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Re: *Karen M. Seamans (formerly McClure)*
v.
Stephan James McClure
Roanoke County Circuit Court CL09-183

Dear Counsel:

When the parties initially divorced they shared custody of their son pursuant to an agreed court order. When he started grade school, they adjusted the custody arrangement without the benefit of a court order, so that the child lived with his Mom and visited his Dad. Now Mom wants to move to Bluefield, Virginia with the child, and Dad objects. The Court will treat this case, as do the parties, just as though Mom is currently the *de facto* custodian.

CUSTODY

To be classified as a "relocation custody case" so that the three pronged evidentiary standard set forth in *Sullivan v. Knick*, 38 Va. App. 773, 781-83 (2002) is to be applied, the change to the visitation schedule of the non-custodial parent and his or her relationship with the child must be more than minimally affected, and it must constitute

something more than a minor inconvenience, or in the alternative, the proposed relocation must be across state lines. In this case, the proposed move by Mom with the parties' nine year old son from Roanoke to Bluefield, Virginia, a distance of slightly over 100 miles with a driving time of slightly less than two hours, will not have a major effect on Dad's visitation or his relationship with his son, and it will not cross state lines. Currently Dad has visitation with his son two or three afternoons per week, alternate weekends, a portion of each school holiday and one half of the summer. He has in the past coached his son's after school sports activities, but has not done so since last fall.

Mom wants to move with their son to live with her new husband, a Virginia State Trooper who is stationed in Bluefield. Her parents live in Bluefield and her father has offered to let her take over the family funeral home business once she completes the approximately one year interning and schooling necessary to become a licensed mortician. Mom is burned-out in her old job and needs a change. Although the child has a secure bond with both Dad and Mom, he has a closer bond with Mom. Nothing has occurred to convince the Court that the *de facto* custody arrangement that Mom has with their son should be changed. It is in the child's best interest for him to remain in the custody of his mother provided he is able to continue to visit frequently with his father. Mom has offered to deliver their son for his visitations with Dad to Christiansburg, which is approximately a one-half hour drive from Roanoke. Dad will have almost all of the visitation he now has, plus his alternate weekends will include all of the three day weekend school holidays. He would lose his two or three weekly afternoon visits with his son. That change is nothing more than a minimal effect to Dad's visitation and constitutes only a minor inconvenience to him. This is not a relocation custody case.

In reaching the conclusion that it is in the best interest of the child to remain in his mother's custody, the Court considered all of the facts of this case as they apply to the factors contained in §20-124.3, Code of Virginia (1950), as amended, including, but not limited to: The child is 9 years old and in good physical condition. He has a secure bond with both Mom and Dad, but is much closer to his mother. The child is excited about moving to Bluefield where he has made new friends, and where he will be in frequent contact with his new stepbrothers, his new stepfather and his maternal grandparents. He is doing very well in school, and the schools in Bluefield are statistically and educationally similar to his current school. Both parents are physically and mentally fit, although Mom is burned-out in her current occupation and needs a change. Mom is extremely encouraging to her son regarding his visits and his involvement with his father. She tries to foster that relationship and adjusts her schedule so that Dad can take their son to out of town football games and go on hunting, fishing and camping trips. The child goes to daycare every day after school, but would not have to do that if he moved to Bluefield with his mother. He would have more contact with her, and his maternal grandparents could care for him after school if his mother were not available. Her new husband would also be able to care for the child. Her work would be less stressful and in theory, her dealings with her family and her son would, as a consequence, also be less stressful. The child is thriving in his mother's custody. Mom's offer to meet Dad in Christiansburg so that his travel for visitation would not be a burden on him was not reciprocated by Dad in his plan to become the custodial parent. Mother has in the past

devoted more of her time caring for their son than has Dad, and will presumably do so in the future. Her statements on the stand indicate that she places the welfare of her child over her own wants and desires in that she is willing to give up a normal home life with her new husband and give up her future career, rather than lose custody of their son. Dad's position is more self-serving. He is rigid in his declarations that he wants to maintain the status quo, or in the alternative, he asks for custody, in which event he plans to file for child support, something mom has not requested in the past. His statements do not indicate his intent to accommodate Mom in the future in regard to visitation transportation if he obtains custody of the child and Mom moves to Bluefield.

Accordingly, the parties will be granted joint legal custody of their son with Mom having primary physical custody. She and the child may move to Bluefield, Virginia. Dad will have alternate weekend visitation from 6:00 pm Friday to 6:00 pm Sunday, except that the schedule will adjust to give Dad the three- day weekends from school as one of his alternate weekends. Dad will have all of the spring break and one-half of the remaining holiday time, one-half of the Christmas vacation and one-half of the summer vacation. The pickup and delivery of the child will be in Christiansburg. If the parties are unable to work out the details of these visitations, please schedule a brief hearing and the Court will fix them. The details of the visitation schedule need to be spelled out in the final order.

RELOCATION THEORY

In the alternative, if the three prong evidentiary standard were to be applied to these facts as though this were a "relocation custody case," the results would be the same. Although the parties had a shared custody order in their final divorce decree, they have ignored it and treated it for the approximate past three years as though Mom has custody and Dad has visitation. The Court will also treat this as though Mom's *de facto* custody was in fact, primary physical custody.

Both parties agree that there have been material changes in circumstances. Dad has remarried, and Mom has remarried, divorced and remarried. The child is about five years older than he was at the time of his parent's divorce and he now attends third grade. The child goes to daycare after school. There are other facts indicating a material change in the circumstances of the parties, but because of their agreement on this issue it is not necessary to list them. The Court has determined, as set forth above, that it is in the best interest of the child to continue to reside with his mother when she moves to Bluefield. The bond between Dad and the child is strong. It will not be substantially impaired, and, more than likely, not altered in the slightest by the move, as evidenced by the testimony of Dad, Mom and the counselor.

Accordingly, if this were a relocation case, the Court would rule that Mom would be granted primary physical custody of the child and be allowed to move with him to Bluefield, Virginia. Dad would be granted frequent visitation. The custody and visitation arrangements set forth above would be applied.

Counsel for Mom should prepare an appropriate order, incorporating this letter opinion by reference, and present it for entry after first obtaining endorsement of counsel.

Very truly yours,

Robert P. Doherty, Jr.

RPDjr/bh