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ATTORNEYS FOR APPELLANT:

RICHARD R. FOX
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IN THE
COURT OF APPEALS OF INDIANA

P. G.,)
)
Appellant,)
)
vs.) No. 22A01-0912-CV-596
)
T.G.,)
)
Appellee.)

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable Vicki L. Carmichael, Special Judge
Cause No. 22C01-0606-DR-107

June 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

P.G. (“Father”) appeals the denial of his petition to change custody after T.L.G. (“Mother”) filed a motion to relocate their minor child out of Indiana.

We affirm.

ISSUE

Whether the trial court erred in granting Mother’s request to relocate and in concluding that she demonstrated that her proposed relocation was being made for a legitimate purpose and in good faith; and that Father failed to demonstrate that the proposed relocation was contrary to the child’s best interests.

FACTS

Mother and Father married, and K.G., was born to the marriage on June 30, 2004. On June 26, 2006, Mother filed a petition for dissolution of marriage. On April 12, 2007, the parties attended a voluntary mediation session, and on April 26, 2007, they entered into a Mediated Agreement resolving their child custody concerns.¹ On May 1, 2007, the trial court entered its dissolution decree and approved the parties’ Mediation Agreement.

On May 6, 2009, Mother filed a petition to relocate and move K.G. from Indiana to Navarre, Florida, and a notice of intent to change state of residence. In response, Father filed a petition for modification of custody on May 30, 2009. On July 10, 2009, counsel moved for findings of fact and conclusions of law, pursuant to Indiana Trial Rule 52, which motion was granted on July 17, 2009. On July 17 and 24 of 2009, the trial court heard evidence on Father’s petition to modify custody. Subsequently, on

¹ In November of 2007, the parties entered into a property settlement agreement to divide their marital estate.

September 17, 2009, it issued its findings of fact and conclusions of law, wherein it denied Father's petition. Its findings and conclusions provided, in pertinent part, as follows:

Findings of Fact

* * *

5. [Mother] presented the following reasons to support her request to relocate with [K.G.] to Navarre, Florida:

She is a single parent with two children at home and no family support system in Indiana.

- a. The parties have not communicated well since the separation. In fact, [Father] testified he did not like [Mother] and would rather not have anything to do with her.
- b. [Mother] does have a family support system in Navarre, Florida, consisting of her brother, sister-in-law, and their two children.
- c. Although her brother is currently deployed to Iraq, she testified she is close to him and her sister-in-law and their children are similar in age to her two children.
- d. Timing is appropriate now because [K.G.] has not yet begun school and is not in sports or other activities in Indiana.
- e. [K.G.]'s half-sister, [Mother]'s other child at home, is moving to Navarre, Florida, with [Mother]. She and [K.G.] have a very close relationship.
- f. The timing of [Mother]'s move is also associated with her losing a job in Indiana and finding better employment in Florida.
- g. [Mother] offered more parenting time to [Father] than the Indiana Parenting Time Guidelines require, but not as much as he is currently enjoying.

6. [Father] presented the following reasons to support his request to grant him primary physical custody of [K.G.] if [Mother] does relocate to Navarre, Florida:

- a. [Father]'s extended family lives very close by, including [K.G.]'s half-siblings. All have a very close relationship with [K.G.].
- b. [Father] is a teacher in the Floyd County Schools, where [K.G.] will eventually attend, if he lives in Indiana. Likewise, [Father's] new spouse is also a teacher, so there will be little need for outside daycare for [K.G.].
- c. [Father] will not be able to maintain his current parenting time schedule if [Mother] is allowed to relocate with [K.G.] because of the distance involved, as well as the travel time and expense.
- d. [Father] testified [that Mother] had a "history" of moving all over the United States.
- e. [Father] has substantial outdoor activities available for [K.G.] at his residence, and he has many family gatherings.

7. Both parties agreed to the following:

- a. [K.G.] loves both parents and needs to spend time with both parents.
- b. It would not be in [K.G.]'s best interest to split up parenting time during the school year.
- c. [K.G.] has not been separated from [Mother] for longer than ten days; however, he has been separated from [Father] for up to a year after his birth because of [Father's] deployment.

8. Other factual findings include:

- a. [Mother]'s relocation resulted in her finding better employment with many more benefits than she had in Indiana.

