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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE PARENTAGE OF D.D.-P.	No. 46598-1-II
	UNPUBLISHED OPINION

MAXA, J. – Darcia Davis appeals the trial court's order modifying the parenting plan between her and George Patecek regarding their son DD-P, which was entered in the context of Davis's motion for relocation. We hold that the trial court (1) approved Davis's relocation, and we therefore do not address whether it erred in failing to make findings of fact on the statutory relocation factors; (2) abused its discretion in making the parents joint custodians and changing the residential schedule in a way that requires DD-P to change school every year; and (3) did not miscalculate the amount Davis owed to Patecek for day care expenses not incurred. Accordingly, we affirm in part and reverse in part and remand for a new trial regarding custody and residential schedule.

FACTS

On April 7, 2010, the trial court entered a parenting plan and child support order regarding Davis and Patecek's son, DD-P. Under these orders, DD-P resided primarily with Davis. DD-P was three years old at that time.

On August 31, 2012, Patecek filed petitions to modify the parenting plan and the child support order. In the petition to modify the parenting plan, Patecek alleged that Davis was not properly caring for DD-P, used abusive language in the home, had mental health and substance abuse issues, and was withholding visitation. He asserted that it would be better for the child to

live with him because of Davis's inconsistency and neglect. In the petition to modify the child support order, Patecek asserted that DD-P resided with him the majority of the time and that he was paying daycare expenses that Davis did not incur.

In her response, Davis asserted that she provided a stable, nurturing home for DD-P, that Patecek often forfeited his visitation time, and that she did not have mental health or substance abuse issues. She asserted that there was no factual basis for Patecek's allegations. She also opposed any changes in the child support order. On January 13, 2013, Davis also filed a petition to modify the parenting plan and proposed a new residential schedule.

The first two days of trial occurred on July 25 and 26, 2013. The guardian ad litem (GAL) testified that Davis's assertions were more credible and recommended that she remain as the primary custodial parent. He also recommended that the parents obtain counseling therapy to improve their ability to communicate with each other. The primary difficulty he identified was that Patecek lived several hours away from Davis and his days off were Wednesdays and Thursdays.

Before trial resumed, Davis, on August 2, 2013, filed a notice of intent to relocate from Westport to Bellingham. Patecek objected to the relocation and asked the court to adopt his proposed parenting plan submitted as part of the modification proceedings. On October 7, 2013, the trial court entered a temporary order granting Davis's motion to relocate temporarily, pending trial.

After an agreed continuance, trial resumed on April 18, 2014. The evidence showed that DD-P lived with Davis in Bellingham, and that Patecek lived in Clallam Bay. After a day of testimony, the trial court issued an oral ruling. Throughout its ruling the trial court expressed

frustration with both parents and with their inability to cooperate. The trial court stated that if the parents were wealthy, he would send DD-P to a private school on the east coast so his contact with his parents would be limited.

With regard to DD-P's residential schedule, the trial court ruled that a substantial change in circumstances had taken place because both parents had moved, the child had reached school age, and both parents' employment had changed. The trial court then stated that it was awarding joint custody of DD-P and that DD-P would reside every other school year with each parent. Specifically, DD-P would reside with Davis until the end of the 2013-2014 school year, reside with Patecek for the 2014-2015 school year, and alternate between the parents for each subsequent school year. The trial court stated that although it was unfortunate that DD-P would have to change schools every year, this arrangement was the only way to resolve the situation because the parties did not live close to each other. The trial court entered a final parenting plan that imposed this residential schedule. Significantly, the trial court did not address in either its oral ruling or in the parenting plan whether the residential schedule was in the best interests of DD-P.

The trial court also entered a judgment against Davis for $10,966.53 for daycare expenses not incurred and an additional $2,000 in attorney fees for the collection of the overpayment. Davis appeals.

ANALYSIS

A. RELOCATION

Davis argues that it is not clear whether the trial court granted her petition for relocation, and claims that the trial court abused its discretion in not making findings of fact on each of the

statutory relocation factors. We hold that the trial court did approve Davis's relocation, and therefore we do not address Davis's appeal on this issue.

RCW 26.09.520 sets out 11 factors the trial court must consider when making a relocation decision. The statute creates a rebuttable presumption in favor of the custodial parent that the relocation will be permitted. *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555, *review denied*, 180 Wn.2d 1012 (2014). The burden is on the objecting party to show that "the detrimental effect of the relocation outweighs the benefit of the change to the child and relocating person." RCW 26.09.520. We review whether the record supports the trial court's findings of fact to see if the trial court considered the statutory factors and whether substantial evidence supports the findings. *Kim*, 179 Wn. App. at 244.

Here, Davis filed her notice of intent to relocate in the middle of the modification trial in August 2013. In October, the trial court granted the relocation temporarily pending trial, and Davis relocated to Bellingham with DD-P. Eight months later, the modification trial resumed. Following trial, the trial court made the following findings:

> Mother has moved, both parents have different employment and multiple petitions have been brought before the court. Relocation statutes as well as modification statutory factors were all considered during the multiple day trial.

Clerk's Papers (CP) at 181. However, the trial court did not enter a final ruling to supplant its temporary ruling granting relocation to Davis. The trial court also did not enter any written findings on the 11 statutory relocation factors.

Despite the absence of a formal ruling and findings, the record is clear that the trial court accepted Davis's relocation. Davis already had relocated and had been living in Bellingham for at least eight months before the final portion of the trial. By the time trial resumed in April 2014,

Davis and her boyfriend had purchased a house in Bellingham, DD-P was enrolled in school in Bellingham and doing well, and Davis was a student at Whatcom Community College. The GAL visited Davis's new residence in making its placement recommendation to the court. And the trial court's findings in the modification order reflected the new status quo: Davis was living in Bellingham, not Westport, and Patecek was living in Sekiu, not Sequim.

