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

In re the Marriage of:	)	No. 29653-9-III
LAURA LOUISE DeAGUERO,	)	
Appellant,	)	
v.	)	UNPUBLISHED OPINION
PARIS ANTHONY DeAGUERO,	)	
Respondent.	)	

Brown, J. • Paris A. DeAguero appeals a trial court order, awarding primary residential custody of his son, D.D., to D.D.'s mother, Laura L. DeAguero (now Ruland) and awarding Ms. Ruland $36,434.68 in back spousal maintenance and child support. Mr. DeAguero contends the court erred by improperly exercising its discretion within RCW 26.09.187(3) guidelines in placing D.D. with Ms. Ruland and failing to consider an alleged two year reconciliation when awarding back support. We affirm.

FACTS

The following facts derive mainly from the trial court's findings of fact that are unchallenged and, therefore, verities on appeal.[1] *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Mr. DeAguero and Ms. Ruland were married in 1987 and have four children: Cierra, Marseilles, Brandon, and D.D. The parties' marriage was dissolved in 2005. The court awarded Ms. Ruland $1,086.00 per month in child support and $1,500 per month in spousal maintenance.

Mr. DeAguero claims he and Ms. Ruland reconciled from March 2006 to February 2008, during which time Mr. DeAguero provided for the family and expended $10,000 for Ms. Ruland to have plastic surgery. Ms. Ruland denies this. The court, however, found the parties resided together for three months from December 2007 to February 2008.

On May 27, 2008, Mr. DeAguero petitioned to modify the parenting plan and petitioned to modify child support. Mr. DeAguero did not request modification of maintenance. On February 27, 2009, the court, having found adequate cause, entered a

[1] It is noted that Mr. DeAguero makes a general allegation that the court's findings are not supported by the record (*see* Appellant's Br. at 1), but does not assign specific error to any of the court's 21 findings. This is insufficient under RAP 10.3(g), requiring "a separate assignment of error for each finding of fact a party contends was improperly made . . . with reference to the finding by number."

temporary parenting plan designating Mr. DeAguero as the temporary primary residential parent of the three children still residing at home (Marseilles, Brandon and D.D.) and suspending child support under the former order until further order of the court. Mr. DeAguero resided in Florida.

Trial commenced on Mr. DeAguero's modification requests in November 2010. By this time only Brandon and D.D. were still residing at home. Brandon wanted to attend college on the east coast, so Ms. Ruland deferred to her son's career plans and agreed to allow him to stay with Mr. DeAguero in Florida. Thus, solely D.D.'s placement was to be decided by the court.

After hearing testimony from the parties; the two older siblings; both stepparents; D.D.'s stepfather's siblings; D.D.'s teacher; the school superintendent; the children's guardian ad litem, Rebecca Albright; and the court-appointed psychologist, Clark Ashworth, Ph.D., and after considering numerous reports, declarations, and photographs, the court granted primary residential placement to Ms. Ruland. The court concluded Ms. Ruland had a stronger, more stable relationship with D.D. The court, however, granted Mr. DeAguero liberal visitation.

The court determined Mr. DeAguero's claim he had lived with and supported Ms. Ruland and the children from 2006 to 2008 and claim Ms. Ruland had agreed to forgive his past due child support in exchange for a car had not been proven by clear, cogent and

convincing evidence. The court found Mr. DeAguero did not prove Ms. Ruland's alleged delay in enforcing his child support obligation worked an inequitable detriment to Mr. DeAguero and therefore laches did not apply. The court, then concluded that with applicable credits, Ms. Ruland was entitled to a judgment for past due support and maintenance in the amount of $45,434.68.

Mr. DeAguero successfully requested reconsideration and the court reduced the judgment amount by $9,000. Mr. DeAguero appealed.

ANALYSIS

A. Residential Placement

The issue is whether the court erred in awarding primary residential placement of D.D. to Ms. Ruland. A trial court has broad discretion in making residential placement decisions. *In re Marriage of Possinger*, 105 Wn. App. 326, 335, 19 P.3d 1109 (2001). This broad discretion is due to the trial court's unique opportunity to observe the parties, determine their credibility, and sort out conflicting evidence. *In re Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982). The appellate court is "'extremely reluctant to disturb child placement dispositions.'" *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (quoting *In re Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P.2d 543 (1996), *overruled on other grounds by In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997)).

A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court's decision is based on untenable reasons "if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Littlefield*, 133 Wn.2d at 47.

Placement decisions are based on the child's best interests, as found at the time of trial. RCW 26.09.187(3)(a); *Littlefield*, 133 Wn.2d at 52. The court must consider seven statutory factors when establishing a residential schedule. These include the strength, nature, and stability of the relationship with each parent and whether one parent has taken greater responsibility for the child's daily care; any agreements between the parties; each parent's past performance and future potential as a parent; the child's emotional needs and developmental level; the child's involvement in significant activities; the parents' and child's wishes; and each parent's employment schedule. RCW 26.09.187(3)(a)(i)-(vii). The first factor is given the greatest weight. RCW 26.09.187(3)(a)(vii).

A trial court's decision regarding residential placement must be made with the best interests of the child in mind after considering the factors found in RCW 26.09.187(3). Mr. DeAguero contends the court did not adequately consider RCW 26.09.187(3)(a)(i)-(v) (the strength of the nature of the relationship between D.D. and each parent, the parties' agreements, the parents' potential for future performance of parenting functions,

D.D.'s emotional needs, and D.D.'s relationship with siblings and other significant adults.).

Contrary to Mr. DeAguero's contention, it is evident from the trial court's oral opinion and written findings (verities on appeal) that the court considered the required statutory factors. The court evaluated the nature of the relationship of the children with both parents and found that although Mr. DeAguero had been a primary caretaker for a period of time, both parents substantially participated in the raising D.D. The court noted D.D. was originally placed with Ms. Ruland for the first six years of his life based on a parenting plan entered by default.