- b. [Father]’s employment [as a schoolteacher] allows for him to have summers and school breaks free to exercise time with [K.G.].
- c. [Mother] has cooperated with [Father]’s military schedule to allow make-up parenting time.

d. The parties did agree at the mediation to joint legal AND physical custody, and [K.G.] has adjusted well to such an arrangement.

Conclusions of Law:

- 1. Indiana Code [§] 31-17-2.2 provides the guidance for this Court’s decision.
- 2. I.C. [§] 31-17-2.2-1(b) provides, in part:

The Court shall taken [sic] 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 . . . [;]
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time . . . 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;
 - (B) nonrelocating parenting [sic] for opposing the relocation of the child.

(6) Other factors affecting the best interest of the child.

3. The distance involved in the proposed relocation is significant: 640 miles resulting in a ten hour drive. While ten hours in the car might be difficult for a five year old, it can also be a time of quality interaction between parent and child.
4. The hardship and expense on [Father] to exercise parenting time will be increased. However, [Mother] agreed to drive further than half-way for any short exchanges and agreed to drive to and from [Father]'s residence for summer exchanges.
5. The feasibility of preserving the relationship between [Father] and [K.G.] through suitable parenting time is not negatively affected by the proposed relocation. When the Court considers the financial circumstances of the parties, [Father] clearly has the financial ability to exercise all of the parenting time offered by [Mother] and more. The "suitable parenting time" for the [Father] will occur mainly in the summer months when [K.G.] is out of school and when [Father] is out of school – leading to much more quality parenting time with the child.
6. There was no evidence presented that [Mother] had ever tried to "thwart" [Father]'s parenting time with [K.G.]. In fact, the opposite is true. Both parties testified [that Mother] worked well with [Father] in allowing him to alter the schedule or make up time with [K.G.] when his military serve [sic] interrupted his regular [parenting] time.
7. The reasons espoused by both parties as to why [Mother] wants to relocate and why [Father] opposes that Relocation are set forth in the Findings of Fact above.
8. This Court also considers other factors that may affect [K.G.]'s best interest.
 - a. The parties acknowledge an animosity between them that negatively affects their son. Relocation will allow the parties to minimize their contact with one another, while maintaining a high level of contact with [K.G.] on an individual basis.
 - b. Both parties admit [K.G.] has a good relationship with the other party and with the other party's prior-born children although [K.G.]'s

half-sister on [Mother]'s side is closer in age than the half-siblings on [Father]'s side. Further, one of [Mother]'s nephews in Florida is the same age as [K.G.], unlike any of the children in [Father]'s family.

c. [Mother] has been the primary caregiver for [K.G.]. While [Father] has increased his care giving since the separation and divorce, prior to that, [Mother] was the parent responsible for such care giving.

9. The Court finds [Mother] has met her burden that her proposed relocation is made in good faith and for very legitimate reasons. She followed the proper procedure when she decided to relocate and filed her Notice timely. She testified that her reasons were many, including better employment, being closer to family, providing a better environment for her child, and relocating prior to the child becoming so entwined in school and sports to make relocation less desirable.
10. The Court finds that [Father] did not meet his burden to show [that] the proposed relocation is not in the best interest of the child. While the child will not have contact with [Father] every two or three days as he does now, he will have extended, quality time with [Father] when school and work do not interfere. He will have phone contact on a daily basis and visits anytime [Father] chooses to arrange such visits.

IT IS THEREFORE CONSIDERED, ORDERED ADJUDGED AND DECREED that the parties shall have joint legal custody of the minor child, [K.G.].

IT IS FURTHER ORDERED [that Mother] is granted primary physical custody of the child, and shall be allowed to relocate to Navarre, Florida, with the child.

IT IS FURTHER ORDERED [that Father] shall have liberal, extended parenting time with the child, including [K.G.]'s fall break from school; one-half of the Christmas break; and the full summer break, except for any weekend or two-week period [when Father] has military duty (which dates shall be provided to [Mother] at the beginning of the summer break) and the last week before school begins for [K.G.].

IT IS FURTHER ORDERED [that Father] shall have such additional parenting time as may be arranged for weekend visits when

there is a three or four day weekend and any time the [Father] is in the Navarre, Florida, area with the [Father] providing [Mother] at least two weeks' advance notice.

IT IS FURTHER ORDERED when the child is in the other parent's custody, the parent without physical custody shall be entitled to one phone call per day at 8:30 p.m. with the parent not having physical custody to make the phone call. If the parent with physical custody is not a [sic] home at 8:30 p.m., that parent shall have the responsibility to call the other parent and let the child speak to the other parent.

