IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:		**No. 27637-6-III**
CRAIG McDONALD,	)	
Appellant,	)	**Division Three**
and	)	
MEGAN McDONALD,	)	
Respondent.	)	**UNPUBLISHED OPINION**

Siddoway, J. — Craig McDonald appeals (1) the trial court's entry of a permanent parenting plan naming his ex-wife, Megan McDonald, the primary residential parent of the couple's children following her relocation to Oregon and (2) the court's refusal to grant a new trial on the relocation issue after Ms. McDonald lost her contract employment in Oregon. He argues that the trial court failed to weigh and create a record as to the statutory relocation factors required to be considered under RCW 26.09.520. We conclude that Mr. McDonald is barred by the doctrine of invited error from raising this issue on appeal and, in any event, failed to preserve the error. The trial court

otherwise gave due consideration to the residential situation of Mr. and Ms. McDonald and did not abuse her discretion in denying Mr. McDonald's motion for a new trial. For all of these reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Craig and Megan McDonald were married on August 4, 2000 and lived prior to this dissolution action in the Tri-Cities. Together they have a son and a daughter, Brantley and Makenzie. The parties separated in June 2006 and Mr. McDonald petitioned for dissolution in November 2006. In February 2007, a temporary parenting plan was entered naming Ms. McDonald the primary residential parent of the children.

Shortly thereafter, in March 2007, Ms. McDonald filed a notice of intent to relocate, stating her intention to move to Lake Oswego, Oregon. The principal reason she offered for moving was that she had been offered a contract position in Portland with her existing employer, Boston Scientific. The Portland position would involve less travel and more regular hours than her position in the Tri-Cities, thereby allowing her to spend more time with the children. Related reasons offered for the move were the quality of the schools and extracurricular opportunities available to the children in Lake Oswego and that the relocation would not interfere with Mr. McDonald's visitation schedule. Mr. McDonald objected to the relocation. A hearing was held before a court commissioner who granted a temporary order allowing the relocation in early August 2007. Ms.

McDonald signed a contract accepting the position in the Portland area through June 30, 2008.

The parties' dissolution trial took place over several days between January and April 2008. Mr. McDonald's position at trial was that the dissolution trial was not a hearing on permanent relocation under the child relocation act[1]; from that, he argued that Ms. McDonald did not enjoy the statutory presumption permitting relocation provided at RCW 26.09.520. Mr. McDonald made no affirmative argument that the children's continued residence in Oregon would be more detrimental than beneficial taking into consideration the relocation factors provided by RCW 26.09.520. The trial court accepted Mr. McDonald's position in announcing her decision on the parenting and other issues on May 1, 2008 and made no record applying the relocation factors; she applied RCW 26.09.187 instead.[2] The court designated Ms. McDonald as the primary residential parent. The decree of dissolution and permanent parenting plan were entered on

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[1] Laws of 2000, ch. 21, *codified as* RCW 26.09.405-.560.

[2] The court prefaced her decision, and the reasons for it:

> So looking at the factors that I have to look at, and both [Mr. McDonald's lawyer] and [Ms. McDonald's lawyer] have pointed the Court to the factors that I have to look through—and I recognize this is not a relocation trial. And so, the Court believes that the Court is bound to look at the law. And the statute that the Court finds and agrees is appropriate [is RCW] 26.09.187. And really that forces the Court to look at what are the best interests of the child.

Report of Proceedings (RP) (May 1, 2008) at 844-45.

August 1, 2008.

Shortly prior to entry of the final orders, Mr. McDonald discovered that Ms. McDonald's employment contract with Boston Scientific had not been renewed. He also learned that while she had accepted new employment in the Portland area, it was to work for a man with whom she was romantically involved. On the basis of the new information, Mr. McDonald moved for a new trial under CR 59(a)(4) and (9) and for leave to conduct further discovery into whether Ms. McDonald had acted in good faith in seeking primary residential placement in Oregon. The motion was denied.

