

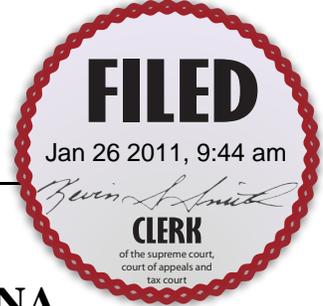
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**IN THE  
COURT OF APPEALS OF INDIANA**

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MELISSA A. (SCALES) CRUPPER, )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
CHARLES D. SCALES, JR., )  
 )  
Appellee-Respondent. )

No. 87A05-1008-DR-500

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APPEAL FROM THE WARRICK CIRCUIT COURT  
The Honorable David O. Kelley, Judge  
Cause No. 87C01-0703-DR-156

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**January 26, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary and Issue**

Melissa (Scales) Crupper (“Mother”) and Charles Scales, Jr. (“Father”), were married and had two children. They divorced in April 2009, agreeing that Mother should have physical custody of the children. Father and Mother lived approximately twelve miles apart, and Father exercised regular visitation with the children. In February 2010, Mother informed Father that she wished to relocate with the children to Fort Campbell, Kentucky, approximately one hundred and thirty miles from Father’s home. Due to Mother’s proposed relocation, Father filed a petition for modification of custody. The trial court found that it would not be in the children’s best interests to remain in Mother’s physical custody due to her relocation and granted Father physical custody of the children, with Mother to exercise reasonable visitation. Mother appeals, arguing that the trial court’s judgment is clearly erroneous. Finding that the evidence and the legitimate inferences arising therefrom support the trial court’s judgment granting Father physical custody of the children, we affirm.

## **Facts and Procedural History<sup>1</sup>**

On April 9, 2009, the parties’ marriage was dissolved by a mediated summary dissolution marriage decree. Pursuant to the decree, the parties had joint legal custody of the two children born to the marriage, E.S. and I.S., with Mother having primary physical custody. Following the divorce, Father exercised the following visitation schedule: one day

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<sup>1</sup> We direct the parties’ attorneys to Indiana Appellate Rule 50(F), which provides, “Because the Transcript is transmitted to the Court on Appeal pursuant to Rule 12(B), parties should not reproduce any portion of the Transcript in the Appendix.” The appellee’s appendix contains a reproduction of the entire transcript, and the appellant’s appendix includes many pages of it.

We direct the Court Reporter to Indiana Appellate Rule 28(A)(7), which requires that the cover of the Transcript “shall be clear plastic.”

each week from the afternoon until 7:00 or 8:00 p.m.; Thursday night to 6:00 p.m. the following Sunday every other week; and alternating weeks during the summer. At all times relevant to this appeal, Father lived at his farm in Tennyson, Indiana. His farm home had been the marital residence. In addition to his farm, Father drives a school bus. Mother is a dental assistant. At the time of the dissolution, Mother resided in Boonville, Indiana, in a cabin belonging to her parents. Boonville and Tennyson are approximately twelve miles apart. At some point, Mother married John Crupper, and they rented a Newburgh townhouse together. Newburgh is about twenty-three miles from Tennyson. Sometime in October or November of 2009, Mother filed a petition to divorce Crupper.

In November and December of 2009, Mother dated Brian McMullen. Also, Mother met Keith Nelson online, and they met as friends for around three months but did not become romantically involved. On January 6, 2010, Mother met Brandon Shell online. Shell was in the military and lived at Fort Campbell, Tennessee.<sup>2</sup> On January 16, 2010, Mother went to Fort Campbell to meet Shell. On January 23, 2010, Mother took E.S. and I.S. to Fort Campbell to meet Shell.

On February 6, 2010, Mother sent a letter to the trial court clerk and to Father stating that she wanted to move to Fort Campbell, Kentucky, because she was offered a job with better pay and benefits. On February 19, 2010, Father filed a petition to modify custody. On May 17, 2010, Mother filed a verified cross-petition to modify, asserting that Father's child support payments were insufficient to support the children and substantially below the

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<sup>2</sup> Fort Campbell sits astride the Kentucky-Tennessee border.

amount payable under the Indiana Child Support Guidelines, and requesting that Father's child support be set pursuant to the Guidelines.

