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IN THE
COURT OF APPEALS OF INDIANA

ROGER A. STEUP, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A04-0602-CV-62
	)	
ELECTRIA A. STEUP,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Craig J. Bobay, Magistrate
Cause No. 02C01-0008-DR-674

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Roger Steup appeals the trial court's granting sole legal and physical custody of his children to his ex-wife, Electria Steup, and permitting her to move out-of-state with the children. We affirm.

Issues

The restated issues before us are:

I. whether the trial court erroneously allowed Electria to present various evidence;

II. whether there is sufficient evidence to support the trial court's orders.

Facts[1]

The evidence most favorable to the trial court's rulings reveals that Roger and Electria met in Georgia, where Electria's family lived and where Roger was stationed in the military. They married in Georgia in 1998. Electria already had custody of a child, C.K., from a previous relationship. Electria agreed with Roger to move to Fort Wayne, close to his family, "on a one year trial basis." App. p. 63. At the end of the year, Electria wanted to move back to Georgia, but Roger refused to do so.

The parties' first child, J.C.S., was born in 2000. In August of that year, Electria filed for divorce. The dissolution became final in September 2001; Electria was granted primary physical custody of J.C.S., and the parties were granted joint legal custody. The

[1] Because the hearing in this matter apparently was not tape recorded, we are relying upon the trial court's certified statement of the evidence presented at the hearing in accordance with Indiana Appellate Rule 31. Although that statement is detailed and makes possible our review of this case, it would be preferable that all in-court hearings, particularly disputed evidentiary hearings and trials, be recorded, regardless of whether any party has requested it.

parties reconciled shortly after the divorce was final, and they had another child, J.R.S., who was born in July 2002. In a paternity action, Roger was determined to be J.R.S.'s father, and as with J.C.S., Electria was named primary physical custodian and the parties were granted joint legal custody of J.R.S. Roger and Electria again separated briefly, then again reconciled and had a another child, T.S., who was born in August 2003. Roger's paternity of T.S. was not officially established. In October 2003, Roger and Electria permanently ended their relationship.

On April 23, 2004, Electria filed a notice of her intent to move with the children to Georgia.[2] On May 20, 2004, Roger filed a petition to modify physical custody of J.C.S. and J.R.S. to him, rather than permitting Electria to move them to Georgia. On July 21, 2004, Roger filed a petition to establish T.S.'s paternity. The trial court consolidated the separate cases involving J.C.S., J.R.S., and T.S. into one proceeding to address custody, support, and visitation issues related to all three children. At the beginning of trial on June 1, 2005, the parties stipulated that Roger was T.S.'s father. On December 5, 2005, the trial court entered an order, with accompanying findings and conclusions, granting sole physical and legal custody of J.C.S., J.R.S., and T.S. to Electria, permitting her to move with them to Georgia, and making accompanying child support and visitation orders for Roger. Roger now appeals. Additional facts will be presented as necessary.

[2] The record also indicates that Electria filed a notice of intent to move on April 23, 2003. It appears the parties agreed to mediation, which was unsuccessful, with respect to this filing.

Analysis

I. Admission of Evidence

Roger argues that the trial court made several errors regarding the admission of evidence presented by Electria. We review decisions regarding the admissibility of evidence for an abuse of discretion. Lee v. Hamilton, 841 N.E.2d 223, 227 (Ind. Ct. App. 2006). "An abuse of discretion occurs if the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court." Id. A trial court may also abuse its discretion if its decision is without sufficient legal reason or is based upon impermissible considerations. Id. "Even if a trial court errs in a ruling on the admissibility of evidence, we will reverse only if the error is inconsistent with substantial justice." Id. Additionally, "The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal." In re Guardianship of Hickman, 805 N.E.2d 808, 822 (Ind. Ct. App. 2004), trans. denied.

The first evidence Roger challenges on appeal is the testimony of Patricia Fox. When Electria filed her first notice of intent to relocate in 2003, the parties agreed to attend mediation to attempt to resolve the issue of her relocation without court involvement. As part of the mediation, the parties agreed to attend family counseling sessions led by Fox, a licensed family counselor. Fox testified that she met with Electria on three occasions, but Roger never attended the sessions despite his awareness of them and prior agreement to attend them. Fox testified that based upon her discussions with

Electria regarding Roger, she believed he had "control issues that were adversely affecting the Children and his ability to co-parent." App. p.62. She also testified "that Mother needed to get out of the Fort Wayne area to get away from Father's influence and cycle of physical and emotional abuse." Id. at 62-63. Roger contends Fox was not qualified to render opinions like these and that, in any event, she lacked sufficient data to form such opinions.

