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ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

**DAN J. MAY**  
Kokomo, Indiana

**DONALD E.C. LEICHT**  
Kokomo, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

IN RE THE PATERNITY OF R.T. )  
 )  
A.G., et al., )  
 )  
Appellants, )  
 )  
vs. )  
 )  
C.T., )  
 )  
Appellee. )

No. 34A04-1012-JP-792

APPEAL FROM THE HOWARD CIRCUIT COURT  
The Honorable Richard A. Maughmer, Special Judge  
Cause No. 34C01-0701-JP-21

**October 6, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

A.G. (“Mother”) appeals the trial court’s order granting C.T.’s (“Father”) petition to relocate their minor child, R.T. to Kentucky and denying Mother’s motion to modify custody. Specifically, she argues that pursuant to Indiana Trial Rule 52(A), the trial court’s findings of fact were not adequate, and that the court abused its discretion when it denied her motion to correct error. R.T.’s paternal grandfather and step-grandmother have also intervened in this appeal and argue that the trial court denied them due process of law when it would not allow them to intervene in the child custody modification proceedings.

We affirm.

### **Facts and Procedural History**

R.T. was born to Mother and Father in 2003, and the three resided together for a short period of time. Mother and Father were not married, and Father’s paternity was established in 2007. After their relationship deteriorated, Mother and Father shared joint custody of R.T. until January 8, 2009. On that date, the parties, who were represented by counsel, entered into an agreement giving physical custody of R.T. to Father. The parties also agreed that Mother would have parenting time the first three weekends of each month and one mid-week evening each week.

Mother failed to exercise her parenting time the first weekend in August 2009 and did not inform Father of her whereabouts. Father suspected that Mother was using illegal substances because she had done so in the past. Thereafter, Father denied Mother any parenting time with R.T.

On September 15, 2009, Mother filed a Verified Application for Rule to Show Cause and for an Emergency Restraining Order. Approximately one month later, Mother

filed a motion for change of judge, and Cass Superior Court Judge Richard Maughmer qualified and assumed jurisdiction of this case on November 4, 2009. After several continuances attributable to Father, the trial court held a hearing on Mother's Rule to Show Cause on April 5, 2010.

At that hearing, Mother testified that Father denied her parenting time with R.T. until the first weekend of October 2009, and that Father refused to follow the Parenting Time Guidelines. But Mother admitted that she was at fault for failing to exercise her parenting time the first weekend of August 2009 and for failing to inform Father of her whereabouts. April 5, 2010 Hearing Tr. p. 53.

On the date of the hearing, Mother and Father were unemployed and Mother was living with Father's father and stepmother. Father was living with his grandparents in Kokomo, Indiana. Father also testified that he was moving to Kentucky with his wife, who was stationed at Fort Campbell. But Father had not yet filed a notice of intent to relocate R.T.

On April 5, 2010, the trial court ordered all prior orders concerning visitation terminated and ordered the parties to comply with the Indiana Parenting Time Guidelines. The court stated that failure to do so would be punishable by contempt. Two days later, Father filed his notice of intent to relocate R.T. to Kentucky. Mother objected to Father's notice, and also filed a petition to modify custody of R.T.

A hearing was held on the pending motions on September 1, 2010. Mother requested findings of fact and conclusions of law. Mother and Father were also unemployed on the date of this hearing, and Father was collecting unemployment. Father

testified that R.T.'s household in Kentucky would consist of his wife and R.T.'s two stepsiblings, but she would have no other relatives in the area. Most of R.T.'s extended family members live near Kokomo, Indiana. The distance between Fort Campbell, Kentucky and Kokomo is over 300 miles and approximately six hours of driving time.

At the hearing, Mother admitted to cocaine use, but she has undergone inpatient rehabilitation and attends narcotics anonymous meetings. She also testified that she has had a few "slips" since the April 5, 2010 hearing. Mother still resided with Father's father and stepmother on the date of the hearing. It would be a financial hardship for Mother to travel to Kentucky to exercise parenting time with R.T. because she does not own a car and has no income.

On September 15, 2010, the trial court issued an order granting Father permission to relocate R.T. to Kentucky. The trial court's order included the following pertinent findings of fact:

9. Father's desire to relocate [R.T.] to Kentucky is not a sham, but necessitated by father's desire to reside with his present wife in Kentucky.

