appellee ran away from home, R. 3130, l. 5-15; (18) she and Eric had involuntary committed Appellee to a juvenile facility, R. 3131, l. 11-14; (19) the family had the government pay for Appellee's stay at Archway, R. 3132, l. 3-5; (21) Appellee stayed with her and Eric for a couple of weeks before running away again, R. 3132, 14-16; (22) at midnight one day, she and her husband took Appellee to emergency counsel, but he ran away, R. 3232, l. 1920; (23) she and Eric discussed what to do, but determined that it would cost too much money to have Appellee placed into a program, R. 3133, l. 12-13; (24) after he ran away, she and Eric remained in contact by texts, R. 3134, l. 3-9; (25) she inferred that Appellant wasn't engaged with the child, R. 3136, l. 1-3; (27) she and Eric allowed Appellee to move to Massachusetts with Appellant's family, R. 3137, l. 7-9; (29) Appellee had concerns that Aaron and Jaime might adopt the child, R. 3138, l. 22-24; (30) she believed that Jaime had facilitated Appellee running away, R. 3140, l. 21-22; (31) she admitted that her son lies, R. 3141, l. 24-25; (32) Appellee was rebellious, R. 3142, l. 25; (33) she heard Appellee making inappropriate sexual references, R. 3144, l. 18-21; (34) Appellee took a full load of classes when he returned home, and was also working a part-

time job, R. 3146, l. 16-18, R. 3147, l. 6); (35) Appellee was taking medication because of a diagnosis of anxiety and depression, R. 3148, l. 3-10; (36) Appellee skips taking his medications regularly, R. 3148, l. 13-15; 38) she is the primary caregiver for the child, R. 3151, l. 7; (39) several members of the Barnes family discussed custody of the child with Appellant, R. 3153, l. 10-12; (40) Appellant had brought a paper for Appellee to sign, but Eric would not sign it, R. 3154, l. 1-2; (41) Appellant could not be a mother, R. 3154, l. 19-25; R. 3155, l. 1; (42) Eric suggested to Appellant that the parties mediate the custody issue, R. 3155, l. 8-10; R. 3156, l. 1-4; (43) the juvenile facility is for children who are runaways, R. 3158, l. 8-11; and, (44) she never knew where Appellee was living, R. 3159, l. 15.

Appellee testified that: (1) he recently scheduled an appointment for the child's ophthalmologist and attended the appointment, R. 3169, l. 8-11; (2) he has a loving relationship with the child, R. 3169, l. 21-25; (3) he is comfortable being a parent, R. 3172, l. 14-17; (4) his mother cares for the child three days per week, R. 3172, l. 21-25; (4) he first filed a paternity action in Massachusetts, R. 3175, l. 25; (5) he talked with Eric about filing the law suit in Massachusetts, R. 3176, l. 6; (8) when Appellant met with Appellee and Eric Barnes to discuss custody, a mediation had already been scheduled by the parties' lawyers, R. 3182, l. 16; (9) the document Appellant had brought to the meeting proposed joint legal and physical custody with

him getting more than 50%, R. 3184, l. 18; (10) Appellant wanted him to sign the agreement, R. 3185, l. 1-5; (11) he saw the child infrequently, and made no effort to fly to Massachusetts, R. 3188-3195; (12) Jaime pursued him sexually, R. 3201, l. 22-25; (13) Appellee had reported to the police that Jaime had molested him, R. 3202, l. 8; (14) Appellee's siblings have a good relationship with the child, R. 3202, l. 18-20; (15) the one week parent-time Appellant was allowed was too much for the child, R. 3202, l. 21-14; (16) Appellee was not open to a four month on four month off joint custody arrangement, R. 3205, l. 20-22; (17) all of the people in Appellant's household love the child (R. 3206, l. 17-19); (18) he was not attracted to Jaime, R. 3208, 1-2; (19) seven people lived in the Day household, and two people were retired great grandparents of Appellant, R. 3208, l. 23; (20) he had exaggerated the number of times he had sex with Jaime when he reported her to the police, R. 3209, l. 14-16; (21) Appellee admitted that the police never prosecuted Jaime, R. 3209, l. 23-25; (23) he provided interrogatory answers under oath which were inaccurate, R. 3210, l. 16-21; (24) he knew it was a crime to lie to the police, R. 3211, l. 6-7; (25) he intentionally grabbed Jaime breasts without consent, R. 3211, l. 11-13; (26) the Day household had a charged sexual environment, R. 3211, l. 11-25; (27) he watched pornography in the Day home, R. 3212, l. 8-10, 14; (28) he watched pornography in his parents' home and became addicted to it there, R.

3212, l. 20-22; R. 3214, l. 22-24; (30) Eric knew that he was viewing pornography for several years, R. 3215, l. 9-13; (31) he admitted to swatting Jaime Day's butt because it was acceptable behavior in the Day household, R. 3216, l. 11-13; (32) he had frequent consensual sex with Jaime Day, and Jaime encouraged it, R. 3218, l. 1-9; (33) Jaime had told him that she was raped one night while he was sleeping by a guy she had met at a dog park, R. 3221, l. 19-23; (34) he had knocked on the bathroom door on the night of the rape and found Jaime inside the bathroom sitting in a bath tub with her clothes on at 3:00 A.M. in the morning, R. 3222, l. 10-11; R. 3265, l. 1-5; (35) Jaime did not report the rape until the next day when she was driving him to school, R. 3265, l. 1-5; (36) Carrie was not involved that night, R. 3222, l. 21); (37) Jaime had told him that she had taken a knife to defend herself from the rapist, who then took it from her, who then dropped the knife, and Jaime put it in the sink, R. 3268, l. 1-19; (38) he had lied in a second interrogatory response that he had never been diagnosed with a mental illness, R. 3270, l. 1-24; (39) he had misrepresented the vehicle expenses on his financial declaration, R. 3273; (40) he walked naked in the Day home because it was normal, R. 3223, l. 9-13; (41) he made out with Kennedy Thompson while Appellant was lying on close by, R. 3223, l. 16-25; R. 3225-26; (42) he had told the Day family about five or six times that his father might bring criminal charges against Jaime Day, R. 3277-78;

(43) he discussed with Eric two or three times about bringing charges against Jaime Day for allegedly molesting him, R. 3282, l. 7-12; (44) Appellee didn't care whether the Day family would be upset by reporting Jaime to the police, R. 3282, l. 23-25, R. 3283, l. 1.6; (45) he delayed voluntarily dismissing the Massachusetts action which allowed him more time to bond with the child, R. 3285, l. 20-25; R. 3286; (46) he acknowledged that it was a crime to testify falsely, R. 328, l. 22; (47) he admitted that he never had any physical contact with the child for about a year after he relocated to Utah, R. 3291, l. 18-25; (48) he admitted never paying any medical insurance premiums for the child, R. 3294, l. 17-19; (49) he admitted denying Appellant mid-week overnights, R. 3295, l. 14-16; (50) he tacitly admitted that he was unavailable to facilitate virtual parent-time, R 3301, l. 14-17; (51) when the child was placed in the Barnes home, the child hardly knew them, R. 3302, l. 13-15; (52) he admitted that it was not hard for the child to transition between households, R. 3303, l. 1-9; (53) he met with Jaime privately and she begged him not to report her to the police, R. 3386, l. 6-12; (54) he told her that he couldn't promise that, R. 3387, l. 8-10; (56) he told Jaime that he could not believe that she had told Appellant that he had raped her, R. 3388, l. 25, R. 3389, l. 1; (57) Appellant told him that she was sorry because Jaime had told her that he hadn't raped her, R. 3390, l. 3-4; and, (58) Jaime asked him not to blackmail him (R. 3391, l. 8).

Eric Barnes, Appellee's father, and present counsel, testified as follows: (1) Appellee has caused him a lot of pain, R. 3331, l. 2-4; (2) his oldest son also caused him problems, R. 3331, l. 7-9; (3) Appellee deceived him after he ran away from home, R. 3332, l. 10-13; (4) he and Carolyn discussed the parties' relationship, and agreed that the Days should not encourage contact between the parties without their knowledge, R. 3337, l. 15; (5) Jaime picked up Appellee without Eric's permission, R. 3338, l. 7; (6) Eric wrote Aaron and told him that his house rules differed from his, R. 3338, l. 17-25; (7) when Appellee ran away the first time, he was attending school, but Eric allowed him not to return home, R. 3339, l. 19; (8) he had no idea where Appellee was when he ran away the second time, R. 3340, l. 17-25; (9) after he learned that Appellee had gotten Appellant pregnant, he took a stand off approach with Appellee, R. 3241, l. 14-22; (10) Appellee at some point called Eric, said he wanted to move back home, and said he was concerned about his parental rights, R. 3343, l. 12; (12); (11) he has seen Appellee mature over time, R. 3344, l. 4-7; (12) the child is happy living with him, R. 3344, l. 10-12; (13) Appellee is caring for the child, R. 3344, l. 14-20; (14) he has a close relationship with the child, R. 1-4; (14) Tom Day had asked him to write up a stipulation whereby Appellee would get sole custody of the child and the parties would share joint legal custody, R. 3348, l. 22-23; (15) his oldest son, Jared, had run away from home for a

two-week period when he was 18, R. 3351, l. 3-11; (16) Appellee had been deceptive about using the family computer to look at pornography, R. 3351, l. 12-25; R. 3352, l. 1-12; (17) he had encouraged Appellee to file a police report against Jaime, R. 3352, l. 23-24; (18) Appellee told him that Jaime had molested him, R. 3354, l. 7-9; (19) he excused his son's lies to the police by labeling Appellee as traumatized, R. 3355, l. 12-18; (20) he blamed the Days for deceiving him when Appellee ran away, R. 3358, l. 14-15; (21) he never went to the Days' home to check to see if Appellee was living there, R. 3358, l. 16-17; R. 3359, l. 1-4; (22) he told Appellant's attorney that he believed the child was homeless, R. 3364, l. 10-18; (23) he discussed Appellee's allegations of molestation with Appellant's attorney, and said that if the case went to trial, he would be presenting Appellee's testimony about the alleged molestation, R. 3364, l. 21-25; R. 3365, l. 1-5; (24) he talked to Appellant directly about the case, R. 3368, l. 18; and, (25) he knew that Appellant was represented by counsel at the time, R. 3368, l. 16-25; R. 3369, l. 1-3.

The court had also ruled that the deposition testimony of Appellant' former attorney, Candace Ragsdale-Pollock, would be part of the record in the UCCJEA proceeding. R 896, ¶3; R. 679. The court referred to that testimony in its 2014 findings. R. 1057, ¶9. During her deposition, Ms. Pollock testified that at the parties' mediation and at a prior conference, Eric Barnes had threatened Jaime with

prosecution if Appellant did not sign over custody. She also testified that when she and Appellant started the mediation, their goal was for Appellant to get primary physical custody of the child. However, due to the threats, Appellant agreed to reduced custody. R. 691, p. 49, 17-25, p. 50, 1-21; R. 691, p. 52, 13-19; R. 696, p. 69, 2-25; R. 698, p. 801, 8-16; R. 701, p.89, 20-24; R. 701, p. 91, 22-24; R. 701, p. 92, 1-7. The agreement awarded Appellee primary physical custody and Appellant parent-time pursuant to U.C.A. § 30-3-35.5, and the agreement was a deposition exhibit. R. 141, ¶6, 8.

C. THE EVIDENCE AT THE RELOCATION HEARING

The Commissioner entered a written recommendation (R. 1881). Among other things, the commissioner drew an erroneous inference and found that because Appellant had not filed any contempt actions, the parties must have been getting along fairly well (R. 1889, ¶11(n)). However, Appellant testified that she did not file contempt actions because her family could not afford to do so. R. 2232, 19-25; R. 2233; R. 2287, 12-16.

