



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

CANDICE MERRIWEATHER, N/K/A	)	No. ED109385
CANDICE SCHUVAL,	)	
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	14SL-DR03833-04
	)	
NATHON CHACON,	)	Honorable Bruce F. Hilton
	)	
Appellant.	)	Filed: December 28, 2021

Michael E. Gardner, P.J., James M. Dowd, J., and Lisa P. Page, J.

Introduction

Appellant Nathon P. Chacon (Father) appeals the trial court's judgment (1) denying his motion for contempt against Respondent Candice Merriweather, N/K/A Candice Schuval (Mother) for her unauthorized disclosure to third persons of his confidential psychological evaluation; (2) granting Mother's request to relocate with the parties' minor child; (3) denying Father's request to modify the parties' child custody order; and (4) denying his request for attorney's fees. We affirm.

Background

The parties were married on October 28, 2011 in San Diego, California and had one child together, a son (Son), who is now 9 years old. The parties' marriage was dissolved via a consent judgment on August 27, 2014. Regarding custody of Son, the dissolution judgment established

joint physical custody but granted Mother *sole legal custody* and designated her the residential parent. The original judgment was modified three times; February 26, 2016, February 23, 2017, and December 17, 2018. The most recent modification maintained Mother as the residential parent with sole legal custody and joint physical custody with Father receiving reasonable visitation including alternate weekends, weekday visits, a holiday schedule, and vacation weeks during the summer.

This litigation commenced on September 17, 2019, when Father filed a motion for civil contempt alleging that Mother violated the court's order by disclosing Father's confidential psychological evaluation to one or more third parties. On April 10, 2020, while Father's motion for contempt was pending, Mother notified Father pursuant to section 452.377.2¹ of her intent to relocate to a new residence approximately five miles from her then-current residence.² Mother's notice included the assertion that the relocation would not affect the parties' visitation schedule. After Father learned that the proposed relocation would require Son to transfer to a different

¹ All statutory references are to RSMo 2020 unless otherwise indicated.

² "Notice of a proposed relocation of the residence of the child, or any party entitled to custody or visitation of the child, shall be given in writing by certified mail, return receipt requested, to any party with custody or visitation rights. Absent exigent circumstances as determined by a court with jurisdiction, written notice shall be provided at least sixty days in advance of the proposed relocation. The notice of the proposed relocation shall include the following information:

- (1) The intended new residence, including the specific address and mailing address, if known, and if not known, the city;
 - (2) The home telephone number of the new residence, if known;
 - (3) The date of the intended move or proposed relocation;
 - (4) A brief statement of the specific reasons for the proposed relocation of a child, if applicable;
 - (5) A proposal for a revised schedule of custody or visitation with the child, if applicable;
- and
- (6) The other party's right, if that party is a parent, to file a motion, pursuant to this section, seeking an order to prevent the relocation and an accompanying affidavit setting forth the specific good-faith factual basis for opposing the relocation within thirty days of receipt of the notice."

elementary school in the same school district, Father timely objected on that basis to the proposed relocation pursuant to section 452.377.8³ and also on the grounds that the relocation was not in Son's best interests.

Before the trial court heard and decided the relocation issue, Mother effectuated the relocation with Son to the new residence and enrolled Son in the new school. As a result, on July 15, 2020, Father amended his opposition motion to include the allegation that Mother's violation of the relocation statute in this regard warranted modification of custody. Father requested the trial court change the custody order to joint legal and joint physical custody of Son and that Father be designated the residential parent.

On July 28, 2020, a hearing was held on Father's motion for civil contempt and his opposition to Mother's relocation. Evidence was adduced by both parties relating to the issues raised by Father's contempt motion and the relocation question including whether the relocation was in Son's best interest and whether it was proposed in good faith. On September 2, 2020, the trial court entered its judgment in favor of Mother on both matters. The court's judgment reiterated that joint custody would continue and Mother would remain Son's residential parent and sole legal custodian. Father now appeals.

