ATTORNEY FOR APPELLANT:

JAMES R. REED
Morocco, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF ROBIN KILBOURN, Appellant-Respondent, vs. CARYL KILBOURN, Appellee-Petitioner.	))))))))))	No. 56A05-0803-CV-156

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel Molter, Judge
Cause No. 56D01-0405-DR-3

September 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robin Kilbourn appeals the trial court's decision to grant Caryl Phillips Kilbourn's request to relocate to Florida with their minor child. We affirm.

Issues

Robin raises two issues on appeal, which we restate as:

I. whether the trial court's decision to grant Caryl's request to relocate was clearly erroneous; and

II. whether the trial court abused its discretion in assigning all transportation expenses related to parenting time to Robin.

Facts

Robin and Caryl married on May 5, 2000. They had one daughter, K.K., born October 2, 2000. The marriage was dissolved on November 9, 2004. The trial court granted joint legal custody and ordered Caryl to have physical custody with "reasonable and generous" visitation for Robin pursuant to the Parenting and Visitation Guidelines. App. p. 16.

On March 15, 2007, Caryl sent correspondence to the trial court, asking for permission to relocate to Florida. The trial court classified the correspondence as a "pro se notice of intent to relocate" and ordered Caryl to serve the notice on Robin. Id. at 5. The trial court set a hearing for April 12, 2007. Apparently, the hearing was continued by agreement of the parties.[1] On June 28, 2007, Robin, through counsel, filed an objection to Caryl's intent to relocate and requested a hearing. The trial court set another

[1] We glean the details of these proceedings only from the chronological case summary. The record does not contain Caryl's first letter or any additional information regarding an agreement to continue.

hearing for July 31, 2007. The parties appeared for the hearing and informed the court that an agreement had been reached. The substance of this agreement is not part of the record on appeal. The trial court directed Robin's counsel to tender documents for approval and entry, but the chronological case summary does not reflect this task was completed.

Apparently, Caryl did not move, and on December 14, 2007, she addressed another letter to the trial court requesting "permission to relocate." Id. at 18. Again, the trial court ordered notice to be served on Robin. Caryl sent a third letter to the trial court on January 17, 2008. In this letter she stressed that a move to Florida was "vital" because she was being evicted. Id. at 20. Caryl also requested a hearing. The trial court set a hearing for January 31, 2008.

Robin filed an objection to the request to relocate on January 30, 2008. He appeared at the January 31, 2008 hearing represented by counsel, and Caryl appeared pro se. The trial court authorized Caryl to remove K.K. from Indiana to Florida, awarded Robin parenting time pursuant to the Guidelines, and provided that Robin would be responsible for all transportation costs related to his exercise of parenting time. This appeal followed.

Analysis

We first note that Caryl did not file an appellee's brief. Under such circumstances, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant. Griffin v. Griffin, 872 N.E.2d 653, 656 (Ind. Ct. App. 2007). Instead, we may reverse the trial court if the appellant makes a prima facie

case of error. Id. "Prima facie" is described as at first sight, on first appearance, or on the face of it. Id.

I. Request for Relocation

The parties did not request special findings and the trial court's order entered limited findings sua sponte. Under such circumstances, we will not set aside the findings and judgment unless clearly erroneous. Piles v. Gosman, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006). A judgment is clearly erroneous if there is no evidence supporting the findings, or the findings fail to support the judgment, or if the trial court applies the wrong legal standard to properly found facts. Id. Although we review findings of fact under the clearly erroneous standard, we do not defer to conclusions of law, which are reviewed de novo. Id. Because the findings and conclusions here were issued sua sponte, they control only the issues they cover, and we will apply a general judgment standard to any issues about which the court did not make findings. Id.

In 2006 our legislature added Indiana Code Chapter 31-17-2.2 to guide the courts in dealing with parents' requests for relocation. Our supreme court recently summarized this relatively new statute in Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008). The relocation statute provides that a notice of intent to move must include specific details such as the intended new address and telephone number, the date of the move, specific reasons for the move, a proposed plan for revised schedule of parenting time, and an indication that the non-relocating parent can object. See Ind. Code § 31-17-2.2-3(a)(2). There are two ways to object to a proposed relocation: a motion to modify custody order under the custody chapter or a motion to prevent relocation. See I.C. §§ 31-17-2.1-1(b)

& 31-17-2.2-5(a). Robin did not move to modify custody, rather he objected to Caryl's relocation. If the non-relocating parent does file a motion to prevent relocation, then the relocating parent must prove "the proposed relocation is made in good faith and for a legitimate reason." 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 child." I.C. § 31-17-2.2-5(d).

At the hearing, Caryl testified that in Florida "there is just plenty to do down there. There's plenty of jobs for me." Tr. p. 4. "I have a complete support system in Florida where I have help with watching my children and there's just plenty of jobs is my main reason." Id. at 5. Caryl admitted she only applied to handful of jobs and had not actually secured employment in Florida. Her current job at Red Lobster requires a sixty mile round trip commute. Her father testified that moving to Florida would be in the best interest of the K.K. because Caryl would have childcare. The testimony at the hearing did not reveal details of childcare arrangements or how many members of Caryl's extended family actually resided in Florida. Robin pointed out that Caryl did not provide evidence that restaurant service job opportunities were more plentiful in Florida.