IT IS FURTHER ORDERED that the parties shall meet at the last exit in Tennessee before the Tennessee/Alabama state line on Interstate 65 for the exchange of the child for all visits, except summer. The exchange time shall be agreed upon by the parties. If not [sic] agreement is reached, the exchange time shall be 1:00 p.m. The parties shall keep the other notified if their arrival time is delayed for any reason; however, the Court does not expect either party to be more than thirty (30) minutes late for the exchange. For the summer visitation, [Mother] shall have the responsibility for delivering the child to [Father] on the first Sunday after school is out and retrieving the child on the Friday one week before school is to resume.

IT IS FURTHER ORDERED [that] neither party shall pay child support at this time[,] and each party shall pay his/her own attorney fees and costs.

(App. 5-10). Father now appeals.

DECISION²

1. Standard of Review

The trial court here entered findings of fact and conclusions of law; thus, 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 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.*

2. Relocation

In 2006, our General Assembly amended the Family Law Title of the Indiana Code by adding Indiana Code section 31-17-2.2, concerning the relocation of a custodial parent. *Swadner v. Swadner*, 897 N.E.2d 966, 975 (Ind. Ct. App. 2008).

“Relocation” is “a change in the primary residence of an individual for a period of at least sixty (60) days” A “relocating individual” is someone who “has or is seeking: (1) custody of a child; or (2) parenting time with a child; and intends to move the individual’s principal residence.” A “nonrelocating parent” is someone “who has, or is seeking:

² Mother has not filed an appellee’s brief. In such a situation, we do not undertake the burden of developing arguments for her. *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 establishes *prima facie* error, which means error “at first sight, on first appearance, or on the face of it.” *Id.*

(1) custody of the child; or (2) parenting time with the child; and does not intend to move the individual's residence.”

Baxendale v. Raich, 878 N.E.2d 1252, 1256 (Ind. 2008).

There are two ways under Indiana law to 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). *Swadner*, 897 N.E.2d at 975. If the non-relocating parent does not file a motion to prevent relocation, the relocating custodial parent may relocate. However, where, as here, the non-relocating parent files a motion to prevent relocation, the relocating parent must first prove that “the proposed relocation is made in good faith and for a legitimate reason.” *Id.*; I.C. §§ 31-17-2.2-5(c), (d). If this burden is met, the non-relocating parent must prove that the proposed relocation is not in the child's best interests. *Id.*

The record reveals that on April 26, 2007, pursuant to the parties' Mediated Agreement, the trial court granted joint legal and physical custody of K.G. to Father and Mother. Father argues that by granting Mother's request to relocate, the trial court effectively granted her a custody modification that elevated her to the primary custodial parent, without first “requir[ing] [her] to meet the burden of proof appropriate for such a change of custody.” Father's Br. at 17. We are not persuaded.

Father has cited no legal authority in support of his claim that because the parties had a custody agreement, Mother's petition to relocate should be analyzed under a different legal standard than that specified by our Legislature with regard to proposed

relocations. We, therefore, find no legal justification for requiring Mother to meet an evidentiary burden other than to demonstrate that her proposed relocation is being made (1) for a legitimate reason and (2) in good faith. I.C. § 31-17-2.2-5(c). Notably, our Supreme Court has previously held that once the custodial relocating parent has demonstrated that the proposed relocation is being made in good faith, the analysis “ultimately turn[s] on the best interests of the child” which is, after all, the “overarching policy goal of all family court matters involving children.” *Baxendale*, 878 N.E.2d at 1256 n.5; *Lambert v. Lambert*, 861 N.E.2d 1176, 1180 (Ind. 2007). We proceed to review the trial court’s grant of Mother’s request to relocate under Indiana Code section 31-17-2.2-5(c).

3. Analysis

As noted above, Indiana Code section 31-17-2.2-5(c) requires the relocating parent to prove that “the proposed relocation is made in good faith and for a legitimate reason.” If the relocating parent carries his or her burden, 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). The trial court shall also consider the following factors:

- (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.

I.C. § 31-17-2.2-1(b).

