IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

EARTH FEATHER QUINTERO (now GUARDIPEE, Appellant, and DAVID QUINTERO, SR., Respondent.	)	No. 28899-4-III UNPUBLISHED OPINION

Sweeney, J. — This appeal follows a decision of the Superior Court to award custody of children to their father and impute income to the mother. We conclude that, while the findings necessary to support the court's decision to award custody to the father are not perfect, they are sufficient to support the court's decision to do so. And we conclude that the court's decision to impute income to the mother was required by statute. We therefore affirm the judgment of the trial court.

FACTS

Earth Feather Quintero (now Guardipee) and David Quintero have two sons, Aztec

and Sky. A 2007 parenting plan equally divided their residential time with their sons. The plan provided that, if a parent intended to move out of the Spokane school district, that parent had to give the other parent notice that complied with RCW 26.09.440 (standards for parental relocation). Ms. Guardipee moved the children to Olympia in 2008 without properly notifying Mr. Quintero. Mr. Quintero brought the boys back to Spokane and they have lived with him ever since.

Ms. Guardipee moved to modify the parenting plan. She asked that she be the primary residential parent for Sky and Aztec. Mr. Quintero responded with his own petition that he be designated the primary residential parent. Both represented themselves at trial.

Evidence at Trial

The challenge here on appeal is to the sufficiency of the evidence. We therefore lay out the testimony of the witnesses in some detail.

A guardian ad litem, (GAL), Michael Little, recommended that Mr. Quintero be designated the primary residential parent. Mr. Little said that both parties have been referred to Child Protective Services (CPS) in the past and that some of the referrals were founded. Specifically, he said that CPS concluded that Ms. Guardipee had abused or neglected the children in 2006 when she relapsed on cocaine and alcohol. Mr. Little also

said that Mr. Quintero twice reported to police that he was the victim of domestic violence committed by his former girl friend, Michelle Ortiz.

Mr. Little reported that Mr. Quintero was more involved in the children's education. Mr. Little spoke to Aztec's teacher for the 2008-2009 school year. That teacher reported that he had almost daily contact with Mr. Quintero, but that he had never been contacted by Ms. Guardipee. Sky's special education teacher also reported that Mr. Quintero was very involved, but that she had no contact with Ms. Guardipee. That teacher taught Sky before he went to Olympia and afterwards. She reported that Sky "had lost significant progress" during his absence. Report of Proceedings (RP) at 15. Sky's medical providers told Mr. Little that Ms. Guardipee was very involved "early on." RP at 19.

Mr. Little spoke to both of the children. Sky has significant language delays and was unable to communicate with Mr. Little. Mr. Little observed that Sky appeared to be very happy. Aztec told Mr. Little that he loved both of his parents and liked his mother's apartment. But he also said that he liked his school in Spokane and that he had more friends in Spokane. Ultimately, he said that he wanted to live with his father.

Mr. Little saw that the parents have a hard time working together. He said that there were often problems arranging to pick up and drop off the children. He also said

that the parents did not work together to decide whether Sky needed surgery to improve his speech.

Mr. Little recommended that Mr. Quintero be designated the primary residential parent because he provided a more stable environment for the children. He noted that the children had gone to the same school until Ms. Guardipee "uprooted" them. RP at 23. Mr. Little noted that they are both doing well in school, lived less than a block from the school, and that Mr. Quintero "has been consistently involved with the children." RP at 23.

Ms. Guardipee explained her move to Olympia. She said she was raped in her Spokane home and was afraid. Her bishop and a sexual assault advocate recommended that she move away from Spokane. She testified that she moved based on their advice. Ms. Guardipee also testified about her employment situation. She said that she was receiving public assistance so that she could attend domestic violence and sexual assault recovery groups as well as individual counseling. She also testified that she volunteers at WorkSource and is looking for part-time employment.