Father brings four points of error. First, he argues the trial court abused its discretion in denying his motion in opposition to the relocation because despite Father's request, the trial court

³ Section 452.377.8 provides that "[t]he residence of the child may be relocated sixty days after providing notice, as required by this section, unless a parent files a motion seeking an order to prevent the relocation within thirty days after receipt of such notice. Such motion shall be accompanied by an affidavit setting forth the specific good-faith factual basis supporting a prohibition of the relocation. The person seeking relocation shall file a response to the motion within fourteen days, unless extended by the court for good cause, and include a counter-affidavit setting forth the facts in support of the relocation as well as a proposed revised parenting plan for the child."

failed to issue written findings addressing the statutory factors relevant to the issue of Son's best interest as required by section 452.375.2. Second, Father argues the trial court abused its discretion in granting Mother's relocation because the proposed relocation was not made in good faith and Mother, as the party seeking relocation, did not meet her burden to show it was in Son's best interest. Third, with regard to the disclosure of Father's confidential psychological report, Father argues the trial court erred in denying his contempt motion because the record showed Mother disclosed the report to at least two third parties. And finally, Father argues the trial court abused its discretion by denying his request for attorney's fees which he claims were warranted in light of Mother's violation of the relocation statute by relocating Son without Father's consent and before the trial court considered and ruled on her request.

Standard of Review

"In a court-tried case, we will uphold the trial court's judgment as long as it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." *Courtney v. Courtney*, 550 S.W.3d 522, 525–26 (Mo. App. E.D. 2017) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). "We defer to the trial court's determinations of credibility and view all facts and any inferences drawn therefrom in the light most favorable to the judgment." *Id.* These standards apply to this Court's review of a trial court's judgment denying or granting a motion to relocate a minor child. *Henry v. Henry*, 353 S.W.3d 368, 371 (Mo. App. S.D. 2011) (citing *Mantonya v. Mantonya*, 311 S.W.3d 392, 395 (Mo. App. W.D. 2010)).

Discussion

I. & II.

Father's first two points address the trial court's decision to allow Mother to relocate with Son. His first point asserts the trial court erred by failing to issue detailed findings of fact on the eight best interest factors set forth in section 452.375. His second point claims as erroneous the trial court's findings that the relocation was in Son's best interest and was made in good faith. We address them together and deny both points because we find that the trial court's factual findings readily support that the relocation is in Son's best interest and was brought in good faith and the court's detailed findings comply with the requirements of Missouri law in terms of their specificity and their treatment of the relevant factors set forth in section 452.375.2.

The relocation of a minor child is governed by section 452.377. Under the statute, the trial court must determine whether the proposed relocation is in the best interests of the child, whether the relocation proposal is made in good faith, and, if the relocation is permitted, whether the relocation complies with the requirements of section 452.377.11.⁴ *Schlotman v. Costa*, 193 S.W.3d 430, 433 (Mo. App. W.D. 2006) (citing *Stowe v. Spence*, 41 S.W.3d 468, 469 (Mo. banc 2001); *see also* section 452.377.10. When it comes to determining the best interests of the child in a relocation case, "sections 452.377 and 452.375 ... are part of a single statutory scheme and must be read together." *Pasternak v. Pasternak*, 467 S.W.3d 264, 269 (Mo. banc 2015) (citing *Abernathy v. Meier*, 45 S.W.3d 917, 924 (Mo. App. E.D. 2001)).

⁴ Section 452.377.11 provides that if relocation is permitted, the court shall address how the child's frequent, continuing, and meaningful contact with non-relocating party will be maintained in light of the relocation. Inasmuch as Son's relocation was local and actually brought Son's residence closer to Father's, the matters raised by section 452.377.11 are irrelevant to this case.

The failure of a trial court to make findings on the controverted material fact issues specified by the party mandates reversal only when the trial court's failure to issue requested findings materially interferes with appellate review. *Valentine v. Valentine*, 400 S.W.3d 14, 20 (Mo. App. E.D. 2013). We begin with the presumption that the trial court made its determinations motivated by and in accordance with the children's best interests after a thorough review of all of the evidence. *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 89 (Mo. App. W.D. 2006) (citing *Dunkle v. Dunkle*, 158 S.W.3d 823, 832–833 (Mo. App. E.D. 2005)). We will only reverse a decision if we are firmly convinced the welfare and best interest of the child require otherwise. *Id.*

We acknowledge at the outset of our analysis of Father's first two points our agreement with the initial premise of Father's argument – that in a relocation-of-a-minor case, when the trial court performs its best interests analysis required by section 452.377.10, the trial court is properly guided by the factors set forth in section 452.375.2 which govern the best interests analysis in custody determinations.⁵ See *O'Brien v. O'Brien*, 611 S.W.3d 522, 252 (Mo. App.

⁵ Section 452.375.2's eight factors are substantively as follows:

- (1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
- (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
- (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;
- (5) The child's adjustment to the child's home, school, and community;
- (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved....
- (7) The intention of either parent to relocate the principal residence of the child; and
- (8) The wishes of a child as to the child's custodian...

W.D. 2020) (“Although section 452.375.2 does not expressly govern the best interest inquiry in relocation determinations, it is proper for a trial court to consider the factors articulated in section 452.375.2 because those factors are equally relevant to the best interest inquiry in section 452.377.”)

