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IN THE
COURT OF APPEALS OF INDIANA

J.H.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A04-1010-DR-729
	)	
B.H.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
The Honorable Craig J. Bobay, Magistrate
Cause No. 02C01-0410-DR-956

July 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

J.H. ("Father") appeals from several orders of the dissolution court, including its final order granting B.H.'s ("Mother") motion to modify child custody in response to Father's relocation to Ohio. We affirm.

Issue

Father presents three issues for our review, but we find one dispositive: whether the trial court erred when it modified the parties' child custody arrangements in response to Father's relocation.

Facts and Procedural History

Mother and Father married on July 14, 2001, and divorced on October 28, 2004. They have two children from the marriage, C.H. and O.H. (collectively, "the children"), and Mother has a child, C.L., from another marriage. Following the divorce, Father had physical custody of the children and the parties shared legal custody. Mother exercised parenting time pursuant to recommendations of the Indiana Parenting Time Guidelines, except that her midweek visit with the children was overnight.[1] The marital settlement agreement further provided that:

> Husband is contemplating relocating outside the State of Indiana. Wife does not object to Husband and children relocating outside the State of Indiana. By acknowledging the same, Wife is giving her written consent for Husband to change the residence of Husband and children to a location outside the State of Indiana.

[1] Section II(B)(1) of the Indiana Parenting Time Guidelines recommends a regular parenting time schedule of alternating weekends and one evening per week for up to four hours, which may be extended to an overnight if the distance from the non-custodial parent's house makes it reasonable.

App. 45.

In May 2006, Father relocated with the children from Indiana to Paulding County, Ohio. In November 2006, Father then relocated back to Fort Wayne, Indiana. Before September 2008, Mother had no complaints about the communications between the parties regarding exchanges of the children, or decisions regarding their best interests.

Then, on September 8, 2008, Mother left Father two voicemail messages regarding C.H.'s back-to-school night. The next day, Father returned Mother's calls and informed her that C.H. no longer attended school in Indiana because they had moved to Ohio over the weekend. Mother became upset, and Father hung up on her and refused to answer her repeated calls thereafter.[2] Father telephoned Mother the following morning and informed her that she should cancel C.H.'s dental appointment that was scheduled for that day, that she would not have her scheduled midweek parenting time that night, and that she would be unable to see the children until her weekend parenting time scheduled for September 19. Father refused to reveal where he had moved, but did tell Mother that C.H. now attended Lincolnview Elementary School, which Mother later discovered through internet research to be located in Van Wert, Ohio. At some point, Father told Mother that her parenting time would be reduced to four days per month from two to four days per week.

Father eventually revealed his home address on Friday, September 19, 2008, and Mother drove to Ohio to pick up the children for her weekend parenting time. When Father picked the children up on Sunday, Mother informed Father that C.H. had a parent-teacher

[2] Phone records indicate that Mother called Father five times after their initial conversation.

lunch at school that Tuesday, September 23, 2008, and that she had made arrangements with C.H.'s teacher to attend. She asked Father if she could see O.H. that day, too, as O.H. was not yet in school, but Father denied this request.

On September 23, 2008, Mother attended the school lunch and afterward, despite Father's earlier denial, went to Father's home to see O.H. Jennifer Harris ("Jennifer"), Father's then-girlfriend and present wife whom Mother had never met until that day, answered the door. Mother told Jennifer who she was and told her she would like to take O.H. out for lunch and ice cream. Jennifer refused, and Mother told Jennifer that she had her driver's license and a copy of the dissolution decree, and that O.H. could identify her. Jennifer still refused to let her see O.H. and they both called the police. Jennifer also called Father, who told her not to let Mother see O.H. Mother left without seeing O.H., returned to Indiana, and filed the following with the court the same day: a "Verified Motion for Emergency Temporary Restraining Order and Permanent Injunction," a "Verified Motion to Modify Custody," and a "Verified Information for Rule to Show Cause" why Father should not be held in contempt of the dissolution decree. Father then submitted his "Belated Motion to Relocate" on October 3, 2008.

The dissolution court held a hearing on October 10, 2008, and orally granted Mother's petition to temporarily restrain the children's move, and ordered that Father immediately move the children back to Allen County, Indiana and re-enroll C.H. in his prior school by October 14, 2008. Father did not comply, and on October 14, 2008, Mother filed a "Motion to Modify Custody and for Contempt" seeking emergency custody of the children and

seeking to hold Father in contempt. The court held an emergency hearing, and issued an order temporarily restraining Father's relocation of the children, ordering him to move the children back to Allen County by October 17, 2008, and ordering him to at least re-enroll C.H. in a Fort Wayne Community School. The order further stated that if Father was unable to comply with the order, Mother would be awarded temporary physical custody of the children as of December 18, 2008.

