DIVISION ONE
FILED: 1/24/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0717
	)	
CHRISTOPHER T. FOSTER,	)	DEPARTMENT B
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	(Rule 28, Arizona Rules of
KELLY J. FOSTER,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN2009-004355

The Honorable Christopher T. Whitten

AFFIRMED

Paus Law PLC — Phoenix
Andrea Paus
Attorneys for Petitioner/Appellant

Kelly Foster — Gilbert
In Propria Persona

G O U L D, Judge

¶1 Christopher Foster ("Father") appeals the trial court's order denying his petition to modify child

custody/relocate minor children, or in the alternative, modify parenting time. For the following reasons, we affirm the trial court's denial of Father's petition to modify child custody/relocate minor children and its modification of parenting time.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Kelly Foster ("Mother") and Father divorced in Florida in May of 2008 and are the parents of two children. The Florida court designated Mother the primary residential parent and ordered that Mother and Father jointly share responsibility for making all major decisions affecting the welfare of the children. In February of 2010, Father petitioned the trial court seeking primary residential custody of the children, or primary residential custody of their son ("Son") with their daughter ("Daughter") to remain with Mother. Father sought the custody modification, in part, for the purpose of relocating the parties' minor children from their home with Mother in Arizona to Father's home in Colorado. Alternatively, Father requested more parenting time.[1]

¶3 Father later filed an emergency motion to modify custody that the trial court denied. Mother filed a counter-

[1] Father also sought to modify his child support obligation, but that issue is not before this court.

petition to modify custody, seeking sole custody of the minor children.

¶4 After an evidentiary hearing, the trial court denied both petitions, making no change to the existing custody arrangement because "neither party has shown that there has been a substantial and continuing change in circumstances justifying a reevaluation of the Florida custody orders." As for parenting time, the trial court reaffirmed the Florida court's shared parenting order with three adjustments: Father was awarded parenting time during all fall breaks from school; Daughter is now permitted to travel with Son on direct flights to and from Colorado; and Father is permitted to Skype with Son every school day.

¶5 Father appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

¶6 Father argues that the trial court abused its discretion in denying Father's request to designate him as the primary custodial parent.

Substantial and continuing change of circumstances

¶7 First, Father contends that the trial court erred in finding there was no substantial and continuing change of circumstances. A trial court has broad discretion to determine whether a change of circumstances has occurred and we will not reverse its decision absent a finding of an abuse of discretion. *Pridgeon v. Super. Ct.*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982).

¶8 Father argues that the trial court failed to "consider[] the evidence, failed to base its decision on any evidence in the record, and failed to make any findings of fact to support its decision." Specifically, Father points out that Son's school grades and behavior have suffered; that Father's employment has changed and Mother is now in school; and that the environment in Mother's home has changed.

¶9 Father cites to one case as authority for his position that a change of circumstances has occurred, *Georgia v. Georgia*, 27 Ariz. App. 271, 553 P.2d 1256 (1976). *Georgia*, however, is not dispositive. In *Georgia*, the court affirmed the trial court's decision to change custody from mother to father because after the original custody determination the parties discovered that the son had a learning disability which required immediate attention. Father located and enrolled son in a school where he would receive the special attention that he needed, while

Mother made no genuine effort to address his problems. *Id.* at 273-274, 553 P.2d at 1258-1259.

¶10 Contrary to Father's contention, the trial court did not fail to consider the evidence in the record. In fact, the court acknowledged Son was going through a difficult period in his life, his grades had dropped and he had exhibited some behavioral issues. The court also noted that he had "symptoms which at least one expert believes are consistent with anxiety and/or depression" and that all the experts and witnesses "believe he feels caught in the middle of the discord between his parents."

¶11 Unlike the mother in *Georgia*, the record here establishes that Mother has taken an active role in addressing Son's academic and behavioral challenges. Moreover, the trial court ordered that Father is permitted to Skype with Son for a minimum of thirty (30) minutes each school day to assist Son with his homework, as Father's ability to help Son do well in school is one of Father's "great strengths."

¶12 As for the change in environment in Mother's home, Father's primary allegation is that Mother is an alcoholic and is emotionally abusive. As the court noted, Father made the same allegations in Florida. However, it is important to note that although Mother has admitted to having an occasional drink,

she has never been prohibited by the court from drinking alcohol. Rather, on May 10, 2011, after reading allegations of alcohol and drug abuse in one of Father's motions, but before receiving any order from the court, Mother voluntarily underwent drug testing, which came back negative. Thereafter, of the twenty-three court ordered drug tests, only one came back positive for alcohol; and both of the random tests she took through school came back negative for alcohol and drugs. Additionally, the Best Interest attorney appointed to represent Son, unbeknownst to Mother, ordered "trash runs" to determine whether Mother had a drinking problem. These surreptitious "trash runs" turned up no evidence to substantiate Father's claim of Mother's binge drinking.

¶13 As for Father's allegations regarding emotional abuse, the trial court heard testimony from the court-appointed counselor charged with interviewing Son, Father's expert, and Mother's expert. We note that Mother's expert was critical of the interview process conducted by the court-appointed counselor and the conclusions drawn by Father's expert from those interviews. The trial court referred to Father's expert's testimony that Daughter might be in a dangerous situation as "without foundation and wildly, potentially dangerously, speculative."