In April 2010, Mother purchased and moved into her grandparents' former home in Boonville. Mother's parents provided the down payment for the home, with Mother to cover all the mortgage payments.

On July 8, 2010, a hearing was held. At the time of the hearing, E.S. was seven and I.S. was five years old. The trial court interviewed each child in camera to determine their wishes regarding custody. On July 20, 2010, the trial court issued its order finding that relocating with Mother to Fort Campbell was not in the children's best interests and awarding Father primary physical custody of the children. Mother appeals.

### **Discussion and Decision**

Our supreme court has expressed a "preference for granting latitude and deference to our trial judges in family law matters." *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993). Such deference is based on the rationale that

[appellate courts] are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

*Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (citation omitted). As such, we review a trial court's decision to modify custody for an abuse of discretion. *Id.* Additionally, we will not set aside the trial court's findings or judgment unless clearly erroneous. Ind. Trial Rule 52.

We do not weigh the evidence nor judge the credibility of witnesses, but rather consider only that evidence most favorable to the judgment, together with reasonable inferences which can be drawn therefrom. If, from that viewpoint, there is substantial evidence to support the finding of the trial court, it will not be disturbed, even though we might have reached a different conclusion if we had been the triers of fact. If there is any evidence or legitimate inferences to support the finding and judgment of the trial court, this Court will not intercede and use its judgment as a substitute for that of the trial court.

*Richardson*, 622 N.E.2d at 179 (citation omitted).

Under Indiana Code Section 31-17-2-21, a trial court may not modify a child custody order unless modification is in the child's best interests and there is a substantial change in one of several factors that a court may consider in initially determining custody. Those factors include the following: (1) the child's age and sex; (2) the wishes of the child's parent or parents; (3) the child's wishes, with more consideration given to the wishes of a child who is at least fourteen years old; (4) the child's interaction and interrelationship with his or her parents, siblings, and any other person who may significantly affect the child's best interests; (5) the child's adjustment to his or her home, school, and community; (6) the mental and physical health of all individuals involved; (7) evidence of a pattern of domestic or family violence by either parent; and (8) evidence that the child has been cared for by a de facto custodian. Ind. Code § 31-17-2-8.

Indiana Code Section 31-17-2.2-2(b) specifically authorizes a court to "consider a proposed relocation of a child as a factor in determining whether to modify a custody order, parenting time order, grandparent visitation order or child support order." When the modification of custody is sought due to a proposed relocation of the child, the trial court

must consider additional factors: (1) the distance involved; (2) the hardship and expense involved for the nonrelocating parent to exercise parenting time; (3) the feasibility of preserving the relationship between the nonrelocating parent and the child; (4) whether there is an established pattern of conduct by the relocating individual, including action by the relocating parent to promote or thwart the nonrelocating parent's contact with the child; (5) the reasons provided by the relocating parent for seeking relocation and the nonrelocating parent for opposing the relocation; and (6) other factors affecting the best interest of the child. Ind. Code § 31-17-2.2-1(b).

Our supreme court has commented on the interaction between the factors in Indiana Code Section 31-17-2-8 and those in Section 31-17-2.2-1(b):

The general custody determination required under Section 8 is to find “the best interests of the child” by examining the factors listed in that section. As a result, chapter 2.2 incorporates all of the Section 8 considerations, but adds some new ones. Because consideration of the new factors might at least theoretically change this balance, the current statutory framework does not necessarily require a substantial change in one of the original Section 8 factors. Finally, section 31-17-2.2-2(b) of the relocation chapter expressly permits the court to consider a proposed relocation of a child “as a factor in determining whether to modify a custody order.” Because section 31-17-2.2-1(b) already contains a list of relocation-oriented factors for the court to consider in making its custody determination, section 31-17-2.2-2(b) seems to authorize a court to entertain a custody modification in the event of a significant proposed relocation without regard to any change in the Section 8 factors.

*Baxendale v. Raich*, 878 N.E.2d 1252, 1257 (Ind. 2008). The supreme court also noted that “relocation may or may not warrant a change of custody.” *Id.* A petitioner seeking modification bears the burden of demonstrating that the existing custody should be altered. *Kirk*, 770 N.E.2d at 307.