Mr. McDonald timely appealed. He assigns error to (1) the court's failure to analyze the relocation issue under the 11 factors required to be considered under RCW 26.09.520, (2) the trial court's alleged failure to give proper consideration to Ms. McDonald's relocation in applying the standards of RCW 26.09.187(3), and (3) the trial court's denial of a new trial under CR 59. Br. of Appellant at 4.

ANALYSIS

I

We first address Mr. McDonald's argument that in arriving at the permanent parenting plan the trial court failed to consider, on the record, the statutory child relocation factors provided by RCW 26.09.520. Where an objection is made to a divorcing or divorced parent's relocation out of state with children of the marriage, the

trial court is required to examine these statutory factors on the record and articulate the reasons behind its determination to allow or deny the requested relocation. *Bay v. Jensen*, 147 Wn. App. 641, 650, 196 P.3d 753 (2008) (citing *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P.3d 124 (2004)). A trial court abuses its discretion if it does not examine all of the factors and either enter specific findings of fact on each, or demonstrate by its findings of fact and oral ruling that it did, in fact, consider each factor. *Horner*, 151 Wn.2d at 895-96. More fundamentally, a trial court abuses its discretion when it applies the wrong legal standard. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

In this case, an order permitting temporary relocation was in place at the time of the dissolution trial. Under RCW 26.09.510(2), a court may grant a temporary order authorizing a parent involved in a dissolution proceeding to relocate the residence of a child "pending final hearing" if, after examining the evidence presented at a hearing in which the parties had adequate opportunity to prepare and be heard, it finds in pertinent part that "there is a likelihood that on final hearing the court will approve the intended relocation of the child." RCW 26.09.510(2)(b). In requiring the court to predict the outcome of the final hearing, the statute implicitly requires the court considering temporary relocation to consider the relocation factors set forth in RCW 26.09.520. *See Bay*, 147 Wn. App. at 654. Indeed, the 11th factor to be considered is, "[f]or a temporary

order, the amount of time before a final decision can be made at trial." RCW 26.09.520(11). The superior court commissioner applied the factors and articulated his reasons for approving relocation in entering the temporary order. Read together, however, RCW 26.09.510 and .520 require that the trial court examine all 11 factors and make a record as to its final relocation determination at the time of trial.

Here, as Mr. McDonald points out, not only did the trial court not examine the factors or state her reasons with respect to them on the record, she even stated, in announcing her decision on the permanent parenting plan, that "this is not a relocation trial." RP (May 1, 2008) at 845.

But it is Mr. McDonald who first suggested that RCW 26.09.520 was not the relevant standard in a dissolution trial. While he unquestionably wanted the trial court to revisit the permission given Ms. McDonald to relocate, Mr. McDonald contended that the trial court's decision was governed by RCW 26.09.187(3), not the child relocation act. This was reflected in his trial brief, in which he accused Ms. McDonald's lawyer as "posit[ing] an erroneous position that this matter is set for trial to determine if Megan McDonald shall be allowed to permanently relocate the children," Clerk's Papers (CP) at 399, and in which he framed the issues before the court in pertinent part, as

1. Is the trial to be heard[ ] a matter of dissolution or a hearing on permanent relocation?

2. What is the burden of proof? Best interests of the children? Or[ ] is

> Megan allowed the presumption of being allowed to relocate the children?

CP at 405. Mr. McDonald's brief argued the residential placement issue solely with reference to RCW 26.09.187(3), making no mention of RCW 26.09.520. In presenting evidence, Mr. McDonald called an expert witness to testify to the detrimental effect of relocation, but his questions and the expert's testimony were directed entirely to the generalized "best interests of the children," not to the factors under the relocation act. And when Ms. McDonald objected to the relevance of the expert's testimony and his qualifications, Mr. McDonald's lawyer responded:

> Well, first of all, this is not a relocation trial. It is a trial on divorce, where the presumption doesn't lie. Determined to be in the best interests of the child. And the effects of relocation on a child are certainly one of the factors, particularly factor number four in the factors [presumably RCW 26.09.187(3)(a)(iv)] under the emotional needs and aspects of the children.