¶14 We will not reweigh the evidence; instead we give deference to the trial court's opportunity to judge the credibility of the witnesses, and we will affirm the trial court's ruling if substantial evidence supports it. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 511, ¶ 41, 114 P.3d 835, 843 (App. 2005); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). There is substantial evidence in the record to support the trial court's conclusion that, as before, Father's allegations regarding Mother's drinking and emotional abuse are unfounded, such that there has been no substantial and continuing change of circumstances in this regard.

¶15 Father also points to his retirement from the military and Mother's status as a full time student as a substantial and continuing change. We disagree. At the time the Florida court entered the original custody order, Father had already relocated to Colorado and was an instructor at the Air Force Academy. After his retirement, he chose to remain in Colorado and continues to teach (P.E.) and is an assistant soccer coach at the Air Force Academy. Father did testify that his current schedule is more flexible than his schedule before he retired.

¶16 At the time the Florida court awarded custody to Mother, Mother had already planned a move to Arizona so that she

could be near her family and enroll as a full time student. The Florida court allowed her to relocate with the children, and conditioned her rehabilitative spousal support award on her full time enrollment in school. Thus, there is substantial evidence supporting the trial court's finding that Father's retirement and Mother's status as a full time student is not a substantial and continuing change in circumstances.

Failure to make findings of fact on the record

¶17 Father next argues that the trial court abused its discretion in failing to make findings of fact on the record as required by A.R.S. § 25-403 and A.R.S. § 25-408. We disagree.

¶18 The law is clear that when a court considers a petition to modify child custody, it must first determine whether there has been a significant and continuing change of circumstances that materially affects the welfare of the child. *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3 (citing *Black v. Black*, 114 Ariz. 282, 283, 560 P.2d 800, 801 (1977)). Absent a finding of such change, the court does not reach the question of whether modification of custody is in the best interests of the children. *Pridgeon*, 134 Ariz. at 179, 655 P.2d at 3. Because the trial court properly determined that no change in circumstances had occurred, it appropriately did not consider whether modification of custody would be in the children's best

interests. *Id.* Thus, we need not address Father's argument that the trial court erred by failing to make findings of fact as to the best interests of the children on the record as required by A.R.S. § 25-403 and A.R.S. § 25-408.

¶19 Father's argument as to A.R.S. § 25-408 fails for an independent reason. The statute does not apply here. The relocation provisions contained in A.R.S. § 25-408 apply only if Father establishes two prerequisites: (1) a written agreement or court order providing for custody or parenting time by both parents, and (2) both parents reside in Arizona.[2] *See Buencamino v. Noftsinger*, 223 Ariz. 162, 163, ¶ 8, 221 P.3d 41, 43 (App. 2009). The first prerequisite exists here. The Florida court's order provides for parenting time by both parents. However, the second prerequisite is lacking. Only Mother resides in Arizona; Father resides in Colorado.

¶20 Under the plain language of A.R.S. § 25-408, the statutory prerequisites for application of the relocation provisions do not exist in this case. *See id.* at ¶¶ 9-10. Accordingly, for this independent reason, the trial court was

[2] Effective January 1, 2013, A.R.S. § 25-408 was amended. The relocation provision which was previously designated A.R.S. § 25-408(B) is now A.R.S. § 25-408(A) and has been reworded as well. Notwithstanding those changes, under the amended statute, the relocation provisions do not apply unless the two prerequisites set forth above are present.

not required to consider or make specific findings regarding the factors identified in § 25-408. *See id.* at ¶ 10.

Father's request for additional parenting time

¶21 Father also argues that the trial court abused its discretion by not awarding him all the additional parenting time requested. We disagree.

¶22 Before the hearing, Father asked the trial court to order parenting time every Monday and/or Friday of a holiday weekend, every spring break, fall break, summer break, winter break and alternating Thanksgiving and Christmas each year. Father is already entitled to the Monday/Friday of holiday weekends, and alternating Thanksgiving and Christmas under the Florida order. His primary complaint in his petition regarding parenting time was that the Florida order did not provide for parenting time over fall breaks (which did not exist in Florida), and Mother wants to alternate fall breaks. The trial court awarded Father parenting time for every fall break. Thus, Father is apparently dissatisfied that he did not receive every spring and winter break and the entire summer break. Rather, he asserts he is entitled to parenting time for alternating spring breaks, half the winter break, and half the summer break plus two additional weeks.

¶23 Father cites no authority supporting his position that he should be awarded parenting time on every school break and the entire summer break. As Father notes, A.R.S. § 25-103 provides that it is the public policy of Arizona and the general purpose of Arizona law, that it is generally in a child's best interest to have "substantial, frequent, meaningful and continuing parenting time with both parents." A.R.S. § 25-103 (emphasis added). Moreover, based upon the record we are unable to conclude that the trial court abused its discretion in reaffirming the Florida court's parenting time order, particularly given the fact the trial court modified the Florida order by awarding Father parenting time on every fall break and a minimum of thirty minutes per day on every school day to Skype with Son.

ATTORNEYS' FEES ON APPEAL

¶24 Mother and Father have both requested an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324. In considering this request, we have, in accordance with A.R.S. § 25-324, considered the reasonableness of the positions taken by the parties. In our discretion, because the law is well-settled on the issues brought on appeal, we award an amount of reasonable attorneys' fees to Mother, upon her compliance with

Arizona Rule of Civil Appellate Procedure 21(c). Mother is also entitled to an award of taxable costs.

CONCLUSION

¶25 For the foregoing reasons, we affirm the trial court's order.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge