# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| KIMBERLY SUE MILES,<br><br>Respondent,<br><br>v.<br><br>ANTHONY HAROLD MILES,<br><br>Appellant. | No. 42060-1-II<br><br>UNPUBLISHED OPINION |

Armstrong, J. — When Anthony and Kimberly Miles divorced in January 2003, the trial court awarded Kimberly full custody of their son; Anthony retained supervised visitation rights. Kimberly moved with their son to New Jersey with the court's permission to temporarily relocate. She then filed a notice seeking authority to permanently relocate, which Anthony did not object to. In June 2010, Anthony filed a petition to modify the parenting plan; he also sought to challenge the 2003 relocation order. The trial court denied the modification and refused to consider Anthony's challenge to the 2003 relocation order. Anthony appeals both rulings. We affirm.

FACTS

Anthony and Kimberly married in 1995, and had a son in 2000.[1]

In March 2002, the parties separated after Anthony assaulted Kimberly in their son's presence. Anthony admitted to pushing and grabbing Kimberly and pleaded guilty to fourth degree domestic violence assault. The trial court ordered Anthony not to contact Kimberly. Kimberly filed a petition for dissolution in April 2002.

[1] Because both parties share the same last name, they are referred to by their first names to avoid confusion.

Kimberly also sought to relocate to New Jersey with their two-year-old son. She attempted to serve Anthony with temporary orders while he was incarcerated for the assault; however, he was released prior to receiving service. Anthony admits to being served with the relocation notice on April 10, 2002. On April 12, the trial court granted Kimberly permission to move temporarily with the child. Anthony unsuccessfully contested the move. Kimberly filed a notice of relocation on June 18, 2002. The notice included procedures for objections; Anthony did not timely object.

During the dissolution trial in December 2002, Kimberly testified that Anthony assaulted her twice; during one assault he punched her in the face 10 to 12 times, fracturing her nose, cutting her forehead, and causing a large hematoma on her jaw. She also suffered multiple bruises to her buttocks, hips, and arms. At the trial, Anthony had requested that his son be kept in Washington state.

In January 2003, the court entered findings and conclusions, a child support order, and a final parenting plan. At the January hearing, Anthony renewed the argument, claiming that he had not received proper notice of Kimberly's relocation. The court ruled that the parties had not properly raised the relocation issue. The final parenting plan designated Kimberly as the primary residential parent and granted Anthony supervised visitation rights. Because of Anthony's assault conviction, the plan restricted his visitation privileges. RCW 26.09.191. But it allowed Anthony to apply for unsupervised visits after his son turned six, if Anthony satisfactorily completed a court-ordered Domestic Violence Perpetrator's Parenting Class.

In June 2010, Anthony petitioned to modify the parenting plan. He requested a minor

modification, to include virtual visitation through Skype,[2] and summer time visitation in Washington. The trial court denied the request because Anthony had not completed the court-ordered parenting class. Because of this, the court found that he could not show adequate cause.

## ANALYSIS

### I. Adequate Cause

Anthony argues that the trial court abused its discretion when it denied his petition to modify the parenting plan. Kimberly counters that the trial court properly denied adequate cause because Anthony had not complied with the parenting plan's requirement that he complete the court-ordered Domestic Violence Perpetrator's Parenting Class.

A trial court may modify a parenting plan upon a showing that conditions have substantially changed and that modification is in the child's best interest. RCW 26.09.260(1). A party moving to modify a parenting plan must submit an affidavit setting forth facts supporting modification. RCW 26.09.270. A court shall deny the motion without a hearing if the affidavit does not establish "adequate cause." *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004). Adequate cause is a factual inquiry that requires the moving party to present evidence sufficient to support a finding on each fact he or she must prove to justify modification. *Lemke*, 120 Wn. App. at 540.

The trial court can better determine whether adequate cause exists to modify a parenting plan than the appellate court. *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003). We will overturn a trial court's adequate cause determination only if the trial court

[2] Skype is a live video chat and long-distance voice calling service. *See i.e.*, *Fuqua v. Fuqua*, 57 So. 3d 534, 537 (La. Ct. App. 2d Cir. 2011).

abuses its discretion. *Jannot*, 149 Wn.2d at 126. A court abuses its discretion when it bases its decision on untenable grounds or reasons. *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). Further, we consider that a child's interest in finality is particularly strong in cases where the child's living arrangements are at stake. *Jannot*, 149 Wn.2d at 128.