In *Baxendale*, our Supreme Court found that trial courts must also consider statutory factors enumerated in Indiana Code section 31-17-2-8, which are deemed relevant to every custody change. 878 N.E.2d at 1256. Specifically, Indiana Code section 31-17-2.2-1 provides that a court may not modify a child custody order unless the modification is in the best interests of the child and there is a substantial change in one or more of the factors a court is to consider in determining custody initially. These factors include 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 his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(5) the child's adjustment to the child's home, school, and community;

(6) the mental and physical health of all individuals involved; and

(7) evidence of a pattern of domestic or family violence by either parent.

I.C. § 31-17-2-8 (“Section 8”). However, because our Supreme Court held in *Baxendale* that Indiana Code section 31-17-2.2-1 incorporates all of the Section 8 factors, *id.*, our analysis will be centered upon the Indiana Code section 31-17-2.2-1 factors.

In her petition to remove K.G. from the jurisdiction, Mother asserted the following reasons for her proposed relocation:

[Mother] intends to relocate to . . . Florida [because she] has close family living in Florida and no family ties or support system in Floyd County, Indiana. Further, [Mother]’s management position was eliminated with her current employer and [she] was offered a sales position at a much lesser salary, and there are gainful employment opportunities available in Florida where she plans to relocate, and [Mother] desires to relocate where [K.G.] can be raised surrounded by her loving family and continue his close relationship with his sibling, [M.] and his mother, still allowing [F]ather to have [a] substantial relationship and visitation with [K.G.], all of which are in the best interest of [K.G.].

(App. 21).

Mother carried her evidentiary burden under Indiana Code section 31-17-2.2-5(c). At trial, she testified that her brother, sister-in-law, and two nephews reside in Navarre, Florida; and that her nephews are approximately the same ages as K.G. and M. and attend the school corporation that her children will attend if her request to relocate is granted. She also testified that her mother, who currently resides in Hawaii, intends to retire to Navarre, Florida within approximately one year. In addition, Mother testified and presented documentary evidence that she has secured more favorable employment in

Florida, and will therefore “have a better job, a nicer house, and family [there].” (Tr. 265). Lastly, she testified that

the timing [of the proposed relocation] kind of worked out right because of [her] job being eliminated, [M.] finishing 5th grade and [K.G.] not being in school yet [therefore] he doesn’t have forged friendships and commitments with school and sports and things like that . . . , so the timing just all came together that it was the right time for [her] . . . to move with the kids.

(Tr. 341).

We find no clear error from the trial court’s finding that Mother established that her proposed relocation was made in good faith and for a legitimate reason. *See Swadner*, 897 N.E.2d at 976 (finding custodial parent’s proposed relocation was in good faith and for legitimate reasons where she was moving to live with family and had secured new employment).

After the evidentiary burden shifted to Father, the trial court concluded that he had failed to show that the proposed relocation was not in K.G.’s best interests, stating:

While the child will not have contact with [Father] every two or three days as he does now, he will have extended, quality time with [Father] when school and work do not interfere. He will have phone contact on a daily basis and visits anytime [Father] chooses to arrange such visits.

(App. 10). We analyze the trial court’s determination as to whether the proposed relocation was in K.G.’s best interests under the statutory factors enumerated in Indiana Code section 31-17-2.2-1 below.

Factor #1: The distance involved in the proposed relocation.

Mother has requested permission to relocate to Navarre, Florida, which is approximately 640 miles from Greenville, Indiana, where Father currently resides. The distance between these two locations can be traveled by car in approximately ten hours.

Factor #2: The hardship and expense involved for Father to exercise parenting time.

At the hearing, Mother testified that she was willing to bear the lion's share of the transportation burden. She testified that she would drive six hours and Father could drive four hours to reach the Tennessee state line for short exchanges, and that she would "provide full transportation to and from [Father's residence] in the summer." (Tr. 279).

Factor #3: The feasibility of preserving the relationship between [Father] and [K.G.] through suitable parenting time.

The record supports the trial court's findings that (1) Father has the financial means to exercise all available parenting time with K.G.; and (2) summertime is an ideal time for Father to exercise his parenting time. At the hearing, Father testified that in addition to his earnings as a school teacher, he also receives income for his military service. In addition, he testified that his teaching schedule leaves his summers free of school-related responsibilities; and that although there might be times when he has to fulfill his military obligations throughout the year, a recent military promotion has afforded him "more [schedule] flexibility than [he's] ever had." (Tr. 132).

Factor #4: Evidence of an established pattern of conduct by Mother to “thwart” Father’s parenting time with [K.G.].

