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IN THE
COURT OF APPEALS OF INDIANA

T.N.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0801-JV-52
	)	
B.D.	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION CIRCUIT COURT
The Honorable Theodore M. Sosin, Judge
Cause No. 49C01-0104-JP-811

October 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

T.N. (Mother) appeals the trial court's modification of custody order, which granted B.D. (Father) legal and physical custody of the parties' daughter, K.D. She presents the following restated issue for review: Did the trial court abuse its discretion by modifying custody?

We affirm.

K.D. was born on May 17, 2001. The following month, Father signed a paternity affidavit acknowledging his paternity of K.D., and the parties filed a joint verified petition to establish paternity and support. Pursuant to the joint petition, which the trial court approved, Mother was granted legal and physical custody of K.D. and Father was granted visitation rights pursuant to the Indiana Parenting Time Guidelines.

Mother and Father had an on-again-off-again romantic relationship until the end of 2003. While there had apparently been some discord regarding visitation prior to the end of their relationship, the facts most favorable to the modification of custody order reveal that after their breakup Mother became intent on interfering with Father's visitation and relationship with his daughter.

On April 21, 2005, Father filed a petition to modify custody. Father sought custody of K.D., alleging Mother had continued to withhold K.D. from him and had exhibited violent and erratic behavior in front of Father and K.D. The final hearing on Father's petition to modify custody began on August 24, 2006. Testimony was also heard on three subsequent dates, May 16, May 17, and June 25, 2007. During the pendency of the hearings, on Monday, March 19, 2007, Father discovered that K.D. had been withdrawn from school the previous Friday and that Mother had relocated to Nashville, Tennessee with K.D. Mother

had not informed Father of the pending move and did not file a notice of intent to relocate with the trial court prior to her move.

Father filed an emergency petition for modification of custody on April 2, 2007. Thereafter, on April 25, Mother filed her notice of relocation with the trial court. At the emergency hearing on April 27, which Mother did not attend, the trial court issued an order granting Father additional parenting time to make up for his missed visits due to Mother's relocation with K.D. The following day, Mother failed to comply with the parenting time ordered. On May 1, 2007, the trial court, noting its extreme displeasure with the fact that its parenting-time order had not been followed, issued yet another order, granting Father additional parenting time pending the resolution of the modification proceedings.

Following the final hearings regarding modification of custody, the trial court issued a detailed order on August 27, 2007. The trial court's findings, conclusions, and judgment are set out in relevant part below:

FINDINGS OF FACT:

* * * *

> 3. Since the time of the [paternity] judgment, [Father] has filed a number of contempt petitions against [Mother] alleging among other things a denial of parenting time. These petitions were incorporated into the final hearing in this matter.
>
> 4. In December 2004, the Court eliminated [Father's] overnights with the child due to allegations of sexual abuse of the child against him. In April of 2005, the Court reinstated the overnights, finding no substantiation of the allegations and that [Mother] had essentially deceived the Court in that the child's counseling had been terminated by [Mother] even before the December of 2004 hearing.
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> * * * *
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> 6. [Father] filed his Petition to Modify Custody on April 21, 2005.
>
> 7. [Mother] "left" for Tennessee on February 20, 2007, and moved her

belongings there on March 5, 2007. [Mother] signed a lease in Tennessee on March 10, 2007.

8. When [Mother] left the State of Indiana, the child remained in the care of the maternal grandmother, Minnie Blaylock. [Father] was not offered the first right of refusal.

9. [Mother] did not inform [Father] of any specifics of her move, including the exact moving date nor when the child would be withdrawn from school. [Father] was not aware of the child's removal to Tennessee until March 19, 2007.

10. [Mother] filed her Notice of Intent to Relocate on April 25, 2007, which was verified by [Mother].

11. The Notice was replete with false information, including [Mother's] report that she had received a "job offer" from Grapevine. In actuality, [Mother] worked at Grapevine on March 5, 2007 and March 6, 2007 and was terminated thereafter. The Notice did not report that [Mother] was employed by Queststar on March 26, 2007, nor that she was currently working at Placement Pros. Finally, the Notice indicated that [K.D.] was attending Ezell Harding, which was untrue.

12. [Mother] received another job offer, her fourth since relocating to Tennessee, on June 18, 2007 from SBR-Thinking Head.Com.

13. [K.D.] has attended Jewel Academy in Indianapolis since preschool. This school includes up to fifth grade. [Father] intends to enroll [K.D.] in Jewel should he be awarded custody.

14. [Mother] removed [K.D.] from Jewel in March of 2007, two months prior to completing her kindergarten year.

15. [K.D.] was enrolled in Shane Elementary in Tennessee for the remainder of the 2006-2007 school year.

