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IN THE
COURT OF APPEALS OF INDIANA

DOUGLAS MCCORKLE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 30A01-1009-DR-438
	)	
ALESIA MCCORKLE,	)	
	)	
Appellee-Petitioner.	)	
	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
The Honorable R. Scott Sirk, Commissioner
Cause No. 30D01-0109-DR-478

May 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Douglas McCorkle ("Father") intended to relocate his twelve-year-old son, E.M., to Tennessee. Alesia McCorkle ("Mother") filed a petition to modify custody of E.M. to her. At the hearing, Father told the trial court that he would move back to Indiana to maintain custody of E.M. The trial court denied Father's notice of intent to relocate, maintained custody of E.M. with Father, and ordered Father to move back to Indiana.

Father now contends that the trial court erred by denying his notice of intent to relocate and ordering him to move back to Indiana. We conclude that the trial court did not err by denying Father's notice of intent to relocate and affirm the court on this issue. However, although we are sympathetic to the trial court's reliance on Father's word, Father is entitled to move wherever he wants. Because the trial court erred by ordering Father to move to Indiana and because its determination of custody was influenced by its reliance on Father's statements, we reverse the court's custody order and remand for a redetermination of custody.

Facts and Procedural History

Mother and Father were married and have four children: E.C., born August 26, 1986, T.M., born July 14, 1991, B.M., born September 30, 1992, and E.M., born February 11, 1998. This appeal pertains only to E.M.

In September 2001, Mother filed a petition for dissolution. In May 2002, the trial court entered a provisional order regarding, among other things, child custody. The provisional order granted joint legal custody with Father having physical custody and Mother having parenting time pursuant to the Indiana Parenting Time Guidelines. In

November 2003, the trial court granted the parties' joint petition to bifurcate so that matters other than dissolution, such as custody, would be determined at a later date. The trial court dissolved the marriage in February 2004. Mother and Father each subsequently remarried. No final order on custody was entered until 2010, and that order is the subject of this appeal.

Although the 2002 provisional order gave physical custody of the children to Father, over the years, the girls, E.C., T.M., and B.M., moved into Mother's Greenfield, Indiana, home. The parties dispute which year each girl moved, but they agree on the order: E.C. moved first, then T.M., then B.M. Father did not object when the girls moved in with Mother. Regarding their son, E.M., in the past few years, Mother has had more parenting time with him than that set forth in the Guidelines. In 2007, E.M. stayed with Mother more often than with Father. The next year, Mother had parenting time with E.M. every other week. At some point, Father limited Mother's parenting time with E.M. to every weekend.

Father worked in Indianapolis at Major Tool and Machine as a technical manufacturing planner for twenty-four years. His salary was $80,000. Sometime between March 12 and 14, 2010, Father's primary customer at Major Tool and Machine, Alston, offered him a job at a new start-up company in Chattanooga, Tennessee. Alston offered Father a salary of $95,000 and better benefits. Father saw an opportunity for advancement at the Chattanooga job, whereas he had already hit the ceiling at his Indianapolis job. On March 19 or 20, Father told Mother about the job opportunity and his intent to move E.M. to Chattanooga. Father and his wife moved to Chattanooga on

March 28. They left E.M. with Mother so that he could finish the school year and the baseball season. Father intended to relocate E.M. to Chattanooga after the baseball season. Although Father apparently drafted two different written agreements regarding E.M., Mother never agreed to or signed either of them.

On July 16, 2010, Mother filed a petition to modify custody of B.M. and E.M. The petition stated that Father had not filed a notice of intent to relocate but that he intended to move E.M. to Tennessee on July 25. On July 21, Father returned to Indiana, filed a notice of intent to relocate, and restricted Mother to parenting time pursuant to the Guidelines.

At a hearing in August 2010, both parties testified about the reasons for their requests. Mother testified that E.M. has sisters, uncles, aunts, nephews, and nieces in Greenfield. He is involved in a variety of sports and has many friends in Greenfield. Mother was concerned that E.M. would be cut off from many valuable relationships if he relocated to Chattanooga, where he would have only Father, Father's wife, and a stepsister: "He's getting ready to go through various stages and I think it would be a hard transition for [E.M.] to make going down there and being, not alone but for the lack of a better word, alone." Tr. p. 77. Mother also indicated that she would not get to have the kind of relationship with E.M. that she has now.

Mother further testified that after her custody request and Father's reinstatement of parenting time pursuant to the Guidelines, E.M. stayed at Father's wife's mother's house in Greenfield, which is where Father and Father's wife stayed after Mother filed her petition to modify custody. Mother called Father's wife and asked if she and her husband

could stop by to see E.M. Father's wife agreed. Mother and her husband were visiting with E.M. on the porch of the house for two minutes before Mother got a call from Father telling them to leave because it was interfering with Father's time with E.M. and E.M.'s nightly routine. Father was in Chattanooga at the time.

