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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IAN QUINONES, Appellant

and

SUSAN QUINONES, Respondent

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. ARGUMENT	3
A. The trial court’s finding as to factor one regarding the bonds involvement, and stability with parents and others is not supported by substantial evidence.....	3
B. The trial court’s finding as to factor three and whether it would be more detrimental to disrupt the contact between C.Q. and Ms. Quinones than to disrupt contact between C.Q. and Mr. Quinones is erroneous	4
C. The trial court’s finding as to factor five that Ms. Quinones did not act in bad faith in seeking relocation is not supported by substantial evidence.....	5
D. The trial court’s finding as to factor eight that there are sufficient alternative arrangements to foster and continue C.Q.’s relationship with Mr. Quinones is not supported by substantial evidence	6
E. The trial court’s finding as to factor nine relating to alternatives to relocation and the possibility of the objecting party relocating is erroneous.....	8
F. The trial court’s finding as to factor ten and the financial impacts of relocation or its prevention is not supported by substantial evidence	10
G. The trial court should deny Ms. Quinones’ request for attorney’s fees on appeal as the appeal is not frivolous.....	11
III. CONCLUSION	12

TABLE OF AUTHORITIES

Cases

Camer v. Seattle Sch. Dist. No. 1, 52 Wn. App. 531, 540,
762 P.2d 356 (1988).....11

Granville Condo. Homeowners Ass'n v. Kuehner, 177 Wn. App. 543,
557, 312 P.3d 702 (2013) *citing Streater v. White*,
26 Wn. App. 430, 435, 613 P.2d 187 (1980).....11

In re Marriage of Fahey, 164 Wn. App. 42, 262 P.3d 128,
rev. denied, 173 Wn.2d 1019 (2011)12

Other

RAP 18.9.....11

I. STATEMENT OF THE CASE

While Ms. Quinones' brief sets forth some of the relevant history of the case, Mr. Quinones clarifies and elaborates on the restatement presented by Ms. Quinones as it relates to evidence admitted at the relocation trial. The trial court admitted testimony from Scott Adams, Aida Perez, Penny VanVleet, Leann Watzlawick, Ian Quinones, Carol Spiller, and Susan Quinones.

Regarding Ms. Quinones' work with the Department of Social and Health Services (DSHS), DSHS administrator, Scott Adams, testified as to Ms. Quinones' termination from DSHS in November 2013 for "abandonment of position." RP 40, 44-45. While Mr. Adams was not Ms. Quinones' direct supervisor and did not conduct Ms. Quinones' performance evaluations, the record contains multiple performance reviews of Ms. Quinones that identify her and her work as reflecting "good self-management skills, little supervision required, knowledgeable, punctual, and no excessive absences." Exs. 15-17.

As to Carol Spiller, Ms. Quinones' mother, Ms. Quinones' brief points out that Ms. Spiller testified that she would be able to assist with C.Q.'s care if Ms. Quinones moved to Arizona. However, Ms. Quinones' brief fails to include the context of Ms. Spiller's testimony, that is, that she resides an hour and a half from Ms. Quinones' intended residential location of Peoria. RP 231-232.

As for C.Q.'s health situation, Ms. Quinones testified that C.Q. is allergic to cats, dogs, and environmental pollens. RP 182. He is also allergic to peanuts and tree nuts. RP 285. None of the above-named allergens are exclusive to the State of Washington. Ms. Quinones also testified, and medical records reflect, that he has "mild asthma persistent" that is improved with his Flovent maintenance inhaler. RP 285. In fact, a December 3, 2013 report from Northwest Asthma & Allergy Center, P.S. reflects that Flovent was used for C.Q.'s allergies "with good result." Ex. 49.

Ms. Quinones' brief also asserts that "many of Susan's friends also live in Arizona," and that she has "very few connections in Washington." Brief of Respondent, at p. 7. However, the evidence reflects that Ms. Quinones has two friends in Washington with whom she saw approximately once a week or two to four times per month. RP 279. Further, Ms. Quinones testified that she has "zero" family members residing in Peoria. RP 206. Moreover, while it is true that Ms. Quinones testified that she has "extensive networking opportunities" and contacts in Arizona, she failed to provide specific evidence of such, and Ms. Quinones had not resided in Arizona for seven years. RP 283, 305. Ms. Quinones did not attempt to find employment in the social work field in Washington, despite holding a master's degree in social work and her employment by the State of Washington, Department of Social and Health Services since May 2009. RP 183-184. Instead, she chose not to pursue

any work in Washington and be a stay-at-home mother after she abandoned her position with DSHS. RP 201, 309.

