THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2014-0256, In the Matter of Adriana Sullivan and Sean Sullivan, the court on May 22, 2015, issued the following order:

The respondent, Sean Sullivan, appeals a final order and parenting plan issued by the Circuit Court (Moore, J.) in his divorce from the petitioner, Adriana Sullivan. He contends that the trial court erred by: (1) allowing the petitioner to relocate with their child, see RSA 461-A:12 (Supp. 2014); (2) granting the petitioner alimony, see RSA 458:19 (Supp. 2014); (3) setting the amount of alimony; and (4) failing to impute income to the petitioner, see RSA 458-C:2, IV (2004). We vacate and remand.

At the outset, we note that the trial court's order contains inconsistencies that make it difficult to understand. For example, the trial court granted the respondent's request for a finding that he "does not have the ability to pay for the cost of COBRA coverage for [the petitioner's] benefit and it would be inequitable for him to be ordered to do so." However, the trial court granted the petitioner's request for a finding that the respondent had "the ability to pay [her] COBRA costs until she secures employment, which provides health insurance," while also entering "a specific finding that the Petitioner has the ability to make [the petitioner's COBRA] payment over the next 24 months." (Emphasis added.)

In spite of these contradictory findings, the trial court ordered that the respondent "shall be responsible for the premiums associated with [the petitioner's] COBRA coverage for twenty-four (24) months or until she secures full-time employment with health insurance benefits available at a reasonable cost, whichever occurs first." "Reasonable cost" is not defined. Elsewhere, the order requires the respondent "to be responsible for the premiums associated with the Petitioner's COBRA coverage for a period of 24 months or until she secure[s] full-time employment," with no proviso that the petitioner's employment must provide health insurance benefits or that the cost of those benefits be "reasonable."

We first address the trial court's initial order "[g]ranting the petitioner's request that she be allowed to relocate from Wilton, NH . . . with this Court setting a radius of 40 miles" and its subsequent order, on the respondent's expedited motion to prohibit the petitioner's relocation, allowing the petitioner "to relocate within 50 miles of the marital residence," which was in Wilton. RSA 461-A:12, V-VI establishes a two-part test, known as the burden-shifting test, that applies when a parent seeks to relocate the residence of a child. In the Matter of Heinrich & Curotto, 160 N.H. 650, 654 (2010). Under this test, the

parent petitioning for relocation must demonstrate that the relocation is for a legitimate purpose and is reasonable in light of that purpose. RSA 461-A:12, V. If the petitioning parent meets this burden, the opposing party then has the burden of proving that the relocation is not in the child's best interest. RSA 461-A:12, VI; Heinrich, 160 N.H. at 654. We review the trial court's decision under our unsustainable exercise of discretion standard. Heinrich, 160 N.H. at 655. We will affirm the findings and rulings of the trial court unless they are unsupported by the evidence or legally erroneous. In the Matter of Lynn & Lynn, 158 N.H. 615, 617 (2009).

In this case, the trial court's order does not reflect that it performed the statutorily required analysis regarding the petitioner's relocation forty or fifty miles from the marital residence in Wilton. The mother testified that, in the event the trial court denied her request to relocate to Connecticut, she requested to be allowed to relocate within fifty miles of Wilton. However, the evidence focused upon her proposed relocation to Connecticut. After analyzing the petitioner's proposal to relocate to Connecticut and quoting from the guardian ad litem's (GAL) report recommending that it was not for a legitimate purpose or in the child's best interest, the trial court denied the petitioner's request. It then found the petitioner's request to relocate from Wilton to be "reasonable" and that

> the "positives" surrounding the move from Wilton NH (Petitioner's ability to find a job as a CPA within a reasonable commuting distance) outweigh the negatives (an increase in the Respondent's commute time) and to be [sic] in [the child's] best interest as it would allow the Petitioner to reenter the work market in a position more commensurate with her skill set, obtain employment compensation that will benefit both parties and [the child] now and in the foreseeable future and allow [the child] to remain in counseling until released by her counselor.

A relocation motivated by a legitimate purpose should be considered reasonable unless its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child. Tomasko v. DuBuc, 145 N.H. 169, 171-72 (2000) (quoting with approval Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998)). However, the trial court's order does not explain why the petitioner's purpose was not achievable by moving to a location substantially less disruptive to the respondent's relationship with the child and contains factual findings that indicate such disruption may result from the relocation the court authorized.

The trial court found that the petitioner failed to meet her statutory burden with reference to relocating to Connecticut. It further found that "[b]ased upon the Petitioner's extensive work history[,] the Petitioner should not have an issue with being able to find a job in Southern New Hampshire/Greater Boston Area in her career field . . . in which she would be able to support her family while at the

same time accommodate the Respondent's desire to jointly parent his [child]." It granted the respondent's requested finding that "based upon her education and work history, [the petitioner] has the ability to obtain gainful employment in a number of fields in the State of New Hampshire." It noted that it "was presented with extended testimony from both parties relative to the Petitioner's degree, job skills, [and] prior work history as well as being presented with approximately 200 openings for CPAs in the New Hampshire/Greater Boston Area." The GAL, while acknowledging that the petitioner had to relocate from her rental housing in Wilton, recommended that the petitioner relocate within twenty miles of the respondent's place of employment. The trial court did not articulate why a larger relocation distance was reasonable.

Furthermore, the trial court's findings do not reflect that it assessed whether a fifty-mile relocation was in the child's best interest. We have identified seven factors (the Tomasko factors) for a trial court to consider when determining whether a proposed relocation is in a child's best interest:

> (1) each parent's reasons for seeking or opposing the move; (2) the quality of the relationships between the child and the custodial and noncustodial parents; (3) the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent; (4) the degree to which the custodial parent's and child's life may be enhanced economically, emotionally, and educationally by the move; (5) the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements; (6) any negative impact from continued or exacerbated hostility between the custodial and noncustodial parents; and (7) the effect that the move may have on any extended family relations.

