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Washington State
Court of Appeals
Division Two

January 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADAM CHARLES TORRES, Petitioner, v. MEGAN JEWELL ROLAND, Respondent.	No. 49464-7-II UNPUBLISHED OPINION

JOHANSON, J. — Adam C. Torres appeals the superior court's ruling granting Megan Jewell Roland permission to relocate their son from Thurston County to Cowlitz County and order amending the parenting plan under the relocation statute (RCW 26.09.520) and the modification statute (RCW 26.09.260(1)).[1] Torres challenges several of the trial court's findings on the relocation factors required under RCW 26.09.520 and the finding that the parenting plan modification was in his son's best interest under RCW 26.09.260(1). He also asserts that the trial court refused to consider all of the evidence. Because the trial court considered the evidence properly before it and substantial evidence supports the trial court's decisions, we affirm.

[1] Torres originally filed his notice of appeal in the Washington State Supreme Court. The court transferred the appeal to this court.

FACTS

I. BACKGROUND FACTS

Torres and Roland have one son together; they divorced in September 2013. The resulting parenting plan apparently allowed for 50/50 shared custody of their son.[2]

From February 2012, when the child was approximately three-and-a-half years old, until February 2015, Torres moved in and out of Washington several times to attend school and to work. When Torres was not living in Washington, the child resided almost exclusively with Roland, although Torres still tried to maintain as much contact as possible with the child. When Torres was residing in Washington, he and Roland abided by the existing parenting plan.

Torres returned to Washington in February 2015, and he and Roland resumed the 50/50 schedule. In addition, Torres provided day care for his son when Roland was working.

II. PROCEDURE

A. OBJECTION TO RELOCATION AND TEMPORARY ORDER

In the summer of 2015, Roland informed Torres that she was planning to relocate from the Olympia area to the Longview area with their then-seven-year-old son to live with her fiancé, who could not move to Olympia because of his work. Torres filed a motion opposing the relocation and a petition to modify the parenting plan to change the residence in which their son would reside the majority of the time. After a preliminary hearing, the trial court temporarily restrained the relocation pending a final hearing.

[2] The original parenting plan is not part of the record on appeal.

Following this ruling, Torres agreed that Roland could relocate as long as they maintained the original parenting plan and their son remained in school in the Olympia-Tumwater area. Roland, who was still working in Olympia, relocated to the Longview area. Torres then enrolled his son in school in Tumwater. During Roland's weeks with her son, they commuted approximately an hour each way to work and to school, and her son went to the Boys & Girls Club in the Olympia area for after-school care and was no longer with Torres for more than the time scheduled in the original parenting plan.

B. RELOCATION HEARING

1. TORRES'S EXHIBITS

The relocation hearing took place on November 10.[3] At the start of the hearing, Torres informed the trial court that he was his sole witness and that he had submitted the evidence he intended to rely on that morning, "a parenting plan, a . . . temporary restraining order, and modification for child support," and a photograph that Torres asserted showed a bruise on his son's body (exhibit 3) and demonstrated that his son had been abused while in Roland's care. Report of Proceedings (RP) (Nov. 10, 2015) at 8. The trial court advised Torres that it would consider only the evidence submitted that day and that it would not examine the court file. Torres stated that he understood that the court would not examine the court file, but he did not ask to resubmit any of the evidence he had presented at the preliminary hearing.

[3] Torres represented himself at both the preliminary hearing and the November 10 hearing.

2. ROLAND'S EVIDENCE

Roland testified that she had been with her son every day of his life unless he was with Torres, including two years as a stay-at-home mother during the first two years of her son's life. She stated that she and her son were very close and that "it would be very hard on him not to be with [her] per [Torres's] proposed parenting plan." RP (Nov. 10, 2015) at 28.

Roland also testified that Torres's absences had been difficult for her son and had resulted in less of a bond between her son and Torres. When Torres returned to Washington in February 2015, they resumed the one week on, one week off schedule. Although the child adjusted to the new schedule, it was a hard adjustment for him because it disrupted his routine.