Although her notice of intent to relocate was not perfect as to form, no evidence in the record showed that Caryl at any time tried to hide her plans to move from Robin or refused to provide him with details of the proposed move. In fact, she openly encouraged his visits to her future home in Florida. We conclude that Caryl satisfied her burden of proof that her proposed relocation was made in good faith and for a legitimate reason under the relocation statute.

Once the relocating parent has met his or her burden, the non-relocating objecting parent must show that relocation is not in the best interests of the child. During his closing statement, Robin's counsel implied the move from her father and her familiar school system is not in K.K.'s best interest. Robin did not present any evidence, however, from teachers, counselors, family members, or others, that the move was not in K.K.'s best interests. No evidence was presented as to what family, if any, Robin had in Newton County. No evidence was presented as to what activities K.K. engaged in at school or in the community and whether she would have those opportunities in Florida.

Robin contends the case of Rogers v. Rogers, 876 N.E.2d 1121 (Ind. Ct. App. 2007), trans. denied, supports his position that Caryl's relocation request should not have been granted. Robin contends that Caryl did not present as much evidence as the mother who requested and was granted a relocation in Rogers—a woman who already had a job offer for a higher salary and needed to be closer to an ill parent. Robin alleges that comparing the evidence in Rogers, Caryl's "reasons for relocating in this case appear feeble at best." Appellant's Br. p. 7. The standard is not whether Caryl presented a similar amount of evidence as past litigants, but whether she met the burden in place under the relocation statute.[2] We conclude that she did and that Robin did not meet his burden to prove the relocation was not in K.K.'s best interest. Even given the limited evidence presented during the short hearing, it was within the trial court's discretion to

[2] The trial court had entertained three of Caryl's requests to relocate in the previous ten months and presided over the couple's divorce. Although the trial court may have been familiar with Caryl and Robin, it would have been helpful to establish a more complete record in terms of evidence regarding the proposed relocation. Considering that Caryl was proceeding pro se, and Robin did not call any additional witnesses, we conclude the trial court acquired as much information as possible.

grant Caryl's request for relocation and the trial court's conclusion was not clearly erroneous.

Because custody was not modified, physical custody remained with Caryl, and K.K. would move to Florida with her. Once the relocation matter is set for a hearing, the trial court may review and modify the custody, parenting time, and child support arrangements if appropriate. See I.C. § 31-17-2.2-1(b). Though the distance of relocation is great and the cost of travel between Indiana and Florida could be substantial, neither party moved for a custody modification and the trial court was not obligated to grant one. See Baxendale, 878 N.E.2d at 1256 ("[R]elocation does not require modification of a custody order.")

II. Transportation Expenses

Robin argues that the trial court's order making him responsible for all transportation expenses while exercising parenting time is not sustained by any rationale or theory consistent with the evidence. When reviewing the trial court's resolution of a parenting time issue, we reverse only when the trial court has manifestly abused its discretion. In re Paternity of G.R.B., 829 N.E.2d 114, 122 (Ind. Ct. App. 2005).

The parenting time guidelines advise that scheduling parenting time when there is a significant distance between the parents is "fact sensitive and requires consideration of many factors which include: employment schedules, the costs and time of travel, the financial situation of each parent, the frequency of parenting time and others." Ind. Parenting Time Guideline III(1). The comments in the Guidelines suggest that for a child of K.K.'s age, visitation would include seven weeks of summer vacation, seven days of

winter vacation, and spring break. The comments also contemplate shared transportation costs based on considerations of "distance involved, the financial resources of the parents, the reason why the distances exist, and the family situation of each parent at that time." Parenting Time G. I(B)1 Comment 2. The trial court ordered visitation "pursuant to the parenting time guidelines save and except that [Robin] shall be responsible for all costs of transportation incurred on behalf of the minor child when [Robin] is exercising visitation." App. p. 8. Nothing in the guidelines or comments was expressly adopted or tailored to the situation and the court provided no other specifics in its order.

Caryl testified that she was not receiving regular child support from Robin. She was being evicted at the time of the hearing, was only working three days a week as a waitress, and struggling financially. During the hearing, Caryl said that Robin would be able to visit Florida whenever he liked and he was welcome to stay with her, her parents, or her sister, presumably reducing potential lodging expenses. She suggested that Robin should take K.K. for "a week here, a week there" and complained that he had not exercised such lengthy visitations with his daughter in the past. Tr. p. 12.

Although it is likely that travel expenses between Florida and Indiana could be substantial, no evidence was presented that getting K.K. from Florida to Indiana for several weeks visit would be impossible. The trial court noted that Robin was not regularly paying support and had not taken opportunities to exercise lengthy visitation in the past. Evidence presented also indicated the Caryl was struggling financially. The trial court did not abuse its discretion by assigning transportation expenses to Robin.

Conclusion

The trial court's decision to grant Caryl's request to relocate to Florida with K.K. was not clearly erroneous. The trial court did not abuse its discretion by ordering Robin to assume the transportation costs associated with parenting time. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.