IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:	)	
	)	No. 63870-0-I
HEATHER S. SHAY,	)	
	)	DIVISION ONE
Appellant,	)	
	)	
and	)	
	)	UNPUBLISHED OPINION
BRIAN J. SHAY,	)	
	)	FILED: November 2, 2009
Respondent.	)	
	)	

AGID, J.—Heather Shay, the custodial parent, notified her former husband, Brian Shay, of her intent to relocate their children.[1] Brian objected. Heather preferred venue in Thurston County but did not seek discretionary review of the Grays Harbor County Superior Court's decision to retain venue, a decision which waived her improper venue argument. After a trial, the Grays Harbor County Superior Court denied the relocation, finding that Brian carried the burden of demonstrating that the detriment of allowing the move outweighed the benefits. The trial court abused its discretion by considering improper factors and not recognizing the presumption that Heather would be permitted to move. But this court can no longer provide effective relief because the facts relevant to Heather's requested relocation have changed. Accordingly, we must dismiss this appeal.

[1] We use the parents' first names for clarity.

FACTS

Heather and Brian Shay began dating in 1989 as students at the University of Washington. They settled in Grays Harbor County and married in July 1993. Their older daughter, Rachel, was born in September 1995. Their younger daughter, Emily, was born in February 2000. Brian and Heather separated in October 2006. Heather filed a petition to dissolve the marriage in May 2007 in Grays Harbor County.

In December 2006, Heather moved with the girls to Gig Harbor. In July 2007, Brian and Heather agreed that she and their daughters would live in Olympia. The parties entered an agreed parenting plan on September 26, 2007, stating that the children would reside the majority of the time with Heather and would spend every other weekend (Friday through Monday morning) and every Wednesday overnight with Brian. Because the parenting plan conditioned the Wednesday and Sunday overnights on Brian's living within 30 minutes from the children's school, Brian moved to Tumwater and exercised those overnight visits. He commuted to Hoquiam to continue working there as the city administrator.

On May 6, 2008, Heather e-mailed Brian that she planned to take the girls to Austin, Texas, that weekend for a visit in anticipation of moving there. Heather told Brian that her employer requested that she move to Austin and that her attorney was drawing up a notice of her intent to relocate with the girls. The same day Brian obtained a restraining order from the Grays Harbor County Superior Court preventing Heather from taking the children out of the state on vacation.[2] On May 8 or 9, 2008,

[2] The parenting plan states, "The parties shall give each other written notice, 10 days in advance, of any plans to vacation with the child. Parties must provide an itinerary and contact numbers to the non-vacationing party."

Heather's boyfriend, Randy Connelly, moved for a protection order against Brian in Grays Harbor County. Shortly after his motion was dismissed, Heather petitioned for a domestic violence protection order in Thurston County. After a hearing, Thurston County Commissioner Christine Schaller denied Heather's request for a domestic violence protection order.

On May 16, 2008, Heather filed in Thurston County a notice of intent to relocate and a petition to modify the parenting plan. Brian objected to the intended relocation in Grays Harbor County on May 27, 2008. He also moved for an order "retaining jurisdiction in Grays Harbor County of any domestic actions pertaining to the parties herein and their children." Heather asserted that Thurston County was a more appropriate venue and moved in Grays Harbor County to change venue to Thurston County. Brian requested an order from Thurston County changing venue to Grays Harbor County. On June 2, 2008, Grays Harbor Superior Court Judge Mark McCauley found that Grays Harbor County had jurisdiction. And on June 10, 2008, Thurston County Superior Court Judge Paula Casey deferred to Judge McCauley's order changing venue to Grays Harbor County. After a trial, Judge McCauley found that the "detrimental effects of allowing the children to move with the relocating person do outweigh the benefits of the move to the children and the relocating person" and restrained Heather from relocating the children. Heather lost her job after the trial and did not move.

DISCUSSION

"A case is moot if a court can no longer provide effective relief."[3] "[C]ourts

[3] Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

should normally dismiss cases that involve only moot questions" unless they present "issues that are of substantial and continuing public interest."[4] We consider three factors "[i]n deciding whether a case presents issues of continuing and substantial public interest:

. . . '(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur'."[5] Brian argues that this case presents only moot issues because Heather's reason for relocating to Texas vanished once she lost her job after the trial. We agree. Heather brought this appeal, claiming that the trial court incorrectly balanced the child relocation act (CRA)[6] factors and abused its discretion by concluding that the harm of relocation outweighed the benefits. To remedy those alleged wrongs, she is asking this court to remand this case back to the trial court with instructions on how to properly weigh these factors. But rebalancing the particular facts found below no longer serves any purpose now that those facts have changed: if Heather still wants to move, the reason for her request, one of the CRA factors, has changed now that she no longer has a job that required a move.[7] Any rebalancing that this court could order would only answer the academic question of whether the trial court should have allowed relocation under a certain set of facts that are no longer present. Should Heather still want her children to relocate with her, the trial court

---

[4] Client A v. Yoshinaka, 128 Wn. App. 833, 841-42, 116 P.3d 1081 (2005).

[5] In re Marriage of Horner, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004) (internal quotation marks omitted) (quoting Westerman v. Cary, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994)).

[6] RCW 26.09.520.

[7] See Horner, 151 Wn.2d at 892 (finding case moot where reason for moving changed, among other posthearing changes).

deciding that request would have to conduct further fact-finding about the reason for her requested relocation and conduct an appropriate balancing of the CRA factors.

