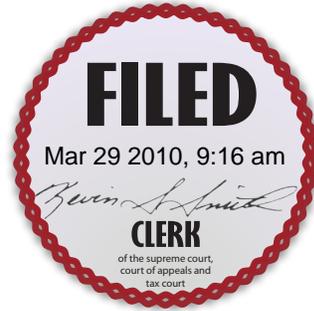


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**IN THE
COURT OF APPEALS OF INDIANA**

HILDA TSAI,)
)
Appellant-Petitioner,)
)
vs.) No. 64A05-0909-CV-508
)
ALFREDO R. PAMINTUAN,)
)
Appellee-Respondent.)

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable David L. Chidester, Judge
Cause No. 64D01-0710-DR-9207SJ

March 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Hilda H. Tsai (“Mother”) appeals the trial court’s denial of her motion to relocate after Alfredo R. Pamintuan (“Father”) filed an emergency motion in opposition to the relocation of their minor children.

We affirm.

ISSUES

1. Whether the trial court analyzed Mother’s proposed relocation under the wrong statute.
2. Whether the trial court committed clear error by imposing an additional evidentiary burden upon Mother.
3. Whether the trial court’s finding that the proposed relocation was not in the children’s best interests was clearly erroneous.
4. Whether Indiana Code section 31-17-2.2-5 violated Mother’s federal constitutional right to travel.

FACTS

On June 1, 1991, Mother and Father were married. Two children were born to the marriage: A.P. (born April 9, 1998); and B.P. (born April 22, 2000). On October 1, 2007, Mother filed a verified petition for dissolution of marriage.

Mother has a B.S. in engineering and an M.B.A., but has not worked outside the home since the children were born. In the winter of 2007-2008, she began to search for employment in northwest Indiana, southwest Michigan, and Chicago, Illinois. *See* Mother’s Ex. A (log of Mother’s job search efforts). By July of 2008, Mother still had

not received any job offers; during a trip to Cincinnati, Ohio, to visit her parents, she met and networked with Tom Bryan, the owner of a small engineering firm.

On September 29, 2008, Mother and Father, both represented by counsel, entered into a Partial Mediation Agreement, which was filed with the trial court on October 27, 2008. On October 18, 2008, the parties entered into a Second Partial Mediation Agreement.

In early winter of 2008, Mother had contacted Bryan in Cincinnati to inquire about job openings at his engineering firm. In January of 2009, Bryan offered Mother a job as a sales engineer at a salary of \$40,000.00 plus commissions. On January 29, 2009, the parties filed their Custody, Support and Property Settlement Agreement which *inter alia* addressed Father's child support obligation; responsibility for marital debt; and the division of certain marital assets. The agreement also provided that Mother and the children would remain in the marital residence, which would be listed for sale; and that until the sale, Father would be responsible for paying the mortgage note, property taxes, and insurance obligations.¹

On February 2, 2009, the parties filed their Second Partial Mediation Agreement wherein they established, *inter alia*, Father's child support obligation at \$468.89 per week; however, his weekly payment was temporarily increased to \$500.00 per week to assist Mother with her financial obligations for the duration of the 2008-2009 school

¹ The parties agreed that after the marital residence was sold, Mother would reimburse Father for 50% of each monthly mortgage payment that he paid; and the remaining net proceeds would be divided with Mother getting 60% and Father getting 40%.

year. The agreement also provided that Father would pay 96% of the children's joint tuition of \$1,014.75 per month, plus school supplies expenses up to \$600.00 per child through the commencement of the 2009-2010 school year, at which time the parties would divide the expenses pursuant to their respective shares of the child support obligation.²

On February 6, 2009, the trial court entered a dissolution decree, which incorporated and ordered compliance with the parties' mediated agreements as well as the Custody, Support and Property Settlement Agreement. Mother was awarded physical custody of the children, sharing joint legal custody with Father, pursuant to the parties' mediated agreements and the Indiana Parenting Time Guidelines.

On March 24, 2009, Mother filed a notice of intent to relocate pursuant to Indiana Code section 31-17-2.2-4, asserting prospective employment and proximity to family³ as the basis for the proposed relocation to Cincinnati, Ohio. On April 27, 2009, Father filed an emergency response in opposition to Mother's proposed relocation of the minor children. He also filed a verified petition for contempt against Mother. On May 21, 2009, Father filed a second verified petition for contempt and rule to show cause. On August 3, 2009, the trial court conducted a hearing on Father's emergency response in opposition to the proposed relocation and two contempt petitions and rule to show cause.