Jessica Bankey is Sky's speech language pathologist. She explained Sky's special needs and the parents' involvement. She testified that Sky's ability to communicate is severely delayed. She advised that she and Mr. Quintero had been working to get

Medicaid to approve a Vantage Lite "augmentative communication device" to help Sky communicate. RP at 86-88. She testified that she and Mr. Quintero began the process to get the device in October 2008, but were not able to complete that process because Ms. Guardipee took the children to Olympia.

Sean Dotson, the principal at the children's elementary school, also testified. He said that the children regularly attend school and are making adequate progress. He also testified that Mr. Quintero attends Sky's Individual Education Plan meetings and other school functions.

Mr. Quintero's daughter, Monica Quintero, testified about Mr. Quintero's poor relationships with his adult children. She testified that Mr. Quintero's relationship with two older sons, David Junior and Orlando, was "rocky" and that those sons did not want a relationship with Mr. Quintero. She said that she had not seen Mr. Quintero for 12 years because she also did not want a relationship with him. She explained that she was a troubled teenager when Mr. Quintero introduced her to gangs and drugs. She said that she became addicted to crack cocaine and used drugs with her father. And she said that Mr. Quintero molested her.

Deanna Clark, Ms. Guardipee's mother, testified that Ms. Guardipee is "very attentive," takes good care of the boys, and frequently engages them in family activities.

She testified that Ms. Guardipee has a nice two-bedroom apartment. She also said that Ms. Guardipee is planning to go back to college, works at WorkSource, and is involved in her church. She also testified that the Wahelut School in Olympia had special education, speech therapy, and had a curriculum that teaches Native American culture and tradition.

Ms. Clark testified that Mr. Quintero isolated her from the children and abused drugs. She said that she had not had contact with the children since they returned to Spokane because Mr. Quintero would not allow it. She testified that she had seen Mr. Quintero high on methamphetamine, but did not say when. She said Mr. Quintero and his most recent ex-girlfriend, Michelle Ortiz, drink and argue in front of the children.

Michelle Ortiz testified that she recently dated Mr. Quintero. She testified that Mr. Quintero had never hit her and that Mr. Quintero did not have an anger problem. She testified that Mr. Quintero drinks alcohol two to three times per month.

Parenting Plan Modification Ruling

Before ruling, the court noted that some evidence was troublesome, but also that it only related to events far in the past. It also noted that much of the testimony amounted to allegations that had no connection to the care of Aztec and Sky. The court discounted the credibility of family-member witnesses because "clearly there are strong emotions here, animosities that go back a long time." RP at 206. The court also noted that some

family-member witnesses provided information that was too old to be very relevant. The court found that the testimony of Mr. Little, Mr. Dotson, and Ms. Bankey was unbiased.

The court signed Mr. Quintero's proposed order on modification as presented. In the order, the court found:

> The following facts, supporting the requested modification, have arisen since the decree or plan/schedule . . . :
>
> - G.A.L. recommendation
> - Children's request to remain with their father
>
> Mother has:
>
> - History of drug and alcohol related offenses
> - Founded by CPS twice
> - Found in contempt of court in bad faith
> - Father has no history of any of these concerns
> - The children's physical, mental and emotional health as well as educational needs are best met while with father.

Clerk's Papers (CP) at 169, section 2.2. The court also found:

> The following substantial change has occurred in the circumstances of either party or of the children:
>
> - Relocation of children by Mother across the state without proper notification to father or courts.
> - While with Mother the children missed substantial amounts of school, negatively affecting their educational performance.
> - Mother on several occasions failed to show for scheduled visitations and has not maintained consistent contact with children.
> - Father has the quality time and has proved most involved in the children's schooling.
> - It is in the children's best interests to remain with the father who has established continuity for their needs.

CP at 172, section 2.7. The court ultimately named Mr. Quintero the primary residential parent.

Child Support

After ruling on the motions for modification, the court advised Mr. Quintero that he needed to prepare a proposed order on child support. The court continued the hearing several times to give the parties time to get help with the paperwork.