We disagree, however, with Father's argument that the trial court's factual findings here documenting its best interest analysis failed to comply with the spirit and letter of sections 452.377.10 and 452.375.2. Simply put, whether a trial court is analyzing a minor's best interests in the context of child custody or in the context of relocation, Missouri law requires only that the trial court address all *relevant* factors and enter written findings as to those. Section 452.375.2; *A.A.B. v. A.D.L.*, 572 S.W.3d 562, 568 (Mo. App. E.D. 2019) (“The trial court is not required to make a detailed finding on each factor listed in section 452.375.2, but only to make sufficient findings on the factors relevant to the case.”).

Our review of the transcript and of the factual findings contained in the trial court's judgment demonstrates that the trial court addressed *all* of the section 452.375.2 factors that were raised in the evidence and *all* that were relevant to whether the Son's best interest was served by the relocation. And, importantly, the court addressed *all* the matters raised by Father. In this regard, the court adhered fully to the task Missouri law imposes on trial courts in these types of cases – not to conduct a mechanical-like analysis of each and every factor set forth in section 452.375.2, including the irrelevant ones, but instead to limit its analysis to the relevant factors. *See, e.g., Dunkle*, 158 S.W.3d at 833 (for the assertion that trial courts are not required to compile a “complete laundry list” of the statutory factors).

We find to be robust the trial court's best interest analysis in this case. Addressing the fifth factor – Son's “adjustment to the new home, school, and community” – which was Father's

chief concern, the court provided detailed findings regarding the new school's impact on Son. The court found that the new school had a gifted program, speech therapy services, and after-school activities that were comparable to those offered at Son's then-current school; that the overall difference between the two schools was negligible; that several other children lived in Son's new neighborhood with whom he could ride to school on the bus; and that the GAL recommended the relocation and change of schools.

The court's findings also show it considered the first factor – the wishes of both parents – when it noted Father's admission that he “did not really care” if Mother relocated and that his primary concern was that Son remain at his then-current school even after the move by way of a special waiver. At the same time, the court considered Mother's wish that Son reside in a more spacious and permanent residence which the new home represented.

On the good faith issue, there was no evidence whatsoever that Mother's proposed relocation was done in bad faith. *Courtney*, 458 S.W.3d at 475 (quoting *Mantonya*, 311 S.W.3d at 399 (“When a trial court considers whether a parent's desire to relocate a child is in ‘good faith,’ the question is whether ‘the relocating parent's motive or purpose for relocating [is] something other than to disrupt or deprive the non-relocating parent of contact with the children.”) Here, the court found Mother was seeking for her and Son a larger and more permanent home which was actually closer to Father's residence. This evidence alone, in the absence of any proof that Mother's action was designed to disrupt or deprive Father of contact with Son, constitutes substantial evidence supporting the finding of good faith on the part of Mother.

We conclude on this record, therefore, that the trial court addressed all the factors that were disputed and relevant and that were of concern to Father. Frankly, this relatively short, 5-

mile relocation that brought Son *closer* to Father's residence largely rendered irrelevant the second, third, and fourth factors of section 452.375.2. There was no evidence that the relocation would affect the visitation schedule or otherwise tend to interrupt Son's relationship with each parent or his ability to interact and have frequent, continuing, and meaningful contact with them. While the court found that the parties are unable to effectively communicate with each other regarding what is in Son's best interest, there is no evidence that the relocation was likely to change that sad circumstance for the better or for the worse.

Before we proceed to Father's third point, we address Father's assertion that the trial court erred by failing to modify the child custody arrangements. While this argument was not properly presented in Father's brief because it was multifariously slotted into the argument portion of his second point in violation of Rule 84.04, we have decided to address it.⁶

By way of background, Father's custody modification request was based on his allegation that by relocating without Father's consent and before the trial court had considered and ruled on the matter, Mother violated section 452.377.14 which provides that "[v]iolation of the provisions of this section or a court order under this section may be deemed a change of circumstances under section 452.410, allowing the court modify the prior custody decree...". We also note that section 452.377.12(6) provides that the "failure to notify a party of a relocation of the child may be considered in a proceeding to modify custody or visitation with the child."

⁶ Another multifarious portion of Father's argument is his claim that the trial court misapplied the law by shifting the burden of proof on the relocation to Father. We are unpersuaded and find nothing in the record to suggest such a burden shift. The record shows that the trial court engaged in an appropriate and balanced assessment of the evidence to determine not just the impact of the school transfer, but of the relocation in general and determined that Son attending a new school was a factor in favor of relocation. Therefore, we find ample evidence on this record supporting the trial court's conclusion, and will not second guess that determination. *See Pasternak*, 467 S.W.3d at 270; *Stuart v. Ford*, 292 S.W.3d 508, 513-514 (Mo. App. S.D. 2011).