II. ARGUMENT

A. The trial court's finding as to factor one regarding the bonds, involvement, and stability with parents and others is not supported by substantial evidence.

The trial court determined that this factor weighed in favor of Ms. Quinones because she was primarily responsible for raising C.Q. while Mr. Quinones was stationed in Korea, deployed to Afghanistan, and took other work related trips. Further, the trial court found that this factor weighed in favor of Ms. Quinones because she was more concerned about and responsible for C.Q.'s health, namely his asthma and allergy therapy. CP 363-64, 377.

The court's findings fail to consider the relative strength, nature, quality, and present extent of involvement and stability of the child's relationship with each parent. The only aspects of C.Q.'s life that the court considered was who was primarily responsible for caring the C.Q.'s health when he was two years old (or younger) and the parents' concerns as to his asthma and allergy therapy. RP 268. There was not substantial evidence as to Ms. Quinones' bond and emotional ties with C.Q. Neither was there sufficient evidence to support the finding that Ms. Quinones was more concerned about and responsible for C.Q.'s health. While it is true

that Mr. Quinones wrote a letter to the doctor to provide his personal input on C.Q.'s allergies, such does not negate his involvement or contribution to the care of C.Q., but rather exemplifies his concern and participation in his child's health. RP 288. As to the child's allergies, the evidence at trial reflect that C.Q.'s "mild asthma persistent" is improved with his Flovent maintenance inhaler. RP 285; Ex. 39. Also, a December 3, 2013 report from Northwest Asthma & Allergy Center, P.S. reflects that Flovent was used for C.Q.'s allergies "with good result." Ex. 49.

Ms. Quinones contends that Mr. Quinones' argument improperly shifts the burden of proof in the relocation analysis. Mr. Quinones does not shift the burden, but rather demonstrates that the trial court's finding is not supported by substantial evidence with respect to the first factor.

B. The trial court's finding as to factor three and whether it would be more detrimental to disrupt the contact between C.Q. and Ms. Quinones than to disrupt contact between C.Q. and Mr. Quinones is erroneous.

The trial court found this factor to weigh in favor of Ms. Quinones, basing its findings on the same facts cited in the analysis of first factor, namely, Ms. Quinones' primary responsibility for attending to C.Q.'s health needs and day-to-day care including his allergy and asthma issues. CP 364-65, 377. The trial court failed to consider the proper criteria in its evaluation of this factor. The court's findings make no reference as to

what the detrimental effect would or would not be should the relocation be granted or denied and fails to reference or explain that it considered such in its finding. As such, the court's finding constitutes an abuse of discretion. Further, the trial court's finding is not supported by substantial evidence for the reasons detailed in Mr. Quinones' Opening Brief.

C. The trial court's finding as to factor five that Ms. Quinones did not act in bad faith in seeking relocation is not supported by substantial evidence.

The trial court found that neither party acted in bad faith. CP 378, 365-66. However, the trial court's finding that Ms. Quinones did not act in bad faith in pursuing relocation is not supported by substantial evidence.

Although Ms. Quinones asserts in her brief that Mr. Quinones' use of her first and second Notices of Intent to Relocate as evidence of bad faith is misplaced, the timing of such, along with her job loss at DSHS and absolutely no effort to search for a job in the state of Washington support a finding that she did not act in good faith in seeking relocation. Further, Ms. Quinones accepted a lower paying job from a friend who owned a barbeque business in Tucson, Arizona located one and a half hours from the city in which she would relocate. RP 271, 306, 309; Ex. 30. With respect to Ms. Quinones' desire to relocate to Arizona due to C.Q.'s allergies, many of his allergies related to items that are present in Arizona and Washington, namely, dogs, cats, peanuts and tree nuts. RP 285. With

regard to his allergies, C.Q. has a “mild” case of persistent asthma, which is adequately maintained and controlled by a Flovent inhaler. RP 285; Ex. 39. In sum, there was not substantial evidence to support that Ms. Quinones acted in good faith in her proposed relocation action.

D. The trial court’s finding as to factor eight that there are sufficient alternative arrangements to foster and continue C.Q.’s relationship with Mr. Quinones is not supported by substantial evidence.