Roland also testified about her son's education. The child started kindergarten in 2013, apparently in the Yelm area, but he repeated kindergarten so he could "develop a little more and be more prepared to go to first grade." RP (Nov. 10, 2015) at 15. When Torres returned to Washington in February 2015, Roland moved from Yelm to Olympia to be closer to Torres, and the child switched schools during his second year in kindergarten. The child adjusted well to that school change.

The child changed schools again at the start of the 2015 school year when Roland relocated, and he started his first-grade year in Tumwater. His current teacher had recently commented about how well he had adjusted to this change socially. But the teacher also told Roland and Torres that the child had difficulty concentrating and completing his work at school. The teacher recommended that the child be evaluated, and they were in the process of setting up an appointment for after November 30.

Roland testified that the relocation was necessary because she was getting married and her fiancé was not able to move to Olympia because he had an "on-call job where he has to be available to go to work within 20 minutes." RP (Nov. 10, 2015) at 18. She stated that when she told Torres about the possible relocation, he objected because he did not intend to move again and it was too expensive to travel that far.

Roland further testified that her fiancé has two children close to her son's age who were with them on alternating weekends. She stated that her son enjoyed being a "big brother" and that he got along well with her fiancé and his extended family. RP (Nov. 10, 2015) at 22. Neither Roland nor Torres had family in Washington.

Roland also testified about how her recent move had impacted her and her son. She stated that their quality of life had improved since the move because she was now in a two-income household, which allowed them to participate in more activities with family and friends. But the move had also increased her work commute and her son's school commute to an hour each way and increased her commuting costs. The commuting costs were, however, offset by her savings in rent and other expenses. Roland stated that it would be better if they could both stay near her new home and that she had job prospects in the Longview area.

In response to Torres's allegations of abuse, Roland testified that Torres had not mentioned the bruising he was now concerned about before the relocation issue arose and that the child bruised easily, was very active, and frequently had bruises from playing outside and from his after-school care activities. Roland also testified that she and her fiancé did not discipline each other's children and that she did not use physical discipline. In addition, she testified that the latest bruise could not have been caused by her fiancé because he had been working nights and was not there

to play with her son. She admitted, however, that her fiancé had been present for a few hours the Saturday before Torres noticed the bruise, but she stated that they had just watched television and no roughhousing occurred.

In addition to her own testimony, Roland called four witnesses who knew her from work and as friends. They testified about the close, positive bond between Roland and her son and about her disciplinary style. None of them had ever observed Roland use physical discipline with her son. They also testified that it would be difficult for the child if he were not allowed to relocate with Roland.

One friend, Mallorie Smith, also testified that her husband and Roland's fiancé worked together. Smith stated that Roland's fiancé was a gentle person and seemed to have a comfortable relationship with Roland's son. Smith had never seen Roland's fiancé discipline the child.

3. TORRES'S EVIDENCE

Torres was his only witness. He testified that before February 2015, he had lived out of state to attend a training school and to work. He chose the school because it was a shorter program than the programs in Washington, and he was unable to return to Washington to look for work for financial reasons.

He stated that between February and July 2015, he cared for his son about 69 percent of the time because he was also watching the child while Roland worked. He asserted that he was "[m]edically retired from the military" and had the ability to be a stay-at-home father, so he would be available to care for his son full time. RP (Nov. 10, 2015) at 63.

Torres acknowledged that at a recent teacher conference, the teacher noted the child's lack of concentration and asked if they could have the child evaluated. Torres stated that he did not

think that his son has learning problems and that he and Roland could address the issue by increasing their role in their son's schoolwork. Torres noted that they had been receiving fewer notices that his son had not been completing his work.

Torres stated that he could not relocate because he was in a relationship, his lease did not expire until February, and he did not have the money to move. Although he was actively looking for work, his ability to work was limited. He was simultaneously working with the Veteran's Administration to change his disability rating from 90 percent to 100 percent due to his physical limitations.

