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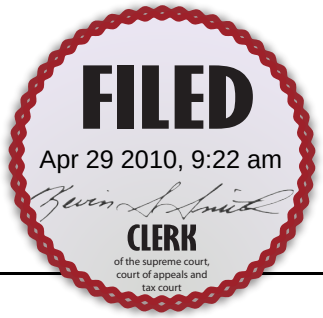

IN THE
COURT OF APPEALS OF INDIANA

G.S.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 08A02-0911-JV-1096
	)	
W.J.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE CARROLL SUPERIOR COURT
The Honorable Jeffrey R. Smith, Judge
Cause No. 08D01-0612-JP-33

April 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

G.S. ("Mother") appeals the trial court's grant of W.J.'s ("Father's") petition to modify custody of the parties' minor child, J.J. Mother presents three issues, which we consolidate and restate as whether the trial court abused its discretion when it awarded Father custody of J.J.

We affirm.

FACTS AND PROCEDURAL HISTORY

This is an appeal after remand from a prior appeal to this court. We set out the facts and procedural history in In re Paternity of J.J., 911 N.E.2d 725, 726-27 (Ind. Ct. App. 2009) ("J.J. I"), as follows:

> J.J. was born on October 16, 2005. On February 12, 2007, Father's paternity to J.J. was established and Father was awarded visitation consistent with the Indiana Parenting Time Guidelines. Father was also ordered to pay $55.11 per week in child support.
>
> On January 6, 2009, Mother filed a notice of intent to relocate J.J. to Florida due to her husband's naval service. On February 9, 2009, Father sent a letter to the trial court, which the court considered to be a petition for modification of custody, child support, and visitation.
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> At the custody hearing held on March 10, 2009, neither party was represented by counsel. Father testified that he is J.J.'s primary caretaker. Father also presented evidence that from February of 2007 to December 31, 2007, he had J.J. for 271 days, in 2008 he had J.J. for 274 days, and from January 1 to February 9, 2009, he had J.J. for 32 days. Father stated that he provided clothes, diapers, and other necessities for J.J. However, Father admitted that he did not pay his court-ordered child support. Mother stated that Father watched J.J. because she worked two jobs and Father was unemployed. She testified, "I give him first chance since he was not working if he wanted to watch her so I could work and not have to take her to a babysitter."
>
> On March 15, 2009, the trial court entered the following order modifying custody:

> On February 12, 2007, the mother was granted custody of [J.J.] and the father was granted parenting time in accordance with the parenting time guidelines. [Mother] will be relocating to Georgia as a result of a change in the assignment of her husband by the military to a base in Florida. Consideration of proposed relocation of a child is a factor in determining whether to modify custody.
>
> The father has had [J.J.] for parenting time on all or part of 271 days in 2007, 274 days in 2008, and on 32 days from January 1 to February 11, 2009. [J.J.] has stayed in the home of her father more than one-half of the overnights. If [J.J.] were to relocate to Georgia with her mother, it would result in a significant change in her relationship with her father. Given that the father has been the "de facto custodial parent," it would be the same as a change of custody. "One of the most significant elements of stability in a child's life is the child's primary caretaker--the person who cooks his meals, puts him to bed, and cares for him on a daily basis." During the past two years, the primary caretaker has been her father.
>
> [J.J.] has a close relationship with her grandparents, two sisters and a brother, aunts, and cousins from both sides of her family who reside in Indiana. A move with her mother to Georgia would also have a significant impact upon [her] relationship with those other than her parents who are closest to her.
>
> The court finds, based upon the substantial changes that will result in the relocation of the child to Georgia set forth above that it is in the best interest of [J.J.] for custody to be modified.
>
> The trial court modified custody by awarding joint custody to Mother and Father, with Father having primary physical custody and Mother having parenting time in accordance with the parenting time guidelines.

(Citations omitted.) Mother appealed the trial court's grant of custody of J.J. to Father, and this court remanded to the trial court with instructions to conduct another hearing on

Father's motion to modify custody and to hear evidence on each of the factors set out in Indiana Code Section 31-17-2.2-1(b).

On October 2, 2009, the trial court held a hearing on remand, and the parties presented evidence on each of the statutory factors. The trial court took the matter under advisement and issued an order granting Father custody of J.J. This appeal ensued.

DISCUSSION AND DECISION

In J.J. I, we discussed the applicable law in this case as follows:

> ### Standard of Review
>
> Initially, we observe that Father failed to file an appellee's brief.[1] We will not undertake the burden of developing arguments for the appellee. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Applying a less stringent standard of review, we may reverse the trial court if the appellant establishes prima facie error. Id. Prima facie error is defined as at first sight, on first appearance, or on the face of it. Id.
>
> Moreover, we review custody modifications for an abuse of discretion. Apter v. Ross, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003), trans. denied. We will not reweigh the evidence or judge the credibility of the witnesses. Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences from that evidence. Leisure v. Wheeler, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005).
>
> ### 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).