At the presentment hearing, Ms. Guardipee indicated that she received copies of Mr. Quintero's proposed child support worksheet and order on child support. The worksheet stated that Ms. Guardipee's income was imputed because she "has not worked in more than 9 (nine) years, has no disability to prevent her from working, and she has not presented any evidence that she is a student." CP at 159. The order on child support stated that "Miss Guardipee refuses to provide any financial information, and is voluntarily unemployed therefore her income was imputed." CP at 175. The order imputed full-time minimum wage to Ms. Guardipee. Ms. Guardipee did not object and did not file her own proposed order on child support. After the court signed the order, Ms. Guardipee asked for a deviation. The court denied the motion.

Ms. Guardipee now appeals that order and the modification order.

DISCUSSION

Designation of Mr. Quintero as Primary

Residential Parent

We review a court's decision to modify a parenting plan for abuse of discretion. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). A decision to modify will not be reversed unless the decision is manifestly unreasonable or the court's reasons for modification are untenable. *Id.*

Changes in custody are disruptive to children, so the courts generally opt for continuity and stability. *Id.* A two-step process to modify a parenting plan implements that policy. *In re Marriage of Zigler*, 154 Wn. App. 803, 809, 226 P.3d 202 (2010) (citing RCW 26.09.260, .270). First, the parent seeking modification must file an affidavit showing adequate cause. RCW 26.09.270. If adequate cause is shown the court will then move to the second step: a full hearing. *Zigler*, 154 Wn. App. at 809. There the moving party must show that: (1) facts have arisen since the prior parenting plan, (2) those facts constitute a substantial change in the circumstances of the child or the nonmoving party, (3) the modification is in the best interest of the child, and (4) the child's environment is "detrimental to the child's physical, mental, or emotional health" and the harm caused by changing the environment is outweighed by the benefit. RCW 26.09.260(1), (2)(c).

Sections 2.2 and 2.7 of the court's order address the requirements of RCW

26.09.260(1) and (2)(c). Ms. Guardipee's primary argument here on appeal is that the court's findings in those sections are not supported by the evidence.

Section 2.2

In section 2.2, the court concluded that the children's environment was detrimental to their health and that the benefit of changing their environment outweighed the harm. *See* RCW 26.09.260(2)(c). It included findings that (1) both children wanted to remain with their father; (2) the mother has had two founded CPS referrals; (3) the father had no history of drug, alcohol, or CPS concerns; and (4) Mr. Quintero is best able to meet the children's needs. Ms. Guardipee argues that the first three findings are not supported by substantial evidence. She also argues that the fourth finding amounts to legal error.

Ms. Guardipee first argues that the trial court incorrectly found that the children requested to remain with their father. Br. of Appellant at 17. The record shows that Aztec asked to stay with his father, but that Sky was unable to communicate a request one way or the other. The finding is not then totally supported by the evidence.

Next, Ms. Guardipee argues that the court incorrectly found that CPS investigations twice determined that allegations against her were founded. Br. of

Appellant at 18. The record shows that CPS determined that allegations were founded only once. This was in 2006 when Ms. Guardipee relapsed on cocaine and alcohol. This finding is then also not totally supported by substantial evidence.

Ms. Guardipee next argues that the court's finding that "Father has no history of any of these concerns" was incorrect. Br. of Appellant at 18-19. She contends that the court acknowledged Mr. Quintero's history of problems in its oral ruling, but ignored it in the written findings. She points out that Mr. Little testified regarding both parties' collective history of CPS involvement and that Mr. Quintero's daughter testified that Mr. Quintero had substance abuse problems and was abusive to her.

There was evidence that showed that Mr. Quintero had a history of child abuse and substance abuse. But the court weighed that evidence and passed on the credibility of the witnesses testifying. *See In re Marriage of Pennington*, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000). Mr. Little testified that there were some founded CPS referrals against Mr. Quintero before 2005. And Mr. Quintero's daughter testified that she used drugs with her father and that he molested her at least 12 years ago. However, the court concluded that much of the evidence regarding Mr. Quintero's history related to things in the distant past and came from witnesses who were biased. The court noted that "[t]here's also been an allegation Mr. Quintero has a gambling problem, that he has

unresolved alcohol and drug issues, and most recently that there was, a number of years ago, sexual abuse by Mr. Quintero as to his daughter, Monica," but the court also explained that many of the witnesses had "strong emotions here, animosities that go back a long time" and that the court considered those when weighing the witnesses' credibility. RP at 205-06.