The trial court found that factor eight weighed in favor of relocation. However, there is not substantial evidence in the record to support that there are sufficient alternative arrangements for Mr. Quinones to maintain communication with C.Q. in the event of a relocation to Arizona. While it is true, as Ms. Quinones’ brief asserts, that Mr. Quinones had been geographically separated from C.Q. when he was deployed in Afghanistan for seven months and was able to maintain contact with him via Skype, the record does not reflect, as Ms. Quinones asserts, that Ms. Quinones facilitated such communication.¹ Rather, it was Ms. VanVleet, C.Q.’s daycare provider, who ensured that Mr. Quinones maintained a meaningful, personal relationship through Skype with C.Q. while he was deployed. RP 93, 109. Ms. VanVleet also testified that Ms.

¹ Ms. Quinones’ response brief asserts that “*she made sure* that Ian was able to maintain his relationship with C.Q. through frequent use of Skype”. Brief of Respondent, at p. 1 (emphasis added)(citing to RP 93, 109, 272). However, the record reflects that it was Mr. Quinones and daycare provider, Penny VanVleet who facilitated contact with father and son via Skype.

Quinones admonished her for allowing Mr. Quinones to communicate with C.Q. and restricted by Skype time with C.Q. while he was deployed. RP 93-94.

Further, Guardian Ad Litem, Kelley LeBlanc's initial GAL report reflects her finding and opinion that Ms. Quinones has little respect for Mr. Quinones as a parent and little insight into how "damaging continued obstruction of a normal father-child relationship might prove to be". CP 23. Further, Mr. Quinones testified that it appeared that there was always an excuse as to why Ms. Quinones did not allow him to communicate with their son including work conflicts, dinnertime, bedtime and busy weekend schedules. RP 109. Ms. Quinones' actions in denying communication with Mr. Quinones during his deployment would likely continue if Ms. Quinones and C.Q. relocated to Arizona. RP 112.

There is not substantial evidence to support the trial court's finding that there exist alternative arrangements for Mr. Quinones to maintain communication with C.Q. given Ms. Quinones' history of not supporting facilitating or supporting Skype contact between father and son. Additionally, in-person visitation involves airline travel, which is expensive and burdensome to both parties, and thus affects the feasibility of alternate arrangements to foster and continue the child's relationship with and access to Mr. Quinones. CP 113-123.

Thus, a fair-minded, rational trier of fact could not have found, based on the evidence presented at trial, that there were sufficient alternative arrangements available to foster the relationship between C.Q. and Mr. Quinones. This is not “speculation,” as Ms. Quinones’ brief asserts. The evidence supports that there is not substantial evidence to support this finding.

- E. The trial court’s finding as to factor nine relating to alternatives to relocation and the possibility of the objecting party relocating is erroneous.

The trial court’s findings as to this factor are insufficient as they are contradictory and are not supported by substantial evidence. Specifically, in a portion of its oral ruling, the trial court found in favor of Mr. Quinones as to this factor. RP 9. In another portion of its oral ruling, the trial court found that this factor favored Ms. Quinones. RP 10.

If this Court interprets the trial court’s decision as finding in favor of Ms. Quinones, the trial court erred in its finding as there is not substantial evidence to support this finding. The evidence in the record reflects that Mr. Quinones could not transfer to Arizona given that there were no FAA jobs in that State. RP 142. Further, the record supports that there are alternatives to Ms. Quinones relocating to Arizona including the potential for seeking re-employment with DSHS, based on her history of stellar work for DSHS as well as the testimony of a DSHS supervisor that

he assumed she would still have her job with DSHS but for her abandonment of position, which was a product of her simply not showing up for work. RP 41, 52-53. Further, she could have sought re-employment with DSHS and could have reached out to her business contacts in the State of Washington to seek employment. RP 279, 288-89. Ms. Quinones demonstrated no effort to find a job in the State of Washington as an alternative to relocating.

The record also reflects that C.Q.'s asthma could be sufficiently addressed with his medication and his other allergies could have been managed by avoiding peanuts and tree nuts (whether in Washington or Arizona). Ex. 39. Finally, Ms. Quinones could continue to facilitate her relationship and C.Q.'s relationship with her family members living in Arizona by visiting them as she had done historically. RP 300.