[1] Father did not file an appellee's brief either in J.J. I or in this appeal after remand.

Custody modifications are generally governed by Indiana Code Section 31-17-2-21 (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 31-17-2-8 (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 recently 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. Id. § 31-9-2-107.7. 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." Id. § 31-9-2-107.5. 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." Id. § 31-9-2-84.7. Upon motion of either parent, the court must hold a hearing to review and modify custody "if appropriate." Id. § 31-17-2.2-1(b). 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 omitted).

Under Chapter 2.2, 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 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. 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." I.C. § 31-17-2.2-1(b)(6). 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.

> . . . When a motion to modify custody is filed in response to a notice of intent to relocate, the trial court is required to consider the factors listed in Indiana Code Section 31-17-2.2-1(b). Wolljung, 891 N.E.2d at 1112.

911 N.E.2d at 727-30.

Here, on remand, the trial court held a hearing and directed the parties to present evidence on each factor listed in Indiana Code Section 31-17-2.2-1(b), as we had instructed in J.J. I. We also instructed the trial court to "consider not only the existing relationship between Father and J.J. but also the circumstances giving rise to that relationship." J.J. I, 911 N.E.2d at 729. Mother contends that the evidence does not support the trial court's modification of custody. And Mother contends that the trial court did not properly consider the circumstances giving rise to Father's relationship with J.J., namely, his failure to be employed and pay child support, which required that Mother work at two jobs and which led to Father having extensive parenting time with J.J. We address each contention in turn.

Initially, Mother correctly points out that because she proved that her move to Georgia was made in good faith and for a legitimate reason, Father had the burden to prove that the proposed relocation was not in the best interest of J.J. See Baxendale, 878 N.E.2d at 1256 n.5. And Mother maintains that Father did not satisfy his burden on that issue. But Mother's contentions amount to a request that we reweigh the evidence, which we cannot do.

The evidence supports the trial court's determination that modification of custody was in J.J.'s best interests. In particular, the trial court made specific findings and conclusions under Indiana Code Section 31-17-2-8, which sets out the factors to

determine the best interests of a child, and the evidence supports those findings and conclusions. In particular, the trial court concluded that Father "has been the stable influence in [J.J.'s] life during the past two and one-half years." Appellant's App. at 10. And the court concluded that "[i]f [J.J.] remains with her father, her relationship with her mother will change significantly but she will still be living in familiar surroundings and can continue to have regular contact with grandparents, siblings, and friends." Id. at 11. Finally, the trial court concluded that because Father "was the primary care giver of the child and the relocation of the mother would separate the child from her primary care giver," modification of custody was in J.J.'s best interests. Mother has not shown an abuse of discretion on this issue.

Next, Mother contends that Father did not present sufficient evidence to support the custody modification under the relocation statute, Indiana Code Section 31-17-2.2-1. But, again, Mother's contention amounts to a request that we reweigh the evidence. The trial court made findings and conclusions on each factor under the statute, and Mother has not shown that the evidence is insufficient to support those findings and conclusions. Mother merely asks that we find the weight of the evidence in her favor. While we might have reached a different result had we been the fact-finder, we review the trial court's order only for an abuse of discretion.

Finally, Mother contends that the trial court did not properly consider the circumstances that led to Father spending so much time with J.J. Again, Mother argues that she should not be penalized for having to work two and sometimes three jobs to support herself and J.J. while Father was unemployed and not paying his child support.

But Mother was obligated to give Father the right of first refusal to care for J.J. while Mother was at work, and he exercised that right extensively. In essence, Mother maintains that Father should not be given credit for having spent so much time with J.J. because his failure to pay child support was the reason that Mother had to work so much. But our review of the record indicates that the trial court explicitly considered those circumstances in granting Father custody of J.J. The trial court stated that because it had concluded that modification of custody was in J.J.'s best interests, "it would have been improper for the Court to deny the motion for modification to avoid penalizing the mother for doing what she was obligated to do[, namely, permit Father to have parenting time with J.J. while Mother was working]." Appellant's App. at 6.

In sum, the evidence supports the trial court's findings and conclusions in modifying custody of J.J. There have been substantial changes in circumstances, namely, that Mother relocated to Georgia and Father had become J.J.'s primary caregiver. The court noted correctly that "Mother's relocation will result in a substantial change in circumstances no matter what decision the Court makes." Id. at 7. The ultimate issue is the best interests of the child, and the trial court concluded that modification of custody of J.J. is in the child's best interests. Mother has not demonstrated that the trial court abused its discretion when it granted Father's motion for modification of custody. Faced with a difficult choice, the court decided to maintain the status quo in the child's life insofar as possible.

Affirmed.

VAIDIK, J., and BROWN, J., concur.