On October 15, 2008, Father enrolled C.H. at Northcrest Elementary School in Fort Wayne using his sister's address. Father then filed a Notice of Intent to Relocate on November 5, 2008, informing the court that he had moved his principal residence to an apartment in Fort Wayne on October 15, 2008. Thereafter, the parties resumed the normal parenting time schedule and Mother exercised her midweek overnight visits.[3] During the parenting time exchanges, Mother noticed very minimal furnishings in Father's apartment, and became suspicious that he and the children were not actually living there. To confirm her suspicion, Mother hired a private investigator who conducted surveillance of Father and ultimately concluded that he and the children were not living in the Fort Wayne apartment. Instead, Father used the apartment for exchanges and then drove the children to Ohio during the night.

Following this revelation, Mother filed a "Verified Information for Rule to Show

[3] Father did not allow Mother to exercise her midweek overnight parenting time in September. On October 5, 2008, after Mother's weekend visit, Father told Mother that her midweek parenting could resume, but it had to be a midweek visit, not an overnight. Mother informed Father that she could not do it on Wednesday, and asked whether they could move it to Thursday. Father told her that it had to be Wednesday or nothing. When Mother went to Father's house that Wednesday, Father refused her parenting time, and Mother called the police. Mother then went to Father's house the next day with her mother, and they saw the children for an evening visitation.

Cause and for Emergency Hearing" on November 10, 2008. She then filed a "Motion for Immediate Temporary Custody and Verified Information for Rule to Show Cause" on November 24, 2008, and a "Motion for Immediate Hearing" on November 24, 2008. The court held a case management conference on December 11, 2008, and granted Mother immediate access to Father's Fort Wayne apartment for inspection. Mother entered the apartment and took pictures of, among other things, empty closets, Father's bedroom containing only a futon frame, the children's bedroom with two small twin mattresses on the floor, a refrigerator with two containers of soda, a living room floor with only a few toys, and a bathroom without toothbrushes or toilet paper.

On December 18, 2008, the dissolution court held a hearing on Mother's petitions, as well as Father's "Verified Information for Rule to Show Cause" which he had filed in the interim. On December 22, 2008, the court issued an order finding Father in contempt of the relocation order and granting Mother temporary physical custody of the children, effective January 4, 2009.

Between January 2009 and July 15-17, 2010, when the dissolution court held a final hearing on custody, the parties made multiple filings seeking to hold the other party in contempt. Mother also submitted a motion to modify parenting time requesting an end to Father's midweek overnight visit[4] as well as a notice of intent to relocate to Hunterstown, Indiana. Father objected to Mother's proposed relocation by filing his own emergency

[4] Since the temporary modification of custody, Father has exercised parenting time on alternating weekends with a midweek overnight visit.

request for a temporary order restraining the relocation of the children, and a motion to modify custody. At the conclusion of the three-day hearing, the court issued a written order which granted Mother primary physical custody and sole legal custody of the children and ended Father's midweek overnight visits.

Father now appeals. Additional facts will be provided as necessary.

Discussion and Decision[5]

Standard of Review

Custody modifications are reviewed for an abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." Wolljung v. Sidell, 891 N.E.2d 1109, 1111 (Ind. Ct. App. 2008). We do not reweigh evidence or judge credibility of witnesses. Id. Instead, we consider only the evidence most favorable to the judgment and any reasonable inferences for that evidence. Id.

The order modifying the parties' custody arrangement does not contain special findings, so we review the decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence. Id. Judgments in custody matters typically turn on essentially factual

[5] In his brief, Father also challenges the October 14, 2008 order temporarily restraining his relocation of the children to Ohio and the December 22, 2008 order finding him in contempt of the relocation order and granting temporary custody of the children to Mother. However, the trial court has since made a final custody determination with which we find no error, thus rendering Mother's temporary custody of the children in the interim period a *fait accompli*. See Francies v. Francies, 759 N.E.2d 1106, 1110-11 (Ind. Ct. App. 2001), trans. denied. Inasmuch as Father is attacking the validity of the trial court's emergency custody determination, we are unable to render effective relief, and the issue is moot. See id (citing Bartholomew County Hosp. v. Ryan, 440 N.E.2d 754, 757 (Ind. Ct. App. 1982), abrogated on other grounds by In the Matter of Lawrence, 579 N.E.2d 32 (Ind. 1991)), for the proposition that we will not reverse a lower court's determination where absolutely no change in the status quo will result).

determinations and will be set aside only when clearly erroneous. Id. We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. Id. "The concern for finality in custody matters reinforces this doctrine." Baxendale v. Raich, 878 N.E.2d 1252, 1257-58 (Ind. 2008).