As to his abuse allegations, Torres testified that he had on five occasions noticed bruising on his son's buttocks, cheek, arms, and shins after his son had been with Roland. He admitted that he did not tell Roland about any of the bruising, despite his being concerned. The most recent bruising was to his son's shins and the lower part of his right buttock. Torres testified that when he asked his son what happened, the child first said the bruises were from playing with Torres's girlfriend's son, but later admitted that the bruise on his buttock was from Roland's fiancé hitting him with a belt when the child refused to play with him. But Torres also admitted that he was aware there could be innocent explanations for bruising on a child. The only exhibit related to his abuse allegations that Torres presented was a photograph of the bruise he found on his son shortly before the November 10 hearing.

4. TRIAL COURT'S ORAL RULING

After hearing the evidence, the trial court concluded that the rebuttable presumption of relocation did not apply to either parent in this case because the parents had essentially shared equal time with the child. The trial court then considered each of the relevant relocation factors

and the modification factors on the record.[4] The trial court concluded that the evidence supported allowing Roland to relocate the child and a change to the parenting plan under both the relocation statute, RCW 26.09.520, and the modification statute, RCW 26.09.260(1).[5]

On December 11, 2015, the trial court issued a final order allowing Torres time with his son every weekend except the third and fifth weekend of each month. Torres appeals the relocation ruling and the modification order.

ANALYSIS

Torres challenges several of the trial court's findings on the relocation factors required under RCW 26.09.520 and the finding that the parenting plan modification was in his son's best interest under RCW 26.09.260(1). He also argues that the trial court denied him his right to present all of his evidence by refusing to consider the materials he submitted in support of his motion to temporarily restrain the relocation.

I. RELOCATION

RCW 26.09.520 lists 11 factors that the trial court must balance to determine whether the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person. *In re Marriage of Horner*, 151 Wn.2d 884, 894-95, 93 P.3d 124 (2004) (quoting RCW 26.09.520). Torres challenges the findings on factors 1, 3, 4, 5, 6, and 7 and contends that

[4] We describe the trial court's findings in more detail below.

[5] Although any written findings of fact and conclusions of law are not part of our record, the trial court's oral ruling is sufficient for our review.

the trial court should not have found that relocation was appropriate in light of its prior order restraining the relocation.[6] We hold that substantial evidence supports these findings.

A. PRINCIPLES OF LAW

We review a trial court's decision regarding the relocation of children for an abuse of discretion. *Horner*, 151 Wn.2d at 893. A trial court manifestly abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Horner*, 151 Wn.2d at 893-94. A decision "'is based on untenable grounds if the factual findings are unsupported by the record.'" *Horner*, 151 Wn.2d at 894 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

We do not substitute our judgment for that of the trial court in weighing conflicting evidence or making credibility determinations. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). We review challenged findings of fact only for substantial evidence in the record before the trial court. *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). "'Substantial evidence' exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Fahey*, 164 Wn. App. at 55. Unchallenged findings are verities on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

[6] To the extent that Torres's arguments refer to events that occurred after the November 10 hearing, we do not consider them because our review of the trial court's decision is limited to the evidence that was before the trial court at the time it made its decision. *See* RAP 9.1.

B. RELOCATION FACTORS

1. FACTORS ONE AND THREE

The first relocation factor is "[t]he relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life." RCW 26.09.520(1). The trial court found that although the child had a strong relationship with Torres, the child's relationship with Roland was stronger because of the amount of time she had spent with the child during Torres's absences and the relatively short time that Torres had been present in the child's everyday life. Thus, it found that factor one weighed in favor of Roland.

The third factor is "[w]hether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation." RCW 26.09.520(3). The trial court found that this factor weighed in favor of Roland. It stated,

> [F]rom what I've heard from all the witnesses, . . . significantly limiting [the child's] contact with his mother would be difficult for him and not in his best interests. It would be more detrimental to him to do that than to limit his contact with his dad. And that's no offense to his dad or the commitment that his dad has.

RP (Nov. 10, 2015) at 126.