During the subsequent, evidentiary hearing, the judge cut off cross-examination of Appellant's first witness, Aaron Day. The judge stated that he would not receive testimony about any subject from any witness who had testified about that subject previously at the UCCJEA hearing. Upon Appellant's

suggestion, he agreed to make the transcript of the March 25, 2014, ruling part of the relocation record. R. 2231, 7-17. Aaron Day then testified as follows: (1) the facts contained in his declaration were true (R. 2220, 23-24); (2) Appellant had wanted to file contempt actions against Appellee since the UCCJEA case order, but had no funds to do so (R. 2232-33); (3) a great deal of family and friends live in Boston to support Appellant and the child (R. 2233-34); (4) Appellant cries and gets frustrated in her communications with Appellee over child issues since the UCCJEA order (R. 2235, 8-10; 2236, 1-12); (5) when the child had to go back to Appellee's home after visiting Appellant in Massachusetts, the child would get very upset (R. 2236, 1-25; R. 2237, 1-5); (6) the child loves to fly in airplanes (R. 2237, 9-17); (7) Appellant's family was willing to pay all of the travel costs for the child, including monthly, holiday, and summer travel if the child was allowed to relocate to Massachusetts (R. 2237, 18-25; R. 2238, 1-10); (8) the child has bonded well with family and friends in Massachusetts, R. 2238, 11-25; R. 2239, 1-3; (9) Appellant is adamant about finishing her college degree, and needs to be in Massachusetts because she is a dance and business major, and intends to open a dance studio upon graduation so that she can support the child (R. 2239, 7-16).

Appellant testified as follows: (1) she has been the child's primary caregiver since birth (R. 2243, 17-25); (2) she received a full academic scholarship to Dean

College in Massachusetts (R. 2245, 2-7); (3) she would lose her academic scholarship if she stopped attending school (R. 2246, 10-15); (4) the tuition for attending Dean College annually is $35-45,000.00 (R. 2246, 16-21); (5) she is a dance and business major (R. 2246, 22-25); (6) Dean's dance program is unique because it allows her to take classes teaching children with disabilities, and the schools in Utah don't offer that program (R. 2247, 1-17); (7) the reason why she wanted to complete her degree is because she will be able to support the child by opening a dance studio (R. 2294, 14-22; R. 2250, 22-25); (8) Appellant had been involved in dance for 17 years, and opening a dance studio has been her ambition for many years (R. 2249, 1-11); (9) the child has a passion and natural talent in dance (R. 2250, 1-6); (10) she is dating a young man, they have discussed marriage, and he has given her a ring (R. 2251, 4-22); (11) the young man is unlikely to move to Utah (R. 2253, 4-13); (12) the child has a close bond to the young man (R. 2253, 24-25; R. 2254, 1-7); (13) the parties have had a hard time communicating about the child, R. 2260, 23-25; R.R. 2261-63, 2715, 22-24; R. 2269, 1-13; (14) when Appellant came back to Utah in July of 2015, the parties shared 50-50 custody (R. 2269, 16-19); (15) under the terms of the stipulated order, Appellant was designated the primary caregiver, and had final say over all decisions regarding the child (R. 2270, 13-25; R. 2271, R. 1747, ¶1, 5); (16) after July of 2015, Appellant flew back

to Massachusetts four or five times with the child for two week periods (R. 2271, 10-21); (17) it took the parties six months to create a Google calendar as required by paragraph 10 of the stipulated order (R. 2276, 13); (18) Appellee would not cooperate in having a weekly parenting meeting as required by the stipulated order (R. 2276, 23); (19) the parties have a very hard time communicating (R. 2277, 7-23); (20) the parties were unable to use a parent coordinator pursuant to the stipulated order (R. 2278, 1-6); (21) Appellant sent a proposed parenting plan to Appellee in June of 2015, but he never signed it (R. 2280, 25; R. 2280, 1; R. 2286, 14-15); (22) the parties were under an obligation to create a parenting plan pursuant the stipulated order (R. 1535); (23) Appellant's parents have been paying her attorney fees, but they can't afford to continue, R. 2287, 12-16; (24) Appellee refused to participate in a high conflict parenting class(R. 2290, 13-25; R. 2291, 1-18; Ex. 2); (25) Appellee was not following the stipulated order (R. 2293, 1-5); (26) Appellant's parents did not have the money to request contempt hearings (R. 2287, 12-23; R. 2292, 1-6, 12-13, 23-25; R. 2293, 5-7; R. 2240, 4-16, Ex. 3); (27) Appellee's lawyer is Eric; (28) Appellee continued to restrict Appellant's parent-time until she relocated to Utah (R. 2294, 22-25; R. 2295, 1-5); (29) Appellee would not respect Appellant's final say authority (R. 2296, 9-13); (30) the parties have had a difficult time reaching joint decisions (R. 2296, 18-20); (31) Appellee has

threatened to take Appellant back to Court (R. 2297, 1-3); (32) Appellee threatened to report Appellant to the police regarding transfers (R. 2296, 4-25); (33) Appellee, without permission, has accessed Appellant's family's accounts and passwords (R. 2298, 4-16); (34) Appellant has felt intimidated by Appellee and Eric (R. 2299, 1-9); (35) because Appellee has not approved a parenting plan, exercising parent-time has been difficult (R. 2299, 14-25; R. 2300, 1-2); (36) Appellant would have not filed a motion to relocate if Appellee had been cooperative in exercising joint custody (R. 2301, 13-16); (37) the student to teacher ratio if better in Massachusetts than in Utah (R. 2301, 17-25; R. 2302, 1-2; (38) the child has traveled to Massachusetts since 2013 more than 25 times (R. 2303, 2-5); (39) the child loves to fly (R. 2303, 10-19); (40) in June of 2015, Appellant offered a parenting plan to Appellee which would give him much more time with the child than is allowed under U.C.A. § 30-3-37, and would pay for all of the travel (R. 2304, 1-20; R. 2313-15); (41) the child has become upset when she has to return to Utah (R. 2304, 21-25); (42) Appellant tries to cheer up the chid (R. 2305, 1-15); (43) Appellee doesn't play with the child that much (R. 2306, 6-18); (44) the child has an attitude after returning from Appellee's house (R. 2307, 7-16); (45) the child has many friends in Massachusetts (R. 2307, 19-25); the paternal grandparents show more interest in the child than Appellee (R. 2311, 1-13); (46) Appellant understands her "final say"

power (R. 2355, 4-14); (47) Appellee delayed for several days in getting back to Appellant regarding travel itineraries for the child when she had to book a flight (R. 2358, 4-11); (48) Appellee made a big deal about Appellant wanting to drop off the child's Teddy Bear at his home (R. 2381, 9-20; R. 2402, 18-25; R. 2403, 1; R. 2804, 5-15); (49) Appellee interferes with virtual parent-time (R. 2385, 3-11); (50) Appellant assumed the role of primary caregiver from the time the child was born until April 13, 2013, (when she lost custody by coercion), and then from July 17, 2015, to the time of the relocation hearing, i.e., July 8, 2016 (R. 2389, 2-12; R. 2410, 1-7); (51) Appellee wanted to deviate from the joint custody order to take two week blocks of parent time three times, and Appellant allowed him to do so (R. 2399, 11-25); (52) Appellee would not reciprocate with two week blocks of parent-time when Appellant wanted to (R. 2400, 1-8); (53) Appellant sent Jaime at transfers because she felt threatened by Appellee and her family (R. 2400, 9-24); 55) the bond between the child and extended family in the Massachusetts home is very strong (R. 2406, 1-25; R. 2853, 1-19); (56) the custody evaluator did not file a written report in the case (R. 2407, 20-25; R. 2854, 1-6); (57) Appellant paid Dr. Davies ½ of his retainer to write a written report, but Appellee refused to do so (R. 2408, 9-18; R. 2856, 15-17); (59) the Court's ruling made it difficult for Appellant to relocate to Utah without the support she had in Boston (R. 2416, 7-18); (60)

Appellant has a very strong support system in Boston (R. 2417, 1-25; 2864-65); (61) Appellant has much less support in Utah, has been judged by her friends for getting pregnant, and is not close to her paternal grandfather, R. 2419, 8-23; R. 2420, 1-25; (62) the parties could not agree as to which kindergarten to send the child (R. 2499, 1-6); (63) both parties have had problems at times having virtual parent-time (64) (R. 2499, 11-24); and, (64) the custody evaluator came up with the idea of two months on two months off for parent time (R. 2502, 11-21).

Jaime Day testified as follows: (1) Appellant is an only child who she is extremely close to (R. 2423, 10-13); (2) Appellant's relationship with her paternal grandfather is strained (R. 2423, 16-21); (3) the Massachusetts community is far more caring than that in Utah (R. 2424, 1-18); (4) Appellant has matured in her parenting skills (R. 2424, 19-25; R. 2871, 1-3); (5) Appellant has been asked by the young man she had been dating to marry her (R. 2425, 13-19); (6) the child enjoys flying (R. 2428, 6-15); (7) she and Aaron Day are willing to pay for all transportation expenses upon relocation (R. 2428, 16-25); (8) she would encourage the child to have a close relationship with Appellee and his family; and, (9) Appellant has a great love for dance and she is good at working with children (R. 2429, 7-11).

Appellee testified as follows at the relocation hearing: (1) at age 22, he still

resides with his parents (R. 2431, 20-21); (2) he has been "working" as a self-employed, multi-level marketer for the past one ½ years (R. 2440, 16; R. 2887, 2-3); Appellee has made no money in this multi-level marketing activity (R. 2441, 4-8); (3) although enrolled in college and living with his parents, Appellee was hoping to obtain his Associates degree by the end of 2016, R. 2442, 6-7; (4) he disagrees with the child attending a charter school for kindergarten (R. 2450, 1-9); (5) Appellee admitted that he was at fault for trying to enjoy virtual parent-time when the five-year-old child by calling at 9:30 P.M. (R. 2469, 9-18); (6) Appellee did not want his name on the birth certificate (R. 2472, 14-23); (7) Appellee took no action to enroll the child in kindergarten, R. 2473, 15-17; (8) Appellee spends less than one hour weekly trying to sell product through the multi-level marketing activity, R. 2474, 5-8; (9) Appellee was paying $150 per month rent including utilities while he was living with his parents, R. 2475, 1-8; (10) when the court originally gave sole physical custody to Appellee, he was working 40 hours a week at a minimum wage job, and his parents were caring for the child (R. 2474, 2-20); (11) Appellee became a student at Weber State in January of 2013, and as of July of 2016, he had not obtained an Associates degree (R. 2476, 21-25); (12) Appellee was unemployed (R. 2477, 24-25); (13) Appellee has been fired from a job (R. 2478, 17-23); (14) Appellee's parents have told him that he should spend more time with the child (R.

2479, 10-16); (15) Appellee spoke disrespectfully to Appellant in his communications (R. 2482, 3-7); (16) despite testifying that Appellant had offered a two month on/two month off parenting plan: (a) Appellant's parenting plan indicated a two-week/on two-week off plan, and Appellee could produce no material evidence to contradict Appellant's evidence (R. 2480-81); (17) Appellee threatened to take Appellant back to court after the final order had been signed (R. 2482, 8-12); (18) despite the final order stating that Appellant had decision making authority for the child's dance programs, Appellee told Appellant that he did not want the child to go to a school that had a dance program (R. 2482, 17-25, R. 2483, 1-2); (19) Appellee listed the child's surname as Barnes when he applied for Medicaid without Appellant's permission (R. 2483, 17-25; R. 2484, 1); (20) Appellee never submitted a parenting plan to Appellant as required (R. 2485, 15-19); (21) Appellant allows the child to speak with Appellee by virtual parent time (R. 2487, 9-11); (22) Appellee told Appellant's parents that he wanted them to adopt the child when the child was first born (R. 2495, 2-4); and, (23) when Appellee lived with Appellant's family, his care giving to the child was minimal (R. 2496, 14-25).

D. FACTS REGARDING THE MARSHALING REQUIREMENT

In his ruling on March 25, 2014, the judge found that he had a significant

concern about the ability of Petitioner to 'give first priority to the welfare of the child,' because Appellant had wanted to obtain a college degree by way of a full academic scholarship (so that she could care for the child financially and obtain a degree without going into debt $140,000.00, (R. 1060, ¶15). Appellee testified that: (1) Jaime Day had begged him not to tell anyone about their sexual relationship, not to report their activities to the police, and that she loved him (R. 2198, 7-14); (2) Jaime had told Appellant that she had been raped by Appellee, that it only happened once, that he was appalled by Jaime's lies, that he would not promise Jaime that he would not report what had happened, and that Jaime was frustrated about Appellee's position (R. 2200, 1-14); (3) Appellee denied that he had concocted the burglary story by making a record and texting Jaime that he could not believe that she had lied about the rape incident (R. 2201, 1-6); (4) Appellee had agreed that Appellant could have four days of virtual parent-time while she was living in Massachusetts (R. 2382, 24-25; R. 2383, 1-4); (5) when Appellant has gotten virtual parent-time, the exchange between mother and child has gone well (R. 2384,10-25); (6) on occasion when Appellee has wanted to enjoy virtual parent-time, he has been unable to do so due to problems on Appellant's end (R. 2385, 12-18); and, (7) Appellee was flexible in terms of allowing Appellant four or five times of extended parent-time to return with the child to Massachusetts after a final, stipulated order had been

entered in the UCCJEA case (R. 2392, 7-18).