However, Mother did not submit an appellee's brief and therefore we apply a less stringent standard of review. See Vandenburgh v. Vandenburgh, 916 N.E.2d 723, 725 (Ind. Ct. App. 2009). We may reverse the trial court if Father is able to establish prima facie error, which means error on first sight, on first appearance, or on the face of it. Id. We need not develop arguments for Mother, but her failure to submit a brief does not relieve us of our obligation to correctly apply the law to facts in the record to determine whether reversal is required. Id.

Analysis

Father challenges the trial court's custody modification order by arguing that Mother did not show that modification was in the best interests of the children and that there had been a substantial change in circumstances.[6] We disagree.

Indiana Code section 31-17-2-8 ("Section 8") governs initial child custody orders and

[6] Father also asserts that the dissolution court erred by modifying his existing parenting time schedule by ending his midweek overnight visits and right of first refusal. However, he does not support this challenge with a cogent argument or citation to case law, instead characterizing it as a "needless pound[] of flesh." Appellant Br. p. 27. The appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]" Ind. App. Rule 46(A)(8)(a). "It is well settled that we will not consider an appellant's assertion on appeal when he has failed to present cogent argument supported by authority and references to the record as required by the rules." Shepherd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). "If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties." Id.

states that custody shall be determined "in accordance with the best interest of the child." The court is to "consider all relevant factors" in determining the child's best interest, including a nonexclusive list of factors listed in section 8.[7] I.C. § 31-17-2-8; also Baxendale, 878 N.E.2d at 1254-55. In general, modifications to custody orders are permitted only if the modification (1) is in the best interest of the child and (2) there has been a "substantial change" in one or more of the factors identified in Section 8 as considerations in the initial custody determination. I.C. § 31-17-2-21 ("Section 21"); also Baxendale, 878 N.E.2d at 1255.

However, relocation[8] issues in child custody are governed by their own chapter of the Indiana Code, Chapter 2.2, which was added on July 1, 2006. Baxendale, 878 N.E.2d at 1255-57. Under this chapter, there are two ways a non-relocating parent[9] can object to a proposed relocation: a motion to modify a custody order under Indiana Code section 31-17-2.2-1(b), and a motion to prevent the relocation of a child under Indiana Code section 31-17-2.2-5(a). In re Paternity of Ba.S., 911 N.E.2d 1252 (Ind. Ct. App. 2009). If the non-relocating parent does not file a motion to prevent relocation, then the relocating parent with

[7] These factors are: the age and sex of the children; the wishes of the children parent or parents; the wishes of the children (with more consideration given to a child's wishes if the child is at least fourteen years old); the interaction and interrelationship of the children with parents, siblings, or other persons who may significantly affect the children's best interests; the child's adjustment to the child's home, school, and community; the mental and physical health of all individuals involved; evidence of a pattern of domestic or family violence by either parent; and evidence that the child has been cared for by a de facto custodian. I.C. § 31-17-2-8.

[8] "Relocation" means "a change in the primary residence of an individual for a period of at least sixty (60) days," and no longer requires a move of 100 miles or out of state. Baxendale, 878 N.E.2d at 1255-56 (quoting I.C. § 31-9-2-107.7).

[9] "A 'nonrelocating parent' is someone 'who has, or is seeking: (1) custody of the child; or (2) parenting time with the child' and does not intend to move the individual's principal residence.'" Id (quoting I.C. § 31-9-2-84.7). "A 'relocating individual' is someone who 'has or is seeking: (1) custody of a child; (2) parenting time with a child; and intends to move the individual's principal residence.'" Id. (quoting I.C. § 31-9-2-107.5).

custody of the child may relocate. Id.

Here, Mother filed a motion to modify custody in response to Father's relocation. A custodial parent's relocation does not require modification of a custody order, Ba.S., 911 N.E.2d at 1255, but when the non-relocating parent seeks custody in response to the relocation of a custodial parent, the court shall take into account the following in determining whether to modify a custody 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
> >
> > (B) nonrelocating parent for opposing the relocation of the child.
>
> (6) Other factors affecting the best interests of the child.