² The parties agreed that Mother's child support obligation would vary, depending upon her employment status.

³ In addition to Mother's parents, her brother, aunt, uncle, cousin and several friends live in Cincinnati.

At the hearing, Father testified that he believed that Mother's relocation was "going to further alienate [him] from the children and really interfere with [thei]r relationship especially in light of everything that has gone on during the marriage."⁴ (Tr. 4). He testified that as an established obstetrician in Michigan City for fifteen years, he could not simply relocate to Cincinnati, Ohio, because he is not licensed to practice medicine there. When the court asked whether it was "more important to [Father] to have . . . every other weekend contact for just a week-end than to get maybe a large[r] amount of [visitation] in the summer if [Mother] is allowed to relocate," he responded affirmatively, testifying that frequent contact was best for his relationship with his children,⁵ taking into consideration the nature of his work. (Tr. 65, 66). He also testified that the children are "shy introverted people" who tend to take "some time to adjust to a situation before they blossom," and they "are now comfortable in the activities, the opportunities that are available to them in th[eir] community and that they are now blossoming." (Tr. 44, 45).

⁴ Father testified that there had been "past experiences when [he] ha[d] gone to the house to pick up the children and them not being there," (tr. 16); that despite having given Mother several weeks of prior notice of the dates on which he planned to exercise his extended parenting time, that on his first week, she told him that he could not have the children because she had purchased tickets for a trip; that Mother had not complied with the mediated agreement(s) with respect to giving him advance notice of the children's medical/dental appointments and ensuring that his calls and/or messages for the children were returned; and that Mother had failed to respond to his emails regarding her plans for the children's schooling if she was permitted to relocate.

⁵ Specifically, Father testified,
. . . I think it's important that throughout the year, the[] [children] know they have contact with me . . . every other weekend[.] I'm satisfied with [the fact that] I can at least see them every other weekend and they know that in two (2) weeks they are going to be seeing Dad. It would be difficult if I don't see them for months at a time.
(Tr. 65).

Mother testified that she had proposed the relocation due to her inability to find local employment and the attractive prospects of working in her field, earning steady income, schedule flexibility, and the proximity to her family and friends. Mother also testified that if she was not allowed to relocate and could not secure employment locally, her only source of income would be child support. She further testified that since the residence was to be sold, the children would have to relocate anyway. She testified that the children were thriving at school and would adapt easily to a new academic setting, and that Cincinnati boasted a wealth of cultural, educational, housing, and recreational options. Lastly, she testified that although the parties were engaged in mediation talks at the time of her job search, interview, and when she received the job offer, she had not disclosed the job offer to Father because “we don’t discuss things.” (Tr. 114).

On August 4, 2009, the trial court issued an order containing the following pertinent findings and conclusions: (1) that Mother’s proposed relocation was being made in good faith and for a legitimate reason, but that she might be “moving, in part, to get away from the Father and the tensions” that existed in their relationship, (app. 79); (2) that the parties’ manner of communication occurs primarily via email; (3) that Mother “sometimes intentionally or perhaps unintentionally thwarts parenting time and telephone access [which] is a good indication and predictor o[f] what Father can expect in the future as far as [her] willingness to foster and encourage Father’s role in the children’s lives,” (app. 78); (4) that the distance involved in the proposed relocation would likely exacerbate the “tensions” and “animosity” between the parties in their “dysfunctional

[sic] cooperative relationship,” (app. 80, 79); (5) that if the relocation was granted, “the parties[’] relationship and perhaps [Father’s] relationship with his children, would be by email and text message,” (app. 80); and (6) that given the significant travel required by Mother’s sales job, “it is almost certain that the extended family would see the children more often than either parent [would],” (app. 80). Thus, the trial court concluded that the relocation was not in the children’s best interests and denied the request to relocate.⁶ Mother now appeals.

DECISION

Mother argues that the trial court (1) improperly analyzed Father’s emergency response in opposition to the proposed relocation under Indiana Code section 31-17-2.2-1(b) instead of Indiana Code section 31-17-2.2-5; (2) improperly shifted the burden of proof from Father to Mother; and (3) erroneously concluded that the proposed relocation was not in the best interests of children. She also argues that Indiana Code section 31-17-2.2-5 violated her federal constitutional right to travel. We address her contentions in turn.