Ms. Guardipee also says that the finding is incorrect because Mr. Quintero has a history of domestic violence. Mr. Little testified that there were some police reports in which Mr. Quintero alleged that he was the victim of domestic violence perpetrated by Ms. Ortiz. However, the finding did not state or imply that Mr. Quintero had a history of domestic violence. And whether Mr. Quintero was the victim of domestic violence does not bear upon whether there is evidence to support this finding.

Finally, Ms. Guardipee challenges the finding that "the children's physical, mental and emotional health as well as educational needs are best met while with father." CP at 169. She contends that this is a conclusion that we must review de novo. And she urges that the conclusion cannot stand because it is based on unsupported findings. Br. of Appellant at 19. The statute requires that "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health" to change a residential schedule. RCW 26.09.260(2)(c). The court's statement touches upon the same subject

matter as the statute—the children's physical, mental, and emotional health—but it does not pass on whether the children's present environment warrants a change in residential schedule. The statement is more akin to a finding.

And ultimately it is supported by the evidence. Evidence at trial showed that Sky had failed to progress when he changed schools and that he appeared to be happy in Mr. Quintero's care. The evidence also showed that Aztec wanted to live with his father in part because he liked his school and had more friends in Spokane.

Substantial evidence supports most of section 2.2. The findings that both children wanted to remain with their father and that the mother has had two founded CPS referrals are not supported. The balance is however sufficient to support the court's conclusions.

Section 2.7

Section 2.7 addresses the requirement that substantial changes have occurred since entry of the prior parenting plan. *See* RCW 26.09.260(1). In section 2.7, the court found the following substantial changes: (1) the mother's relocation across the state without properly notifying Mr. Quintero, (2) the children missing "substantial amounts" of school while with Ms. Guardipee, (3) that the father has more time and has proved to be more involved with the children's schooling, and (4) remaining with Mr. Quintero is in the children's best interest because he "has established continuity for their needs." RP at

172. Ms. Guardipee argues that the first of these findings is not supported.

Ms. Guardipee argues that the finding that "[r]elocation of children by Mother across the state without proper notification to father or courts" is unsupported. Br. of Appellant at 20. She points out that she had a legitimate reason for moving across the state because she had been sexually assaulted in her Spokane home and was afraid. She also points out that Mr. Quintero knew of her plan to relocate and knew where the children went to school in Olympia. The record supports this claim. However, the record also suggests that Ms. Guardipee did not give Mr. Quintero the notice that the parenting plan required. *See* RCW 26.09.440 (stating that a parent must give written notice of a move outside of the school district by personal service or mail and that the notice include the new street address, mailing address, home phone number, a proposed parenting plan with the updated information). This finding is supported by the record.

Next, Ms. Guardipee argues that the finding that "[w]hile with Mother the children missed substantial amounts of school, negatively affecting their educational performance" is not supported by the record. Br. of Appellant at 20 (citing CP at 172). The record shows that the children did have some excused absences due to weather and transportation problems. However, the record does not support that the children missed "substantial amounts of school" or that any absences hurt their academic performance.

Ms. Guardipee next argues the finding that "Father has the quality time and has [proved] most involved in the children's schooling" is unsupported. Br. of Appellant at 21. The testimony at trial indicated that Mr. Quintero was unemployed and therefore had a lot of time to devote to the children. It also supports that Mr. Quintero was at the children's school almost every day and participated in Individual Education Plan meetings and other school events. Finally, the record shows that Ms. Guardipee rarely, if ever, contacted the children's school and removed the children from school with no notice to the school. There is then substantial evidence to support this finding.