16. On the school enrollment/registration documents for Shane Elementary, [Mother] did not list [Father] as [K.D.'s] father nor provide any information about him. Further, [Mother] registered the child as [K.N.D.], which is not the child's legal name.

17. [Mother] has lived at seven different residences since [K.D.'s] birth. [Father] has lived at three residences; most recently moving due to his marriage to his current wife.

18. Since 2004, [Mother] has had at least seven different employers in the State of Indiana. Since relocating to Tennessee, [Mother] has had four different employers.

19. [Father] worked at Charles Schwab for seven years, and began working at TIAA CREF in September of 2006.

20. The parties participated in two DRCB custody evaluations, one in 2005 and the other in 2006.

21. In the 2005 evaluation, [Mother] told the evaluator that the paternal grandmother had been diagnosed with schizophrenia. There was no evidence

to support this and the evaluator concluded that the assertion was false. [Mother] also reported that she did not want overnight parenting time for [Father] until her "concerns regarding the alleged molest are resolved", yet [Mother] had withdrawn [K.D.] form [sic] counseling for these allegations in December 2004. [Mother] has not sought additional counseling for the child to address these concerns.

22. There is a pattern of [Mother] interfering with [Father's] relationship with [K.D.] and evidence illustrating [Mother's] efforts to limit [Father's] involvement with the child. [Mother] had denied [Father] parenting time with [K.D.] on at least six occasions over the years, and she informed Jewel Academy to not allow [Father] to take [K.D.] off school premises. She has been reluctant to give and has delayed giving [Father] information regarding the child's medical provider. She has disallowed consistent telephone contact with [K.D.] She has not kept [Father] informed of [K.D.'s] school and extracurricular activities. She has denied the first right of refusal, and most recently, had failed to inform [Father] about the relocation or any details surrounding her move.

23. [Mother] also gave incorrect information to Detective Dixon, an Indianapolis Police Department Officer by showing him an outdated parenting time order in an effort to terminate [Father's] parenting time.

24. Both parties have been late to parenting time exchanges. Both parties have acted inappropriately and used demeaning and derogatory language in front of the child.

25. Both parties have acted selfishly and with disregard for [K.D.'s] best interests. Both parties also believe they are not to blame for the child's confusion and "guarded" attitude and instead place the fault on the other parent.

26. [Father] has engaged in reciprocal game-playing by failing to disclose his marriage to [Mother] and not telling [Mother] about the Atlanta trip nor the water gun incident. While the Court believes these actions were taken in retaliation against [Mother] for her mistreatment of [Father] and ignorance of court orders, [Father] cannot let his anger towards [Mother] cloud his judgment with respect to [K.D.]

27. [K.D.] has a solid and bonded relationship with both parents. She also enjoys a good relationship with [Father's] wife and [K.D.'s] step-brother. [K.D.] also has a very close relationship with the maternal grandmother, who resides in Indianapolis.

28. [Mother] does have a number of relatives in the Tennessee area.

CONCLUSIONS OF LAW:

* * * *

3. The Court may not modify a child custody order unless 1) the modification is in the child's best interests and 2) there is a substantial change in one or more of the factors the Court may consider under I.C. 31-14-13-2.

4. The Court has considered all of the factors enumerated in I.C. §31-14-13-2, as well as the child's best interests.

5. The Court has also considered all of the sections enumerated in I.C. §31-17-2.2 *et seq*, or Indiana's Relocation Statute.

6. Pursuant to the Relocation Statute as applied to this case, [Mother] must first show that the relocation was in good faith and for a legitimate reason. If that is established, the burden shifts to [Father] to show that he [sic] relocation is not in the child's best interests. Indiana Code §31-17-2.2-5(d).

7. The Court has also considered the legitimacy of the reasons for the relocation, the motivation for relocating, the impact of relocation on the child, the impact of custody modification upon the child and the motivation for opposing the relocation.

8. The Court questions whether [Mother's] relocation was done in good faith and for a legitimate reason. [Mother] claims she couldn't find profitable work in Indianapolis due to her criminal history; yet **if** her criminal history is an obstacle, such would be the case **regardless** of which state she lived in. [Mother] made an insufficient effort to secure employment in Indianapolis, or anywhere else in the vicinity, rather than having to relocate. Further, and most importantly, [Mother] has had four different jobs in Tennessee. [Mother] claimed in her Notice that she was moving because of her job at Grapevine, yet, her last day there was on March 6, 2007, **two weeks** before she withdrew the child from school.