Mother's premature relocation violated section 452.377. *Henry v. Henry*, 353 S.W.3d at 373. But that violation "does not require automatic modification of custody in favor of Father; rather it merely allows for such modification if the trial court finds that to be in the best interests of the child." *Id.* Here, we find that the court fully considered Father's request to alter the child custody arrangements and declined to do so. The trial court considered Mother's violation and found that Father was not prejudiced as a result. We find no reason on the record to second guess that determination, nor will we retry the case or reweigh the evidence. *See Pasternak*, 467 S.W.3d at 270; *Stuart*, 292 S.W.3d at 514. *See also Dunkle*, 158 S.W.3d at 833; *Brethorst v. Brethorst*, 50 S.W.3d 864, 867 (Mo. App. E.D. 2001).

Points one and two are denied.

III.

In his third point, Father claims that the trial court's judgment overruling his contempt motion based on Mother's alleged contumacious dissemination of Father's confidential psychological evaluation to third persons was against the weight of the evidence. We disagree.

Civil contempt is intended to benefit a party for whom an order, judgment, or decree was entered, and its purpose is to coerce compliance with the relief granted. *Stuart*, 292 S.W.3d at 513 (Mo. App. S.D. 2011) (citing *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994)). To warrant a finding of civil contempt, the record must show that (1) the movant met the burden of proving a prima facie case for contempt, and (2) the alleged contemnor then failed to meet their burden of proving their conduct was not intentional and contumacious. *See id.* at 513-514. A movant alleging contempt establishes a prima facie case for civil contempt when they prove: (1) the contemnor's obligation to perform an action as required by the decree; and (2) the contemnor's failure to meet the obligation. *Walters v.*

Walters, 181 S.W.3d 135,138 (Mo. App. W.D. 2005). Essentially, the movant bears the burden of demonstrating a violation of the court's orders. *A.G. v. R.M.D.*, 730 S.W.2d 543, 546 (Mo. banc 1987). Then the burden shifts to the alleged contemnor who must prove their non-compliance was not intentionally and contumaciously brought about. *Id.*

The trial court's ruling in a civil contempt case is a discretionary ruling and is therefore presumed correct; it will not be disturbed by the reviewing appellate court unless the ruling was a clear abuse of discretion. *Watkins v. Watkins*, 839 S.W.2d 745, 747 (Mo. App. E.D. 1992). The party challenging the trial court's finding bears the burden of showing an abuse of discretion, and if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992).

We are unable to convict the trial court of an abuse of discretion here. In his motion for contempt, Father alleged that Rick Saddler, Father's current wife's ex-husband, obtained from Mother information found in Father's psychological evaluation, which only Mother had access to as it was under seal by court order, and employed that confidential information to seek custody modification as to Father's current wife's children.

Father's assertion relied exclusively on Saddler's testimony which the court rejected as not credible because his testimony here that Mother provided him with Father's confidential psychological report was *directly* contradicted by his prior testimony given during a previous hearing in this matter in October 2018. The court also decided to disregard Saddler's testimony because he had been twice convicted of fraud.

Father also claimed that Mother, in contempt of the court's order, provided the report to another person, Martha Dietrich, who was then an employee of the St. Louis County Children's

Division. Dietrich testified that she received an envelope from Mother which she understood contained some portion of Father's psychological evaluation, but that she did not open the envelope or otherwise see its contents.

And while the trial court made no mention of Dietrich or her testimony in its judgment, it was the court's prerogative not to do so. In its capacity as the trier of fact, judging credibility and assigning weight and value to evidence and testimony are matters for the trial court, which is free to believe none, part, or all of the testimony of any witnesses; and we must give those determinations due regard. *Pasternak*, 467 S.W.3d at 270; *Stuart*, 292 S.W.3d at 514. Simply put, the trial court was free to accept all or none of the evidence Father presented regarding Mother's dissemination of his evaluation, and this Court will not second guess those determinations particularly given Dietrich's testimony that she did not see any part of Father's evaluation. *See id.* Therefore, Father has failed to demonstrate that the trial court abused its discretion by denying Father's contempt motion. Point three is denied.

IV.