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12. Father's present wife is employed by, or a member of, the U.S. Army.

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15. Father and his present wife have a home in Kentucky.

16. Mother presently resides with the father's parents and has not maintained her own household for several years, if ever.

17. Mother has experienced some past antisocial behavior related to drug dependency. While the court considers mother's attempts to rehabilitate herself sincere, the court must consider the same in deciding the issues before the court.

18. Given the respective circumstances of the parties, father's home in Kentucky is the only option for a stable environment for [R.T.].

19. Modification of [R.T.'s] physical custody to mother from father is not in [R.T.'s] best interests.

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23. While father did briefly intervene with [R.T.'s] visitation with her mother, such intervention was appropriate given mother's then circumstances.

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30. The court has reviewed, considered, and acted in accordance with the provisions of Indiana Code 31-17-2.2-1 et seq., 31-17-2-8, and 31-17-2-21, in making this decision.

Appellant's App. pp. 21-22. The trial court also determined that the distance between mother's home and father's home was too far away for weekend and midweek visitation as contemplated by the Parenting Time Guidelines. Therefore, the court awarded Mother "an additional twenty-nine days of visitation with [R.T.] to be exercised as extended visitation contiguous to school vacations (fall, winter, spring, and summer if applicable)." Id. at 21.

On October 12, 2010, Mother filed a Motion to Correct Error, Motion to Re-open Evidence and Motion to Submit Additional Testimony. A hearing was held on Mother's motions on December 8, 2010. At the hearing, Father admitted, contrary to his testimony at the prior hearing, that his oldest stepchild did not move to Kentucky, but was remaining in the Kokomo area to finish high school. Mother testified that she was able to exercise parenting time with R.T. on her birthday at her school in Kentucky, but Father would only allow her to keep R.T. until 5:00 p.m. even though Father did not return home from work until after 6:00 p.m. Father also would not allow Mother to have R.T. for her Thanksgiving Break, which was Mother's holiday pursuant to the Parenting Time Guidelines.

The trial court issued an order denying Mother's motions, but clarifying its prior order as follows:

2. The father's actions related to [R.T.'s] visitation on her birthday and Thanksgiving are in violation of this court's prior order and the parenting time guidelines.
3. Judgment is entered against the father in favor of the mother for \$120.00 representing transportation expenses related to [R.T.'s] birthday.
4. As a result of the visitation irregularities occurring with Thanksgiving and [R.T.'s] birthday; mother shall exercise visitation with [R.T.] beginning 17 December 2010 and ending 31 December 2010. ([N]one of this period shall count against the additional twenty-nine days in Paragraph 2, order dated 15 September 2010[.] )
5. Transportation expenses shall be shared equally between father and mother related only to extended visitation (at least five contiguous days) and those specific instances of visitation provided in the parenting time guidelines excepting Halloween.

Appellant's App. p. 23. Mother appeals the denial of her motion to correct error.

R.T.'s paternal grandfather and stepmother (collectively "the grandparents") also moved to intervene below. Specifically, on August 21, 2009, the grandparents filed a motion to intervene in the paternity action and a petition for grandparent visitation. The trial court set a hearing date on the motions, but grandparents' counsel filed a motion to withdraw her appearance shortly thereafter.

Over one year after they filed the pleadings and after the trial court entered its September 15, 2010 order on Father's petition to relocate, the grandparents filed a Praecipe for Withdrawal of Submission pursuant to Trial Rule 53.2(A) requesting a special judge be appointed on their motion to intervene in the paternity action. On December 8, 2010, the Howard Circuit Court Clerk found that the "cause of action has not been delayed within the terms of Trial Rule 53.2(A)." Intervenor Appellants' App. p. 18. The trial court then denied the grandparents' motion to intervene at the December 8, 2010

hearing on Mother’s motion to correct error. But with regard to their pending petition for grandparent visitation, the court stated:

[U]pon the request of [either grandparent] or any lawyer that represents them at that time [] the Court will set the matter . . . for Hearing. [] Court declines to set it [] for Hearing today given that [] [the Grandparents] are not present. I want you to still add them . . . in the . . . litigant screen.

December 8, 2010 Hearing Tr. p. 18. The Grandparents have filed an Intervenors’ Appellants’ Brief in this appeal.

