NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IN RE THE MARRIAGE OF:

TAMMY EVERSOLE,

Petitioner/Appellee,

vs.

MATT TORRES,

Respondent/Appellant.

Case No. 119,165

APPEAL FROM THE DISTRICT COURT OF
COMANCHE COUNTY, OKLAHOMA

HONORABLE GERALD F. NEUWIRTH, TRIAL JUDGE

AFFIRMED

George H. Brown
BROWN & GOULD, PLLC
Oklahoma City, Oklahoma

For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The Respondent/Appellant, Matt Torres, former husband of the Petitioner/Appellee, Tammy Eversole, and custodial parent of their minor child, appeals the district court's denial of Torres's request to relocate with the child to Florida. On review, we determine that the trial court's determination that moving the child to Florida was against his best interests was not clearly contrary to the weight of the evidence. Thus, the ruling of the district court is affirmed.

BACKGROUND

Torres and Eversole were married in 2010 and had one child, born in August 2012. They were then divorced in 2018. Pursuant to an agreed divorce decree, Torres was awarded primary custody of the child while Eversole maintained visitation rights. In July 2019, Torres filed a motion to modify Eversole's visitation rights to the child due to various allegations related to Eversole's alleged alcohol abuse. Eversole responded and filed a motion to modify custody to make her the legal custodian.

During this same time, Torres was unemployed and looking for work. Job opportunities were scarce due to the onset of the Covid-19 pandemic. On March 31, 2020, Torres noticed Eversole of his intent to relocate with the child to Florida to pursue employment opportunities. Eversole made no written objection to this request, but did object to the move at the hearing the court eventually held on the motions to modify.[1]

That hearing was held in July 2020. As related to the request to relocate, Torres testified that he was a disabled veteran who had worked as an instructor at Fort Sill. Torres explained that his contract was released in early 2019 and that he unsuccessfully applied to work for the companies that picked up the released contract. By early 2020, Torres explained, all hiring was frozen as a response to the pandemic. Torres believed, though was uncertain, that MacDill Air Force Base in Tampa, Florida, might have positions available in line with

[1] Eversole did reference the notice of relocation in her own motion to modify seeking custody, which was filed on May 19, 2020.

Torres's experience and skill set. He also testified that his father and two paternal uncles lived in Florida, though exactly where was not clear from the record.

Eversole testified against the child's relocation, stating that it would prejudice her visitation rights, her relationship with the child, as well as the child's relationship with the child's half-sibling. Eversole maintained that the children saw themselves as siblings and shared a close bond.

The trial court denied Torres's request to relocate the child to Florida.[2] The court specifically found that it was not in the child's best interests to be separated from his mother and sibling and to be relocated "to a foreign place where he really doesn't have a lot of relatives." Torres appealed the trial court's relocation denial.[3]

STANDARD OF REVIEW

In determining custody matters, Oklahoma appellate courts "will not disturb the trial court's judgment regarding custody absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence." *Scocos v. Scocos*, 2016 OK 36, ¶ 5, 369 P.3d 1068 (quoting *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863). Discretion is not a "hard and fast" rule, and this court may consider "what is right and equitable under the

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[2] The trial court ordered that custody remain with Torres and that Eversole's visitation be limited to once per week, with no overnights, until Eversole completed an outpatient course related to her alcohol consumption and parenting classes. Those orders were not appealed.

[3] Eversole did not file an answer brief. However, "[r]eversal is never automatic on a party's failure to file an answer brief. When the record presented fails to support the error alleged in the brief of the party who lost below, the decision to be reviewed cannot be disturbed. It is presumed correct until the contrary is shown by the record." *Enochs v. Martin Properties, Inc.*, 1997 OK 132, ¶6, 954 P.2d 124, 127.

circumstances." *Matter of Termination of Parental Rights of Schultz*, 2017 OK 5, ¶ 5, 389 P.3d 322.

ANALYSIS

In Oklahoma, the custodial parent has the right to change their child's residence, but the trial court may intervene to protect the rights and welfare of the child. 43 O.S.2011, § 112.2A. This statute gives the presumptive right to relocate to the custodial parent. *Scocos v. Scocos*, 2016 OK 36, ¶ 6, 369 P.3d 1068; *Kaiser v. Kaiser*, 2001 OK 30, ¶ 18, 23 P.3d 278. The Supreme Court has held that a custodial parent may relocate if it is determined that the custodial parent is fit to parent, and that the child will not be "placed at risk of specific and real harm by reason of living with the custodial parent in the new location." *Hart v. Bertsch*, 2013 OK CIV APP 52, ¶ 12, 306 P.3d 585 (quoting *Kaiser*, 2001 OK 30, ¶ 33, 23 P.3d 278).

Eversole, as someone with court-ordered visitation rights, had thirty days to "file a proceeding" in an effort to block the proposed relocation. 43 O.S.2011, § 112.3(G)(2). Eversole filed no such objection or proceeding. As such, pursuant to subsection (G)(1), Torres was entitled to relocate with the child thirty days after Eversole received the notice of relocation. *Id.* § 112.3(G)(1) ("The person entitled to custody of a child *may relocate* the principal residence of a child after providing notice as provided by this section *unless* a parent entitled to notice files a proceeding seeking a temporary or permanent order to prevent the relocation within thirty (30) days after receipt of the notice." (emphasis supplied)).

However, instead of exercising this statutory right, Torres submitted the relocation question to be heard along with the cross-motions to modify. Eversole objected to the relocation at the hearing, and the question was submitted for the court's consideration. At no point during the hearing or after did Torres argue, as he does on appeal, that the trial court was required to allow the relocation due to Eversole's failure to file a written objection. We thus decline to consider this proposition of error further. *Jernigan v. Jernigan*, 2006 OK 22, ¶26, 138 P.3d 539, 548. ("Matters not first presented to the trial court are generally excluded from consideration by an appellate forum.")

Torres also argues that the evidence was insufficient to meet the two-step process of determining whether relocation should be permitted. We disagree.

In order to relocate a child, the custodial parent first has the burden of showing that the proposed relocation is made in good faith. 43 O.S.2011, § 112.3(K). If the custodial parent demonstrates a good faith reason for relocation, the burden shifts to the noncustodial parent to show that the move is not in the child's best interests. *Id.*; *Scocos*, 2016 OK 36, ¶ 6, 369 P.3d 1068; *Mahmoodjanloo v. Mahmoodjanloo*, 2007 OK 32, ¶ 12, 160 P.3d 951.

Because the district court proceeded to determine whether the move would be in the best interest of the child, we will presume that the trial court believed the evidence was sufficient to show that the move was made in good faith.[4]

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[4] The trial judge's own colloquy with Torres and other evidence leaves some doubt on this question. When the trial judge specifically asked Torres about his job prospects in Florida, Torres was forced to reply that, though he had "a few [he had] applied to," he had nothing concrete lined up. Further, when asked whether the Air Force base he hoped to work at in Florida had a similar hiring freeze as Ft. Sill's, he replied, "Not that I'm aware of."

Eversole testified that she had a bond with her son, wished to see her son through a restored visitation schedule, and agreed to take the parenting classes ordered by the court. Eversole also testified that her other child had developed a genuine sibling bond with the child at issue, and that the two children saw each other as siblings. On these grounds, the district court ruled that it was against the child's best interests to be moved to Florida. Based on this testimony, we cannot find the trial court's finding that the child's best interest would be thwarted by moving to Florida was against the clear weight of the evidence.

AFFIRMED.

RAPP, J., concurs, and WISEMAN, P.J., dissents.

May 19, 2022