9. Even assuming [Mother's] reasons are legitimate, the Court concludes that the relocation is not in the child's best interests. The Court concurs with [Father's] contention that [Mother's] relocation is an effort to lessen, or eliminate [Father's] involvement and relationship with the child. [Mother] has established a pattern of behavior with [Father] over the last few years in her actions to thwart contact with [K.D.], and that pattern has continued since the relocation; **beginning** with the failure to file a Notice and the removal of the child without **any** specific notification to [Father]. This Court has no confidence that [Mother] will follow its orders if she is allowed to maintain custody in Tennessee; further, the relationship between [K.D.] and [Father] will be substantially diminished if [K.D.] continues living there. Finally, it will be infinitely more difficult for [Father] to obtain school and medical information about [K.D.] if she is hundreds of miles away. The relocation will have an adverse impact on [K.D.], as her sole daily influence will be from [Mother] without regular influence from [Father].

> 10. The Court also concludes that there has been a substantial change in [Father's] wishes, in the child's adjustment to her home and community, and in the child's interaction and interrelationship with both parents and with [Father's] wife. This finding is true whether the relocation is considered **or not**. Further, [Mother] has not demonstrated appropriate stability and consistency for the child since the Paternity Judgment was issued. [Father] has a stable residence, adequate financial resources, a good relationship with his wife, two siblings for [K.D.] to interact with, and can maintain the Jewel Academy for her.
> 11. The Court finds [Mother's] credibility is severely diminished. [Mother] has made false statements to DRCB, Detective Dixon and this Court, and blatantly misrepresented the truth in her Notice of Intent to Move. Quite simply, the Court cannot trust anything that [Mother] says.
> 12. The Court finds that it is not in [K.D.'s] best interests to be relocated to Tennessee.
> 13. The Court finds that it is in [K.D.'s] best interests for custody to be modified to [Father].
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> JUDGMENT
>
> 1. [Father] shall have legal and physical custody of [K.D.], effective immediately. [K.D.] shall be enrolled in Jewel Academy.
> 2. As cited above, part of the reason for this modification is [Mother's] lack of compliance with Court orders and [Mother's] efforts to reduce the relationship between father and daughter. The Court **strictly** **admonishes** [Father] that this behavior **shall** **not** be reciprocated by him, nor shall he act in anger or manipulation towards [Mother].
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> * * * *
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> 10. [Mother] is found in contempt for her willful failure to comply with this Court's parenting time order. Based on this finding, as well as, due to the hearing on [Father's] Emergency Petition *(for which [Mother] failed to appear)*, the Court awards attorney fees in the amount of $1,500.00….

Appellant's Appendix at 55-61 (emphasis in original). After an unsuccessful motion to correct error, Mother now appeals the award of custody to Father.

The general provision governing custody modification in the paternity context is found in Ind. Code Ann. § 31-14-13-6 (West, PREMISE through 2007 1st Regular Sess.). Under this statute, modification is permitted only if it is in the best interests of the child and

there has been a substantial change in one or more of the factors identified in I.C. § 31-14-13-2 (West, PREMISE through 2007 1st Regular Sess.) as considerations in the initial custody determination.[1] With respect to relocation-driven modifications, however, I.C. § 31-14-13-6 does not necessarily require a change in one or more of these statutory factors before a modification may be ordered. *See Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008). Rather, the relocation chapter introduces new factors (specific to relocation) that are required to be considered:

> (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.

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[1] I.C. § 31-14-13-2 provides:

> The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a 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 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 parents;
> (B) the child's siblings; and
> (C) any other person who may significantly affect the child's best interest.
> (5) The child's adjustment to 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….

Ind. Code Ann. § 31-17-2.2-1(b) (West, PREMISE through 2007 1st Regular Sess.). *See also Baxendale v. Raich*, 878 N.E.2d at 1257 ("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").[2] Thus, in determining the best interests of the child, we look to the Section 8 factors, as well as the relocation-specific factors.[3]

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. *Kirk v. Kirk*, 770 N.E.2d 304 (Ind. 2002). "Judgments in custody matters typically turn on essentially factual determinations and will be set aside only when they are clearly erroneous." *Baxendale v. Raich*, 878 N.E.2d at 1257. We will not substitute our judgment if any evidence or legitimate inferences support the trial court's judgment, and the concern for finality in custody matters reinforces this doctrine. *Baxendale v. Raich*, 878 N.E.2d 1252. *See also Kirk v. Kirk*, 770

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[2] As our Supreme Court has recognized, "[i]n most cases the 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." *Baxendale v. Raich*, 878 N.E.2d at 1257 ("[i]t 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").