Heinrich, 160 N.H. at 656 (quoting Tomasko v. DuBuc, 145 N.H. 169, 172 (2000)). No one factor is dispositive, nor are these the exclusive factors bearing upon a determination of a child's best interest. In the Matter of Pfeuffer & Pfeuffer, 150 N.H. 257, 260 (2003). While a trial court is not required to consider each factor individually or to make specific findings on each factor, it should not rely upon one factor to the exclusion of the others. See id. (noting trial court order specifically incorporated GAL's report and analysis, which thoroughly discussed all Tomasko factors).

In spite of its finding that the petitioner has a "well-documented history of obstructing the Respondent's custodial time" and its concern "that the Petitioner's history of making unilateral decisions relative to [the child's] custodial care will continue to the detriment of the Respondent," the trial court did not make specific findings regarding the application of the Tomasko factors to the forty- or fifty-mile relocation. See Pfeuffer, 150 N.H. at 260-61 (holding guiding principle in assessing relocation request is children's best interest because they are innocent victims of parents' decision to divorce and are least equipped to

handle stresses of changing family situation). The only factors related to the child's best interest it mentioned were the child's ability to continue seeing her counselor and the petitioner's earning capacity. The petitioner argues that the trial court found that her remaining in Wilton was not in the child's best interest. However, this does not address whether relocating fifty miles from Wilton was in the child's best interest.

The trial court found that relocation to Connecticut was not in the child's best interest. A fifty-mile relocation implicates many of the same detriments to the child, including the respondent's resulting inability to participate with the child in daily school and family activities, the "Petitioner's well-documented history of obstructing the Respondent's custodial time," and the amount of time the child would be required to spend traveling between the parents' homes each week. However, the trial court did not address these impacts on the child in the context of a fifty-mile relocation, finding that the only "negative" of such a relocation was an increase in the respondent's "commute."

Although the trial court adopted one of the GAL's parenting plans, providing the respondent with mid-week overnight parenting time, the trial court did not address the impact on the child of more than doubling the relocation distance the GAL recommended. This is reflected in the confusion in the trial court's initial order, which allowed a forty-mile relocation from Wilton in the narrative order and a twenty-mile relocation from Wilton in the parenting plan. Furthermore, although the trial court granted the respondent's requested finding that "it is not in the best interests [of] the minor child to be allowed to relocate out of the State of New Hampshire," it did not address the fact that allowing the petitioner to relocate fifty miles from Wilton could result in the child residing outside New Hampshire.

The petitioner argues that the trial court awarded the respondent the same amount of parenting time as the GAL recommended, based upon the GAL's recommendation of a twenty-mile relocation. However, this does not address whether the fifty-mile relocation was in the child's best interest. The petitioner argues that the child can continue with her counselor even if she relocates fifty miles from Wilton. However, we conclude that this is not the only factor that should be considered when determining whether such relocation is in the child's best interest. See Pfeuffer, 150 N.H. at 260.

Because it appears that the trial court did not perform the required statutory analysis regarding the relocation it allowed, we vacate its order. See RSA 461-A:12, V, VI.

We next address the trial court's award of alimony and calculation of child support based solely upon the respondent's income. At the outset, we note that the trial court's order again contains inconsistencies. The trial court granted the respondent's requests for findings that the petitioner was "voluntarily underemployed," that she had "the ability to obtain gainful employment in a

number of fields in the State of New Hampshire," and that she "has historically earned a higher income than [the respondent] has earned." At the hearing, the petitioner agreed that, at one point, her salary was twice that of the respondent. The trial court found that the marriage had been short-term, lasting approximately five years.

In spite of these findings, the trial court awarded the petitioner alimony for three years, stating that it found certain facts dispositive: (1) the length of the marriage, which it found to be short-term; (2) "Petitioner's services as the primary custodial caregiver" for the child who was approximately two and a half when the petitioner filed for divorce; (3) "Petitioner's contribution to the marital estate," although the petitioner testified that she had been employed part-time or unemployed for much of the marriage; (4) "Petitioner's current medical condition," although the trial court found that she was able to support herself; and (5) "Petitioner's need for assistance during her relocation from Wilton as well as in dealing with her medical condition."

Similarly, the trial court's decision to base child support solely upon the respondent's income is not consistent with its findings that the petitioner had a high earning capacity and was voluntarily underemployed. The petitioner argues that the trial court's grant of the respondent's request for a finding that she "is voluntarily underemployed" is not applicable to the calculation of child support because "it was granted under [the respondent's] 'Alimony' section of his proposed findings," while "[u]nder the 'Child Support' section of [the respondent's] proposed findings, the trial court declined to make the requested finding that '[she] is voluntarily underemployed and has not actively sought employment.'" We agree that this inconsistency in the trial court's findings is confusing. However, we disagree that it negates the trial court's grant of the finding that she is voluntarily underemployed, which is a question of fact, see In the Matter of Muller & Muller, 164 N.H. 512, 521 (2013), supported by the record, and consistent with other findings by the trial court.

Because of these inconsistencies, and because we are vacating the trial court's decision permitting the petitioner to relocate within fifty miles of Wilton and remanding for further consideration on that issue, we also vacate its award of alimony, including COBRA payments, and child support because these issues may be affected by its reconsideration of the petitioner's request to relocate.

Vacated and remanded.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

Eileen Fox,
Clerk