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IN THE COURT OF APPEALS OF INDIANA

JAMES QUINCY CALLOWAY,	)	
Appellant-Respondent,	)	
vs.	)	No. 79A02-0701-JV-22
LISA D. FREISMUTH PFROMMER,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Thomas H. Busch, Special Judge
Cause No. 79C01-0402-JP-10

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James Quincy Calloway ("Father") appeals the trial court's order permitting Lisa Freismuth Pfrommer ("Mother") to move to Colorado with their six-year-old son, L.C. Father raises two issues: (1) whether the evidence supports the conclusions and judgment; and (2) whether the court abused its discretion when it ordered the parties to divide equally the cost of the custody evaluation. We affirm.

FACTS AND PROCEDURAL HISTORY

Mother gave birth to L.C. on September 24, 2000. Father's paternity was established about six months later, and in July 2001, an agreed entry gave custody to Mother and visitation to Father in accordance with the Indiana Parenting Time Guidelines.

In September of 2004, Father petitioned for custody. In May 2005, the court denied Father's request for change of custody, but ordered Mother's custody was contingent on her not moving to Colorado.

In June 2006, Mother filed notice of her intent to move to Colorado. Mother also filed a motion to modify custody. Mother requested a custody evaluation, which the trial court granted. The court then maintained custody of L.C. with Mother, permitting her to move to Colorado with him. The court also ordered Mother and Father to split equally the costs of the custody evaluation.

DISCUSSION AND DECISION

1. Burden of Proof

As an initial matter, the parties disagree about who had the burden of proof in this case.[1] Father asserts Mother had the burden to prove a substantial change in circumstances justified modifying the previous order, which prohibited Mother from moving to Colorado with L.C. Mother asserts Father had the burden to prove a substantial change in circumstances justified modifying custody from Mother to Father, in light of Mother's notice she intended to relocate to Colorado. Our Indiana Supreme Court's decision in *Bojrab v. Bojrab*, 810 N.E.2d 1008 (Ind. 2004), requires we agree with Mother.

In *Bojrab*, a mother wished to move with her children from Fort Wayne to Michigan, and the father opposed this relocation. The trial court maintained custody in the mother with the explicit condition that she remain in Fort Wayne. When mother challenged the validity of that condition, our Supreme Court explained:

> [A] trial court may not prospectively order an automatic change of custody in the event of any significant future relocation by the wife. The decree does contain language ordering that, in the event the wife unilaterally decides to relocate outside Allen County, Indiana, "custody of the children shall be granted to the [husband]." This language is inconsistent with the

[1] Mother's notice of intent to move was filed on June 13, 2006. A new statute dealing with relocation of children, Ind. Code § 31-17-2.2-5, became effective July 1, 2006. Because Mother's notice was filed before that effective date, decisions interpreting the former statutes control the result in this case. Nevertheless, we note the new statute explicitly establishes burdens of proof that differ from the result we reach herein. *See* Ind. Code § 31-17-2.2-5(c) (2006) ("The relocating individual has the burden of proof that the proposed relocation is made in good faith and for a legitimate reason.") and Ind. Code § 31-17-2.2-5(d) (2006) ("If the relocating individual meets the burden of proof under subsection (c), the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the best interest of the child.").

> requirements of the custody modification statute . . . . Immediately preceding such language declaring a conditional future change of custody, however, the decree states: "the grant of custody of the parties' minor children is subject to maintaining their residence in Allen County, Indiana." There is a significant difference between the two phrases. One purports to automatically change custody upon the happening of a future event; the other declares that the present award of custody is conditioned upon the continuation of the children's place of residence. 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. Upon a violation of said conditions by the wife as custodial parent, the basis for the custody order is undermined, and the husband may seek a change in custody pursuant to the custody modification statute. This is consistent with the operation of Indiana Code § 31-17-2-23, which establishes procedures that apply when a person who has been awarded child custody intends to relocate outside Indiana or more than 100 miles from the existing residence. The statute calls for a notice by the relocating party and, upon request of either party, "a hearing for the purposes of reviewing and modifying, if appropriate, the custody, visitation, and support orders."

Id. at 1012-13 (internal citations and footnote omitted).

Similarly, here, the trial court's previous order maintained custody in Mother on the condition that she not move to Colorado. While "the conditional determination of present custody" is appropriate, *id.* at 1012, an "automatic future custody modification" would violate the custody modification statutes. *Id.* Thus, one year later, when Mother filed her notice of relocation to Colorado, that previous order could not prohibit her from maintaining custody if she moved to Colorado. Rather, "the basis for the custody order [was] undermined, and the husband [could] seek a change in custody pursuant to the custody modification statute." *Id.* The fact that Mother, and not Father, filed a motion for the court to review custody issues does not lead us to shift the burden to her. Because

Mother was the custodial parent, the burden was on Father to demonstrate the move to Colorado would justify modification of custody from Mother to Father.

2. Sufficiency of Evidence

Modification of child custody may occur only when a parent can demonstrate "modification is in the best interests of the child, and there is a substantial change in one or more of the factors the court may consider." Ind. Code § 31-14-13-6. The factors the court may consider are listed in Ind. Code § 31-14-13-2, which in pertinent part provides:

> 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.
>
> (8) Evidence that the child has been cared for by a *de facto* custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

The court should evaluate the impact of a change in any of those circumstances on the particular child at issue, because a change that would be inconsequential to one child might be devastating to another child. *Joe v. Lebow*, 670 N.E.2d 9, 25 (Ind. Ct. App. 1996). We must give the trial court latitude to determine whether a change is substantial. *Id.* at 24.

Father argues the evidence and findings do not support the court's conclusions and, therefore, "the court abused its discretion in granting the Mother's petition to modify the custody order." (Appellant's Br. at 27.) Father's argument and analysis are off the mark.

As we explained in Section 1, Father had the burden to demonstrate a change in circumstances sufficient to justify modification of custody from Mother to himself. Because he does not direct us to evidence in the record supporting a change in circumstances,[2] we cannot say the court erred in failing to find one.

3. Custody Evaluation Expense

Father asserts the court abused its discretion by requiring each party to "pay half the costs of the custody evaluation and the guardian ad litem's fee." (Appellant's App. at 50.) Under Ind. Code § 31-14-18-2(a):

> The court may order a party to pay:
> (1) a reasonable amount for the cost to the other party of maintaining an action under this article; and
> (2) a reasonable amount for attorney's fees, including amounts for legal services provided and costs incurred, before the commencement of the proceedings or after entry of judgment.

We review the court's decision for an abuse of discretion. *Maxwell v. Maxwell*, 850 N.E.2d 969, 975 (Ind. Ct. App. 2006) (discussing Ind. Code § 31-15-10-1(a), a nearly identical provision in the dissolution of marriage statutes). "Some of the factors courts should consider when deciding whether to require one spouse to pay the attorney fees and costs of the other spouse include the parties's relative resources, ability to engage in

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[2] Instead, he explains why the evidence was insufficient to demonstrate a change in circumstances.

gainful employment, and ability to earn an adequate income." *Id.* The evidence indicated Mother was unemployed and unable to find employment in Lafayette, while Father was running his own travel business. We also note the court's order left each party responsible for his or her own attorney fees. Under these circumstances, we cannot find the court abused its discretion in ordering the parties to divide this expense.

CONCLUSION

Father has not demonstrated the court abused its discretion when it failed to find the change in circumstances required to modify custody from Mother. Neither do we find an abuse of discretion in the trial court's division of expenses between Mother and Father. For these reasons, we affirm.

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.