Appellee also testified: (1) Appellee lives with his parents and brothers and sisters who have a good relationship with the child (R. 2433-35); (2) several extended family members live close by (R. 2437); (3) Appellee loves his daughter and spends time with her (R. 2437, 23-25; R. 2438, 1-8); (4) Appellee has worked as an intern (R. 2441, 21-25); (5) the child's life has "collapsed" since Appellant returned to serve as primary caregiver in July of 2015 (R. 2445, 23-25; R. 2890, 1-9); and, (6) the child attends the LDS primary program in Utah (R. 2447, 1-8).

As discussed *supra,* Carolyn and Eric Barnes's testimonies painted a picture of the child being very happy living in Utah with them, that Appellee was maturing generally and as a young father, and that he actively participated in caring for the child. Appellant incorporates those facts here.

SUMMARY OF ARGUMENT

Appellant was denied due process when, upon remand, the court used the findings of a prior temporary order in a UCCJEA action in an ensuing relocation action, and despite this court stating that the judge had misapplied Civil Rule 108. The Court's findings in the relocation action are also inadequate, and existing authority mandates relocation.

ARGUMENT

I. THE RELOCATION HEARING DENIED APPELLANT DUE PROCESS.

Under the United States and Utah constitutions, a parent has a fundamental liberty interest in raising her child. U.C.A. § 62A-41-201(1)(a). In an action involving an objection to a hearing commissioner's recommendation, a parent is provided procedural due process protection by mandating that a judge allow the parent to present evidence on issues relating to custody, and that the judge make independent findings. Utah R. Civ. P. 108(d)(3)(A) and (f).

Here, the judge ostensibly denied Appellant due process when he: (1) barred testimony from witnesses who had previously testified in the UCCJEA action (R. 2221, 17-25; R. 2222, 6-7; R. 2226, 1-2; R. 2228, 4-5, 9-10; R. 2228, 15-18; R. 2231, 1-17); and, (2) used the findings in the temporary order he had issued two years earlier as the primary basis for denying relocation. R. 2745.

This conclusion comports with other authority associated with child custody proceedings. In the relocation context, what is in the best interest of the child should be the primary focus of the court. U.C.A. § 30-3-37(4). Additionally, as here, when parties have stipulated to custody and there has been no full adjudication of custody on the merits, a stipulation for a particular custody arrangement may be at odds with the best interests of the child. *Elmer v. Elmer,* 776 P.2d 599, 603 (UT

1989). That is because a stipulation may fortuitously benefit a party rather than benefitting the child due to a parent losing her resolve, being stressed out, or as here, being low on funds. *Id.*

Here, when Appellant filed a relocation motion under U.C.A. § 30-3-37 (21 months after the 2014 temporary order had been entered), instead of conducting an open, plenary hearing in accordance with Civil Rule 108(d)(3)(A), the Court relied upon its findings in its temporary order of April 25, 2014 – which did not involve the testimony of the custody evaluator – among other things. R. 1960-61. Therefore, the evidentiary hearing of April 25, 2014, must be viewed only for what it was – a non-binding temporary order which addressed temporary custody of the child and parent-time prior to an adjudication of the issue on the merits. Yet the judge treated his findings for that ruling essentially as dispositive of the relocation issue, and indicated that since nothing had changed since then, he would not allow relocation. R. 1961. Appellant had warned the court of its error in her Rule 54(b) motion. R. 1323.

Additionally, even in the context of a petition to modify a decree (which *Elmer* involved), where custody has been determined previously by stipulation or default, the material change of circumstances rule should not be rigidly applied. *Id.* "A child should not be subjected to spending the rest of his or her minority in an

inferior environment because of the inaction of one parent at the time custody is awarded . . . " (or by a misapplication of law by a judge in this setting). *Id. A fortiori,* as here, where the more stringent material change in circumstances standard does not apply in the relocation context, and where the judge erroneously used the findings in a temporary order (which merged with the stipulated final order under res judicata) as the basis for denying relocation under the material change in circumstances criteria (R. 2745), it follows that the ruling: (1) defies the parent's fundamental liberty interest and procedural due process protection afforded under Civil Rule 108(d)(3)(A); (2) is inapposite to *Elmer* and its progeny; and, (3) is not in the best interest of the child. Clearly, Appellant did not have a fair hearing and ruling – for a second time – and this error was also not harmless.

II. THE FINDINGS ARE GROSSLY INADEQUATE.

In the child custody context, findings are adequate only if they are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. *Rayner v. Rayner*, 316 P.3d 455, 460, ¶11. The clearly erroneous standard applies. *Robertson v. Robertson*, 370 P.3d at 572, ¶5.

Review of the evidence indicates definitively that the District Court findings are grossly inadequate. The Court's findings entered on February 29, 2019 (R.

2738), made bare conclusions without discussing at any reasonable length the great deal of conflicting, material evidence which could have lead to different possible interpretations and a different outcome. The findings also failed to consider all of the factors stated in U.C.A. § 30-3-37(5), although acknowledging the catchall phrase in paragraph four, that the court may consider "any other factor." R. 2740. The Court then referred to the statutory factors found in U.C.A. §§ 30-3-10 and 10.2 and in Administrative Rule 4-903 – which were considered to a certain extent in the Court's ruling entered in April of 2014, but were not applied substantively in the ruling entered on February 20, 2019.

The Court then in paragraph three of its conclusions of law incorporated its findings of April 25, 2014, into the findings entered on February 20, 2019. R. 2745. Consequently, if this court determines that the judge did not err in incorporating the findings for the April 25, 2014, hearing into the relocation ruling, it is necessary to review the 2014 findings as they apply to the evidence presented in both the UCCJEA and relocation hearings.

Therefore, assuming arguendo that there was no error to do so, Appellant begins by a review of the 2014 findings. For the most part, the 2014 findings only determined whether the commissioner's recommendation was correct under the misunderstanding that Appellant had the burden of proof to show that the

recommendation was wrong. R. 1052, 1056, 1058. The 2014 findings do not address the criteria for relocation as set forth in U.C.A. § 30-3-37. Therefore, the 2014 findings are suspect of being correct.

Indeed, the court's focus on the best interest of the child in the 2014 findings was simply to see whether the parents could co-parent in a joint custody temporary arrangement rather than whether it was in the best interest of the child to relocate with her mother in Massachusetts. R. 1057, ¶8, ¶12. The findings also do not address the evidence for Appellant's relocation, and the ability of the parents to facilitate parent-time across the country – given Appellant's willingness to pay for air travel for the child and Appellee – factors which are mandated by U.C.A. § 30-3-37.

Additionally, the 2014 findings misapply the evidence presented in the UCCJEA and relocation hearings. In paragraph six, the findings state that the evidence presented on Jaime's rape was meager and uncorroborated. However, as discussed *infra*, the testimonies of Jaime, Appellant, Carrie, and Appellee on this issue imply that Appellee was lying, and that his credibility generally was an issue.

In paragraph six, the judge followed the commissioner's conclusion that because Jaime did not report the rape to the police, and because no rape charge was brought, Appellant had not carried her burden of proof to show that the rape

occurred. R. 1056, ¶7. However this conclusion failed to weigh Appellant's corroborating evidence from Aaron, Jaime, Appellant, Carrie, Eric, and Appellee that: (1) Eric and Appellee had threatened the Day family over the rape incident; and (2) their intimidation had frightened the Day family into not reporting the rape (R. 2954, l. 17-21; R. 3081, l. 3-6; R. 2936, 2-6); (3) Massachusetts authorities had spoken to Appellant about extraditing Appellee for prosecution there (R. 2989, l. 21-25 - R. 1299, l. 1-4); (4) Jaime saw a therapist over the rape (R. 2954, l. 17-21); and, (5) Appellee had a motive to and did report Jaime to the police over the rape incident (R. 3208, 1-3). Additionally, paragraph 11– regarding the Barnes family's lack of coercion in getting Appellant to turn over custody – was also erroneous in light of the evidence stated *supra*. R. 1058.

Paragraph eight of the 2014 findings follows the commissioner's erroneous "status quo" argument. However, in *Taylor v. Ellison*, 263 P.3d 448, 452, ¶10 (UT App. 2011), this court stated that in the context of a long-standing custody arrangement held by a primary caregiver, the best interests of the child policy suggests that custody should remain with the primary caregiver in the context of temporary custody. However, the commissioner and then the judge ruled that Appellee – who had custody of the child for a far less time than Appellant and who was not the child's primary caregiver – should have custody of the child to maintain

the deal that was struck by coercion. This finding repudiates *Taylor* and did not maintain the status quo. Additionally, paragraph 18 erroneously focused on the child's ties to Utah rather than on the best interest of the child in remaining with her primary caregiver. R. 1052.

Paragraph 10 of the 2014 findings acknowledges that the findings do not have the benefit of the custody evaluator's report and that the findings are only temporary. R. 1058. Yet the judge went on to principally rely on those findings when he ruled on the relocation motion.

Paragraph 13 of the 2014 findings stated that the parties worked sufficiently well together to enjoy joint custody. However, the findings also acknowledge that Appellee was not cooperative, and that continued non-cooperation might result in Appellant being awarded sole custody. R. 1060. Nevertheless, the evidence showed that the parties could not cooperate effectively. The judge's findings (which once again mirrored the commissioner's finding, R.1889, ¶11(n)) that the parties got along well with each other was not supported by the testimonies of Appellant, Aaron Day, and even Appellee, R. 2276, 13, R. 2276, 23, R. 2277, 7-23,R. 2278, 1-6,R. 2280, 25; R. 2280, 1; R. 2286, 14-15, R. 1535, R. 2287, 12-16, R. 2290, 13-25, R. 2291, 1-18; Ex. 2, R. 2293, 1-5, R. 2287, 12-23, R. 2294, 22-25; R. 2295, 1-5, R. 2296, 9-13, R. 2296, 18-20, R. 2297, 1-3, R. 2296, 4-25, R. 2298,

4-16, R. 2299, 1-9, R. 2299, 14-25; R. 2300, 1-2, R. 2301, 13-16, R. 2358, 4-11, R. 2469, 9-18, R. 2485, 15-19; R. 2235, 8-10; 2236, 1-12, R. 2260, 23-25; R.R. 2261-63, 2715, 22-24; R. 2269, 1-13. Therefore, the judge's use of the 2014 findings illustrates that his conclusions regarding relocation, albeit sparsely sprinkled with some material evidence – did not conform to existing authority, and did not weigh all material evidence.

Switching now to the findings entered on February 20, 2019, in paragraph 26, the Court focused heavily on Appellant's ability to give first priority to the child. R. 2745. This was a theme which the Court had originally found in paragraphs 14 and 15 of the 2014 findings. R. 1060. However, this factor found in U.C.A. § 30-3-10.2(2)(b) (regarding a joint custody award), pertains to the ability of a parent to make shared decisions with the other parent – not the reason for the parent's relocation. Indeed, the court made its "failure to give first priority" finding because Appellant elected to finish her college degree at a private Boston college rather than returning to Utah to complete her degree here – thus abdicating her role as a mother. However, the Court's findings never gave considered weight to Appellant's testimony on this issue. Appellant testified that her college's dance program is unique because it allows her to take classes teaching children with disabilities, and the schools in Utah don't offer this kind of program, R. 2247, 1-17. The Court

failed to weigh the economic realities of having to pay for a college degree at a private college, having to provide for the child upon graduation, and that Appellant – not Appellee – was assiduously working to achieve the objective of financial responsibility and independence by earning a college degree that she found satisfying so that she could support her child immediately upon graduation. In contrast, Appellee's testimony indicated that he was much farther behind in achieving an ability to financially care for the child, R. 2474, 5-8, R. 2475, 1-8. R. 2474, 2-20, R. 2476, 21-25, R. 2477, 24-25, R. 2478, 17-23.