### **Discussion and Decision**

First, we observe that our supreme court has expressed a “preference for granting latitude and deference to our trial judges in family law matters.” In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993). The rationale for this deference is that appellate courts “are in a poor position to look at a cold transcript of the record, and conclude that the trial judge . . . 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.” Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (citation omitted).

Custody modifications in paternity proceedings are governed by Indiana Code section 31-14-13-6 (2008), which provides that a custody modification is permitted only if the modification is in the best interests of the child and there has been a substantial change in one or more of the factors identified in Indiana Code section 31-14-13-2 (2008).

In 2006, our General Assembly added to the Family Law Title of the Indiana Code an entire chapter concerning the relocation of a custodial parent. See Ind. Code ch. 31–

17-2.2 (2008). This new chapter was summarized by our Supreme Court in Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008):

“Relocation” is “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. 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: (1) custody of the child; or (2) parenting time with the child; and does not intend to move the individual’s principal residence.” Upon motion of either parent, the court must hold a hearing to review and modify custody “if appropriate.” In determining whether to modify a custody order, the court is directed to consider several additional factors that are set out in section 31-17-2.2-1(b) and are specific to relocation. In general, the court must consider the financial impact of relocation on the affected parties and the motivation for the relocation in addition to the effects on the child, parents, and others identified in Section 8 as relevant to every change of custody.

Id. at 1255-56 (footnotes and citations omitted).

Under Chapter 2.2,<sup>1</sup> there are two ways 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). See Baxendale, 878 N.E.2d at 1256 n. 5. If the non-relocating parent does not file a motion to prevent relocation, then the relocating parent with custody of the child may relocate. Id. If the non-relocating parent does file a motion to prevent relocation, then the relocating parent must first prove that “the proposed relocation is made in good faith and for a legitimate reason.” Id. (quoting I.C. § 31-17-2.2-5(c)). If this burden is met, then the non-relocating parent must prove that “the proposed relocation is not in the best interests

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<sup>1</sup> Indiana Code section 31-14-13-10 provides that in paternity proceedings the relocating individual must send a copy of the notice to each non-relocating individual in accordance with Indiana Code chapter 31-17-2.2.

of the child.” Id. (quoting I.C. § 31–17–2.2–5(d)). Under either a motion to prevent relocation or a motion to modify custody, if the relocation is made in good faith “both analyses ultimately turn on the ‘best interests of the child.’” Id.

The custodial parent’s relocation does not require modification of a custody order. However, when the non-relocating parent seeks custody in response to a notice of intent to relocate with the child, the court shall take into account the following factors in considering the proposed 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 the relocation of the child.
- (6) Other factors affecting the best interest of the child.

Ind. Code § 31–17–2.2–1(b). “The court may consider a proposed relocation of a child as a factor in determining whether to modify a custody [or] parenting time order[.]” Ind. Code § 31–17–2.2–2(b).

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.<sup>2</sup> 878 N.E.2d at 1256-57. The court observed:

First, chapter 2.2 [the relocation chapter] is a self-contained chapter and does not by its terms refer to the general change of custody provisions. Second, the relocation chapter introduces some new factors that are now required to be balanced, but also expressly requires consideration of “other [ ] factors affecting the best interest of the child.” The general custody determination required under Section 8 is to find “the best interests of the child” by examining the factors listed in that section. As a result, chapter 2.2 incorporates all of the Section 8 considerations, but adds some new ones. Because consideration of the new factors might at least theoretically change this balance, the current statutory framework does not necessarily require a substantial change in one of the original Section 8 factors. Finally, section 31-17-2.2-2(b) of the relocation chapter expressly permits the court to consider a proposed relocation of a child “as a factor in determining whether to modify a custody order.” Because section 31-17-2.2-1(b) already contains a list of relocation-oriented factors for the court to consider in making its custody determination, 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. In 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. 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. at 1257 (citations omitted).

### **I. Findings of Fact and Conclusions of Law**

Mother requested findings of fact and conclusions of law pursuant to Trial Rule 52(A). On appeal, she argues that the trial court's findings of fact and conclusions of law

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<sup>2</sup> These are the same factors considered in paternity custody modification proceedings enumerated in Indiana Code section 31-14-13-2.

are inadequate, and that the trial court committed reversible error by failing to consider all the enumerated factors in the relocation statute. Mother both objected to Father's notice of intent to relocate and filed a motion to modify custody of R.T.; therefore, the trial court was required to consider the factors listed in Indiana Code section 31-17-2.2-1(b). See Wolljung v. Sidell, 891 N.E.2d 1109, 1112 (Ind. Ct. App. 2008).