1. Standard of Review

We initially note that Father has not filed an appellee’s brief. In such a situation, we do not undertake the burden of developing arguments for him. *Cox v. Cantrell*, 866 N.E.2d 798, 810 (Ind. Ct. App. 2007). Rather, we apply a less stringent standard of review, and we may reverse the trial court’s decision if the appellant can establish *prima*

⁶ The trial court also “found for Mother on all issues of contempt and f[ound] that her actions were not in contempt of court.” (Order 5).

facie error. *Id.* *Prima facie* means “at first sight, on first appearance, or on the face of it.” *Id.*

Also, because the trial court entered findings of fact and conclusions of law, we employ the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. *D.B. v. M.B.*, 913 N.E.2d 1271, 1274 (Ind. Ct. App. 2009). We will only set aside the trial court’s findings and conclusions if they are clearly erroneous, meaning that the record contains no facts or inferences to support them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* We neither reweigh the evidence nor reassess the credibility of witnesses; rather, we consider only the evidence most favorable to the judgment. *Id.* We review conclusions of law *de novo*. *Id.* We give considerable deference to the trial court’s findings in matters of family law because “the trial court is in the best position to become acquainted with the relationship between parents and their children.” *Id.*

2. Background

In 2006, our General Assembly replaced the section governing child custody in the event of a relocation with a new chapter 2.2. Pursuant to the current Indiana Code section 31-17-2.2, “there are two ways to object to a proposed relocation: a motion to modify a custody order under Indiana Code section 31-17-2.2-1(b) (“Section 1”), and a motion to prevent the relocation of a child under Indiana Code section 31-17-2.2-5(a).”

Swadner v. Swadner, 897 N.E.2d 966, 976 (Ind. Ct. App. 2008) (citing *Baxendale v. Raich*, 878 N.E.2d 1252, 1256 n.6 (Ind. 2008)).

If the non-relocating parent does not file a motion to prevent relocation, then the relocating parent with custody of the child may relocate. If the non-relocating parent does file a motion to prevent relocation, then the relocating parent must first prove that “the proposed relocation is made in good faith and for a legitimate reason.” I.C. § 31-17-2.2-5(c). If this burden is met, then the non-relocating parent must prove that “the proposed relocation is not in the best interests of the child.” I.C. § 31-17-2.2-5(d). Under either a motion to prevent relocation or a motion to modify custody, if the relocation is made in good faith “both analyses ultimately turn on the best interests of the child.”

Swadner, 897 N.E.2d at 976 (internal citations omitted) (emphasis added).

3. Imposition of Additional Evidentiary Burden

Mother asserts that because Father filed a motion to prevent relocation -- and not a motion to modify custody -- pursuant to Indiana Code section 31-17-2.2-5,⁷ she was only required to prove that her proposed relocation was being made in good faith and for a legitimate reason. If she met her burden, the burden would then shift to Father to prove that the proposed relocation was not in the children’s best interests. She argues that, here, after the trial court concluded that the parties had carried their respective burdens of proof, the court improperly imposed an additional burden upon her to “produce evidence that the children would greatly benefit by the move to Cincinnati.” (App. 37) (emphasis added). We agree that this was an improper comment of statutory interpretation; however, we find that it amounts to harmless error.

⁷ Here, Mother filed her notice of intent to relocate on March 24, 2009; Father filed an emergency motion in opposition to relocation of minor children on April 27, 2009.

In *Baxendale*, after the parties' divorce, the mother filed a notice of intent to relocate with the parties' minor child. The father responded with a petition to modify custody. The trial court denied the mother's request to relocate. On appeal, we reviewed the facts under Indiana Code section 31-17-2.2-5(a), and reversed the trial court. Our Supreme Court granted transfer. In affirming the trial court's judgment, our Supreme Court observed that because the father had filed a petition to modify custody under Section 1 and not a motion to prevent relocation under Indiana Code section 31-17-2.2-5(a), the proposed relocation should have been analyzed under Section 1. However, our Supreme Court further observed that where the evidence indicated that the proposed relocation was being made in good faith and for a legitimate reason, the "result [under either analysis] would be the same . . . because when a relocation is made in good faith, . . . both analyses ultimately turn on the 'best interests of the child.'" *Baxendale*, 878 N.E.2d at 1256 n.5 (emphasis added).

