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**IN THE
COURT OF APPEALS OF INDIANA**

R.S.,)
)
Appellant-Petitioner,)
)
vs.) No. 21A01-0902-CV-54
)
T.S.,)
)
Appellee-Respondent.)

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0401-DR-29

September 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

R.S. (“Father”) appeals the trial court’s order modifying custody of his daughter B.P.S. and granting physical custody to T.S. (“Mother”). For our review, Father raises three issues, one of which we find dispositive: whether the trial court abused its discretion by failing to consider all of the statutory factors described in Indiana Code sections 31-17-2.2-1(b) and 31-17-2-8. Concluding the trial court failed to consider all of the statutory factors in reaching its decision, we reverse and remand for further proceedings in light of this opinion.

Facts and Procedural History

Father and Mother married in 1997. The marriage produced one child, B.P.S., who was born in January 1998. On October 14, 1999, the couple divorced and the trial court awarded custody of B.P.S. to Mother. On April 28, 2004, the trial court modified its custody order and awarded custody of B.P.S. to Father, finding “[Mother] failed and refused to permit [Father] to exercise visitation rights ... with [B.P.S.] all without justifiable basis and is in contempt of Court for so doing.” Appendix of Appellant at 171. Mother was ordered to pay child support in the amount of \$35.00 per week. At some point Mother owed Father approximately \$2,800.00 in unpaid support. Though Mother has apparently repaid some of the debt, an arrearage still exists. However, Father testified he now receives regular payments of \$45.00 per week (support payment plus \$10.00 payment towards the arrearage) through a withholding order.

In the summer of 2008, Father verbally informed Mother that he was considering moving to Missouri. Father had voluntarily quit his previous job because his work schedule

did not provide him sufficient flexibility to spend time with his family and attend church regularly. Father began seeking new employment and eventually obtained a job in Missouri. Father and his current wife, A.S., had been contemplating a move to Missouri to be closer to A.S.'s family, specifically her ailing parents. On July 7, 2008, Father, acting pro se, filed a notice of intent to move with the clerk of the trial court. Father's notice did not include any specific information regarding the move except that he planned to move to "Southeast Missouri."¹ Id. at 173. Father listed his reasons for moving as "[d]ue to the economics of our community and the ill health of family members in Missouri." Id. Father did not mail a copy of the notice to Mother.

On July 15, 2008, Mother filed a pro se petition to modify custody and requested a hearing before the trial court. Mother listed the following changes in circumstances as the basis for a change in custody: "1) [Father] has told [Mother] he is thinking of moving out of state. 2) Interference of relationship with parent [Mother]. 3) Lack of communication both written and oral. 4) Lack of additional parenting time. 5) Failure to notify for opportunities to volunteer or participate in activities." Id. at 175. On August 15, 2008, Father filed an address notification listing his new address in Missouri. On August 17, 2008, Father moved to Missouri with B.P.S. Father claims he gave Mother his new address in Missouri on August 14, 2008; however, Mother claims she did not know Father and B.P.S. had moved until August 17, 2008.

¹ It is not disputed that Father did not have specific information regarding the date of his move or his new address when he filed his initial notice. Father filed an address notification with the trial court soon after signing a lease for a home in Missouri.

On November 3, 2008, the trial court held a hearing at which it heard testimony from Father, Mother, Mother's employer, and Mother's sister. Following the hearing, the trial court entered its order on November 25, 2008, in which it found:

1. [Father] and his wife were gainfully employed in the Fayette County area and [Father] made the decision to quit his job and move to Missouri.
2. The only individuals living in the Missouri area are [Father's] wife's family.
3. All of the child's paternal and maternal relation live in or around the Fayette County area.
4. [Father] failed to provide the 90 Days Notice of Intent to Move, in fact he notified [Mother] just days before he took the child to Missouri. This notification to [Mother] took place after [Father] had moved to Missouri.
5. It is in the best interest of the child to remain in Indiana.
6. Custody is hereby granted to [Mother]. [Father] shall have visitation pursuant to the Indiana Parenting Time Guidelines.

Id. at 7. Father filed a motion to correct error and a motion to stay the judgment, both of which the trial court denied. Father now appeals.

Discussion and Decision

I. Standard of Review

We review custody modifications for an abuse of discretion, with a preference for granting latitude and deference to the trial court in family matters. Wolljung v. Sidell, 891 N.E.2d 1109, 1111 (Ind. Ct. App. 2008). We do not reweigh the evidence or judge the credibility of witnesses. Id. The trial court can observe the parties' conduct and demeanor and listen to their testimony; the value of such close proximity cannot be overstated in the matter of deciding custody, where the trial court is called upon to make Solomon-like decisions in complex and sensitive matters. Pawlik v. Pawlik, 823 N.E.2d 328, 329-30 (Ind. Ct. App. 2005), trans. denied. Therefore, we will set aside the trial court's judgment only

when it is clearly against the logic and effect of the facts and circumstances before the trial court. Liddy v. Liddy, 881 N.E.2d 62, 68 (Ind. Ct. App. 2008), trans. denied.