[3] We note that there are two ways to object to a proposed relocation under the relocation chapter: a motion to modify a custody order, I.C. § 31-17-2.2-1(b), and a motion to prevent relocation of the child, I.C. § 31-17-2.2-5(a). In this case, the trial court analyzed the facts under both options, as Father sought both modification of custody and the return of K.D. to Indiana. Under the latter option, 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, the burden then shifts to the nonrelocating parent to prove that "the proposed relocation is not in the best interest of the child." I.C. § 31-17-2.2-5(d). Here, the trial court questioned whether Mother's move was made in good faith and for a legitimate reason and concluded that relocation was not in K.D.'s best interest. Father clearly sought to modify custody (not simply to prevent relocation) and such modification was not based exclusively upon Mother's move, as his original petition was filed well before Mother's abrupt relocation. Therefore, we will review the trial court's ruling as on a petition to modify custody under I.C. § 31-17-2.2-1(b), not as a ruling on a petition to prevent relocation.

N.E.2d at 307 ("'we 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'") (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

In the instant case, Mother argues that the modification was in error because it was predicated solely upon her relocation to Tennessee and Father's contention that exercising parenting time would be more difficult to him. On the contrary, the trial court's decision to modify custody was based upon a thorough consideration of K.D.'s best interest, not Father's.

On appeal, Mother relies heavily on her own testimony, yet the trial court found her credibility completely lacking. *See Appellant's Appendix* at 60 ("the Court cannot trust anything that [Mother] says"). Moreover, on more instances than we can count in her appellate briefs, she misstates the record or takes testimony out of context. One of the most blatant examples of this is her statement that Father came into K.D.'s life when K.D. was three years old. There is absolutely no support for this in the record. Rather, the record plainly reveals that Father has been part of K.D.'s life since she was born. Mother also indicates on appeal that K.D. almost drowned while in Father's care. Again, the record does not support this. Mother also directs us to Father's wife's testimony, claiming that she testified K.D. was standoffish when Father would come home from work. The important fact Mother omitted here, however, is that Father's wife's testimony referenced a few specific

evenings after Mother had visited K.D. for long periods during the day at summer camp. Regarding Father's relationship with K.D., his wife unequivocally testified that they had a "loving father-daughter relationship" and that K.D. was "[v]ery comfortable" with him. *Transcript* at 173-74.

To be sure, the record establishes that Father has a loving, bonded relationship with his daughter, as does Mother. Father has been able to build this bond over the years, and K.D. has also developed a strong relationship with Father's wife and his step-son, who is K.D.'s age. Instead of fostering these important bonds, Mother has engaged in repeated and often extreme attempts[4] to alienate Father from his daughter. Mother's abrupt withdrawal of K.D. from school, her move to Tennessee (in clear violation of the relocation statute), and her subsequent violations of the court's visitation order[5] are just the latest examples of this.

In addition to being uncooperative with Father and defiant of court orders, Mother has also shown a lack of stability over the last several years. She has not maintained full-time employment and has relied on substantial financial assistance from her Mother. In less than four months after moving to Tennessee, Mother had four different jobs, with the first lasting only two days. Her most recent firing occurred because she was "acting out at work unprofessionally." *Transcript* at 349. In addition to professional instability, Mother has also moved with K.D. seven times since the child's birth. Mother admitted at trial that it was not

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[4] For example, Mother has made unsubstantiated allegations of sexual abuse against Father, has claimed Father kidnapped K.D. and brought an officer to his house to remove the child based upon an outdated custody order, and lied to custody evaluators about K.D.'s paternal grandmother.

[5] Contrary to Mother's assertion on appeal, Father did not testify that there had been no problems with visitation since Mother's move. While exchanges (when visitation actually occurred) had gone smoothly because Mother was not involved (she sent a third party), the record reveals Mother did not comply with the

in K.D.'s best interest to be moved around so much but stated, "Well, that's life." *Id*. at 470. Mother also described K.D. as "confused" over the last two years. *Id*. at 497.

The record establishes that Father can offer K.D. the type of stable environment and consistency that she needs. In Indiana, she will be with loved ones (Father, her stepmother, her stepbrother, her soon-to-be-born half-sibling, and her maternal grandmother) and will be able to return to the Jewel Academy (which she has attended since preschool) with her stepbrother. Moreover, in Father's custody, the evidence favorable to the judgment reveals that K.D. will be better able to have a solid relationship with both Mother and Father.

In sum, we find Mother's appellate argument to be a blatant request for us to reweigh the evidence. This we will not do. In light of the record before us, we cannot say that the trial court abused its discretion in modifying the custody order, as there was substantial evidence presented to establish that modification was in K.D.'s best interest.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur

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court's orders regarding visitation. In fact, the trial court found her in contempt for willfully failing to comply with the parenting time order following her move.