Baxendale supports Mother's argument that Section 1 applies to custody modifications, and Indiana Code section 31-17-2.2-5 applies to a motion to prevent relocation; thus, she is correct in asserting that her proposed relocation should have been analyzed under Indiana Code section 31-17-2.2-5. *Baxendale*, however, provides that where, as here, the trial court has already concluded that the proposed relocation was being made in good faith and for a legitimate reason, the result of analyzing the proposed relocation under Section 1 instead of Indiana Code section 31-17-2.2-5(a) "would be the same for either motion because when a relocation is made in good faith . . . , both

analyses ultimately turn on the ‘best interests of the child.’” *Id.* We find no clear error in the trial court’s analysis.

4. Best Interests of the Children

Next, Mother argues that after the burden of proof shifted to Father, the trial court considered improper statutory factors in concluding that the proposed relocation was not in the children’s best interests. Specifically, she argues that the trial court erroneously considered the Section 1 statutory factors⁸ which are meant to be applied only in custody modification proceedings, instead of the general custody factors enumerated in Indiana Code section 31-17-2-8 (“Section 8”). Again, we must disagree.

The Section 1 factors provide as follows:

(b) Upon motion of a party, the court shall set the matter for a hearing to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation order, or child custody order. The court shall take into account the following in determining whether to modify a custody order, parenting time order, grandparent visitation order, or child support order:

- (1) The distance involved in the proposed change of residence.
- (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
- (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual’s contact with the child.
- (5) The reasons provided by the:
 - (A) relocating individual for seeking relocation; and

⁸ It is apparent from the trial court’s order that the court analyzed Mother’s proposed relocation under the statutory factors enumerated in Indiana Code section 31-17-2.2-1(b) because each of the five express factors is addressed therein.

- (B) nonrelocating parent for opposing the relocation of the child.
- (6) Other factors affecting the best interest of the child.

I.C. § 31-17-2.2-1(b). On the other hand, the Section 8 factors provide,

Sec. 8. The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

I.C. § 31-17-2-8 (emphasis added).

In her brief, Mother argues that the Section 1 factors considered by the trial court in determining whether the proposed relocation was in the children's best interests "should be excluded as a consideration under [Indiana Code section 31-17-2.2-5, which governs motions to prevent relocation]," because "the legislature did not specify or enumerate th[os]e . . . [f]actors" in Indiana Code section 31-17-2.2-5." Mother's Br. at 15. We cannot agree.

In the context of family matters, it is axiomatic that the best interests of the child are a paramount concern. Section 8, which Mother insists the trial court should have employed, expressly provides that the trial court “shall consider all relevant factors, including” the specifically-enumerated factors in determining the best interests of the child. I.C. § 31-17-2-8. This language evidences our Legislature’s intentions (1) not to automatically exclude any particular factors from consideration; (2) to communicate that Section 8 was not an exhaustive list; and (3) to ensure that the trial court must consider any and all relevant factors having any bearing upon the best interests of the children.

Common sense dictates that regardless of whether the nonrelocating parent has moved to modify custody or has moved to prevent the proposed relocation, certain Section 1 factors would be relevant in determining the best interests of a child. Here, the trial court found that (1) due to existing animosity and tensions in the parents’ relationship, their primary mode of communication is via email; (2) Mother has previously thwarted, intentionally or unintentionally, Father’s parenting time and telephone access to the children; (3) the proposed relocation would put the children “5+ hours away,” which might further exacerbate the animosity between the parties and adversely affect Father’s parenting time; and (4) Mother might be moving “to get away from the Father and the tensions” in their relationship.” (Order 4).

The trial court’s order thus reveals that the court found the following Section 1 factors to be “relevant” to the determination of what was in the children’s best interests: (1) the long distance involved in the proposed relocation; (2) the hardship and expense

involved for Father to exercise parenting time; (3) the feasibility of preserving the relationship between Father and the children through suitable parenting time; (4) the pattern of conduct by Mother, including her actions to either promote or thwart Father's contact with the children; (5) Mother's reasons for relocating; and (6) Father's reasons for opposing the same. I.C. § 31-17-2.2-1(b). In light of the evidence and the trial court's finding and conclusions, we find that under the circumstances, these Section 1 factors were relevant considerations to the determination of the children's best interests. Accordingly, we find no clear error.