Father suggests that Mother has moved all over the United States at different times; and that her proposed relocation is an attempt to thwart his parenting time with K.G. However, the record contains no evidence that Mother has ever acted to thwart Father’s parenting time with K.G., not to mention “evidence of an established pattern of conduct.” As the trial court observed, the opposite is true. The parties testified that they have worked cooperatively to ensure that Father is able to make up missed parenting time when his military duties conflicted with his regular parenting time. Father testified further that he has had no problems with Mother in this regard. (Tr. 133).

Factor #5: The parties’ reasons for seeking and opposing relocation.

Mother testified that she sought to relocate to Florida because she lost her job; to obtain more favorable employment opportunities, which would afford her and her children a better lifestyle and environment; to reside near members of her family; and to ensure that K.G. develops relationships with her relatives. Father testified that he opposed the relocation because K.G. has a close and loving relationship with him, his other children, and with his close-knit extended family, who reside within the same geographic area and socialize together frequently. Father also testified that given the significant distance involved in Mother’s proposed relocation, “[w]hichever parent [K.G.] is away from, . . . that parent is not really a parent because they [sic] can’t do what they need to do to raise a child.” (Tr. 228).

Factor #6: Other factors that may affect K.G.'s best interests.

The trial court made the following findings -- none of which is disputed by Father or contradicted by the evidence in the record.

a. The parties acknowledge an animosity between them that negatively affects their son. Relocation will allow the parties to minimize their contact with one another, while maintaining a high level of contact with [K.G.] on an individual basis.

b. Both parties admit [K.G.] has a good relationship with the other party and with the other party's prior-born children although [K.G.]'s half-sister on [Mother]'s side is closer in age than the half-siblings on [Father]'s side. Further, one of [Mother]'s nephews in Florida is the same age as [K.G.], unlike any of the children in [Father]'s family.

c. [Mother] has been the primary caregiver for Kyle. While [Father] has increased his care giving since the separation and divorce, prior to that, [Mother] was the parent responsible for such care giving.

(App. 9).

In addition, although the trial court heard testimony from Father about his family's close relationship with K.G., and the myriad ways in which K.G. could benefit from remaining in Indiana with Father as primary custodial parent, the court also heard evidence that the parties' relationship is dysfunctional and characterized by considerable acrimony that interferes with their ability to communicate effectively.³

³ Father testified that he is willing to "deal with [Mother regarding] whatever is important with [K.G.]," (tr. 222), but that "if [he] never saw her again . . . that's ok[ay]." (Tr. 225). Mother testified, "[Father] will do whatever it takes to make me uncomfortable, to um make me upset, to hurt me, absolutely I feel that way." (Tr. 254-55). She also testified, "[Father] does not talk with me well so we communicate for the most part via email . . ." (Tr. 274). She testified further that "[i]t's like a constant battle, and I don't understand it. [I]t's just not an easy environment for anybody. It's games and [K.G.]'s like you know, this toy in between . . . and it's awful." (Tr. 296). According to her trial testimony, custody exchanges between the parties are extremely tense:

Upon reviewing the trial court's order in the context of the Indiana Code section 31-17-2.2-1 factors, we cannot say that the trial court's findings and conclusions are clearly erroneous, or that our review of the record leaves us with the sense that the trial court erred in finding that Father failed to demonstrate that the proposed relocation was contrary to K.G.'s best interests. *See D.B.*, 913 N.E.2d at 1274. Further, given the evidence of the parties' dysfunctional relationship and the palpable tensions and animosity that K.G. has likely witnessed, we find no clear error from the trial court's judgment. We regard Father's contention that Mother's proposed relocation was, in and of itself, an attempt to thwart his parenting time with K.G. as an invitation to reweigh the evidence and to reassess the credibility of the witnesses, which we will not do. *See id.*

Affirmed.

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

[T]here is not a pleasant exchange, especially in the summer, because . . . [Father]'s off work, and we do exchanges at my house a lot. And it's terrible for [K.G.]. I mean, . . . I'll be holding [K.G.], most of the time I'm hugging and kissing on him before [Father] gets there so I can say goodbye, [Father] will come and . . . he will take [K.G.] out of my arms and turn around and walk away. There's no words
(Tr. 255). Lastly, she testified, "[Father] and I don't get along, and it's not good for [K.G.] to see that. [K.G.] does see it, because he asks about it." (Tr. 341).