Patecek did object to Davis living in Bellingham because DD-P had to take the ferry to Port Townsend and he was only able to see DD-P for a short time until he had to take the ferry back and return home to Bellingham. But the trial court apparently ignored this objection. And Patecek does not challenge Davis's ability to reside in Bellingham in this appeal.

We hold that the trial court by implication granted Davis's request to relocate to Bellingham. The trial court may have erred in failing to enter a final order on relocation and findings on the relocation factors, but we do not address Davis's appeal of this issue because she prevailed on the issue in the trial court.

B. RESIDENTIAL SCHEDULE

Davis argues that the trial court abused its discretion in granting a major modification of the parenting plan by giving joint custody to both parents and ruling that DD-P would reside every other school year with each parent. We agree.

We review the trial court's decision on modification for an abuse of discretion. *In re Marriage of Zigler*, 154 Wn. App. 803, 808, 226 P.3d 202 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable; i.e., its decision is based on untenable grounds or untenable reasons. *Id.* at 808-09.

RCW 26.09.260 governs modification of a parenting plan. Under RCW 26.09.260(1), the trial court may modify the existing parenting plan only if it finds based on new or previously unknown facts that there has been a substantial change in the circumstances of the child or the nonmoving party and that the modification is in the child's best interest and necessary to serve the best interests of the child. RCW 26.09.260(2) provides that the trial court shall retain the existing residential schedule unless four specific circumstances exist. The purpose of these procedures is to "protect stability by making it more difficult to challenge the status quo." *In re Parentage of C.M.F.*, 179 Wn.2d 411, 419-20, 314 P.3d 1109 (2013).

RCW 26.09.260(6) provides an exception to these rules, stating that the trial court "may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child." The person objecting to relocation can file a motion to modify the parenting plan "without a showing of adequate cause other than the proposed relocation itself." RCW 26.09.260(6). This means in the context of a relocation request, "it is not necessary for the court to consider whether there is a substantial change in circumstances other than the relocation itself, or to consider the factors contained in RCW 26.09.260(2). *In re Marriage of Raskob*, 183 Wn. App. 503, 513, 334 P.3d 30 (2014).

However, even in the relocation context the trial court is required to consider the best interests of the child in making residential placement decisions. Nothing in RCW 26.09.260(6) supersedes the requirement in RCW 26.09.260(1) that the trial court focus on whether the placement is in the child's best interest and necessary to serve the child's best interests. Even apart from RCW 26.09.260(1), the child's best interests must be considered in all dissolution matters. RCW 26.09.002 provides that "[i]n any proceeding between parents under this chapter

[chapter 26.09 RCW], the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities."

Here, the trial court ordered a residential schedule that would be extremely disruptive to DD-P – alternating his primary residence on a yearly basis. This schedule would require DD-P to switch schools every year, which obviously is not preferable. Yet the trial court made no oral or written findings that this residential schedule was in DD-P's best interests, and there is no indication in the record that the trial court even considered DD-P's interests. Further, the GAL did not address the implications of the trial court's residential schedule.

We hold that the trial court abused its discretion in awarding the parents joint custody and imposing a residential schedule that required DD-P to switch schools every year without finding that such a schedule was in DD-P's best interests. Accordingly, we remand for a new trial on custody and DD-P's residential schedule.

C. CHILD CARE OVERPAYMENT

Davis claims that the trial court erred in awarding $10,966.53 for child care overpayment to Patecek because, at the time, he was delinquent in his child support obligations in the amount of $5,485. She also claims that the trial court erred in not finding Patecek obliged to pay daycare expenses incurred from November 2013 through April 2014 in the amount of $882.[1] We disagree.

Davis relies on Patecek's July 2013 testimony that he had support arrearages of $5,485. Patecek also testified that his current and past due child support was being garnished from his

[1] Davis does not contest the trial court's calculation that she spent $6,219.36 for daycare expenses during the period of March 2010 and the last day of trial.

paychecks. And during the July 21, 2014 proceeding, Patecek indicated that his paychecks were still being garnished. The record is unclear if Patecek was still in arrears after a year of garnishments but the trial court's order specifically states: "The principal judgment below shall be offset against any child support obligations of father." CP 175.

As to the expenses incurred between November 2013 and April 2014, Davis did not make this claim below and does not point to any evidence in the record to support it. The claim also is contradicted by the trial court's finding that Davis spent $6,219.36 on daycare "[b]etween March 2010 and the last date of trial," CP 179, which was April 18, 2014. As a result, this claim fails.

We hold that the trial court did not fail to take into account any arrearages in entering judgment for daycare expenses not incurred.

D. ATTORNEY FEES

Patecek requests reasonable attorney fees as the prevailing party with regard to the child support overpayment under RCW 26.18.160, which provides:

> In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

This provision entitles Patecek, the obligor, to his reasonable attorney fees and costs as to the overdue child support obligation only if Davis, the obligee, acted in bad faith in connection with this proceeding. *In re Marriage of Nelson*, 62 Wn. App. 515, 520, 814 P.2d 1208 (1991). However, Patecek has not alleged that Davis acted in bad faith regarding this appeal. Accordingly, we deny Patecek's request for attorney fees.

CONCLUSION

We affirm in part and reverse in part. We affirm the trial court's award to Patecek for child care overpayment and reverse the trial court's custody and residential schedule order. We remand for a new trial regarding custody and residential schedule.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, P.J.

SUTTON, J.