5. Federal Constitutional Right to Travel

Mother argues that Indiana Code section 31-17-2.2-5 is unconstitutional as applied to her in this case because "a non-custodial parent is allowed to object to the custodial parent's proposed relocation and [allowed to] attempt to force the custodial parent to stay in [] Indiana without attempting to modify custody." Mother's Br. at 23. Specifically, she argues that allowing the noncustodial/nonrelocating parent to object to the custodial parent's proposed relocation "without offering to take custody of the children," restricts the custodial/relocating parent's right to travel because the custodial/relocating parent is not given "a choice to [either] relocate and lose custody of the children or keep custody by staying in the primary residence." Mother's Br. at 23 (emphasis added). We disagree.

The Supreme Court of the United States has held that all citizens have a right to interstate travel "uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement," *Shapiro v. Thompson*, 394 U.S. 618, 629, 631, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), overruled in part on other grounds by *Edelman v. Jordan*, 415

U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), and laws that chill that right with no other purpose are “patently unconstitutional.” *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)).

Baxendale, 878 N.E.2d at 1259. In *Baxendale*, the custodial parent raised the same issue as Mother and argued that the trial court’s denial of her request to relocate violated her right to travel by “forcing her to choose between moving to Minnesota and retaining physical custody of [the parties’ minor child].” *Id.* On appeal, we reversed the trial court’s judgment. Our Supreme Court granted transfer. Recognizing the relocating parent’s fundamental right to travel, the Court endorsed a test that “balance[d] the relocating parent’s right to travel with . . . the best interests of the child and the nonrelocating parent’s interest in the care and control of the child,” stating,

We agree with those courts that . . . recogniz[e] that a chilling effect on travel can violate the federal Constitution, but also acknowledg[e] that other considerations may outweigh an individual’s interest in travel. We think it clear that the child’s interests are powerful countervailing considerations that cannot be swept aside as irrelevant in the face of a parent’s claimed right to relocate. In addition, it is well established that the nonrelocating parent’s interest in parenting is itself of constitutional dimension. * * * In the custody context, Indiana statutes reflect these concerns by considering whether the relocation is indeed bona fide, and explicitly acknowledging the child’s interests and the effect on nonrelocating persons including a nonrelocating parent.

Id. at 1259-60.

Many of the considerations that arise in the custody modification context also arise where the custodial parent wishes to relocate and the noncustodial parent has opposed the proposed relocation without attempting to modify custody. In either circumstance, the

child's best interests, the relocating parent's right to travel, and the nonrelocating parent's interest in the care and control of the child are significant considerations which must be accorded "appropriate recognition." *Id.* at 1259. In either context, as the *Baxendale* Court found, "Indiana statutes reflect these concerns by considering whether the relocation is bona fide, and explicitly acknowledging the child's interests and the effect on nonrelocating persons including a nonrelocating parent." *Id.* at 1259-60.

We acknowledge Mother's concern that a noncustodial parent may attempt to force the custodial parent to remain in Indiana, by opposing the proposed relocation without attempting to modify custody. In such instances, however, we find that in employing the *Baxendale* balancing test, trial courts are well equipped to recognize the potential for abuse by either party under the unique circumstances of their relationship. *See D.B.*, 913 N.E.2d at 1274 (in family matters, we defer to the trial court's findings because the trial court is in the best position to become acquainted with the parties' relationship with one another and with the children). Here, the trial court was well aware of the existing tensions between the parents and brought that knowledge to bear before rendering its determination.

Moreover, trial judges are presumed to know and correctly apply the law. *Thurman v. State*, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). Thus, we can presume that the trial court recognized Mother's federal constitutional right to travel and took pains to ensure that the same was not violated. Accordingly, we conclude that under the instant circumstances wherein the custodial parent wished to relocate and the noncustodial

parent opposed the proposed relocation without attempting to modify custody, the *Baxendale* balancing test was appropriately employed, and Mother's right to travel was not violated.

In sum, the record herein contains evidence to support the trial court's findings; and we, therefore, cannot say that the findings are clearly erroneous. Given the parents' tense relationship and inability to communicate; the long distance involved in the proposed relocation; and the trial court's observation that Mother's prior conduct of interfering with Father's exercise of parenting time was indicative of potential future problems to come, we cannot say that the trial court's finding that the proposed relocation was not in the best interest of the children was clearly erroneous as such was supported by the evidence in the record. *See D.B.*, 913 N.E.2d at 1274. Nor can we say, after our review of the record, that the trial court's judgment denying Mother's proposed relocation is clearly erroneous and leaves us with a firm conviction that a mistake has been made. *Id.*

Affirmed.

BAKER, C.J., and CRONE, J., concur.