RP (Jan. 30, 2008) at 647. Counsel repeated his contention that "[t]his is a dissolution, this is not a relocation hearing" in objecting later to cross-examination of Mr. McDonald's expert. RP (Feb. 1, 2008) at 729. While Mr. McDonald's expert testified to his opinion that relocation was detrimental, he did not speak to the statutory relocation factors at all.

The factors applied in determining whether to approve relocation of children of a marriage differ from the criteria for permanent parenting plans when relocation is not an

issue. The child relocation act incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child by establishing a rebuttable presumption that the relocation of the child will be allowed. *Horner*, 151 Wn.2d at 895. The burden of overcoming that presumption is on the objecting party, who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating person. *Id.* Considering all, it appears that Mr. McDonald made a strategic decision to urge application of RCW 26.09.187(3), with its simpler "best interest of the children" standard, rather than the factors under RCW 26.09.520, "[m]any of [which] refer to the interests and/or circumstances of the relocating person," *Horner*, 151 Wn.2d at 895 n.10. His briefing and objections also reveal a desire to avoid the child relocation act's presumption in favor of Ms. McDonald, as the relocating parent.

The trial court erred in accepting the proposition that the dissolution trial was not "a relocation trial." It was, in part, precisely that, because a final decision had to be made on Ms. McDonald's relocation. But Ms. McDonald argues that the trial court's error was invited by Mr. McDonald, and we agree. The invited error doctrine precludes judicial review of an error where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error. *State v. Phelps*, 113 Wn. App. 347, 353, 57 P.3d 624 (2002) (citing *In re Pers. Restraint of Call*, 144 Wn.2d 315, 326-28, 28 P.3d

709 (2001)). Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)).

Even if we did not regard the error as invited, it was not preserved for appeal. We ordinarily refuse to review a claim of error that was not raised in the trial court. RAP 2.5(a). Mr. McDonald never argued to the trial court that it should apply the 11 relocation factors—this, despite the fact that he bore the burden of proof to overcome the presumption in favor of relocation. The trial court was deprived of the opportunity to address them. We will not send these parties back for a second trial when the application of the factors could have been, but was not, raised below.

II

Mr. McDonald argues that even if he cannot challenge the trial court's failure to examine and announce findings on the 11 relocation factors provided by RCW 26.09.520, the court's failure to explicitly consider the issue of relocation in applying the criteria for a permanent parenting plan provided by RCW 26.09.187(3) is itself reversible error. He relies on *In re Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013 (2001), a case in which a mother's statement that she might move out of

state was held by the court to bear on as many as three of the factors considered under RCW 26.09.187(3) in establishing a permanent parenting plan. *Combs* states:

> Relocation of a child to a different state certainly will affect his or her physical surroundings and thus would be directly relevant to factor (v) [of RCW 26.09.187(3)]. Depending on the circumstances, such a move also may be relevant to other factors, particularly (iii) and (iv). A plan to relocate a child to another state thus would be directly relevant to a determination of the child's best interests.

105 Wn. App. at 175-76. The three parenting plan factors identified by *Combs* to which relocation is, or might be, relevant are:

> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
> (iv) The emotional needs and developmental level of the child; [and]
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.

RCW 26.09.187(3)(a).

Combs involved a dissolution trial conducted prior to the effective date of the child relocation act, hence its application of the parenting plan criteria under RCW 26.09.187 rather than the more specific relocation factors later enacted. To the extent the three factors pointed to in *Combs* do not correspond to those reflected in RCW 26.09.520 or must be weighed against countervailing considerations, *Combs* has been abrogated by RCW 26.09.520. To the extent the parenting plan and relocation criteria are consistent

and were urged by Mr. McDonald to apply, the record reveals that they were considered and applied.