II. Modification of Custody Following Notice of Intent to Relocate

In 2006, our Legislature created Indiana Code chapter 31-17-2.2 to address the issue of a custodial parent's out-of-state relocation with a child. Indiana Code section 31-17-2.2-1(a) requires a relocating parent to file notice of his intent to move with the clerk of the trial court having jurisdiction over the custody order and send a copy of the notice to the nonrelocating parent. The nonrelocating parent may object to the relocation of the child in one of two ways: by filing a motion to prevent the relocation of the child under Indiana Code section 31-17-2.2-5(a); or by filing a motion to modify custody under Indiana Code section 31-17-2.2-1(b). See Baxendale v. Raich, 878 N.E.2d 1252, 1256 n.5 (Ind. 2008). If the nonrelocating parent does not file a motion to prevent relocation, then the custodial parent may relocate. Id. However, if the nonrelocating parent does file a motion, then the relocating parent must first prove "the proposed relocation is made in good faith and for a legitimate reason." Id. (quoting Ind. Code § 31-17-2.2-5(c)). Once the relocating parent meets his burden, the nonrelocating parent must prove "the proposed relocation is not in the best interests of the child." Id. (quoting Ind. Code § 31-17-2.2-5(d)).

Generally, once an initial custody determination has been made, a modification of custody may only occur upon a finding by the trial court that there has been "a substantial change" in one or more of the statutory factors in Indiana Code section 31-27-2-8. Ind. Code § 31-17-2-21(a). However, when a modification of custody is sought in response to one

parent's notice of intent to relocate, the trial court must consider several additional factors specific to 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 relocation of the child.
- (6) Other factors affecting the best interest of the child.

Ind. Code § 31-17-2.2-1(b). Relocation alone does not require a modification of custody. Baxendale, 878 N.E.2d at 1256. Neither, however, must the nonrelocating parent demonstrate a substantial change in one of the factors in Indiana Code section 31-17-2-8. Id. at 1257. Rather, the trial court must balance the factors listed in the relocation statute, which includes the list of factors affecting the best interest of the child. Id.

In its order, the trial court made findings to support its conclusion that a change of custody was warranted. Specifically, the trial court found: Father “made the decision to quit his job and move to Missouri;” only A.S.’s family live in Missouri, all of the B.P.S.’s blood relatives live in Indiana; and Father “failed to provide the 90 Days Notice of Intent to Move ... notified [Mother] just days before he took [B.P.S.] to Missouri.” App. of Appellant at 7. The order does not indicate whether the trial court considered all of the relocation factors or how the trial court weighed those factors, despite the fact that significant evidence on the

factors was presented during the hearing. The trial court's order fails to consider the distance involved, the hardship and expense involved for the Mother, the feasibility of preserving the parent-child relationship through adequate parenting time, the financial circumstances of the parties, any established pattern of conduct by the Father to promote or thwart Mother's contact with B.P.S., and Father's reasons for relocations. Therefore, it is not clear to us that the trial court considered those factors in reaching its decision.

We are mindful that Father failed to comply with the notice requirements of the relocation statute, and this fact certainly should be weighed by the trial court in its decision under the determination of an established pattern of conduct to thwart the nonrelocating parent's contact with the child. However, Father's failure to comply with the notice requirements alone should not be determinative of the need to modify custody. Additionally, under the unique circumstances of this case, the trial court must also consider the fact that custody was previously granted to Father due to Mother's interference with Father's parenting time, and the possibility that such interference would continue.

The trial court's order also does not indicate that it considered all of the best interest of the child factors from Indiana Code section 31-17-2-8. Therefore, because it is not clear the trial court considered all of the relocation and best interest of the child factors, we reverse the trial court's order and remand this case to the trial court to consider the evidence in light of all of the statutory factors.

Finally, it appears from the record that Mother currently has physical custody of B.P.S. See Id. at 188, ordering transfer of custody on December 20, 2008. Absent exigent

circumstances, the trial court shall order the parties to maintain the status quo pending the trial court's decision upon remand. See Wolljung, 891 N.E.2d at 1113.

Conclusion

The trial court failed to consider all of the required statutory factors prior to issuing its order modifying custody. Therefore, we reverse the order and remand this case for the trial court to consider all of the statutory factors described in Indiana Code sections 31-17-2.2-1(b) and 31-17-2-8.

Reversed and remanded.

DARDEN J., and MATHIAS, J., concur.