The court failed to weigh nearly all of the other "catch all" statutory factors (although it mentioned the need to do so in the legal standard section of its relocation ruling). R. 2740-41. This ruling effectively mandated Appellant at the age of 21, to drop out of her scholarship degree program, relocate and to live in Utah to enjoy primary custody of her child.

Additionally, the findings only obliquely touched on the neutral factors of the parties' maturity (paragraph 22), their ability to work together (paragraph 23), that the child was too young to express her wishes (paragraph 19), and that the parties' bonding to the child was equally strong (paragraph 25).

However, the Court failed to acknowledge and weigh the following evidence and statutory factors, that: (1) the child had lived with Appellant and her family for

the first 2 ½ years of her life, that Appellant had played an active role in caring for the child as the primary caregiver, and that the child had a loving and supportive support system in Massachusetts (also admitted to by Appellee) (this is a material factor pursuant to *Robertson*, 370 P.3d at 574, ¶11; *Hudema,* 989 P.2d at 499, ¶26; U.C.A. § 30-3-10(2)(m)), R. 3206, l. 17-19, R. 2243, 17-25; R. 2238, 11-25; R. 2239, 1-3; R. 2307, 19-25; R. 2311, 1-13, R. 2424, 1-18; (2) after meeting with the custody evaluator at the Rule 4-903 conference, Appellee stipulated that Appellant would enjoy primary caregiver designation upon relocating to Utah and would have final say in the legal custody context, R. 1531 (paragraph 1 and 4); (3) the child was happy and thriving while living with Appellant and her extended family in Utah and Massachusetts, R. 3206, l. 17-19; R. 2233-34, R. 2238, 11-25; R. 2239, 1-3, R. 1682, ¶17, 18, R. 2406, 1-25; R. 2853, 1-19; R. 2954, l. 7-8; (this is a material factor; *Id;* Rule 4-903(4)(E); (4) the developmental needs of the child (Rule 4-903(4)(A); (5) the character and moral standards of the parties were improperly or prematurely weighed in the 2014 findings (Rule 4-903(4)(F)(iii); U.C.A. §30-3-10(2)(d); (6) the evidence associated with the reasons for having both parents relinquishing custody did not jive with the findings (Rule 4-903(4)(F)(Viii; U.C.A. § 30-3-10(2)(h)) (where the Court did not consider that Appellee had abandoned the child for almost a year when he relocated from Massachusetts to Utah to live with

his parents and did not properly weigh the Barnes's family's intimidation evidence); (7) the child's strong bond with Appellant's extended family in Massachusetts (Rule 4-903(4)(F)(x); U.C.A. § 30-3-10(2)(l); (8) Appellant's financial responsibility in completing her degree and Appellee's slowness in achieving financial independence (Rule 4-903(4)(F)(xi) (the Court actually found in paragraph 27 of its findings that Appellant's attendance at college was not in the child's best interest); (9) evidence of domestic violence against Appellant and her mother in the household where the child lived (U.C.A. § 30-3-10(2)(a)); (10) Appellee did list himself on the birth certificate, R. 2472, 14-23; (11) Appellant's college's dance program isn't offered in Utah, R. 2247, 1-17; (12) Appellee had no interest in raising the child initially, R. 3056, l. 6; R. 3058, l. 16-25; R. 3059, l. 1-8, R. 3030, 11-23; R. 3031, l. 1-6; R. 3033, l. 17-25; 3034, l. 1-4, R. 3081, l. 15-16; and, (13) Appellant's family was willing to pay all travel costs for the child, including monthly, holiday, and summer travel (R. 2237, 18-25; R. 2238, 1-10; R. 2304, 1-20; R. 2313-15, R. 2428, 16-25, R. 2237, 18-25; R. 2238, 1-10.

As to this last point, U.C.A. § 30-3-37(5)(c) required the Court to consider the economic resources of the parents in fashioning adequate parent-time with the child and their abilities to facilitate long distance travel.

Additionally, the Court also failed to consider the coercive effect on

Appellant by Eric Barnes, as an attorney, speaking to Appellant shortly before the mediation – when she was represented by counsel – on how that exacerbated the other threats. Comment 2 to Professional Rule 4.2 states that this rule attempts to protect the integrity of the legal system by restricting the possibility of over reaching and bearing down on a party. This fact should not be winked at, but enforced. Paragraphs eight and nine of the 2014 findings don't address this evidence. R. 1056-57. Indeed, in light of Appellee – shortly after returning to Utah – reporting Jaime to the police – indicates a strong willingness by Eric to protect his son, and to use coercion to overreach. Additionally, Appellee and Eric admitted that they threatened the Day family. R. 3277-78; R. 3282, l. 7-12; R. 3352, l. 23-24; R. 3364, l. 21-25; R. 3365, l. 1-5.

Additionally, paragraph nine of the 2014 findings states that the court independently found that coercion was not a "driving force" for Appellant turning over custody. R. 1058. However, Appellant's former lawyer had testified by deposition that Eric had threatened Jaime if Appellant did not turn over custody. R. 691, p. 50, 8; R. 691, p. 52, 15; R. 696, p. 69, 2-25; R. 698, p. 801, 8-16; R. 701, p.89, 20-24; R. 701, p. 91, 22-24; R. 701, p. 92, 1-7. Given that Appellant had come to the mediation as the primary caregiver with Appellee having no significant contact with the child, it is reasonable to infer that the threats against Jaime were

indeed the driving force which coerced her to give Appellee primary custodian status.

Additionally, the moral standards of the parties is a statutory factor, and is material to the extent that they may affect a child's best interests. *Robertson*, 370 P.3d at 572, ¶6. Here, Appellant provided evidence that Appellee had raped her, had raped her mother, had lied to the police in reporting the alleged rape, had grabbed her mother's breast, was in the habit of walking naked in the house where the child lived, was in the habit of grabbing or swatting her and her mother's butt in the house where the child lived, was addicted to and watched pornography in the home where the child lived. Therefore, evidence which pertained to Appellee's moral standards was material for this young girl child who primarily lives with him.

Although the Court mentioned the moral character factor in paragraphs 6 and 12 of its 2014 findings, the Court improperly weighed the evidence. Generally, a Court's findings implicitly reflect the weighing of witnesses' credibility. *State ex rel. A.R. v. State*, 2017 UT App. 153, 402 P.3d 206, 214 ¶26. Yet not only do the findings fail to comment on any witnesses' credibility, since the evidence regarding the rape was conflicting and material as to Appellee's moral character, the findings needed to address the witnesses' conflicting testimony.

It is apparent that from the testimonies of Jaime Day, Carrie, and Appellee

regarding the rape incident that someone was lying. Based upon the evidence, it is reasonable to infer that Appellee was lying. If so, then Appellee's testimony should have been discredited, and his moral standards became material.

Here, Carrie, a mature woman, and the great-grandmother of the parties' child, testified that she could hear glass breaking and banging on the downstairs bathroom door. She ran to see what caused the commotion. When she arrived at the bathroom, Tyler was banging on the door, and told her that someone had broken into the house. R. 3053, 2-7. Carrie doubted Appellee from the get-go. R. 3053, 16-20; R. 3055, 20-22. When Carrie got the bathroom door open, Jaime was lying in the bathtub with her clothes on, glass was broken all around, and Jaime was crying uncontrollably R. 3055, 14-19. Carrie could not get Jaime to tell her what happened, but Tyler had taken Carrie outside of the residence and showed her a knife from the alleged intruder. R. 3055, 14-19. Appellee, upon returning to live with his attorney father, filed a report with the police, alleging that Jaime had molested him – thus ostensibly covering his crime by preemptive strike. R. 3054, 4-8.

Jaime testified that Appellee had filed a police report against him for having sexual intercourse with him more than 100 times. R. 3009, 19-21; R. 3014, 1-2. However, the police did not refer the case for prosecution. R. 3013, 23-24. While

Appellee was living with the Day family, Appellee got on top of her in her bed while she was sleeping one evening. R. 3015, 25; R. 3016, 1-3. Appellee threatened her by telling her that if Jaime reported the incident: (1) Appellant would never forgive him; (2) Appellee's parents would put him in juvenile facility; and, (3) Jaime would be prosecuted. R. 3016, 5-9.

Upon cross-examination Appellee testified as follows: (1) he and Jaime had sex multiple times in the Day residence. R. 3207, 3-15; (2) in his report to the police, he said he had sex with Jaime about 100-200 times. R. 3208, 1-3; (3) seven people lived in the Day household when he was having sex with Jaime. R. 3208, 23; (4) Carrie and her husband Mike lived in the Day household and were retired. R. 3208, 24-25, R. 3209, 1-4; (5) deleted (6) he exaggerated the number of times that he had sex with Jaime when he spoke to the police. R. 3209, 14-16; (7) Jaime took advantage of him by convincing him to have sex with her even though he found her unattractive, R. 3209, 18-22; (8) the police did not refer the case for prosecution, R. 3209, 24-25; (9) he admitted to grabbing Jaime's breasts, but said that it was normal to do so in the Day household, R. 3211, 11-21; (10) sex between Jaime and himself was consensual, R. 3217, 21-25; (11) he was not old enough to consent, R. 3218, 11-13; (12) regarding the time when he found Jaime in the bathtub, he was told by Jaime that there was a burglar in the house, R. 3221, 1-3;

(13) Jaime showed him the knife that the burglar used, and it was in the sink, R. 3221, 14-16; (14) Jaime claimed that she was raped the night that she showed him the knife by a "guy she had met at a dog park," R. 3221, 17-23; (15) he denied banging on the bath room door, but admitted that he was knocking on the door at 3:00 A.M., R. 3222, 1-11; (16) Jaime opened the door to let Appellee come into the bathroom, but Carrie was not involved in the incident, R. 3222, 20-22; (17) he awoke around 3:00 A.M. by the sound of water, R. 3264, 22-25; R. 3265, 1-5; (18) deleted (19) he only had sex with Jaime 20-30 times because he's a male and she's a female and "it's natural to be aroused," R. 3263, 23-25, R. 3264, 1-3; (20) the Day family had dogs, but he was not aroused by dog barking despite Jaime's alleged claim of rape, R. 3265, 17-20; (21) at first he stated that he and Carrie had looked to see if the intruder had pried open the door to the residence, then he changed his testimony to not remembering if Carrie was there, R. 3265, 24-25; R. 3266, 1-5; (22) Jaime told him that the intruder had raped her the following day when she drove him to school, R. 3266, 6-9; (22) he reported the incident to Aaron the next day, R. 3267, 5-8; (23) Jaime had grabbed a knife when she heard a sound and the intruder who was about six feet tall, grabbed her from behind and pulled her into a room, R. 3268, 8-12; and, (24) the intruder took the knife from Jaime, dropped it outside, Jaime retrieved it, washed it, and put the knife in the kitchen sink, R. 3268,

14-16).

The testimony about the rape conflicts in material ways between the three witnesses and should have been reflected in the findings. If the Court had credited Carrie's and Jaime's testimonies, there would have been time for Appellee to place the knife near the residence, and show Carrie the knife as a ploy to cover up his rape of Jaime moments earlier.

Additionally, it is reasonable to infer that Appellee was lying about raping Jaime even from his own testimony. That is, even assuming that he woke up by water running in the bathroom at 3:00 A.M., why would he have gotten up and knocked on the bathroom door – not suspecting that an intruder had entered the house? Why did Jaime not scream out for help – given there were dogs and seven people living in the household? Why would the intruder rapist have dropped the knife near the residence with his finger prints on it providing evidence to the police of his identity for prosecution? The answer is that Appellee's version of the facts associated with the rape doesn't hold water. This conclusion is supported by Eric and Carolyn Barnes's testimony who admitted that Appellee has deceived and lied to them, R. 3332, l. 10-13; R. 3141, l. 24-25, and by Appellee's admissions about lying in his discovery responses – despite having the assistance of counsel, R. 3270, l. 1-24, R. 3273; R. 3269, 11-25; R. 3270, 1-25; R. 3271-73.