Although the Washington Supreme Court has reviewed an otherwise-moot CRA case, Heather offers no persuasive reason why we should review her moot case.[8] Horner held that the otherwise moot case before it presented issues of a public nature because it required the court to determine a trial court's duties under the CRA.[9] Here, Heather asks this court to review whether the trial court properly applied the law to the facts of her case, which is not an issue of public nature. Next, in Horner the Washington Supreme Court needed to provide guidance about the correct interpretation of the CRA, which lower courts had been applying inconsistently.[10] Here, there is no reason for this court to provide an authoritative determination on how to properly weigh the CRA factors under the specific facts of this case. Finally, Horner found that the erroneous interpretation of a trial court's duties under the CRA was likely to recur.[11] While Heather's desire to move with her children may recur, these particular facts are virtually certain not to recur.[12] In short, we have no basis for providing an advisory opinion to the next trial court judge who considers whether the detriments of moving outweigh the benefits.

Heather also argues that this court can provide relief for her improper venue

---

[8] In re Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004).
[9] In re Marriage of Horner, 151 Wn.2d 884, 93 P.3d 124 (2004).
[10] Id.
[11] Id.
[12] Horner also considered the likelihood that the issue will evade review because the facts of the controversy are short-lived. Id. at 893. The facts of this case are short-lived like in Horner, but unlike Horner there is not any substantial and continuing public interest in the issues this case presents.

claim. She argues that Thurston County would have been a better venue for the relocation action and that the Grays Harbor County trial court abused its discretion by finding venue proper in Grays Harbor County.[13] Heather does not explain why ordering Grays Harbor County to transfer venue would provide relief in this case, where the only issue on the merits is moot. Whether Grays Harbor County should cede venue if Heather again requests approval of relocation plans depends on that court's assessment of "the convenience of witnesses or the ends of justice" according to the facts presented in the next dispute.[14] Accordingly, Heather's venue issue is also moot.

Additionally, we do not need to reach whether Heather's improper venue claim presents a live or otherwise reviewable issue on appeal because Heather waived appellate review of the trial court's venue decision by not seeking discretionary review of the order finding venue proper in Grays Harbor County.[15] Failure to seek discretionary review of venue decisions before trial waives any objection to venue absent a showing of prejudice.[16]

Heather does not establish that she was prejudiced by the venue decision. As the court said in Lincoln, "There is no contention that other witnesses were needed but

---

[13] RCW 26.09.280 permits venue in either Thurston County, where the children reside, or Grays Harbor County, where the dissolution was entered.

[14] RCW 4.12.030(3).

[15] Heather did not seek discretionary review of the Grays Harbor County order denying a change of venue or the Thurston County order changing venue to Grays Harbor County. RAP 2.3(c) provides, with one irrelevant exception, that "the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision." Heather argues that the inverse of RAP 2.3(c) should also be a rule, so that the failure to seek discretionary review of venue decisions would preserve the right of parties to obtain later review. But Heather does not explain why a rule that expressly minimizes the consequences of seeking discretionary review would also implicitly condone a decision to forgo discretionary review of a venue decision.

[16] Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978). Brian failed to cite any relevant case law in support of his waiver argument.

were not called because of their unwillingness to travel to [Grays Harbor] County."[17] Heather's allegation of potential bias because of Brian's role as city administrator of a city in Grays Harbor County is unsupported. Heather did not ask Judge McCauley to recuse. And even if she had, there is no evidence in the record showing that Judge McCauley abused his discretion by hearing this case. He stated that he knows who Brian is, but does not know him. Of the two parties, he knew Heather better because he took a computer class from her roughly 14 years earlier and remembered her doing a good job and being "very pleasant." "[E]xcept in rare instances, the mills of justice grind with equal fineness in every county of the state."[18] This is not one of those rare instances, and we hold that Heather waived appellate review of the venue decision.

Attorney Fees

Both parties have requested fees on appeal. In appeals arising under the dissolution statute, an appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal.[19] We see no basis for ordering Brian, who does not have the financial resources to pay his own attorney,[20] to pay for Heather's cost in maintaining her appeal. Brian also requests fees, but he is the party defending against the relocation petition, and RCW 26.09.140 does not appear to give this court the discretion to award fees to the party defending the appeal.[21] And even if

[17] Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 579, 573 P.2d 1316 (1978).

[18] Russell v. Marenakos Logging Co., 61 Wn.2d 761, 765, 380 P.2d 744 (1963) (footnote omitted).

[19] RCW 26.09.140.

[20] See Brian's RAP 18.1(c) affidavit of financial need.

[21] RCW 26.09.140 allows the trial court the discretion to award fees for the cost of *maintaining or defending* any proceeding under the dissolution statute. In contrast, the appellate fee provision of RCW 26.09.140 allows fees only to the party *maintaining* the appeal.

we could award fees to the party defending an appeal, Brian does not offer any compelling reason why we should.

Should Heather petition to relocate her children again, we note that there is no reason for Thurston County to refrain from exercising jurisdiction over her request. If Heather's renewed petition for relocation comes before the same trial court in Grays Harbor County, we trust that the trial court will recognize and fully incorporate into its decision the relocation act's rebuttable presumption in favor of relocation. Its reasoning here was flawed by the omission. The CRA does not direct the trial court to seriously consider allowing the relocation only when the relocating party proves that he or she is required to move. Instead, the burden is on the person objecting to the relocation to demonstrate "that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon" the statutory factors.[22] Nor does the CRA permit the court to consider its assumption that, if relocation is denied, the moving party will not relocate. We emphasize that the statutory factors must be considered based on the presumption that relocation will be allowed and the

burden of proof properly placed on the party objecting to the petition.

Appeal dismissed.

Agid, J.

WE CONCUR:

[22] RCW 26.09.520.

Dwyer, A.C.J.

Ellington, J.