We note that we do not have a transcript of the proceedings. However, the trial court's detailed statement of the evidence does, on several occasions, note Roger's objections to evidence presented during the hearing. There is no such objection noted with respect to Fox's testimony.[3] Roger's failure to lodge a contemporaneous objection to Fox's testimony waives the issue for appeal. See Hickman, 805 N.E.2d at 822. Instead, Roger apparently attempted to challenge Fox's credibility at trial by noting that she had only briefly spoken to Roger over the phone, most of her information came from Electria, and that she had not been hired to make a custody evaluation in this case.

Roger next contends the trial court erroneously allowed Electria to present evidence of domestic discord caused by Roger that predated the original custody order with respect to J.C.S. He notes that under Indiana Code Section 31-17-2-21(c), a court being asked to modify custody "shall not hear evidence on a matter occurring before the last custody proceeding between the parties unless the matter relates to a change in the

[3] Roger's brief erroneously suggests that an objection to this testimony can be found in the trial court's statement of evidence, at pages 62 and 63 of the appendix. Curiously, Roger asserts in his reply brief, "nobody is asking the Court to rule on objections not specifically referred to in the statement of the evidence." Reply Br. p. 9. That seems to be precisely what Roger is doing.

factors relating to the best interests of the child . . . ." Putting aside the fact that the hearing in this matter was not a modification hearing with respect to T.S., but an initial custody hearing, Steup cannot challenge on appeal the introduction of this evidence. Again, there is no objection to this evidence reflected in the record, resulting in waiver of the issue on appeal. See Hickman, 805 N.E.2d at 822.

The record does reveal that Roger objected to the testimony of Angie France, who worked for the Head Start Program in Auburn where the children were enrolled. Roger specifically contends the trial court erred in permitting France to testify that in her opinion, the children probably would not suffer developmental or socialization problems if they moved to Georgia. The essence of Roger's contention is that France was not qualified as an expert who could render such an opinion under Indiana Evidence Rule 702.

Regardless of whether France was qualified to render an expert opinion under Rule 702, Indiana Evidence Rule 701 provides that non-experts may testify in the form of opinions or inferences if those opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Opinion testimony by a lay witness is limited to those opinions rationally based on some combination of the witness's own personal observation, knowledge, and past experience. Ackles v. Hartford Underwriters Ins. Corp., 699 N.E.2d 740, 743 (Ind. Ct. App. 1998), trans. denied. "To satisfy Rule 701(a), the lay witness must set forth enough facts to allow the trial court to find, pursuant to Evidence Rule 104(a), that the opinion is based on the witness's personal

perceptions." Id. Additionally, lay witness opinion testimony must be "rationally" based on the witness's personal perception. Id. Speculation or testimony based on improper inferences is inadmissible. Id. "The objective 'reasonable person' test, i.e., whether a reasonable person would form the opinion reached by the witness on the basis of the perceived facts, is the test most often used to determine the admissibility of lay opinion testimony." Id. Finally, even if an opinion is rationally based on the witness's personal perception, the court must find, under Rule 701(b), that the opinion is helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue. Id.

There is no question here that France's opinion regarding the effect a move out-of-state would have on the children was helpful in determining a fact in issue in this case. It also appears to us that this opinion was based on France's own personal observations and interactions with Electria and all of the children in her capacity as a Head Start employee. Her testimony indicated that she had first-hand knowledge of the children's present developmental rates and ties to the Fort Wayne-area community, as well as Electria's home environment, parenting abilities, and bond with her children. We also believe it is permissible to take judicial notice that Head Start is a government program focused on early childhood development in low-income families. Considering France's employment and interactions with Electria and the children, it is reasonable to conclude that her opinion regarding the effect that a move to Georgia would have on the children's development and socialization was rationally based on a combination of her own personal observation, knowledge, and past experience. See id. As such, her testimony was

admissible under Evidence Rule 701. The trial court did not abuse its discretion in admitting France's testimony.

Roger also objected to the testimony of Veronica Kreft, Electria's mother. Specifically, Roger contends the trial court impermissibly allowed Kreft to testify that based upon her own personal experience as a victim of domestic abuse, she believed that Electria was in a similar situation. Roger contends that Kreft's testimony amounted to expert testimony that did not meet the requirements of Evidence Rule 702.