I.C. § 31-17-2.2-1(b).

By directing courts to consider "other factors affecting the best interests of the child," this section incorporates the factors courts use to evaluate the best interest of the child in general custody modifications under section 8. Baxendale, 878 N.E.2d at 1257. However, a

court need not find a substantial change in one of these factors before modifying custody. Id. at 1257 ("[T]he current statutory framework does not necessarily require a substantial change in one of the original Section 8 factors"); see also In re Paternity of J.J., 911 N.E.2d 725, 729 (Ind. Ct. App. 2009) ("In Baxendale, our supreme court held that a change in custody may be ordered due to relocation even if there is not a substantial change in one of the factors enumerated in section 31-17-2-8").[10] Rather, the court must consider all of the factors listed in section 31-17-2.2-1(b), and although the relocation statutes do not require findings of fact, at minimum, there must be some evidence in the record on each of the factors listed in Indiana Code section 31-17-2.2-1(b). Wolljung, 891 N.E.2d at 1113.

The dissolution court had evidence showing that Father's new home town is 53.08 miles from Fort Wayne, Indiana, which is a one hour and one minute drive. Mother explained that, because of the increased distance between her house and Father's, she would be unable to do overnight visits during the week because it would be impossible for her to drive both C.L. and C.H. to their respective schools on time in the mornings. Mother testified that she opposed relocation because Father had moved without telling her, changed C.H.'s school without telling her, and informed her that her parenting time would be reduced. Father explained that he moved to Ohio because Jennifer was from Ohio, he knew he would

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[10] However, our supreme court has added that, in most cases:

> [T]he need for a change in a Section 8 factor is likely to be academic because a move across the street is unlikely to trigger opposition, and a move of any distance will likely alter one of the Section 8 factors. For example, Section 8 requires evaluation of the effect of relocation on the interaction between the child and other individuals and the community. It is hard to imagine a relocation of any distance where there is no effect on the "interaction" of parents, etc. with the child or the child's adjustment to home, school, and community.

Id.

eventually marry her, and Jennifer's house was larger than his house in Indiana and would provide more space for the children.

The court also heard evidence of several instances in which Father thwarted Mother's contact with the children such that the court could have reasonably concluded not only that this was an "established pattern" of behavior, but that it would also not be feasible for Mother to preserve her relationship with her children through suitable parenting time. I.C. § 31-17-2.2-1(b)(4). For instance, Father did not alert Mother to the fact that he would be moving, aside from a comment in July 2008 that he may have to do so "in the future." Tr. 25. He did not consult with her regarding changing C.H.'s school and obfuscated the children's whereabouts. He unilaterally informed Mother that her parenting time would be reduced to four days per month from the typical two to four days per week and denied Mother midweek parenting time during September 2008. In the first week of October, Father changed Mother's midweek overnight visit to an evening visit, and then denied her time with the children when she arrived at his house. When she arrived the following day to make up the time and to take the children to dinner, they had already eaten. Mother testified that Father did not allow the children to speak with their great-grandmother on her birthday, and, in another instance, refused to drop the children off in Fort Wayne with their grandparents, instead making Mother drive to Ohio the following morning.

Both parties also presented a significant amount of evidence concerning the Section 8 factors. For example, the court had evidence of school and daycare records, as well as a custody evaluation report prepared by Dr. Stephen Ross which explored in detail topics such

as the parties' respective family history, education, substance abuse, and interaction with the children. After conducting his research, which included interviews and psychological tests of both parents as well as on-site visits to each of their homes, Dr. Ross stated that he was more inclined to recommend that Mother be the custodial parent. This is all in addition to the evidence concerning denied parenting time, which certainly represents a change in the interaction between Mother and the children, as well as Father's decision to abruptly move and switch C.H.'s school without informing Mother, therefore affecting both her role as joint legal custodian and C.H.'s adjustment to home, school, and community.

Accordingly, the dissolution court had ample evidence of all the factors it was required to consider, and we find no prima facie error in the court's conclusion that it was in the children's best interests to modify custody. While we acknowledge that Father presented evidence to the contrary, we do not reweigh evidence or judge the credibility of witnesses when reviewing custody modifications. See Wolljung, 891 N.E.2d at 1111. The dissolution court's order is affirmed.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.