Father testified that although Chattanooga is about an eight-hour drive from Mother's home, his wife would take E.M. to visit Mother one weekend a month. Father also agreed to give Mother parenting time on every holiday and for the entire summer. Father stated that he would cover all costs of transportation and that he was further willing to provide lodging for Mother to visit E.M. in Chattanooga two or three times a year. Father indicated that although he has "been happy with Greenfield Schools," the school E.M. would be attending in Tennessee is "one of the best schools in the region" and Father is "very happy" with the football and baseball coaches there. *Id.* at 131. Father acknowledged that "[E.M.] is not crazy about leaving," *id.* at 130, but thought he would adapt quickly to living in Tennessee. Father testified at least twice that he would move back to Indiana to maintain physical custody of E.M.:

> Q [Father], I'm gonna ask you, what's more important to you, maintaining custody of your son or your new job?
> A My son.
> Q Hopefully those two things can be co-existing but if they're not, what do you do?
> A If I need to move back I'll move back.
> Q Do I understand then that if this Court were inclined to state that you were not permitted to relocate with [E.M.] to Tennessee that you would – you would quit the job that you've been offered and have taken in Tennessee and move back to Indiana?
> A That's correct. The position I left is still available to me.
>
> * * * * *

> Q [Father], so the Court is clear on what you're requesting, its [sic] your primary request that the Court authorize you to relocate with [E.M.] to Chattanooga, Tennessee, correct?
> A That's correct.
> Q In the alternative if the Court is not comfortable with that order, is it your request that the Court maintain custody of [E.M.] with you provided that you are residing here in Indiana?
> A That is correct.

Id. at 125, 131-32.

The trial court held an in camera interview with B.M. and E.M. before the hearing and another in camera interview with E.M. after the hearing. The court subsequently issued an order granting Mother physical custody of B.M., denying Mother physical custody of E.M., but also denying Father's notice of intent to relocate. The court's order stated, "Father is to have physical custody of the child, [E.M.] and reside in the current school system for the minor child." Appellant's App. p. 8.

Father now appeals.

Discussion and Decision

Father contends that the trial court erred by denying his notice of intent to relocate and ordering him to move back to Indiana.

I. Relocation

First, we observe that the Indiana Supreme Court has expressed a preference for granting latitude and deference to our trial judges in family law matters. *In re Paternity of J.J.*, 911 N.E.2d 725, 728 (Ind. Ct. App. 2009) (citing *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). The rationale for this deference is that appellate courts are in a poor position to look at a cold transcript of the record and to conclude that the trial judge 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. *Id.* Therefore, on appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002).

Relocation is defined as a change in the primary residence of an individual for a period of at least sixty days. *Baxendale v. Raich*, 878 N.E.2d 1252, 1255-56 (Ind. 2008). When a parent seeks to prevent relocation of a child, the relocating parent has the initial burden of showing that the proposed relocation is made in good faith and for a legitimate reason. Ind. Code § 31-17-2.2-5(c); *Swadner v. Swadner*, 897 N.E.2d 966, 976 (Ind. Ct. App. 2008). If that burden is met, the nonrelocating parent must prove that "the proposed relocation is not in the best interest of the child." *Id.* § 31-17-2.2-5(d); *Swadner*, 897 N.E.2d at 976.

The court shall take into account the following factors in considering the proposed relocation:

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

Ind. Code § 31-17-2.2-1(b). The court must hear evidence on each of these six factors before modifying custody due to relocation. *In re Paternity of J.J.*, 911 N.E.2d at 731; *Wolljung v. Sidell*, 891 N.E.2d 1109, 1113 (Ind. Ct. App. 2008). Because the relocation statute requires consideration of "[o]ther factors affecting the best interest of the child," I.C. § 31-17-2.2-1(b)(6), the court must also take into account the best interests of the child as enumerated in the custody statute, Indiana Code section 31-17-2-8, though it need not find a substantial change in one of these factors before modifying custody. *Baxendale*, 878 N.E.2d at 1256-57. In evaluating a child's best interests, a court must consider all relevant factors, including:

> (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 . . . .

Ind. Code § 31-17-2-8; *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1256-57 (Ind. Ct. App. 2010).

Father seeks to relocate because his new job in Chattanooga would provide a higher salary, an opportunity for advancement, and better benefits. Accordingly, Father has met his initial burden of proving that the relocation was sought in good faith and for

legitimate reasons. The burden thus shifts to Mother to prove that the proposed relocation is not in the best interests of E.M.