Torres argues that the trial court's finding on factor one is incorrect because he presented evidence that his relationship with their son was stronger than Roland's relationship with their son, that his involvement with their son was greater than Roland's, and that he was the stabilizing factor in their son's life. He further argues that because of this, disrupting his contact with their son would be more detrimental to the child than disrupting the child's contact with Roland, which relates to factor three.

Torres clearly testified that he had bonded with his son and was an important part of his son's life, and Roland did not dispute that there was a bond between father and son. But Roland also presented evidence that she was closely bonded with her son, that she had been the child's primary parent for the majority of the child's life, and that the bond between Torres and the child had only begun to form in February 2015. In addition, Roland supported her testimony with testimony from several friends and coworkers who had observed her close, positive relationship with her son and opined that less contact with Roland would be difficult for the child. Roland's evidence provides substantial evidence to support the trial court's findings that Roland's bond with the child was stronger and that disrupting this bond would be more detrimental to the child.

2. FACTOR FOUR

The fourth factor is "[w]hether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191." RCW 26.09.520(4). Under this factor, the trial court considered Torres's allegations of abuse. The trial court found that Torres had failed to establish that the bruising he had observed established abuse, so this factor did not apply. The trial court stated,

> There's been some evidence about bruising. I am not persuaded that there has been any abuse. What I am persuaded is that there is a seven-year-old boy here who gets bruises in various locations, and there's a particular bruise or two that he got, and Mr. Torres is quick to jump to an actor, a causation, a sequence of events, whatever, but I'm not there. I'm not satisfied that this bruise was intentionally inflicted.
>
> There's been some testimony about hearsay statements from [the child]. There was no objection. They're in the record. But they're still hearsay, and they came from a seven-year-old, and who knows exactly what he meant or said. I'm certainly not going to make a finding based on that. And I've heard plenty of evidence that Ms. Roland's significant other is not someone to use discipline, nor is he allowed to discipline, and I find that evidence credible.
>
> So, Mr. Torres, I understand your concern for your son. You're absolutely right to be concerned for your son, but I think you're wrong. I don't think that these

> bruises were intentionally inflicted by Ms. Roland's significant other. There are enough other opportunities for a seven-year-old to get bruising.

RP (Nov. 10, 2015) at 126-27.

Despite Torres not specifically identifying the trial court's finding on the fourth factor, most of Torres's brief relates to whether the trial court erred by not finding that his son was subject to abuse while in Roland's care. These arguments relate to the trial court's finding that there were no limiting factors under RCW 26.09.191.[7]

The trial court found that Torres had failed to establish that the bruising he had observed was caused by abuse, so this factor did not apply. The trial court did not ignore Torres's claims or evidence; instead, it specifically acknowledged Torres's evidence but found Roland's evidence more persuasive. We do not review the trial court's credibility determinations. *Rich*, 80 Wn. App. at 259. Thus, substantial evidence supports the trial court's finding on factor four.

3. FACTOR FIVE

Factor five requires the trial court to examine "[t]he reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation." RCW 26.09.520(5). The trial court acknowledged that both parents loved their son and want him to reside primarily with them, and it found that neither party demonstrated bad faith.

To the extent Torres challenges the trial court's finding on this factor, the record also supports that finding. The record shows that both parents expressed love and concern for their son and had legitimate reasons for seeking or opposing the relations. Roland was moving in with her

[7] Physical abuse of a child by a parent or someone the parent is living with can be a limiting factor. *See* RCW 26.09.191(1)(b), (2)(a)(ii), (2)(b)(i).

fiancé, who was restricted to Cowlitz County by his work obligations, and Torres lacked financial resources to relocate. These facts support the trial court's finding that factor five was neutral.

4. FACTOR SIX

The trial court found that factor six, which requires the trial court to examine "[t]he age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child," was in Roland's favor. RCW 26.09.520(6). The trial court considered the child's age and concluded that severing his contact with Roland would be significant at this age and that changing schools at such a young age would not be significant.