In sum, the findings did not properly consider and weigh this conflicting and material evidence.

III. THE RELOCATION RULING IS ERRONEOUS.

Appellant marshals the evidence to prove that the ruling lacks substantial evidentiary support when viewed in the light most favorable to Appellee. *Wilson v. Sanders*, 2019 UT App. 126, ¶16-17.

Appellant incorporates by reference the facts stated in her Statement of Facts which support the ruling. The testimonies of Eric, Carolyn, and Appellee about the child doing well now while living in the Barnes home although relevant, should be considered as neutral – given the equitable concerns of coercive transfer by a Utah lawyer who violated the professional rules. Secondly, Appellant's family has also provided an equally stable and loving home for the child. Additionally, the court's findings and temporary order in 2014 indicate that the judge credited Appellant's "significant testimony" on the issue of Appellee's moral character by ordering that he take a psycho-sexual evaluation. R. 1064, ¶3.

Applying the evidence to U.C.A. § 30-3-37, it is apparent that on balance relocation should have been allowed under the abuse of discretion standard. *Robertson,* 370 P.3d at 573, ¶9. Of relevance is the reason for the move. U.C.A. § 30-3-37(5)(a). Appellant had a good reason relocate to Massachusetts with the

child. She was not a Utah resident, and neither was the child when the UCCJEA action was brought. The court made residency an issue by incorporating its 2014 ruling into the relocation ruling. Appellant had been the child's primary caregiver since birth and would have remained such but for the coercive transfer. Since Appellant relocated to Utah in July of 2015 and enjoyed primary caregiver status and final say authority under the UCCJEA final order, Appellee's involvement remained less important through the time of the court's relocation ruling in July of 2016. R. 1531, ¶1, 5.

Appellant also had the child flown to Massachusetts regularly so that the child continued to have a close bond with the Day family. R. 2303, 2-5; R. 1060, ¶16. Additionally, the 2014 temporary order came with the caveat that Appellee should only enjoy primary custody if he lived with his parents and his parents were willing to help care for the child. R. 1063, ¶1. Around this time, Appellee was working and taking a full load of credits at college. R. 3146, l. 16-18, R. 3147, l. 6. Thus, this case is distinguishable from cases where a parent actually served as the primary caregiver to merit that designation.

Appellant lived with her family as well while finishing college. Therefore, her caregiver status was similar. At the time of the relocation hearing her support system in Massachusetts was much stronger there. However, notably, her extended

family had the economic resources to allow the child to have a significant amount of parent-time with her father by paying for air travel above that which was required under the relocation statute. Appellee made no such offer. This statutory factor was not weighed in the February 20, 2019, order. R. 2738; U.C.A. § 30-3-37(5)(b) and (c). Appellant also showed an 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 (R. 2269, 16-19), and living with her paternal grandfather whom she had a strained relationship (R. 2423, 16-21; R. 2419, 8-23; R. 2420, 1-25). The child's educational opportunities were better in Massachusetts because of the student to teacher ratio (R. 2301, 17-25; R. 2302, 1-2); Rule 4-903(4)(A).

The court also failed to consider that the shift to the Barnes home was a huge change for the child to living with virtual strangers (R. 3302, l. 13-15), and that neither Appellee nor the court disagreed that Appellant had been the primary caregiver of the child since birth, R. 2243, 17-25, R. 1061, ¶17. All of these facts prove that the judge's persistence in finding that Appellant' decision to finish college in a dance program that is not available in Utah so that she can support her daughter does not comport with existing Utah authority. *Robertson*, 370 P.3d at 574, ¶11; *Hudema,* 989 P.2d at 499, ¶26; U.C.A. § 30-3-10(2)(m)). Indeed, if anything: (1) the initial transfer of custody of the child to the Utah residents

uprooted the child from her secure footing in Massachusetts; and, (2) because of Appellant's continued efforts to cultivate and maintain a close bond with the child to her and her family in Massachusetts, the child will not suffer any harm in transferring back now to the loving, Day home, R. 2303, 2-5. Indeed, the initial transfer to the Barnes family conflicts with the authorities cited which state that maintaining stability for the child is of paramount concern.

The moral character was a huge issue because there was evidence of rape, sexual assault, lying in discovery responses, threats, fraudulent police reports, accessing without permission the Day family's accounts and passwords (R. 2298, 4-16), and coercive conduct.

Additionally, there was evidence that Appellee was diagnosed with depression and anxiety, was prescribed mediation, regularly failed to take his medication, was committed for emotional problems, lied to his parents, and is passive aggressive. R. 3270, l. 1-24; R. 3148, l. 13-15; R. 3112, l. 8; R. 3131, l. 11-14; R. 3144, l. 18-21. This statutory factor was not weighed as well. R. 2738. Rule 4-903(4)(F)(iv).

Additionally, there was substantial evidence and the court found that Appellant did not cooperate materially in the co-parenting format. R. 2280, 25; R. 2280, 1; R. 2286, 14-15; R. 1535; R. 1059-60; R. 2276, 13; R. 2276, 23; R. 2277, 7-

23; R. 2278, 1-6; R. 2294, 22-25; R. 2295, 1-5; R. 2296, 9-13; R. 2296, 18-20; R. 2297, 1-3; R. 2358, R. 2381, 9-20; R. 2402, 18-25; R. 2403, 1; R. 2804, 5-15; R. 2385, 3-11; R. 2408, 9-18; R. 2856, 15-17; R. 2482, 17-25, R. 2483, 1-2.

Finally, it seems that the court's ultimate basis for awarding Appellee custody temporarily – given that the child had loving homes to live in – was the child's ties to Utah. R. 1062, ¶18. However, the Court clearly used the wrong standard under U.C.A. § 30-3-37 (which applies by the court's incorporation of that ruling to the relocation ruling). Indeed, the court's thinking superficially mirrors that found in *Pingree v. Pingree*, 365 P.3d 713, 716, ¶9. However, *Pingree* is distinguishable because the Court mentioned the child's ties to Utah there only because that's where the child's life had been. However, here, Jaime, Aaron, Carrie, her husband, and Appellant all reside in Massachusetts. The child moved to Massachusetts when she was around one year old. R. 1958, l. 5-9, i.e., December 2011. The coercive transfer occurred in April of 2013. Appellee lived with the Day household and finished high school in Massachusetts. The child has continued to have a significant contact with the Day family since the transfer. Appellant's contact with her great grandfather where the court ordered her to live in Utah is strained. Therefore, the court 's reasoning on the Utah ties issue is also incorrect as a matter of fact.

In sum, both parents were finishing college when the relocation hearing occurred. Both grandparents provided support to their granddaughter in caring for the child. However, the other factors tip the scale for relocation, i.e., on the moral character issue (sexual activity, lying, intimidation, false reports to the police), Appellant was more emotionally stable, there are better schools in Massachusetts, Appellant closer to graduating from college, the forced adjustment to the Barnes household, the coercive transfer, the unethical conduct by Appellee's father, and Appellee's lack of cooperation in co-parenting.

CONCLUSION

The Court's ruling should be reversed and relocation allowed.

Dated this 3rd day of September, 2019. /s/ Theodore R. Weckel
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1), I certify that this brief contains 13, 669 words by use of Word Perfect's word counting application, and pursuant to Utah R. App. 21(g), this brief does not contain any private information.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2019, a true and correct copy of Appellant's opening brief was served upon counsel for the Appellee, Eric B. Barnes, by first class mail to the following address: 47 N. Main Street, Kaysville, UT, 84037, and by email at: eric@elderlaw-info.com.

/s/ Theodore R. Weckel

ADDENDUM

Addendum A — U.C.A. Section 30-3-37

Addendum B — Utah R. Civ. P. 108

Addendum C — Findings of Fact and Order on Objection (Filed 4/25/14)

Addendum D — Order Regarding Petitioner's Objections to Commissioner's Recommendation (Filed 10/19/16)

Addendum E __ Ruling and Order On Petitioner's Objections to Commissioner's Recommendation (After Remand)

ADDENDUM A

Effective 5/13/2014

30-3-37 Relocation.

(1) For purposes of this section, "relocation" means moving 150 miles or more from the residence of the other parent.

(2) The relocating parent shall provide 60 days advance written notice of the intended relocation to the other parent. The written notice of relocation shall contain statements affirming the following:

(a) the parent-time provisions in Subsection (5) or a schedule approved by both parties will be followed; and

(b) neither parent will interfere with the other's parental rights pursuant to court ordered parent-time arrangements, or the schedule approved by both parties.

(3) The court shall, upon motion of any party or upon the court's own motion, schedule a hearing with notice to review the notice of relocation and parent-time schedule as provided in Section 30-3-35 and make appropriate orders regarding the parent-time and costs for parent-time transportation.

(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.

(5) If the court finds that the relocation is in the best interest of the child, the court shall determine the parent-time schedule and allocate the transportation costs that will be incurred for the child to visit the noncustodial parent. In making its determination, court shall consider:

(a) the reason for the parent's relocation;

(b) the additional costs or difficulty to both parents in exercising parent-time;

(c) the economic resources of both parents; and

(d) other factors the court considers necessary and relevant.

(6) Unless otherwise ordered by the court, upon the relocation, as defined in Subsection (1), of one of the parties the following schedule shall be the minimum requirements for parent-time for children 5 to 18 years of age:

(a) in years ending in an odd number, the child shall spend the following holidays with the noncustodial parent:

(i) Thanksgiving holiday beginning Wednesday until Sunday; and

(ii) Spring break, if applicable, beginning the last day of school before the holiday until the day before school resumes;

(b) in years ending in an even number, the child shall spend the following holidays with the noncustodial parent:

(i) the entire winter school break period; and

(ii) the Fall school break beginning the last day of school before the holiday until the day before school resumes;

(c) extended parent-time equal to 1/2 of the summer or off-track time for consecutive weeks. The children should be returned to the custodial home no later than seven days before school begins; however, this week shall be counted when determining the amount of parent-time to be divided between the parents for the summer or off-track period; and

(d) one weekend per month, at the option and expense of the noncustodial parent.

(7) The court may also set a parent-time schedule for children under the age of five. The schedule shall take into consideration the following:

(a) the age of the child;

(b) the developmental needs of the child;
(c) the distance between the parents' homes;
(d) the travel arrangements and cost;
(e) the level of attachment between the child and the noncustodial parent; and
(f) any other factors relevant to the best interest of the child.

(8) The noncustodial parent's monthly weekend entitlement is subject to the following restrictions.
(a) If the noncustodial parent has not designated a specific weekend for parent-time, the noncustodial parent shall receive the last weekend of each month unless a holiday assigned to the custodial parent falls on that particular weekend. If a holiday assigned to the custodial parent falls on the last weekend of the month, the noncustodial parent shall be entitled to the next to the last weekend of the month.
(b) If a noncustodial parent's extended parent-time or parent-time over a holiday extends into or through the first weekend of the next month, that weekend shall be considered the noncustodial parent's monthly weekend entitlement for that month.
(c) If a child is out of school for teacher development days or snow days after the children begin the school year, or other days not included in the list of holidays in Subsection (6) and those days are contiguous with the noncustodial parent's monthly weekend parent-time, those days shall be included in the weekend parent-time.

(9) The custodial parent is entitled to all parent-time not specifically allocated to the noncustodial parent.

(10) In the event finances and distance preclude the exercise of minimum parent-time for the noncustodial parent during the school year, the court should consider awarding more time for the noncustodial parent during the summer time if it is in the best interests of the children.

(11) Upon the motion of any party, the court may order uninterrupted parent-time with the noncustodial parent for a minimum of 30 days during extended parent-time, unless the court finds it is not in the best interests of the child. If the court orders uninterrupted parent-time during a period not covered by this section, it shall specify in its order which parent is responsible for the child's travel expenses.

(12) Unless otherwise ordered by the court the relocating party shall be responsible for all the child's travel expenses relating to Subsections (6)(a) and (b) and 1/2 of the child's travel expenses relating to Subsection (6)(c), provided the noncustodial parent is current on all support obligations. If the noncustodial parent has been found in contempt for not being current on all support obligations, the noncustodial parent shall be responsible for all of the child's travel expenses under Subsection (6), unless the court rules otherwise. Reimbursement by either responsible party to the other for the child's travel expenses shall be made within 30 days of receipt of documents detailing those expenses.