In his final point on appeal, Father argues that the trial court abused its discretion by failing to award him attorney's fees in light of Mother's violation of section 452.377's notice requirements when she effectuated her relocation with Son without Father's consent or the trial court's approval. He argues that under section 452.355 and section 452.377.6, Mother's actions entitled Father to an award of attorney's fees. We disagree.

Missouri courts apply the "American Rule," which requires that litigants bear the expense of their own attorney's fees. *Cullison v. Thiessen*, 51 S.W.3d 508, 513 (Mo. App. W.D. 2001). In accordance with this rule, parties in a domestic relations case are generally responsible for paying their own attorney's fees. *Fleming v. Fleming*, 446 S.W.3d 677 (Mo. App. W.D. 2014).

One exception to the “American Rule” is when a statute allows for the recovery of attorney’s fees. *Id.*; *Cullison*, 51 S.W.3d at 513.

Here, Father bases his attorney's fee claim on section 452.377.6(3) which provides that “[t]he court shall consider a failure to provide notice of a proposed relocation of a child as ... [s]ufficient cause to order the party seeking to relocate the child to pay reasonable expenses and attorney’s fees incurred by the party objecting to the relocation.” Section 452.377.6(3). Father essentially argues that the attorney's fees language in section 452.377.6(3) is mandatory based on the language “[t]he court *shall consider* a failure to provide notice of a proposed relocation of a child as ... *sufficient cause to order* ... reasonable expenses and attorney's fees...” We disagree.

We agree with Father that by relocating without Father’s consent and before the court had ruled on her proposed relocation request, Mother violated section 452.377 which triggered Father’s right to seek attorney’s fees pursuant to section 452.377.6. *See Fleming*, 446 S.W.3d at 682; *Henry*, 353 S.W.3d at 373. But in our judgment, attorney’s fees in this context are not mandatory and remain within the trial court's discretion and we are unpersuaded that section 452.377.6(3) mandates otherwise.

It is well established that the most basic and seminal rule of statutory construction directs this Court to determine the true intent of the legislature giving reasonable interpretation in light of the legislative objective. *Wallace v. Wallace*, 269 S.W.3d 469, 482 (Mo. App. E.D. 2008) (citing *ACME Royalty Co. v. Dir. of Revenue*, 96 S.W.3d 72, 74 (Mo. banc 2002)). Therefore, our duty is to determine legislative intent, considering the plain and ordinary meaning of the language used, and to give effect to that intent. *Martin v. Obiakor*, 992 S.W.3d 201, 203 (Mo. App. E.D. 1999) (citing *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 446 (Mo. banc 1998)). When the language of the statute is clear, we must give effect to the language as written. *Id.*

The dicta of section 452.377.6 is as follows:

“The court shall consider a failure to provide notice of a proposed relocation of a child as:

- (1) A factor in determining whether custody and visitation should be modified;
- (2) A basis for ordering the return of the child if the relocation occurs without notice; and
- (3) Sufficient cause to order the party seeking to relocate the child to pay reasonable expenses and attorneys’ fees incurred by the party objecting to the relocation.”

A fair reading of the language chosen by the legislature demonstrates the non-mandatory nature of this provision. First, the attorney's fees provision is one of three subparts. The other two, one dealing with the custody modification implications of the violation of section 452.377, and the other with whether the relocating party should be ordered to return with the child, are manifestly not mandatory but are up to the trial court's discretion. Moreover, we find the legislature's use of the word "consider" to be consistent with its legislative intent that the trial court exercise its discretion in deciding whether attorney's fees are warranted. We conclude therefore that an award of attorney’s fees under section 452.377.6 is discretionary.

In order to successfully challenge the trial court’s refusal to grant him attorney’s fees, Father must show that by doing so the trial court abused its discretion in a manner that was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice. *Cullison*, 51 S.W.3d at 513. The burden is a high one as trial courts are considered experts on the necessity, reasonableness, and value of attorney’s fees and, as such, can set the

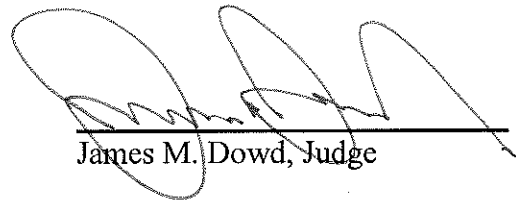
amount of attorney's fees award, if any, without the aid of evidence and that award is presumed correct. *Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980).

Based on our review of the record, Father has failed to show the trial court abused its discretion by denying his request for attorney's fees.

Point four is denied.

Conclusion

For the reasons set forth above, we affirm the judgment of the trial court.



James M. Dowd, Judge

Michael E. Gardner, P.J., and
Lisa P. Page, J., concur.