The trial court did not make specific findings on each statutorily enumerated factor despite Mother's Trial Rule 52(A) request for specific findings of fact and conclusions of law. Special findings entered pursuant to a party's request under Trial Rule 52(A) "must contain all facts necessary to recovery by a party and the ultimate facts from which the court has determined the legal rights of the parties." Erb v. Erb, 815 N.E.2d 1027, 1031 (Ind. Ct. App. 2004) (quoting In re Estate of Inlow, 735 N.E.2d 240, 250 (Ind. Ct. App. 2000)).

Pursuant to Rule 52(A), the trial court should have entered findings of fact on each section 31-17-2.2-1(b) factor. The trial court did not issue a specific finding concerning the hardship and expense involved for Mother to exercise parenting time. But our review of the record in this case leads us to conclude that the trial court heard evidence on and considered all of the section 31-17-2.2-1(b) factors. And in its order, the court indicated that it "has reviewed, considered, and acted in accordance with the provisions of Indiana Code 31-17-2.2-1 et seq., 31-17-2-8, and 31-17-2-21"<sup>3</sup> in making its decision.

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<sup>3</sup> The trial court's citation to Indiana Code chapter 31-17-2 is incorrect because these custody proceedings occurred in a paternity action, but the provisions of Indiana Code sections 31-17-2-8 and 31-17-2-21 are substantially similar to those in sections 31-14-13-2 and 31-14-13-6, and therefore, we find no error.

Appellant's App. p. 22. For these reasons, the trial court's failure to issue a separate finding on each section 31-17-2.2-1 factor does not constitute reversible error.

## **II. Mother's Motion to Correct Error**

Mother also argues that the trial court abused its discretion when it denied her motion to correct error. In support of her argument, Mother relies on evidence that Father continually attempts to thwart her parenting time with R.T.<sup>4</sup>

The uncontested evidence presented during the three custody / relocation hearings leads only to one conclusion: on more than one occasion Father has thwarted Mother's contact with R.T. Evidence was presented at the hearings that Father refused to allow R.T. to attend Mother's family gatherings. Father also denied Mother the opportunity for additional parenting time when he had to travel out of state to attend his wife's graduation ceremony and left R.T. with Father's mother. In 2009, Mother's holiday break with R.T. was supposed to begin on December 30, but Father allowed his Mother to take R.T. to Connecticut until December 31. At the most recent hearing on the motion to correct error, Mother testified that although Father allowed Mother parenting time with R.T. on her birthday, and she traveled to Kentucky to do so, Father only permitted Mother to exercise that parenting time from 2:30 p.m. to 5:00 p.m., even though Father did not return home from work until after 6:00 p.m. that evening. Tr. p. 56. Father also would not allow

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<sup>4</sup> Mother also argues that Father lied to the court about the timing of his relocation and when he testified that both of his stepchildren would be living in Kentucky. It was within the trial court's province to weigh the credibility of this testimony and we will not reweigh this evidence on appeal.

Mother to have R.T. for her Thanksgiving Break, a holiday Mother was entitled to pursuant to the parenting time guidelines.

The trial court's consideration of this evidence is evident from our review of the record. In fact, Father was held in contempt for his interference with Mother's parenting time after Father relocated R.T. to Kentucky. But despite Father's contemptuous acts and his inexcusable attitude toward co-parenting with Mother, we conclude that the trial court's denial of Mother's petition to modify custody and order granting Father's petition to relocate, and subsequent denial of Mother's motion to correct error, is supported by the evidence and is in R.T.'s best interests.

By her own admission, Mother is a habitual cocaine user who has relapsed several times and who does not have stable living arrangements. Mother has made attempts to rehabilitate herself, and the trial court specifically found that those attempts were sincere. Appellant's App. p. 22. But Mother admitted that she still occasionally uses cocaine.

Mother also missed her weekend parenting time with R.T. on two occasions and did not contact Father or disclose her whereabouts to him. Mother has not demonstrated that she is able to provide a stable home for R.T. She resides with her friends, relatives, parents, and Father's father and stepmother. And Mother is not able to maintain consistent employment.