The trial court's order in this case provides in relevant part as follows:

IC 31-17-2-21 provides that the Court may not modify a child custody order unless (1) the modification is in the best interest of the child and (2) [] there is a substantial change in one or more of the factors that the Court may consider under IC 31-17-2-8.

Clearly, the single factor causing this litigation is the Mother's move to Fort Campbell, Kentucky. A review of the past and recent appellate treatment of the issue finds that a custodial parent's relocation alone will not support a modification of custody, rather, it is the effect of the move upon the child that renders a relocation substantial or inconsequential- i.e., against or inline with the child's best interest. Further all that is required to support modification of custody is a finding that a change would in the child's best interest, a consideration of the factors of [Indiana Code Section 31-17-2-8,] and a finding that there has been a substantial change in one of those factors.

With this guidance from our higher Courts, the Court after applying the facts presented at hearing makes the following findings:

1. Factors (1) and (3) are relevant in that the Court interviewed the child without the parents or the attorneys present. The children were given the opportunity to express their desires for custody and schooling.
2. Factor (2) is obvious in that both parties wish to be the custodial parent.
3. Factors (4) and (5) are clearly the most significant for the Court's consideration. The evidence was abundant and clear that a move by the Mother to Fort Campbell would seriously affect the interaction and interrelationship of the children and the Father and the Father's very close knit family. Also the older child has established ties to her school and community and the activities related to these relationships. Also the Mother's parents live near Tennyson, Indiana. The majority of the immediate family of both parents live in the Tennyson, Indiana area. The only family the children would have in Fort Campbell would be the Mother. For these reasons, the Court finds that there would be a substantial change if the Mother would move to Fort Campbell, Kentucky with the children.
4. Factors (6) and (7) are of no significance since there was no evidence that either parent suffered from any mental or physical limitation.

The Court must now determine whether the move is in the best interest of the children.

There was simply no evidence to suggest that either parent was a poor parent or lacked the necessary parenting skills. In fact the opposite was true and such belief was reflected by the parties['] ultimate agreement as to custody and visitation in the final decree.

The children have established lives in the Warrick County area. The Father's and Mother's extended family live in the area. The children attend school and preschool in the area and engage in activities in the area. There was no evidence to suggest that the children are not well adjusted to these surroundings.

The Mother has chosen to disturb this status and move to Fort Campbell.

Visitation by the Father will be impaired because of the distance and will significantly impact his ability to have a meaningful relationship with the children.

Further there was no real evidence to suggest that the move was done to enhance the lives of the children in any way but rather the move was necessary because the Mother had another boyfriend and had a job at Fort Campbell. The Mother testified that the primary reason for the move was to have a steady job. The Court notes that the Mother sent the letter to the Father in February, 2010 stating the move was for financial reasons. The evidence, however, demonstrated that the Mother purchased a house in Warrick County, Indiana several months later. While the Mother's [sic] argues that the move suggests a financial benefit, the evidence does not support such a suggestion.

The Court further notes that since the divorce in April of 2009, the Mother has lived in three different locations, been married once with a dissolution pending and has had four boyfriends including her current relationship at Fort Campbell. Her history suggests that her current relationship could be temporary as well.

The Court cannot find that the move by the Mother can be justified by the disruption to the lives of the children and therefore cannot be in the best interest of the children.

The Court, therefore, finds that the Father's Petition to Modify should be granted and while the parents will retain joint legal custody, the Father shall have physical custody. The Mother's visitation shall be pursuant to the Parenting Time Guidelines except that because of the distance factor weeknight visitation shall be eliminated.

We observe that the trial court's order referenced only Indiana Code Sections 31-17-2-21 and -8. The trial court did not specifically cite Section 31-17-2.2-1(b), but it did in fact consider these relocation factors in assessing whether a change of custody would be in the best interests of the children. Accordingly, we will review the trial court's judgment with regard to the factors in both Sections 31-17-2-8 and 31-17-2.2-1(b).