(13) The court may apply this provision to any preexisting decree of divorce.

(14) Any action under this section may be set for an expedited hearing.

(15) A parent who fails to comply with the notice of relocation in Subsection (2) shall be in contempt of the court's order.

Amended by Chapter 162, 2014 General Session

ADDENDUM B

Rule 108. Objection to court commissioner's recommendation.

(a) A recommendation of a court commissioner is the order of the court until modified by the court. A party may file a written objection to the recommendation within 14 days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, within 14 days after the minute entry of the recommendation is served. A judge's counter-signature on the commissioner's recommendation does not affect the review of an objection.

(b) The objection must identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought. The memorandum in support of the objection must explain succinctly and with particularity why the findings, conclusions, or recommendation are incorrect. The time for filing, length and content of memoranda, affidavits, and request to submit for decision are as stated for motions in Rule 7.

(c) If there has been a substantial change of circumstances since the commissioner's recommendation, the judge may, in the interests of judicial economy, consider new evidence. Otherwise, any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge.

(d)(1) The judge may hold a hearing on any objection.

(d)(2) If the hearing before the commissioner was held under Utah Code Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment, any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact.

(d)(3) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party has the right, upon request:

(d)(3)(A) to present testimony and other evidence on genuine issues of material fact relevant to custody; and

(d)(3)(B) to a hearing at which the judge may require testimony or proffers of testimony on genuine issues of material fact relevant to issues other than custody.

(e) If a party does not request a hearing, the judge may hold a hearing or review the record of evidence, whether by proffer, testimony or exhibit, before the commissioner.

(f) The judge will make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge, or, if there was no hearing before the judge, based on the evidence presented to the commissioner.

ADDENDUM C

The Order of Court is stated below:
Dated: April 25, 2014
09:33:35 AM

/s/ David Connors
District Court Judge

DOUGLAS D. ADAIR, (#6460)
JENSEN ADAIR ARRINGTON & BORNEMEIER, L.L.P.
1010 North 500 East, Suite 100
North Salt Lake, Utah 84054
Telephone: (801) 292-0409
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E-Mail Address: dadair@jjblegal.com
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT OF DAVIS COUNTY,

FARMINGTON DEPARTMENT, STATE OF UTAH

MACAELA DANYELE DAY, Petitioner, vs. TYLER BARNES, Respondent.	**FINDINGS OF FACT AND ORDER ON OBJECTION** Case No. 134700668 PA Judge David M. Connors Commissioner David S. Dillon

On March 20 and 21, 2014, the parties appeared before the Honorable David M. Connors on Petitioner's Objection to the Commissioner's Ruling. Petitioner appeared personally along with her counsel of record, Theodore R. Weckel, Jr. Respondent appeared personally along with his counsel of record, Douglas D. Adair. The parties presented witness testimony, documentary evidence and arguments. Based upon this information the Court hereby finds and orders AS FOLLOWS:

FINDINGS

1. This matter is before the Court after a one and a half day Evidentiary Hearing held in connection with Petitioner's Objection to the Commissioner's Recommendation. The Commissioner's Recommendation were set forth in a Recommendation filed November 22, 2013. Thereafter the Recommended Rulings were incorporated into an Order on Recommended Ruling, entered January 2, 2014.

2. Preliminarily, the Court addresses the question of the appropriate standard of review under Rule 108 of the Utah Rules of Civil Procedure when a District Court Judge is asked to address objections to a commissioner's recommendations in a family law matter. Neither side has cited to the Court any case law interpreting this recently promulgated Rule. The Court, therefore, relies on its reading of the plain language of this Rule. Part (b) of Rule 108 requires the objecting party to "explain succinctly and with particularity why the Findings, Conclusions or Recommendations are incorrect." Later the Rule requires the District Court Judge to "make independent Findings of Fact and Conclusions of Law based on the evidence whether by proffered testimony or exhibit presented to the Judge. This section of Rule 108, by the way, is subsection (f).

3. Because a question of custody is at issue, the Court granted Petitioner's request for an Evidentiary Hearing during which live witnesses were examined and cross examined. During closing argument, when pressed by the Court, Petitioner identified the following areas where she believed the Commissioner's Findings, Conclusions or Recommendations were incorrect:

a) The Commissioner did not give proper weight to the egregiousness and materiality of the evidence that Respondent raped Petitioner and sexually assaulted Petitioner's mother; and,

b) The Commissioner did not give proper weight to the evidence that the April 2013 stipulated agreement between the parties was obtained by threats, coercion or duress.

4. By way of footnote, during closing argument Petitioner's counsel also asserted that the Court should consider whether one party or the other had committed perjury during the course of the Evidentiary Hearing. This, however, is not properly categorized as an objection to the Commissioner's recommendations. The Court recognizes that the parties and their supporting witnesses have presented widely disparate views of the facts on some issues and that clearly there are credibility issues. This hearing was not a trial on the rape or sexual assault allegations, nor was it a trial on allegations of perjury.

5. The Court will discuss in turn each of the issues identified by Petitioner. Petitioner argues that in assessing Respondent's moral character, the Commissioner should have concluded that Respondent raped Petitioner and that Respondent sexually assaulted Petitioner's mother. Regarding the rape allegation, the Commissioner's Ruling states: "There are claims by Mother, [i.e. Petitioner] of rape which have not yet been proven" page 9, Commissioner's Ruling. Then in a somewhat cryptic reference to the allegations that Respondent sexually assaulted Petitioner's mother, the Commissioner's Ruling states, "there have been certain situations that have arisen between the parties and members of their families but nothing that has risen to the level of requiring significant police or court intervention" (paragraphs 9 and 10 of

ruling).

6. After listening to the live evidence and reviewing the affidavits, declarations and documentary evidence presented at the hearing, the Court does not find anything materially incorrect about how the Commissioner viewed these issues. 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 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 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.

7. Under these circumstances, the Court, based on its own independent review of the testimony and other evidence does not conclude that the Commissioner's Ruling was in any material way incorrect as to the weight given by the Commissioner to these allegations. In announcing this conclusion, the Court emphasizes that it is not making a specific finding as to whether a rape actually occurred or not, as to whether a sexual assault against Petitioner's mother actually occurred or not. The Court is only concluding that the evidence on these issues presented to the Commissioner and to the Court during this Evidentiary Hearing did not satisfy Petitioner's burden under Rule 108 to demonstrate that the Commissioner's findings, conclusions or recommendation were incorrect. Therefore, Petitioner's objection to the Commissioner's Recommendation is denied to the extent that it relies on the assertion that the Commissioner did not give due weight to the allegations of rape or sexual assault.

8. Petitioner also argues that the Commissioner did not give proper weight to Petitioner's evidence that the April 2013 stipulated agreement between the parties was obtained by fraud, coercion or duress. A review of the Commissioner's ruling indicates that the Commissioner did not specifically announce a finding on the issue of whether the stipulated agreement was obtained by fraud, coercion or duress. This issue is important in the sense that the April 2013 stipulated agreement resulted in the change in primary physical custody of the child from Petitioner and her extended family to Respondent and his extended family. In his Ruling, the Commissioner referred to the stipulated agreement as reflecting the parties' prior negotiated resolution of the primary physical custody issue and as forming the basis for what the

Commissioner considered the status quo at the time of the Temporary Orders hearing before the Commissioner. Petitioner argues that Respondent's family used threats of potential legal action against Petitioner's mother based on Respondent's allegation that Petitioner's mother had an inappropriate sexual relationship with him during the time when he was still under the age of eighteen, in order to pressure or coerce Petitioner into signing the April 2013 stipulated agreement. Further, Petitioner argues that she received bad legal advice from her own lawyer during this time frame and during the mediation that resulted in the stipulated agreement and Petitioner's lawyer was using medication, i.e., "Lortab" that may have clouded the lawyer's judgment. As mentioned above, the Commissioner did not make a specific finding on the issue of whether the stipulated agreement that enhanced the status quo ante was obtained by fraud, coercion or duress. It is clear, however, that the Commissioner concluded that the Stipulated Agreement that became effective when it was executed by the parties represented a prior resolution by the parties of the question of primary physical custody of the child, at least at that given point in time. For example, on page 13 of the Commissioner's Ruling he stated: "When determining the ongoing best interests of this child, there is significant benefit in maintaining the status quo, resolved by the parties in April, during the pendency of this case." Therefore, the Court believes that the Commissioner implicitly concluded that the April 2013 Stipulated Agreement was not obtained by fraud, coercion or duress.

9. After hearing the live testimony, reviewing the documentary evidence presented to the Commissioner, including the deposition testimony of the lawyer who was representing

Petitioner at the pertinent time, this Court finds and concludes that the evidence presented by Petitioner on this issue, was not sufficient to carry Petitioner's burden demonstrating that the Commissioner's implicit conclusion was incorrect. 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. Accordingly, the Petitioner's objection to the extent that it was based upon argument that the Commissioner did not give due weight to the evidence regarding fraud, coercion, duress or bad legal advice in connection with the parties' April 2013 Stipulated Agreement is denied.

10. Having addressed the primary objections that have been identified with particularity by Petitioner, the Court now outlines its independent findings of Fact and Conclusion of Law and recommendations regarding temporary custody of the child at issue in this case. Again, the Court emphasizes that the issue before the Court is one of temporary custody and the Court is without the benefit of the analysis and conclusions of the custody evaluator who has been chosen by the parties and appointed by the Court.

11. Because many of the findings and conclusions of the Commissioner have not been specifically challenged, the Court will not address all of the findings and conclusions outlined by the Commissioner, but will instead focus on the areas where the Court, having benefit of live testimony, has observations that may differ slightly from the Commissioner's.

12. Both parties agree that the Commissioner correctly referenced the statutory factors that need to be considered in the ultimate determination of what custody arrangement is in the best interests of the child. Those factors are set forth in Utah Code Annotated, Section 30-3-10 and Section 30-3-10.2. They are quoted in the Commissioner's ruling and will not be repeated here. The Court agrees that each of the parties has made questionable choices in the past. Further, the Court specifically agrees with the Commissioner that Respondent's actions related to his running away from home, his admitted pornography addiction, and his acting out sexually during the period late 2009 through mid 2012 have shown a history of lower standards of moral behavior than Petitioner. However, it is less clear whether those issues persist at the present time and whether they directly affect Respondent's ability to function as a parent to the child at this time.

13. Regarding the question of which parent at this time is most likely to act in the best interests of the child, including allowing the child frequent and continued contact with the non-custodial parent, the Court generally agrees with the Commissioner's conclusion that both parties have – at least from time to time – been willing to work together. However, based upon the testimony before it, the Court has some concerns about Respondent's continuing commitment to

such cooperation. It appears to the Court that since the time of the announcement of the Commissioner's Ruling, Respondent has chosen to take an overly restrictive view of the custody sharing arrangement and has been somewhat inflexible in his response to requests from Petitioner for relatively minor accommodations to allow the child to have better contact with Petitioner. The Court warns Respondent that such inflexibility will be a factor that this Court will consider, particularly when making final custody determination in this case.

14. On the flip side of this issue, the Court believes that the Petitioner's decision in April 2013 to agree to the negotiated resolution that resulted in the primary physical custody of the child being switched to Respondent shows a significant level of commitment by Petitioner to allowing the child to have frequent, continuing contact with Respondent.

15. On a related issue, however, the Court has a significant concern about the ability of Petitioner to "give first priority to the welfare of the child," (30-3-10.2) in light of the fact that since November 2013 when the Commissioner issued his Recommended Ruling she had a clear path to share 50%-50% custody of the child, yet she had not chosen to follow that path. 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.

16. On the issue of bonding, the Court, similarly,. has not been presented with any material evidence suggesting the child is not appropriately bonded to both parents. Therefore, the Court's view on this issue does not differ materially from the Commissioner.

