IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of MELISSA DIANE BJARNSON, Respondent, v. MICHAEL EMERY HARPER, Appellant.	No. 41790-1-II UNPUBLISHED OPINION

Johanson, J. — Melissa Bjarnson and Michael Harper are divorced parents. On appeal, Harper argues that the trial court abused its discretion when it granted Bjarnson's relocation request and denied Harper's petition to modify their parenting plan. We affirm the court's relocation decision but remand to the trial court to consider whether Harper's petition to modify is in the best interest of the children.

FACTS

Bjarnson and Harper were married and have two children. Harper is in the military and was previously stationed in Washington. Bjarnson and Harper's relationship deteriorated, they separated, and Bjarnson began living with Paul Bjarnson.[1] Bjarnson and Harper subsequently

[1] We refer to Paul Bjarnson by his first name to avoid confusion.

divorced and established a permanent parenting plan, which designated Bjarnson as the primary parent.

Paul was also in the military, and he received orders to relocate to Oklahoma in 2007. He and Bjarnson married, and they moved with the children from Washington to Oklahoma. Meanwhile, Harper also remarried and moved to Texas.

In 2009, Paul was medically discharged from the military. Paul, Bjarnson, and the children then moved to Oregon, where the children began elementary school for the 2009 to 2010 term.

In August 2009, Harper filed a timely Objection to Relocation and a Petition for Modification of Custody Decree/Parenting Plan in Thurston County Superior Court. He requested the court to (1) restrain the children's relocation and (2) modify the custody decree to designate him as the primary parent. A court commissioner granted a temporary change of placement to Harper. The children moved in with Harper in Texas, where they began school for the 2010 to 2011 term.

Trial was held in Thurston County. The trial court granted the relocation of the children to Oregon and denied Harper's major modification request. We stayed the children's relocation pending our review.

ANALYSIS

I. Jurisdiction

For the first time, Bjarnson argues that Washington courts do not have subject matter jurisdiction over this action. We disagree.

A party may raise lack of the trial court's jurisdiction for the first time on appeal. RAP

2.5(a)(1). To determine jurisdiction issues in interstate custody disputes, we turn to the Uniform Child Custody Jurisdiction and Enforcement Act, chapter 26.27 RCW. Once a court properly asserts jurisdiction and makes an initial child custody determination, that court retains "exclusive, continuing jurisdiction over the determination." RCW 26.27.211; RCW 26.27.021(3) ("'Child custody determination' means a [. . .] parenting plan."). This exclusive, continuing jurisdiction remains until one of the following occurs:

> (a) A court of this state determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
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> (b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

RCW 26.27.211(1)(a), (b). Because no court has made a determination required under RCW 26.27.211(1)(a) or (b), we hold that Washington has not lost exclusive, continuing jurisdiction.

II. Merits

The dispositive issue before us is whether the trial court abused its discretion when it denied both Harper's objection to the relocation and his request for a major modification. We review a trial court's decisions regarding the welfare of children for abuse of discretion. *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). "Abuse of discretion occurs 'when the trial court's decision is manifestly unreasonable or based upon untenable grounds.'" *Horner*, 151 Wn.2d at 893 (quoting *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)).

We begin our analysis with RCW 26.09.260(6) because it applies when a parent seeks a

modification pursuant to a relocation, which Harper did here. RCW 26.09.260(6) states, in part:

> In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560.

Accordingly, we review the relocation issue first and then turn to the modification issue.

A. Relocation

Harper first maintains that the trial court abused its discretion when it denied his objection to the relocation. We disagree.

The relocation statute, RCW 26.09.520, creates a rebuttable presumption in favor of allowing relocation. To rebut the presumption that relocation is beneficial, the parent opposing relocation must show that the intended move has a more detrimental than beneficial effect on the child and the relocating parent. RCW 26.09.520; *Horner*, 151 Wn.2d at 895. In determining whether to approve relocation, the relocation statute requires the court to consider 11 factors on the record. RCW 26.09.520; *Horner*, 151 Wn.2d at 894-95.

We do not review credibility determinations on appeal. *See In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003). "Credibility of parties and witnesses, and the weight to be given to evidence, is for the trial court." *Brauhn v. Brauhn*, 10 Wn. App. 592, 593, 518 P.2d 1089 (1974). The trial court "enjoys a great advantage over us in matters of trial atmosphere, and opportunity to observe witnesses personally so that he may gauge first hand their candor and truthfulness." *Dykes v. Dykes*, 69 Wn.2d 874, 876, 420 P.2d 861 (1966). In light of these principles, we afford the trial court broad latitude in determining the weight to give expert

opinion, and we will sustain the court's findings if they are within the range of the evidence. *See In re Marriage of Harrington*, 85 Wn. App. 613, 637, 935 P.2d 1357 (1997); *In re Marriage of Sedlock*, 69 Wn. App. 484, 490, 849 P.2d 1243, *review denied*, 122 Wn.2d 1014 (1993).