As with France's testimony, we conclude Kreft's testimony was admissible under Rule 701. She testified that she had been mentally and physically abused by an ex-spouse and had relocated because of that abuse. She also noted several signs of abuse that she personally had experienced, and compared those signs to some of the things she personally had observed in the relationship between Roger and Electria, or had been told about by Electria. It is clear Kreft had personal knowledge of what occurred in her own marriage and knowledge of what Electria was experiencing based on information either personally observed or gleaned as a result of her relationship with her daughter. Like France, we conclude Kreft's testimony was rationally based on a combination of her own personal observation, knowledge, and past experience. See id.; see also Prewitt v. State, 819 N.E.2d 393, 414-15 (Ind. Ct. App. 2004), trans. denied (holding State introduced sufficient foundation to allow father to give opinion regarding son's personality and likelihood that he would commit suicide, where father had "close relationship" with son). Although the trial court could have ruled differently on this issue, we cannot say it abused its discretion in admitting Kreft's testimony.

II. Sufficiency of Evidence

Roger generally contests the sufficiency of the evidence supporting the trial court's orders. The trial court in this case entered findings of fact and conclusions thereon, and so we apply a two-tiered standard of review to the court's orders. We first determine whether the evidence supports the findings and second, whether the findings support the judgment. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). We will disturb a judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. Id. We do not reweigh the evidence, and must consider only the evidence favorable to the trial court's judgment. Id. "Challengers must establish that the trial court's findings are clearly erroneous." Id. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. Id. Additionally, a judgment is clearly erroneous if it relies on an incorrect legal standard. Id. With respect to family law matters, we give special latitude and deference to the trial court. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002).

Roger's argument on this point necessarily has multiple layers. First, he was denied his request for a physical custody modification with respect to J.R.S. and J.C.S. Second, the trial court changed joint legal custody of J.R.S. and J.C.S. to sole legal custody with Electria. Third, the trial court granted permission to Electria to move to Georgia with the children. Finally, it granted, as an initial matter, sole physical and legal custody of T.S. to Electria.

Roger makes one argument that affects all of the trial court's determinations. Specifically, he contends there is no evidence in the record to support the trial court's

repeated statements that Electria was a victim of "domestic violence." See, e.g., App. at p. 41. Although the trial court did mention the term "domestic violence" several times in its order, Roger is correct that there is no evidence of him having physically battered Electria.

However, there certainly was evidence presented of an abusive relationship between Roger and Electria, even if no physical batteries of Electria were involved. There was evidence that while the parties were still living in Georgia, Roger punched C.K. in the stomach following a dispute over the family computer. There was evidence that on four separate occasions, Roger locked Electria and the children outside their residence after the parties had argued, including once when Electria was pregnant, forcing them to find other places to stay, such as a local women's shelter. On another occasion, while the parties' dissolution was pending, Roger kicked in the door to Electria's residence while holding J.C.S. in his arms, because he saw another man inside the house. That man turned out to be Electria's brother, but Roger nonetheless was violently confrontational with him. Fox, the family counselor, related that Roger appeared to be a "controlling" person, which negatively affected his ability to parent and the parties' ability to co-parent; this observation is consistent with the specific incidents of Roger losing his temper that we have related.

In sum, we conclude it is appropriate to view the trial court's descriptions of "domestic violence" as more generally describing an abusive relationship, with Father emotionally abusing Mother, forcing her and the children to effectively become homeless on several occasions, and physically abusing her son C.K., as well as being destructive of

property. Regardless of how the parties' relationship is characterized, this evidence lends support to all of the trial court's orders regarding the children.

In addition to challenging the trial court's findings regarding "domestic violence," Roger also asserts there is insufficient evidence that Electria's desire to move to Georgia was in good faith. The statute governing relocation that was in effect at the time of the proceedings below, Indiana Code Section 31-17-2-23, imposed no burden of proof on the party intending to relocate, and was not enacted to punish parents who move.[4] Farag v. DeLawter, 743 N.E.2d 366, 368 (Ind. Ct. App. 2001). The fact that a potential move would make visitation inconvenient for the noncustodial parent did not of itself warrant a modification of the original custody order. Swonder v. Swonder, 642 N.E.2d 1376, 1380 (Ind. Ct. App. 1994). The denial of continued custody, solely on the grounds of change in residence, was improper if there was evidence the move was being made in good faith and out of a desire to improve the material or psychological life of the custodian, so long as the child's interests were not prejudiced by the move. Id.

Roger contends, in part, that Electria failed to establish that a move to Georgia would improve her financial situation, because the only potential job opportunities awaiting her there were for entry-level, low-paying positions. It is important to note, however, that at the time of the proceedings Electria was working in Indiana at McDonald's, twenty hours per week, at six dollars per hour. Thus, it is clear that she was

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[4] In the most recent legislative session, Indiana Code Section 31-17-2-23 was repealed and replaced with an entirely new chapter, 31-17-2.2, effective July 1, 2006, that now governs child custody and parent relocation. See P.L. 50-2006. Obviously, we have not yet had the opportunity to address whether the new statutes materially affect the precedential "gloss" developed under the previous statute.

not planning to leave a lucrative position in Indiana in exchange for a low-paying position by moving to Georgia. It is more important to note that Electria's extended family, including her mother and sisters, live in Georgia. She planned on living with one of her sisters, who would also provide childcare, until she earned enough to live on her own. Electria's testimony also indicated that she had never wanted to live in Indiana on a long-term basis, but had always wanted to move back to Georgia to be closer to her family. Roger had insisted otherwise.