17. There has been significant testimony during the evidentiary hearing before this

Court blatantly questioning each parent's demonstrated commitment to act as the care-giver to the child. For purposes of today's temporary ruling the Court finds that, as between the two parties actually before the Court, each of them has had time periods when he or she has acted as primary care-giver. For Petitioner, it was the period from the child's birth up to April of 2013 when the child was primarily with Petitioner and her family. For Respondent, it has been the period subsequent to the April 2013 stipulated change in primary physical custody of the child. However, the Court shares the concern expressed by the Commissioner of whether either parent has ever demonstrated an ability and willingness to be a responsible parent to the child without significant assistance from extended family members. The Court hastens to note that the assistance of extended family members is and has been a good thing for this child. Nevertheless, there are unanswered questions about the ability and willingness of either parent at this time to be a full time parent to the child.

18. The Court agrees with the Commissioner that the question of geographic proximity or lack thereof does not affect the issue of whether joint legal custody should be awarded. It does, however, have an impact on the issue of the details of any shared parent time arrangements. In that regard the Court agrees with the Commissioner that alternative parent time and shared physical custody arrangements are appropriate, depending on whether the parties live close to each other or not. Other than relying on the April 2013 Stipulated Agreement between the parties, the Commissioner did not specifically set forth Findings as to where the child should reside primarily if the parents continue to live on opposite ends of the country; he in Utah and

she in Massachusetts. For purposes of today's Temporary ruling, this Court finds that the following factors weigh in favor of the child remaining in Utah, if other factors are essentially equivalent: Both the child's parents 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 this immediate past year of her young life. Both parties have strong family ties to Utah and have extended family members living in Utah. Under these circumstances, at least at this stage of the proceedings, the balance weighs in favor of the child remaining in Utah, if other factors are more or less even.

19. No one disagrees with the conclusion that the child is not yet three and a half years old and not at a sufficient age to form an intelligent preference regarding custody status. Therefore, that factor is not material in the Court's mind.

20. This Court echoes the concerns expressed by the Commissioner as to the maturity level of each of the parties, particularly as to either one's ability to function as a parent without significant assistance from extended family members. Today, there does not appear to be significant issues related to each party's willingness and ability to protect the child from conflict that may arise between the parties. The Court strongly encourages the parties and their respective families to continue to protect the child from involvement in any conflict between the parties or their families. The Court has already commented on the factors that effect or may effect the parties' abilities to cooperate with each other.

21. Finally, notwithstanding some testimony from each side that was critical of the

other side, the Court does not at this time find any significant evidence of child abuse, spousal abuse, or kidnaping. Ultimately, the Court independently finds and concludes that a consideration of statutory factors relevant to custody determination, leads to the conclusion that joint legal and joint physical custody are in the best interests of the child at issue in this case. Furthermore, the Court concludes that the balance of positive and negative factors on both sides is relatively equal and that, therefore, a shared physical custody arrangement in which the parties have roughly equal parent time would be in the best interests of the child. However, due to the constraints inherent in the parties' current residential status, with Respondent and the child primarily residing in Utah and the Petitioner now residing in Massachusetts, the Court adopts as its own, the Commissioner's recommendations regarding the alternative arrangements for shared physical custody of the child depending on whether Petitioner chooses to return to reside within 150 miles of where the Respondent and the child reside. Based on the live testimony and other evidence before the Court and given the Court's authority and mandate under the Rule to make independent findings and conclusions, the Court makes the following observations and adds the following conditions:

ORDER

1. As mentioned above, the Court is concerned that both parties are very young and neither party has demonstrated an ability to care for a young child on his or her own. Therefore, as part of this temporary custody arrangement during the pendency of the action and prior to final resolution per Order of the Court, the primary physical custody of the child will remain

with Respondent but only so long as Respondent resides with his parents and his parents remain willing and able to assist in caring for the child.

2. Similarly, if Petitioner moves to Utah and is thus in a position to exercise the 50%-50% shared physical custody arrangement outlined by the Commissioner, she will only be entitled to do so if she is residing with extended family members who are willing and able to assist in the care of the child. For today's purposes, the Court concludes that a living arrangement with her paternal grandparents in Centerville would be a satisfactory arrangement. Other living situations in Utah involving Petitioner's parents or other extended family members might also be satisfactory but will need to be presented to the Court for review and approval.

3. Given the significant testimony regarding Respondent's pornography addiction, proclivity to run naked through the house, swatting butts, making out with Petitioner's best friend while Petitioner was pregnant with his child and other inappropriate sexual encounters, the Court orders that within 30 days Respondent will arrange to have a full psycho-sexual evaluation performed by an expert who regularly performs such evaluations for the Court and a report thereafter to be filed under seal with the Court and provided in confidence to the custody evaluator. In addition to the customary aspects of such a report, the report should include any recommendations by the examiner of treatment or counseling for the Respondent and should indicate whether the examiner has any concern based on the examination regarding Respondent's interaction with the child.

4. In light of testimony regarding lack of cooperation in the timing of virtual parent

time, including telephonic contact with the non-custodial parent, the parties are ordered to meet and confer to determine a more exact schedule for such virtual parent time or telephone time contact.

5. By way of clarification, if Petitioner returns to Utah then the 50%-50% shared physical custody arrangements as outlined by the Commissioner will be self implementing. If Petitioner returns to Utah, the Petitioner will not be required to obtain any further orders of this Court to implement the 50%-50% shared physical custody arrangement.

6. In conclusion, Petitioner's Objections to the Commissioner's Recommendation are denied for failure to demonstrate the Commissioner's findings, conclusions or recommendations were incorrect in any material way. The recommendations will, however, be modified to include the additional provisions outlined above.

APPROVED AS TO FORM:

DATED this 21 day of April, 2014.

/s/ Theodore R. Weckel, Jr.
Signed by Douglas D. Adair
With permission of Theodore R. Weckel, Jr.

Theodore R. Weckel, Jr.
Attorney for Petitioner

NOTICE TO PARTIES

PLEASE TAKE NOTICE that the foregoing Order on Objection shall be submitted to the Court upon the expiration of five (5) days from the date hereof, unless your written objection

ADDENDUM D

IN THE SECOND JUDICIAL DISTRICT, DAVIS COUNTY STATE OF UTAH, FARMINGTON DEPARTMENT

MACAELA DAY, Petitioner, vs. TYLER BARNES, Respondent.	**ORDER REGARDING PETITIONER'S OBJECTIONS TO COMMISSIONER'S RECOMMENDATION** Case No.: 134700668 Judge: DAVID M. CONNORS Commissioner: T.R. MORGAN

This matter comes before the Court on Petitioner Macaela Day's Objection to the Commissioner's Recommendation associated with Petitioner's Motion for Relocation. The Court held an evidentiary hearing on July 6 and 8, 2016. At the conclusion of the evidentiary hearing, the Court orally rendered its ruling denying Petitioner's Objection and asked Respondent's counsel to prepare a draft order. Petitioner filed a proposed order on August 9, 2016, and Respondent filed a competing proposed order on August 11, 2016. Respondent then filed an objection to Petitioner's proposed order and a motion for attorneys' fees on August 12, 2016. Petitioner filed her response to Respondent's objection and motion on August 12, 2016, and Respondent filed his reply in support of his objection and motion on August 17, 2016. Petitioner then filed a request to submit Respondent's objection and motion for attorneys' fees on August 23, 2016. Having reviewed its July 8, 2016 oral ruling and the parties' submissions, the Court herein issues its own order on Petitioner's Objection to the Commissioner's Recommendation.

FINDINGS OF FACT

1. On April 25, 2014, the Court entered Findings of Fact and Order on Objection, denying Petitioner's objections to the Commissioner's recommendation that primary physical custody of the child should remain with Respondent in Utah. Petitioner had asked the Court to rule that primary physical custody of the child be awarded to Petitioner in Massachusetts.

2. On June 18, 2015, the Court entered a stipulated order that, among other things, once the Petitioner relocates to Utah, she shall be designated as the custodial parent, and the parties shall have a one-week on and one-week off parent-time arrangement.

3. On November 10, 2015, Petitioner filed a motion to relocate, seeking approval of the Court to relocate with the child to Massachusetts. Responded objected and proceedings were held before the Commissioner. At the conclusion of a hearing on March 17, 2016, the Commissioner recommended that the motion be denied.

4. On June 27, 2016, the Court entered its order adopting the Commissioner's recommendation.

5. Petitioner objected to the Commissioner's recommendation and requested an evidentiary hearing, which was held before the Court on July 6 and 8, 2016.

6. While Petitioner seeks again to relocate the child to Massachusetts, she has not presented new circumstances that the Court did not already consider in its April 25, 2014 Order, except for evidence that she is now in a serious relationship with a boyfriend and has plans to be married in the future.

7. Both parties continue to be relatively immature and live with family members. Neither parent appears capable yet of being a primary caregiver without significant support of family members.

8. Despite the June 18, 2015 Order designating Petitioner as the custodial parent if she moves 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.

9. Petitioner's desire to relocate to Massachusetts is primarily based upon her desire to complete her college degree and has very little to do with what is in the best interest of the child. While the Court acknowledges that completion of her college degree will be beneficial to Petitioner, and perhaps ultimately to the child, it does not at this time support a finding that it is in the child's best interest to be relocated to Massachusetts.

10. The child is old enough to attend kindergarten, but the parties have had difficulty agreeing on a school for the child to attend.

CONCLUSIONS OF LAW

1. A party objecting to the Commissioner's recommendation has the burden of demonstrating that the Commissioner's recommendation is incorrect.

2. Petitioner has not carried her burden of demonstrating that the Commissioner's recommendations were incorrect and that moving the child to Massachusetts would be in the child's best interest.

3. The new evidence presented related to Petitioner's blossoming relationship with her new boyfriend is not a factor that renders the Commissioner's recommendation erroneous.

4. Otherwise, Petitioner has not presented evidence that is significantly different than what was presented to the Court that resulted in the April 25, 2014 Order. The Court hereby incorporates those proceedings as part of the record in these proceedings. In particular, because the evidence presented by Petitioner during the July 2016 hearings is not materially different

from the previously presented evidence, the Court continues to rely on the point-by-point analysis of pertinent factors that supported the 2014 ruling that the child should remain in Utah.

ORDER

1. Petitioner's objection to the Commissioner's recommendation is denied.

2. This denial is without prejudice, meaning that either party may bring a subsequent motion to relocate if and when circumstances have materially changed.

3. The parties must immediately enroll the child in kindergarten in a Utah school.

4. The parties are ordered to participate in a high-conflict parenting counseling course immediately.

5. Nothing in this Order modifies the general provisions of the June 18, 2015 stipulated order that designate Petitioner as the primary custodial parent, with the parties exercising one week on, one week off shared parent time, if Petitioner actually relocates to Utah.

6. Should Petitioner remain in or return to Utah, her final say authority, as set forth in the June 18, 2015 order, shall not be construed to permit her to take the child out of school to travel to Massachusetts or elsewhere while school is in session, unless the parties otherwise mutually agree in advance in writing.

7. If Petitioner elects to return to Massachusetts, the custody arrangement will return to that stated in the Court's April 25, 2014 Order.

8. Neither party is awarded any attorneys' fees.

DATED this 19th day of October, 2016.

BY THE COURT

David M. Connors
District Court Judge

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH
001962

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing ORDER, postage prepaid, to the following:

Eric B. Barnes
Jeremy Atwood
Villager Professional Building
47 N Main, Ste 1
Kaysville, UT 84037

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

SIGNED and DATED this 19th day of October, 2016.

Judicial Assistant

ADDENDUM E

IN THE SECOND JUDICIAL DISTRICT, DAVIS COUNTY STATE OF UTAH, FARMINGTON DEPARTMENT

MACAELA DAY, Petitioner, vs. TYLER BARNES, Respondent.	**RULING AND ORDER ON PETITIONER'S OBJECTIONS TO COMMISSIONER'S RECOMMENDATION (AFTER REMAND)** Case No.: 134700668 Judge: DAVID M. CONNORS Commissioner: T.R. MORGAN

This matter comes before the Court after remand from the Utah Court of Appeals on Petitioner Macaela Day's Objection to the Commissioner's Recommendation associated with Petitioner's Motion for Relocation.

RELEVANT PROCEDURAL HISTORY

The Court held an evidentiary hearing with regard to the Objection and Motion on July 6 and 8, 2016. At the conclusion of the evidentiary hearing, the Court orally rendered its ruling denying Petitioner's Objection and asked Respondent's counsel to prepare a draft order. Petitioner filed a proposed order on August 9, 2016, and Respondent filed a competing proposed order on August 11, 2016. Respondent then filed an objection to Petitioner's proposed order and a motion for attorneys' fees on August 12, 2016. Petitioner filed her response to Respondent's objection and motion on August 12, 2016, and Respondent filed his reply in support of his

objection and motion on August 17, 2016. Petitioner then filed a request to submit Respondent's objection and motion for attorneys' fees on August 23, 2016.