The evidence presented to the trial court shows that E.M. has a strong network of family and friends in Greenfield as well as established athletic relationships. Although Mother's parenting time with E.M. has been decreased by Father since Mother filed her petition to change custody, E.M. and Mother have enjoyed frequent contact during the years and at one point, Mother had E.M. over fifty percent of the time. E.M., according to Father, "is not crazy about leaving" Indiana.

Further, Chattanooga is about an eight-hour drive from Greenfield. Although Father was willing to pay for E.M.'s transportation to visit Mother one weekend a month, every holiday, and the entire summer as well as provide lodging for Mother to visit E.M. in Chattanooga two or three times a year, the only family that E.M. would have in Tennessee is Father, his wife, and a stepsister.

Based on the evidence presented, the trial court did not err by determining that Mother met her burden of proving that relocation was not in E.M.'s best interests.

In his reply brief, Father contends that Mother cooperated with transitioning E.M. to Tennessee and that she therefore effectuated a constructive fraud on him by subsequently filing her petition to modify custody. We disagree. Mother was extremely upset upon learning that Father intended to move E.M. Further, Mother never signed any of the written agreements drafted by Father that allowed E.M. to relocate. Although Mother did research on appropriate Tennessee schools for E.M., the trial court was

entitled to view this research not as cooperation, but as making preparations for E.M. if she could not prevent the relocation.

Given the latitude and deference we give to trial courts in family law matters, we conclude that the trial court did not abuse its discretion by denying Father's notice of intent to relocate.

II. Ordering Father to Return to Indiana

Father also contends that the trial court erred by ordering him to move back to Indiana because "the grant of custody to [Father] can only be viewed as a grant of custody conditioned on him living in [E.M.]'s school district." Appellant's Br. p. 19.

Our Supreme Court has distinguished an order automatically changing custody upon the occurrence of a future event from an order conditioning custody on the continuation of a child's place of residence. *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1012 (Ind. 2004). In *Bojrab*, the mother wanted to relocate her children from Allen County, Indiana, to Michigan. *Id.* at 1010. In determining custody modification, the trial court determined that the best interests of the children were served by requiring them to remain in Allen County. *Id.* at 1011. The court therefore granted the mother custody of the children "subject to maintaining their residence in Allen County." *Id.* The court continued, "In the event the [mother] decides to relocate outside Allen County, Indiana, without the agreement of the [father] or further order of this court, custody of the children shall be granted to the [father] . . . ." *Id.*

On appeal, the mother argued that the trial court erred by granting an automatic change of custody prospectively upon her future relocation because such an order would

ignore the court's obligation to grant a change of custody based on the best interests of the child and statutory factors of Indiana Code section 31-17-2-8. *Id.*

Our Supreme Court stated that an automatic change of custody upon the mother's relocation would be inconsistent with the requirements of the custody modification statute. *Id.* at 1012. However, the Court noted that the trial court's order also stated that the grant of custody to the mother was subject to maintaining the children's residence in Allen County. *Id.* Thus, the Court held, "While the automatic future custody modification violates the custody modification statute, the conditional determination of present custody does not. The latter is a determination of present custody under carefully designated conditions." *Id.* If the mother violated these conditions, the basis for the custody order would be undermined, and the father could seek modification under the custody modification statute. *Id.* at 1012-13. The Court did not find the custody order improper. *Id.* at 1013.

At the hearing in this case, Father informed the court in no uncertain terms that if he would not be permitted to relocate E.M. to Tennessee, he would move back to Indiana to maintain custody of E.M. The trial court no doubt relied on Father's assertions when crafting its order, which maintained custody of E.M. with Father but also required Father to reside in E.M.'s current school system: "Father is to have physical custody of the child, [E.M.] and reside in the current school system for the minor child." Given that the trial court denied Father's notice of intent to relocate but gave him custody of E.M. and ordered him to move back to Indiana, the trial court's order may be construed as an order conditioning custody on the continuation of E.M.'s place of residence.

But, regardless of whether this order can be seen as a conditional order acceptable under *Bojrab*, the order erroneously required Father to move back to Indiana. And as far as we can tell by the record, Father remains in Tennessee with custody of E.M. while E.M. lives in Indiana. Although we are sympathetic to the trial court's reliance on Father's word by ordering him to move back to Indiana, Father is entitled to move wherever he wants. Because the trial court erred by ordering Father to move to Indiana, we reverse the court's custody order regarding E.M. and remand for a redetermination of custody.[1]

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and MATHIAS, J., concur.

[1] Because we are remanding for a redetermination of custody, we need not address Father's additional issue regarding Mother's parenting time with E.M. We do note, however, that the trial court deviated from the Indiana Parenting Time Guidelines without written explanation. This was error. *See Haley v. Haley*, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002) (remanding where trial court failed to offer written explanation for deviation).