As to the factors in Indiana Code Section 31-17-2-8, Mother first challenges the trial court's finding that relocating to Fort Campbell would seriously affect the interaction and interrelationship of the children and Father and Father's very close knit family. Although Mother attempts to minimize the evidence, she concedes that there was evidence that the children had interaction with two of their paternal uncles. Mother argues that there was no evidence that Father's family was a "very close knit family." Appellant's Br. at 7 (quoting Appellant's App. at 8.). She asserts that the evidence showed only that close family members resided nearby, not that the family was close. Even if the trial court's description of Father's family as close-knit is unsupported by specific testimony to that effect in the evidence, it remains that the majority of the children's family, including paternal and maternal grandparents and uncles, lived in or near Tennyson, and the children had no family in the Fort Campbell area.

Mother also argues that E.S. did not have strong ties to her school and community. She directs us to Father's testimony that E.S. was having problems at her school and did not want to keep going there. Tr. at 26. Father, however, also testified that he believed that E.S. had a lot of friends at school, which she had attended for both kindergarten and first grade,

and that she is well adjusted. *Id.* at 12. Our review of the record shows that Father was aware that E.S. had a problem with another child at the school, but that E.S. had told him that she likes her school. *Id.* at 25-26. Mother asserts that the children have new friends in the area of her proposed relocation and that they are excited about the move. Appellant's Br. at 8 (citing Tr. at 53.). Mother's argument is merely an invitation to reweigh the evidence and judge the credibility of witnesses, which we must decline.

We now turn to the relocation factors in Indiana Code Section 31-17-2.2-1(b). The trial court found that the distance of the proposed relocation would impair Father's visitation and would significantly impact his ability to have a meaningful relationship with the children. Appellant's App. at 8. Although Mother asserts that her proposed relocation is approximately one hundred and thirty miles from Father's residence and that she offered to meet Father halfway for visitation, she fails to acknowledge that the distance between Boonville and Tennyson is only twelve miles. Also, the relocation would prevent Father from spending one weekday every week with his children and his Thursday night visitation every other week. Even though Mother asserts that Father could make up his Thursday night visitation by exercising additional time during spring, summer, and fall breaks, it does not follow that the relocation will have no effect on Father's ability to preserve his relationship with his children. *Cf. Bojrab v. Bojrab*, 786 N.E.2d 713, 735 (Ind. Ct. App. 2003) (evidence was sufficient to support finding that it was in children's best interests to deny mother's request to move 160 miles away from father, due to extensive evidence demonstrating that

father was a caring, nurturing, and active father), *aff'd in relevant part*, 810 N.E.2d 1008 (Ind. 2004).<sup>3</sup>

Mother next disputes the trial court's finding that she wished to relocate not to enhance the lives of the children, but rather because she had a boyfriend and job in Fort Campbell. Although it is true that Mother was offered a full-time job with benefits at Fort Campbell, the evidence and the inferences arising therefrom show that the main purpose of the move was for Mother to be with her new boyfriend. She met Shell in January and thereafter sought work at Fort Campbell. She wrote her letter of intent to move just one month after meeting Shell. Shell appears to have been the impetus for the move.

Finally, Mother challenges the correctness of the trial court's conclusions regarding the number of boyfriends she had and that her relationship with Shell could be temporary. Between the finalization of the parties' divorce and the hearing on their petitions for modification of custody, Mother was married to Crupper, dated McMullen, explored a relationship with Nelson, and began dating Shell. Although Mother did not ultimately become romantically involved with Nelson, the trial court was apparently including this relationship. Given the relatively temporary nature of Mother's relationships with Crupper and McMullen, and the fact that she had known Shell for only seven months at the time of the hearing, we cannot say that the trial court's conclusion that Mother's current relationship could also be temporary is clearly erroneous.

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<sup>3</sup> Mother also argues that Father testified that the distance between his home and the proposed relocation was "not unattainable." Tr. at 35. Our review of the record shows that Father was referring to the burden of travel on the children, not on the effect the relocation would have on his ability to have a meaningful relationship with the children.

Based on the foregoing, we conclude that the trial court's judgment was not clearly erroneous. *See Smith v. Mobley*, 561 N.E.2d 504, 507 (Ind. Ct. App. 1990) (decision to modify custody based on custodial parent's move from state was sufficiently supported by evidence, including evidence that custodial parent had remarried and moved two times since entry of divorce court's judgment, that noncustodial parent was living in marital residence in area where children's extended family resided, and that it would take noncustodial parent six and one-half hours to drive to home that custodial parent was currently renting), *trans. denied* (1991). We therefore affirm the trial court's order.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.