Ms. Quinones' brief further asserts that even if the trial court found this factor weighing in favor of Mr. Quinones, this would only make one out of ten factors that weighed in favor of Mr. Quinones. However, where there are a number of the trial court's findings in favor of Ms. Quinones that are erroneous, reversal and remand is appropriate.

F. The trial court's finding as to factor ten and the financial impacts of relocation or its prevention is not supported by substantial evidence.

The trial court's oral ruling that the financial impact of allowing Ms. Quinones' relocation weighs in her favor in light of her job opportunities is erroneous as it is not supported by substantial evidence.

The trial court relied upon Ms. Quinones' job offer in Arizona versus her lack of a job offer or job in Washington to make its finding that this factor weighed in her favor financially. However, the evidence reflects that no reasonable person would have found such in light of the evidence that Ms. Quinones' historical earnings were greater in Washington than Arizona, RP 247, that there was no evidence of specific "employment opportunities" available to Ms. Quinones in Arizona other than the BrushFire Barbeque where she did not plan to work long-term, RP 218, and where she made no effort whatsoever to secure employment in Washington. RP 201, 309. Further, the "extensive networking opportunities" in Arizona about which Ms. Quinones testified were only vague, undocumented references. RP 282-83, 305.

The trial court and Ms. Quinones' brief also cite to Ms. Quinones' family being available to "assist in caring for the child in Arizona during the day and night" to avoid the use of paid daycare. RP 231. However, the record reflects that the family member available to care for C.Q. is not

located in the city in which Ms. Quinones is relocating, Peoria. Rather, they reside an hour and a half away in Tucson. RP 300.

Based on the foregoing, a reasonable trier of fact would not find that the financial impact of Ms. Quinones' relocation to Arizona favored her. There was not sufficient evidence from which the trial court found that the financial impact of Ms. Quinones' employment in Arizona weighs in favor of relocation.

G. Ms. Quinones should not be awarded attorney's fees because this appeal is not frivolous.

Ms. Quinones requests that Mr. Quinones pay her attorney's fees for bringing a "frivolous" appeal. While RAP 18.9(a) permits the appellate court to award sanctions, which may include a grant of attorney fees and costs when a party brings a frivolous appeal, such award is not appropriate in this case as Mr. Quinones' appeal was not frivolous.

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 was no reasonable possibility of reversal. *Granville Condo. Homeowners Ass'n v. Kuehner*, 177 Wn. App. 543, 557, 312 P.3d 702 (2013), citing *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). Moreover, the appellate court resolves all doubts to whether an appeal is frivolous in favor of the appellant. *Id. citing Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 540, 762 P.2d 356 (1988).

Mr. Quinones is the appellant in this case and as such, receives the benefit of any doubt as to whether this appeal was frivolous weighing in his favor. This appeal was not frivolous as Mr. Quinones is not asking the appellate court to reweigh the evidence and judge credibility as Ms. Quinones asserts. Rather, where the trial court's findings are confusing, contradictory and/or not supported by substantial evidence, there are "debatable issues upon which reasonable minds might differ" and the appeal is not "totally devoid of merit" such that an award of attorney's fees is appropriate.

III. CONCLUSION

Ms. Quinones' brief argues that Mr. Quinones' argument mirrors that of *In re Marriage of Fahey*, 164 Wn. App. 42, 262 P.3d 128 and asks this Court to make credibility determination and weigh evidence on appeal. Mr. Quinones does not ask the appellate court to reweigh the evidence presented at trial or review the trial court's credibility determinations. Mr. Quinones asserts that the trial court's findings of fact are either erroneous because they fail to take into account that which is required by the statute, or are not supported by substantial evidence, that is, evidence sufficient to persuade a fair minded and rational person of the truth of the declared premise.

For the reasons described in Mr. Quinones' Opening Brief and above, many of the trial court findings are erroneous. Thus, the trial court's decision should be reversed and this matter should be remanded to the trial court for entry of findings of fact based upon the evidence presented at trial and a decision as to relocation in accordance with those findings. Additionally, this Court should deny Ms. Quinones' request for attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 30th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2015, counsel for Respondent was served with a true and correct copy of the foregoing Reply Brief of Appellant Brief by email to:

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I arranged for the original of the foregoing document to be filed with the Court of Appeals, Division II, by personal delivery to the following address:

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DATED this 30th day of March, 2015.



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