For these reasons, we conclude that the trial court's denial of Mother's Motion to Correct Error is supported by the evidence. Further, the trial court held Father in contempt for violating the court's order and the Parenting Time Guidelines and indicated

its willingness to do so in the future if Father continues to prevent Mother from exercising her parenting time with R.T.

### **III. Grandparent Visitation**

Finally, the Grandparents have intervened in this appeal, and argue that they were denied due process of law for the following reasons:

- 1) “by the special judge refusing to set a hearing on their motion to intervene for over 15 months;”
- 2) “by the trial court clerk’s failure to withdraw submission of their motion to intervene pursuant to the ‘lazy judge rule;”” and
- 3) “by the trial court actions in proceeding to hear the pending issues of custody, visitation of R.T., and the relocation of R.T. to Kentucky . . . while their Grandparents’ Petition for Visitation was languishing due to the trial court’s refusal to act on their timely filed Motion to Intervene.”<sup>5</sup>

Intervenor Appellants’ Br. at 7.

On August 21, 2009, the Grandparents filed a motion to intervene in the paternity action. On that date, there were no pending motions as the last action in the case was the court’s approval of the parties’ January 2009 agreement giving Father primary custody of R.T. The Grandparents simultaneously filed a Petition for Grandparent Visitation “with

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<sup>5</sup> Mother raises similar issues in her Appellant’s brief, and we have also considered her arguments in our resolution of these issues.

proposed summons and notice of hearing.”<sup>6</sup> Intervenor Appellants’ App. p. 8. A copy of the Petition for Grandparent Visitation was not included in the record on appeal.

On September 15, 2009, the trial court set an October hearing date on the Grandparents’ pending motions. Shortly thereafter, the Grandparents’ attorney moved to withdraw her appearance, and the trial court granted that motion. The court then moved forward with Mother’s Rule to Show Cause filed in September 2009, and Special Judge Maughmer qualified and assumed jurisdiction of this case in November 2009. No other attorney entered an appearance for the Grandparents and they never took any other action in this case themselves until they filed a “Praecipe for Withdrawal of Submission” on November 17, 2010. After the trial court denied Mother’s motion to correct error, Mother’s counsel entered an appearance on the Grandparents’ behalf on December 29, 2010.

At the December 8, 2010 hearing on Mother’s Motion to Correct Error, the fact that the Grandparents’ motion to intervene and petition for grandparent visitation were still pending before the court was discussed. The trial court denied the Grandparents’ motion to intervene. The trial court then stated:

. . . [T]he Court recognizes there is a pending Petition for Grandparent Visitation Rights and upon the request of [either Grandparent] or any lawyer that represents them at that time [] the Court will set the matter for . . . hearing. [] Court declines to set it [] for hearing today given that [neither grandparent is] present. I want you to still add them . . . in the . . . litigant screen.

December 8, 2010 Hearing Tr. p. 18.

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<sup>6</sup> Both Mother and Father have claimed they were not served with the Petition for Grandparent Visitation. See December 8, 2010 Hearing Tr. p. 17; Appellee’s Br. at 5.

The Grandparent Visitation Act codified at Indiana Code chapter 31-17-5 provides the exclusive method for grandparents to seek visitation with a grandchild. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 462 (Ind. 2009). Our supreme court has specifically held that it is error for a trial court to grant visitation rights to grandparents “in the context of a custody modification proceeding.” Id. For this reason, the trial court properly denied the Grandparents’ motion to intervene in the custody proceeding.

In addition, the Grandparents’ attorney withdrew her appearance shortly after their motion to intervene and petition for visitation were filed. Thereafter, the Grandparents failed to hire other counsel or file any other pleading on their own behalf. They also did not request a hearing on their petition, but simply let it languish for over one year. The trial court has expressly stated that a hearing would be held on their visitation petition if requested. On these facts, the grandparents cannot establish that their due process rights were violated.

### **Conclusion**

The trial court’s decision to allow Father to relocate R.T. was supported by the evidence and in her best interests. The failure of the trial court to issue findings on each section 31-17-2.2-1 factor does not amount to reversible error because the trial court indicated that it considered the statute in rendering its decision. For these reasons, the trial

court also properly denied Mother's motion to correct error. Finally, the trial court properly denied the Grandparents' motion to intervene in the child custody proceeding.

Affirmed.

BAILEY, J., and CRONE, J., concur.