We again note the evidence that Roger and Electria had an unhealthy relationship. One of the reasons Electria cited for wanting to move to Georgia was to avoid possible future negative interactions with Roger. We emphasize that the trial court observed the parties first-hand, and was in a much better position than this court to gauge the nature of the relationship between Roger and Electria and to assess the accuracy of the assertion made by Electria and others that Roger tended to be abusive and controlling towards her. This evidence, coupled with Electria's long-standing desire to move back to Georgia and the fact that her extended family lives there, supports the conclusion that the move was planned in good faith and intended to improve her psychological well-being.

As for the interests of the children, there was evidence presented that although they were close to their paternal grandparents who lived nearby, they had not otherwise developed deep ties to their community. J.C.S., the parties' oldest child, was only five years old at the time of the hearing below. Our supreme court has noted that a move out of state may fairly be considered to have less effect on a young child as opposed to an older child who may participate in more activities or have more long-term friends and

other relationships in his or her current community. See Lamb v. Wenning, 600 N.E.2d 96, 99 (Ind. 1992). Ultimately, "Whether the effect is of such a nature as to require a change in custody is a matter within the sound discretion of the trial court." Id.

Here, in addition to the relative youth of J.C.S., J.R.S., and T.S., there was evidence presented by France, the Head Start employee, that Electria was a "warm and loving" parent who was deeply involved with her children and whose home was always clean and well maintained whenever France would make unannounced visits, as required by the Head Start program. App. p. 83. She also testified that the children appeared to have a "strong bond" with Electria. Id. at 84. Given this evidence, as well as the evidence that Electria's planned move to Georgia was in good faith, the trial court did not abuse its discretion in allowing Electria to move there with the children.

The final contention of Roger's we address is that the trial court erred in modifying joint legal custody of J.C.S. and J.R.S. to sole legal custody with Electria. He first notes that it does not appear Electria expressly asked for such a modification. However, we observe that the purpose of providing notice of intent to move under Indiana Code Section 31-17-2-23 was to afford the trial court with an opportunity to modify the original custody order, if necessary. Farag, 743 N.E.2d at 368. The statute expressly stated in part, "Upon request of either party, the court shall set the matter for a hearing for the purposes of reviewing and modifying, if appropriate, the custody, visitation, and support orders." Ind. Code § 31-17-2-23(b) (repealed). It appears to us that under the statute, the trial court here had the inherent authority to modify the pre-existing custody order in accordance with evidence received at the hearing and with the

best interests of the children, regardless of whether any party expressly requested a modification in the legal custody order.

As for the merits of granting Electria sole legal custody of J.C.S., J.R.S., and T.S., "[o]ne of the key factors to consider when determining whether joint legal custody is appropriate is 'whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare.'" Carmichael, 754 N.E.2d at 635 (quoting I.C. § 31-17-2-15(2)). If the parties have made child-rearing a battleground, then joint legal custody is not appropriate. Id. Additionally, in determining the appropriateness of joint legal custody, courts must consider "whether the persons awarded joint custody . . . live in close proximity to each other . . . ." I.C. § 31-17-2-15(5)(A). We review modifications of custody orders for an abuse of discretion. Kirk, 770 N.E.2d at 307.

Roger notes that Electria herself testified that they did not have many disputes regarding the upbringing of the children, except for Electria's desire to move to Georgia. By contrast, however, the trial court noted the abusive and/or controlling relationship between Roger and Electria as the primary basis for terminating the joint legal custody order and changing it to sole legal custody to Electria with respect to J.C.S. and J.R.S., and for initially awarding Electria sole legal custody of T.S. There was also evidence of a continuing pattern of such behavior, beginning before the dissolution of the parties' marriage and continuing thereafter. We cannot say the trial court erred in concluding that the harmful nature of the parties' relationship precluded continuing or establishing joint legal custody of the children. Furthermore, the distance between the parties created by

Electria's move to Georgia creates an additional impediment to the parties' having joint legal custody of the children. The trial court did not abuse its discretion in granting Electria sole legal custody of the children.

Conclusion

The trial court did not err in its evidentiary rulings, and there is sufficient evidence to supports its multiple rulings with respect to child custody. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.