On October 19, 2016, the Court issued its written order denying Petitioner's objections and following the Commissioner's recommendation to deny Petitioner's motion to relocate the child to Massachusetts. Petitioner would be the primary custodial parent with final decision-making authority if she actually relocated to Utah, but if Petitioner elected to return to reside in Massachusetts, the child would remain in Utah with her father as provided in the April 25, 2014 Order.[1] The Court also ordered the parties to immediately enroll the child in kindergarten and to participate in a high-conflict parenting course.

Petitioner appealed this Court's October 19, 2016 Order and the Utah Court of Appeals issued its decision on July 27, 2018. *See Day v. Barnes*, 2018 UT App 143, 427 P.3d 1272. The Court of Appeals held that the district court applied an incorrect standard of review in considering the commissioner's recommendation. *See id.* ¶ 20. The Court of Appeals then remanded back to this Court to make independent findings "without imposing an erroneous burden of proof," but noted that this Court is not necessarily required to rehear the evidence. *Id.* ¶¶ 20, 21, 25.

Following the Court's receipt of the Court of Appeals' remittitur, the parties, at the Court's request, briefed the issue of whether the Court should hear additional evidence. In a telephonic conference on October 17, 2018, the Court ruled that it would not take any additional evidence, but would allow the parties to present additional closing argument, based on the existing record but informed by the appellate court-clarified standards for determination. The

[1] The April 25, 2014 Order granted the parties 50%-50% joint legal and joint physical custody of the child so long as Petitioner returned to reside in Utah, but if Petitioner continued to reside in Massachusetts then Respondent would have primary physical custody of the child in Utah, so long as he resided with his parents and his parents remained willing and able to assist in caring for the child.

Court then held supplemental closing argument on December 21, 2018. The Court now issues its ruling and order.

LEGAL STANDARD

Rule 108 of the Utah Rules of Civil Procedure governs the objections made to a court commissioner's recommendation: "The objection must identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought." When issuing a ruling denying or granting an objection to the court commissioner's recommendation the district court "judge will make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge." Utah R. Civ. P. 108(f). The moving party does not carry a "burden of persuasion . . . akin to overcoming a presumption in favor of the commissioner's recommendation"; rather, the district court is required to make independent findings on "both the evidence and the law." *Day*, 2018 UT App 143, ¶¶ 16, 19.

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. However, consistent with statutes and rules related to custody determinations, some of the other relevant factors that the Court might consider are: the child's developmental needs and the parent's ability to meet those needs; the parents ability to give first priority to the welfare of the child and reach shared decisions in the child's best interest; the geographical proximity of the homes of the parents; the maturity of the parents and their ability to protect the child from conflicts that may arise; past,

present, and future ability of the parents to cooperate to make decisions jointly; which parent is likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent; bonding between the parties and the child; moral standards of the parents; the stated wishes and concerns of the child depending on the child's cognitive ability and emotional maturity; the child's bond with the prospective custodians; previous parenting arrangements where the child has been happy and well-adjusted; the prospective custodians' character and their capacity and willingness to function as a parent, including parenting skills, co-parenting skills, moral character, emotional stability, duration and depth of desire for custody and parent-time, ability to provide personal rather than surrogate care, the child's interaction and relationship with the child's extended family members, and the parties' financial responsibility. *See* Utah Code Ann. §§ 30-3-10(1)(a), 30-3-10.2(2); *see also* UT R J ADMIN Rule 4-903(4). This, of course, is not an exclusive list; other factors may be considered in assessing whether the requested move is in the best interests of the child.

Having carefully reviewed the documentary evidence and live testimony presented to the Court during the evidentiary hearings on July 6 and 8, 2016, as well as appropriate portions of the live testimony presented by the parties during evidentiary hearings before the Court on March 20 and 21, 2014 (as requested by the parties), and considering the standard for review outlined in Rule 108 of the Utah Rules of Civil Procedure and further explained by the Utah Court of Appeals in *Day v Barnes*, 2018 UT App 143, ¶ 20, the Court makes its own independent findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. The parties' child was born December 6, 2010 to Petitioner and Respondent in Utah.

2. The parties were both raised in Utah, they met and started dating in Utah, and the child was conceived and born in Utah. Both parties have strong family ties to Utah and have extended family members living in Utah.

3. The child lived with Petitioner and Respondent in the maternal grandparents' house in Utah until October 2011.

4. The child then relocated with Petitioner and Respondent and maternal grandparents to Massachusetts. While in Massachusetts, the Respondent and Petitioner briefly separated from May 2012 to June 2012.

5. Following the separation, Respondent relocated back to Utah in June 2012. Petitioner and the child remained in Massachusetts.

6. A Decree of Paternity was entered on October 5, 2012 in Utah Second District Court case number 124700899, establishing Respondent as the father of the child.

7. On November 16, 2012, the Respondent filed an action in the Probate and Family Court located in Salem, Massachusetts, Docket No. ES12W 2285WD, seeking custody of the child.

8. In March 2013, Petitioner and the child came back to Utah. On April 3, 2013, the parties entered into a stipulated agreement changing primary physical custody to Respondent in Utah. Petitioner then returned to reside in Massachusetts while the child remained in Utah. Shortly thereafter, in early May 2013, the present action was commenced in this Court and the parties stipulated that further proceedings regarding custody of the child would be held in this Court.

9. The child has resided continuously in Utah since April 2013, although the child has, from time to time since then, visited with Petitioner in Massachusetts.

10. On April 25, 2014, the Court entered its Findings of Fact and Order on Objection, denying Petitioner's objections to the Commissioner's recommendation that primary physical

custody of the child should remain with Respondent in Utah. In that objection hearing, Petitioner had asked the Court to rule that primary physical custody of the child be awarded to Petitioner in Massachusetts.[2] The April 25, 2014 order further provided that if the Petitioner returned to reside in Utah, she would have 50%-50% shared physical custody of the child.

11. On June 18, 2015, the Court entered a stipulated order that provided, among other things, that upon Petitioner's relocation to Utah, she would be designated as the child's primary caregiver, and the parties would share custody on a 50%-50% basis, following a one-week-on and one-week-off parent-time arrangement.

12. Despite the June 18, 2015 Order designating Petitioner as the primary caregiver if she returned to reside in Utah, Petitioner never emotionally relocated back to Utah; in fact, based on the evidence presented, Petitioner never relocated to Utah with an intent to remain in Utah for any extended period.

13. In mid-July 2015, Petitioner came to live temporarily with her grandparents in Centerville, Utah. During that time, she exercised her right to have 50/50 physical custody of the child, with the assistance of her grandparents.

14. However, by November 10, 2015, Petitioner filed her present request to relocate, seeking again the approval of the Court to relocate with the child to Massachusetts. Respondent objected and proceedings were initially held before the Commissioner.

15. At the conclusion of a hearing held on March 17, 2016, the Commissioner orally announced his recommendation that it was in the best interest of the child to stay in Utah.

16. The parties were unable to agree on a proposed order. On June 27, 2016, the Commissioner entered his written recommendation to deny Petitioner's motion to relocate.

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[2] Petitioner did not file a separate motion to relocate at that time. Instead, her motion was styled as a "Motion to Modify Temporary Orders." But ultimately she included a request that the child be relocated to Massachusetts with Petitioner.

17. Petitioner objected to the Commissioner's recommendation and requested an evidentiary hearing, which was held before the Court on July 6 and 8, 2016. Both sides presented extensive live testimony during the two days of the evidentiary hearing.

18. At that time, the child was five and a half years old and had lived in Utah for approximately four years and in Massachusetts for approximately one year and six months.

19. The child was and is still too young to express her wishes, concerns, or preferences.

20. The child had an eye condition for which she was seeing an eye doctor located in Utah.

21. These parties are fundamentally good people who will likely have productive and successful lives as they continue to mature, but there are still present concerns about both parties that must be considered in determining the best interest of the child.

22. These two parents have relied, are relying, and would continue to rely heavily on their own parents, or other extended family members, for assistance in raising this child. Neither has had the economic resources to support themselves, much less themselves and the child.

23. Generally, both parties have been willing to work together regarding sharing time with their minor child. While occasionally these arrangements have been accompanied by a good deal of drama, there have also been many decisions mutually worked out between the parties.

24. While Petitioner seeks again to relocate the child to Massachusetts, she has not presented new circumstances that the Court did not already consider in its April 25, 2014 Order, except for evidence that she was, in July 2016, in a serious relationship with a boyfriend and had plans to be married in the future.

25. On the issue of bonding, there is no material evidence to suggest that the child has not appropriately bonded to both parents.

26. The Court has significant concern about the ability of Petitioner to "give first priority to the welfare of the child," in light of the fact that Petitioner has for many years had a clear path to obtain joint custody of the child and have final decision making authority, but has not chosen to follow that path. *See* Utah Code Ann. § 30-3-10.2. As in 2014, Petitioner continues to give greater priority to her schooling and her potential future as a dance instructor than to her role as a mother.

27. Petitioner's desire to relocate the child to Massachusetts is primarily based upon her desire to complete her own college degree, and has very little to do with what is in the best interest of the child. While the Court acknowledges that completion of her college degree will be beneficial to Petitioner, and perhaps ultimately to the child, it does not at this time support a finding that it is in the child's best interest to be relocated to Massachusetts.

CONCLUSIONS OF LAW

1. Moving the child to Massachusetts would not be in the child's best interest.

2. Evidence presented, during the July 2016 evidentiary hearing, of the Petitioner's blossoming relationship with her new boyfriend in Massachusetts is not a factor that persuades the Court that a move to Massachusetts would be in the best interest of the child.

3. Other than that relationship, Petitioner did not present evidence that was significantly different than what was presented to the Court during the evidentiary hearings that resulted in the April 25, 2014 Order. As requested by the parties, the Court incorporates those evidentiary hearings as part of the record in these proceedings. In particular, because the evidence presented by Petitioner during the July 2016 hearings was not materially different from the previously presented evidence, the Court's analysis of pertinent factors that supported the Court's April 25, 2014 order on custody issues, including the conclusion that the child should remain in Utah,

further informs and supports the Court's present conclusion that the requested move to Massachusetts is not in the child's best interest.[3]

ORDER

1. Petitioner's objection to the Commissioner's recommendation is denied.

2. This denial is without prejudice, meaning that either party may bring a subsequent motion to relocate if it can be demonstrated that circumstances have materially changed since the time of the last evidentiary hearing in July 2016.

3. Nothing in this Order modifies the general provisions of the June 18, 2015 stipulated order that designated Petitioner as the child's primary caregiver, with the parties exercising one-week-on, one-week-off shared parent time, if Petitioner actually relocates to Utah with the intent to reside in Utah.

4. Should Petitioner return to reside in Utah, her final say authority, as set forth in the June 18, 2015 order, shall not be construed to permit her to take the child out of school to travel to Massachusetts or elsewhere while school is in session, unless the parties otherwise mutually agree in advance in writing.

5. If Petitioner continues to reside in Massachusetts, Respondent will continue to have primary physical custody of the child in Utah as outlined in the Court's April 25, 2014 Order.

6. Neither party is awarded attorneys' fees.

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[3] In the April 25, 2014 Order, the Court noted, among other things, the following findings and conclusions as to the best interest of the child in the context of a motion for temporary orders on custody issues: at times, both parents had acted as primary care-giver of the child, but that at that time there were questions of whether either parent was able to be a full time parent without significant assistance from the child's grandparents; that the issue of geographic proximity impacted shared parent time and that based on the history of the parties and the child's history the child should remain in Utah; and that the parties did not appear to have significant issues cooperating with each other and both were willing to protect the child from conflict. Ultimately, the Court found that joint legal and joint physical custody were in the best interest of the child so long as both parties and the child remained in Utah. Those findings and conclusions are consistent with the Court's current findings and conclusions.

DATED this 20 th day of February, 2019.

BY THE COURT

David M. Connors
District Court Judge