The trial court addressed factor (iii), dealing with each parent's past and potential for future performance of parenting, including whether one parent has taken greater responsibility for performing parenting functions, at some length. RP (May 1, 2008) at 848-49. She found that while both Mr. and Ms. McDonald were good parents, it was undisputed that Ms. McDonald had been the primary care provider to the children, performing most of the parenting functions, since the children's birth. *Id.*

The trial court addressed factor (iv), the emotional needs and developmental level of the children, and found that it would be in their best interests at ages three and five to have both parents involved in their lives, a factor that she did not find weighed in favor of either parent. *Id.* at 849.

The court addressed factor (v), dealing with the children's relationship with other significant adults and their involvement with their physical surroundings, school, and other activities. *Id.* at 850-51. In that connection, she recognized that the relocation to Oregon meant moving away from one set of grandparents in the Tri-Cities (Mr. McDonald's parents), just as the couple's earlier move from Florida to the Tri-Cities had meant moving away from Ms. McDonald's parents in Florida. While recognizing that more travel might be involved, she noted that the children's relationship with both sets of

grandparents would continue. She found that the children were "very involved" in their physical surroundings in Oregon, including preschool, play school, and extracurricular activities; that they had made friends in the Lake Oswego area; that they had a regular pediatrician; and that they lived in an excellent school district. *Id.* at 851.

Mr. McDonald has not demonstrated any error by the trial court. While she did not arrive at the findings or conclusions he hoped she would reach, she explicitly considered those factors that Mr. McDonald urged her to apply.

III

Mr. McDonald's final argument is that the trial court committed reversible error in failing to grant a new trial on the issue of Ms. McDonald's good faith in seeking permission to relocate with the children to Oregon. He relied in moving for a new trial on CR 59(a)(4) and (9), which provide that on the motion of the party aggrieved, a new trial may be granted on all or some of the issues, for the following causes affecting the substantial rights of the moving party:

> (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial; [or]
>
> . . . .
>
> (9) That substantial justice has not been done.

An order denying a motion for a new trial is reviewed for abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

A new trial may be granted on the basis of newly discovered evidence if each of five requirements is satisfied: the evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (quoting *State v. Evans*, 45 Wn. App. 611, 613, 726 P.2d 1009 (1986), *review denied*, 107 Wn.2d 1029 (1987)), *review denied*, 108 Wn.2d 1035 (1987). Evidence presented for the first time in a motion for reconsideration without a showing that the party could not have obtained the evidence earlier does not qualify as newly discovered evidence. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003).

In denying Mr. McDonald's motion for a new trial, the trial court rejected the contention that a challenge to Ms. McDonald's motives and good faith was something new and different, stating, in part:

> [A]s the Court recalls from opening statement, that was always the Petitioner's focus of the trial was the reasons why Miss McDonald moved down to Lake Oswego, from the get-go. From opening statement, Petitioner had concerns with her credibility and alleged bad faith for her rationale in taking the children to Lake Oswego.
>
> So, from this Court's perspective, that was fully covered during the trial. And even given that she lost her job at Boston Scientific on June 1, again the Court does not believe that that would change in any way the Court's decision in this particular case.

RP (Oct. 24, 2008) at 29. The record bears out the trial court's recollection that a central

theme of Mr. McDonald's evidence and cross-examination at trial was a challenge to Ms. McDonald's good faith in relocating to Oregon.

The fact that Ms. McDonald lost her position with Boston Scientific, standing alone, is not probative of bad faith. To begin with, then, Mr. McDonald did not meet his burden of presenting material evidence in support of a new trial, he presented speculation in support of a new trial. He did not demonstrate to the trial court that the evidence of bad faith he hopes to identify could not have been obtained earlier. The trial court made clear in denying the motion that the evidence Mr. McDonald hopes to obtain would not change the result of the trial. In light of these multiple bases on which the trial court was entitled to deny the motion, there was clearly no abuse of discretion.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Sweeney, J.