Ultimate Decision to Modify

The essential issue here is whether the court's modification order is supported by trial grounds. A court abuses its discretion if it bases a decision on facts that are unsupported by the record. *Zigler*, 154 Wn. App. at 808-09. Three of the court's findings above were unsupported by the record, at least in part. Ms. Guardipee argues that the order should be reversed because the court's order is based in part on these unsupported findings. Br. of Appellant at 22-23. Ms. Guardipee further argues that the court's ultimate finding—that "[i]t is in the children's best interest to remain with their father who has established a continuity for their needs" is an unsupported conclusion of law. Br. of Appellant 21-22. RCW 26.09.260(1) requires that "modification is in the

best interest of the child and is necessary to serve the best interest of the child."

The court may have based its conclusion in part on incorrect findings but its conclusions that modification was necessary and that Mr. Quintero should be the primary residential parent are supported. A change in the "joint custody environment" may warrant modification even though both parents are fit and have good relationships with the children. *In re Marriage of Stern*, 57 Wn. App. 707, 715, 789 P.2d 807 (1990) (concluding that modification was proper when parents' relationship had deteriorated to such an extent that joint custody was not workable and put the child's well being at risk). A change in the joint custodial environment occurs when a parent with equal residential time moves away. *See Stern*, 57 Wn. App. at 715 (citing *In re Marriage of Murphy*, 48 Wn. App. 196, 198-99, 737 P.2d 1319 (1987)). This is because moving can create an unworkable situation that is ultimately detrimental to a school-aged child's welfare. *Murphy*, 48 Wn. App. at 198-99 (concluding that modification was proper when one parent with joint custody moved from Spokane to Portland and exchanging the child weekly would be unworkable when the child started school).

The finding that Ms. Guardipee relocated the children across the state without properly notifying Mr. Quintero supports the court's conclusion that modification was appropriate. There is a presumption that a parenting plan should remain in effect.

McPole, 122 Wn.2d at 610. It is based on the notion that modification is disruptive to the children. *Id.* But here, the modification was necessary to prevent further disrupting these children. The children had attended the same Spokane school for their entire lives. Ms. Guardipee's move to Olympia created an unworkable situation. The children would have to go to part of the school year in Spokane and part of the school year in Olympia because the parents had equal residential time. This fact supports the court's decisions to modify the parenting plan and to designate Mr. Quintero the primary residential parent. So, although the court made several findings that were not supported by the record, its ultimate conclusion was supported by the evidence and was therefore not an abuse of discretion.

Imputing Income

Ms. Guardipee argues that the court erred by imputing income to her because it ignored evidence that she was a student and therefore was not voluntarily unemployed or underemployed. Br. of Appellant at 26. Even assuming that Ms. Guardipee was a student, the court correctly imputed income to Ms. Guardipee because she failed to provide any financial information. *See* RCW 26.19.071(6).

Application of a statute is a question of law that we will review de novo. *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002).

RCW 26.09.175 governs modification of child support orders. "[A] petition for modification of an order of child support shall be heard by the court on affidavits, the petition, answer, and worksheets only" unless a party asks to present testimony. RCW 26.09.175(6), (7). Here, neither party asked to present testimony on child support and neither party submitted affidavits.

RCW 26.19.071 directs how each party's income is determined when the court considers the parents' child support obligations. It requires each party disclose all household income to the court. RCW 26.19.071(1). If a party fails to submit any records of his or her actual earnings, the court "shall" impute a parent's income. RCW 26.19.071(6).

The court correctly imputed income to Ms. Guardipee because she failed to present any evidence of her income. Ms. Guardipee had a duty to provide her financial information to the court, but did not do so. *See* RCW 26.09.175(6). Because she failed to provide her financial information, the statute required that the court impute income to her. RCW 26.09.071(6).

Conclusion

This is, and was, a very difficult emotionally charged family situation. The trial judge had to make close calls about which of these parents would best serve the interests

of these children. He did so and we are loath to start second guessing him here on appeal.

We affirm the judgment of the trial court.

A majority of the panel has determined 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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Sweeney, J.

WE CONCUR:

_____ _____
Korsmo, C.J. Siddoway, J.