Torres argues that the trial court did not consider the effect of removing the child from his known environment and distancing the child from a supporting parent. But the record shows that the trial court considered the effect that reducing time with Torres would have on the child and determined that it would be more detrimental to the child to reduce his time with his mother. As discussed above, that finding is supported by substantial evidence. The trial court also considered the child's ability to change schools, and there was a substantial amount of evidence demonstrating that he adapted well to prior school changes. Thus, substantial evidence supports the trial court's finding on factor six.

5. FACTOR SEVEN

The trial court found that factor seven, "[t]he quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations," was in Roland's favor. RCW 26.09.520(7). It based this finding on Roland's unrebutted testimony

that her opportunities and resources were better in Cowlitz County and the lack of evidence that there was a significant difference in the quality of schools.

Torres argues that his location offered his son access to established school friends and "a vast array of children's resource buildings and the opportunity of after school activities." Br. of Appellant at 12. But Torres did not present any evidence about his son's access to established school friends, school activities, or other resources. And Roland presented evidence that her move enabled her to engage in more activities because she was more financially secure and that the child was also able to engage in activities with her and her fiancé's extended family. Thus, the trial court's finding is supported by substantial evidence.

C. Effect of Temporary Order Restraining Relocation

Torres further argues that the trial court could not have found that relocation was appropriate since it had granted the temporary order restraining the relocation and he presented additional evidence of abuse at trial that he asserts made his case even stronger. We disagree.

The standards for granting relocation differ from the standards that the trial court applies at the preliminary hearing. In order to grant the temporary order restraining the child's relocation, the trial court had to find only a "*likelihood* that on final hearing the court will not approve the intended relocation of the child," not that Torres had in fact proved that the relocation was improper. RCW 26.09.510(1)(c) (emphasis added). Additionally, the relocation trial is a more in-depth evidentiary hearing, and the trial court makes its decision based on the evidence presented at that hearing. Here, Torres did not present the same evidence at trial that he presented in his motion to restrain the relocation, and Roland was able to more fully rebut his allegations. Accordingly, this argument fails.

Because the trial court's findings are supported by substantial evidence, the trial court did not abuse its discretion when it allowed the relocation.

II. MODIFICATION

Apparently referring to the trial court's decision to modify the parenting plan under RCW 26.09.260(1), Torres argues that the trial court abused its discretion when it allowed the modification because allowing the child to live with the party that causes emotional and physical distress was not in the child's best interest.[8]

Again, as discussed above, the trial court found that Torres failed to establish abuse, and the record supports this finding. Accordingly, this argument fails and the trial court did not abuse its discretion when it modified the parenting plan.

III. REFUSAL TO CONSIDER EVIDENCE

Torres further argues that he was denied the opportunity to present all of his evidence because the trial court refused to consider the court file at the November 10 hearing. We disagree.

Most of the evidence that Torres asserts he presented was not before the trial court at the November 10 hearing. Although Torres submitted some of this evidence at the preliminary hearing, the trial court advised him at the start of the November 10 hearing that it would consider only the evidence Torres presented at that hearing and would not consider the information that was just in the court file. At the November 10 hearing, Torres presented only his own testimony, which focused on his bond with his son and his concern about physical abuse, and one photograph of a bruise on the child's body. Torres did not object to the trial court's refusal to consider the court

[8] Again, to the extent Torres refers to facts that have developed since the November 10 hearing, we cannot consider those additional facts on appeal. *See* RAP 9.1.

file or request additional time to resubmit evidence. Because the additional evidence was not before the trial court and Torres does not demonstrate that the trial court improperly limited the evidence it would consider or prevent Torres from testifying about additional matters, we hold that the trial court did not deny Torres the opportunity to present additional evidence.

IV. ROLAND'S REQUEST FOR ATTORNEY FEES

Roland argues that she is entitled to attorney fees under RAP 18.9 because this appeal is frivolous. Because we were able to discern arguable issues from Torres's pro se brief, we deny Roland's request for attorney fees.

Because the trial court considered the evidence properly before it and substantial evidence supports the trial court's decisions, we affirm.

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.

JOHANSON, J.

We concur:

WORSWICK, P.J.

SUTTON, J.