The court found Ms. Ruland was more observant than Mr. DeAguero of D.D.'s physical, mental, and emotional needs. Dr. Ashworth observed the mother-child interactions were some of the most positive interactions he had ever seen.

Although the court found that both parties were good parents, it considered D.D.'s siblings and other significant relationships and noted that Mr. DeAguero and his live-in girlfriend, Elaine Davis, have had a strained relationship and that Ms. Davis has four children of her own to care for and would share the family home with D.D. The court found Ms. Ruland's relationship with her husband was close and stable and D.D. would be the sole child in his mother's home. The court found the Rulands were in a better position to provide stable, long-term care for D.D. Accordingly, while both parents are

fit, it is in D.D.'s best interest to be placed with his mother as she is the more stable of the parties.

In view of this record, the court's placement decision was based on tenable grounds. Because the court considered the factors of RCW 26.09.187(3)(a), applied the best interests of the child standard, and considered the objectives of the parenting act, it did not abuse its discretion in awarding primary residential placement of the children to Ms. Ruland.

Next, Mr. DeAguero contends the court overlooked RCW 26.09.184. As discussed previously, RCW 26.09.187(3) enumerates factors to be considered when constructing a parenting plan; RCW 26.09.184, on the other hand, sets forth the objectives of the permanent parenting plan.

Pertinent here, RCW 26.09.184(3) states, "In establishing a permanent parenting plan, the court may consider the cultural heritage and religious beliefs of a child." Mr. DeAguero contends the court did not take into consideration that D.D. is one-fourth Native American and one-fourth Mexican. The word "may" in a statute denotes discretion and is distinct from the word "shall," which indicates a mandatory action. *Pierce v. Yakima County*, 161 Wn. App. 791, 800-01, 251 P.3d 270 (2011). Because the legislature used the word, "may" in RCW 26.09.184(3), the court was not required to take D.D.'s cultural heritage into consideration. Nevertheless, Mr. DeAguero

was granted liberal visitation with D.D., which will provide ample opportunity for Mr. DeAguero to emphasize D.D.'s cultural heritage.

Based on all the evidence, the trial court's decision to place D.D. in Ms. Ruland's primary residential care was not manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Accordingly, we conclude the trial did not err in its placement decision.

B. Support and Maintenance

The issue is whether the trial court erred by abusing its discretion in awarding Ms. Ruland with a judgment for back child support and maintenance. Mr. DeAguero contends the court did not consider he and Ms. Ruland had reconciled during 2006 and 2007, and that under equitable estoppel principles Ms. Ruland waived her right to back child support.

We review a judgment for back support for abuse of discretion. *In re Marriage of Peterson*, 80 Wn. App. 148, 152-53, 906 P.2d 1009 (1995). Abuse of discretion occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Initially, Mr. DeAguero challenges the trial court's 2005 default maintenance award amount. Mr. DeAguero did move to modify the maintenance award; thus, as Ms.

Ruland correctly points out, Mr. DeAguero's argument amounts to an impermissible collateral attack. "To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages." *In re Marriage of Peste*, 1 Wn. App. 19, 25, 459 P.2d 70 (1969). Accordingly, the amount of maintenance ordered in 2005 is not properly before this court.

Turning to the judgment amount, Mr. DeAguero argues the court failed to properly consider that he and Ms. Ruland reconciled during 2006 and 2007 and that the parties agreed that if Mr. DeAguero purchased Ms. Ruland a vehicle she would waive his child support obligation. Mr. DeAguero argues under equitable estoppel principles Ms. Ruland waived her right to back support. However, the court specifically found the parties resided together for solely three months from December 2007 until February 2008. As discussed above, this finding is unchallenged and, thus, a verity on appeal. *Brewer*, 137 Wn.2d at 766. Thus, contrary to Mr. DeAguero's argument the court took the cohabitation into consideration but ultimately found it did not last as long as Mr. DeAguero claimed.

Waiver is an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. *Albice v. Premier Mortg. Servs. of*

Wash., Inc., 174 Wn.2d 560, 569, 276 P.3d 1277 (2012). A parent receiving child support acts as a trustee of the support money for the child and thus, "has no authority to waive the children's rights to that support." *In re Marriage of Pippins*, 46 Wn. App. 805, 808, 732 P.2d 1005 (1987); *see also Hartman v. Smith*, 100 Wn.2d 766, 767, 674 P.2d 176 (1984) (contract to avoid support obligations that have been ordered by the court are invalid). Assuming without deciding the parties made an agreement to waive child support, it would not be invalid. The court nevertheless took all things into consideration in reducing the judgment by $9,000 on Mr. DeAguero's motion for reconsideration. Given all, we conclude tenable grounds support the court's judgment amount.

C. Attorney Fees

Ms. Ruland requests attorney fees on appeal under RCW 26.09.140 and RAP 18.9(a). Under RCW 26.09.140, this court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal, including attorney fees, in addition to statutory costs. This provision gives the court discretion to award attorney fees to either party based on the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay. *In re Marriage of Pennamen*, 135 Wn. App. 790, 807-08, 146 P.3d 466 (2006). Under RAP 18.1(c), the parties have until 10 days prior to the date this appeal is set on the docket to file their declarations. Since the necessary declarations were not timely filed, Ms. Ruland's request is denied.

Turning to RAP 18.9, under this rule this court may impose sanctions for a frivolous appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 217, 194 P.3d 280 (2008) (citing *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998)). Because Mr. DeAguero's appeal is not totally devoid of merit it is not frivolous.

Affirmed.

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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Brown, J.

WE CONCUR:

_____ _____
Korsmo, C.J. Kulik, J.