"An appellate court may not substitute its findings for those of the trial court where there is sufficient evidence in the record to support the trial court's determination." *In re Marriage of Pennamen*, 135 Wn. App. 790, 802-03, 146 P.3d 466 (2006) (citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 810, 854 P.2d 629 (1993)). We will uphold a trial court's findings of fact that are supported by substantial evidence. *In re Parentage of J.H.*, 112 Wn. App. 486, 492, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024 (2003).

Harper argues that substantial evidence does not support many of the trial court's findings and that the trial court ignored compelling evidence. Notably, Harper concedes that several of the trial court's findings he now challenges have a degree of support in the record. In Harper's view, the court did not give enough weight to certain evidence, particularly the guardian ad litem's recommendation. His entire argument essentially hinges on the notion that the court erred in assigning less weight to evidence that he believes is more favorable.

The trial court carefully evaluated all 11 factors on the record and entered detailed written findings of fact. We have carefully reviewed the entire record and it appears that the trial court properly considered all of the evidence and appropriately exercised its discretion in weighing the credibility and persuasiveness of the witnesses. Further, substantial evidence supports the court's relocation findings that Harper challenges. Harper has failed to establish any abuse of discretion and we affirm the trial court's relocation decision.

B. Modification

Harper next asserts that the trial court abused its discretion when it denied Harper's request for a major modification. He argues that the trial court applied the incorrect legal standard and, thus, necessarily based its decision on untenable reasons. We remand to the trial court to apply the "best interest of the child" standard, as found in RCW 26.09.260(1).

Statutory interpretation is a question of law that we review de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Our goal is to ascertain and to carry out the legislature's intent, which we derive primarily from statutory language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). We first examine a statute's plain language. If the language is plain and unambiguous, we derive the statute's meaning solely from its language. *Campbell & Gwinn*, 146 Wn.2d at 9-10.

RCW 26.09.260(6) does not expressly include a standard for the trial court to apply in determining whether to grant a modification pursuant to relocation, so we must interpret the statute to determine what standard the legislature intended courts to apply. To do this, we review the relevant subsections here, RCW 26.09.260(1), (2)(c) and (6).

Subsection (1) and (2)(c) state:

> (1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.
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> (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

> . . .
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> (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child . . . .

RCW 26.09.260(1)-(2)(c). Under this plain language, a court considers subsection (1) "[e]xcept as otherwise provided" in various subsections, including subsection (6). Because subsection (6) applies here, the question before us is what part of section (1) is "otherwise provided" for under subsection (6). RCW 26.09.260(1).

Subsection (1) provides that a trial court shall not modify a parenting plan unless two conditions are met. First, that "a substantial change has occurred" and, second, that a modification is in the "best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). Thus, further refined, the question before us is whether subsection (6) displaces one or both of these conditions.

Subsection (6) provides, in pertinent part:

> The 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 the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. [. . .] Following [the relocation] determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

RCW 26.09.260(6). As apparent from this plain language, when subsection (6) applies, the objecting parent may move to modify the parenting plan "without a showing of adequate cause

other than the proposed relocation itself." RCW 26.09.260(6). Clearly, subsection (6) provides "otherwise" with regard to subsection (1)'s requirement that there be a "substantial change" of circumstances. RCW 26.09.260(1).

On the other hand, subsection (6) does not "otherwise provide[]" a replacement for "the best interest of the child" condition, found in subsection (1). Instead, when a court reaches subsection (6)'s modification prong, the court must return to subsection (1) and apply the second standard, namely, "that the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1).

In applying the "best interest of the child" standard in subsection (1), "the court shall retain the residential schedule established by the decree or parenting plan unless: [. . .] [t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." RCW 26.09.260(2), (c). Here, the trial court found, based on substantial evidence, that the Bjarnson's home was not detrimental to the children such that the harm likely to be caused by a change of placement is outweighed by the benefit. But the court did not expressly find that the modification was, or was not, in "the best interest" of the children. RCW 26.09.260(1). Accordingly, we remand to the trial court to consider, based on its findings of fact, whether Harper's petition to modify is in the best interest of the children.

II. Attorney Fees

Bjarnson requests attorney fees but does not provide a reasoned argument. An award of attorney fees must be based on contract, statute, or a recognized ground in equity. *Kaintz v.*

PLG, Inc., 147 Wn. App. 782, 785, 197 P.3d 710 (2008). Bjarnson cites some authority in passing, but she fails to explain how this authority supports an attorney fee award in this case. A party waives any error that is not supported by argument or authority. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). We decline to grant her request.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Armstrong, J.

Penoyar, C.J.