Anthony relies in part on *In re Marriage of Flynn*, 94 Wn. App. 185, 972 P.2d 500 (1999). In *Flynn*, Division Three of our court held that the trial court erred by failing to consider a minor modification when the mother petitioned for a major modification. *Flynn*, 94 Wn. App. at 194-95. Here, the trial court denied Anthony's petition because he failed to complete a Domestic Violence Perpetrator's Parenting Class, an express prerequisite to modifying the parenting plan. Thus, *Flynn* does not support Anthony's position. And the trial court did not err in denying Anthony's petition on this basis.

II. Untimely Objection to Relocation

Anthony asserts that the court erred in 2003 by allowing Kimberly to relocate with the child. He seeks an order that Kimberly return to Washington with the child and for violating the statutory relocation requirements. Kimberly counters that she properly filed a notice of relocation in 2002, and Anthony failed to timely object.

The child relocation act (Act), chapter 26.09 RCW, requires a party, who intends to relocate a child, to give notice to every person entitled to residential time or visitation. RCW 26.09.430. A party objecting to the intended relocation of a child must file an objection with the court "within thirty days of receipt of the notice of intended relocation of the child." RCW 26.09.480(1). Following a timely objection by a proper party, the Act provides for a hearing

under RCW 26.09.520. Because Anthony did not timely object, he waived his right to a hearing on the relocation. *See* RCW 26.09.500(1). Accordingly, the trial court did not err in refusing to consider his current objection to the relocation.

III. Untimely Review of Final Parenting Plan

Anthony also argues that the trial court should have reviewed the final parenting plan that the superior court entered in January 2003. Anthony had 30 days to appeal. RAP 5.2(a). He did not and his attempt to re-litigate the parenting plan now, more than seven years after the decision, is untimely, and we reject it.

IV. Appearance of Fairness

Anthony asserts that the trial court demonstrated favoritism toward Kimberly when entering the final parenting plan and that this violates the appearance of fairness doctrine. Again, the argument is untimely because the court entered the parenting plan in January 2003 and Anthony had 30 days thereafter to appeal. RAP 5.2(a).

V. Additional Issues Raised for the First Time on Appeal

Anthony argues multiple additional issues for the first time on appeal including: (1) the trial court previously erred by granting Kimberly custody under the final parenting plan entered on January 10, 2003; (2) child support was unjust; (3) the trial court improperly considered his prior criminal conviction for assault when originally entering the parenting plan; and (4) that his previous criminal conviction was based on an invalid guilty plea. Anthony also argues that Kimberly's counsel falsified court documents, failed to disclose material facts, and should be held in contempt. We generally will not consider issues raised for the first time on appeal. RAP

2.5(a). Moreover, the issues stem from trial court proceedings in 2002-2003, which are now untimely. RAP 5.2(a).

## VI. Reply Brief

In Anthony's reply brief, he raises several arguments that he did not raise before the trial court or in his opening brief. Specifically, Anthony argues for the first time that the trial court acted with malice and inflicted duress on him. He also argues for the first time that the trial court's approval of the parenting plan in 2003 should be vacated rather than modified. But our Rules of Appellate Procedure (RAP) limit a reply brief to responses to issues raised in the respondent's briefs. RAP 10.3(c). An issue raised and argued for the first time in a reply brief is too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We decline to address these arguments.

## VII. Attorney Fees

Kimberly requests fees in compliance with RAP 18.1(b). Kimberly argues that the court should award her fees because Anthony's appeal is frivolous. Anthony also requests attorney fees. We deny Anthony's request because he is not the prevailing party on appeal and he has not devoted a section of his opening brief to the request. RAP 18.1(b).

We can award Kimberly attorney fees if Anthony's appeal is frivolous. RAP 18.9(a). An appeal is frivolous when, considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ; i.e., it is so devoid of merit that no reasonable possibility of reversal exists. *In re Marriage of Meredith*, 148 Wn. App. 887, 906, 201 P.3d 1056 (2009).

Here, most of Anthony's arguments essentially challenge the original parenting plan and the relocation procedure. These arguments are time-barred. Although his request to modify the visitation schedule is not time-barred, it fails because Anthony failed to comply with the express prerequisite to modification, and there is "no debatable issue" as to why the court should have excused him from meeting the condition. We find Anthony's appeal frivolous and award Kimberly attorney fees and costs on appeal.

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 in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.