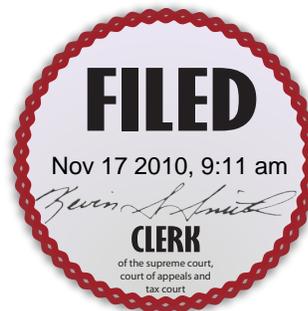


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LISA BURRESS,)
)
Appellant-Respondent,)
)
vs.) No. 82A01-1003-DR-128
)
BRAD WELLS,)
)
Appellee-Petitioner.)
)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
The Honorable Allen R. Hamilton, Magistrate
Cause No. 82D04-0808-DR-776

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

This is a custody-modification/divorce-contempt proceeding. The trial court modified primary physical custody in favor of Brad Wells (“Father”) following submission of a notice of intent to relocate by Lisa Burress (“Mother”). The court also held Mother in contempt for failing to make mortgage payments on the marital home as required by the parties’ divorce settlement. We find the evidence supports the trial court’s judgments modifying custody and holding Mother in contempt. We affirm.

Facts and Procedural History

Mother and Father have a son, S.W., born in June 2005. Mother also has an older son, E.C., from a previous relationship. Mother and Father married in October 2007. They established their marital home in Evansville, Indiana.

Mother and Father divorced in November 2008 pursuant to a Settlement Agreement and Summary Decree of Dissolution. Mother was awarded primary physical custody of S.W. The parties shared legal custody. Father was granted parenting time with S.W. each week from Sunday through Wednesday. E.C. continued to live with Mother.

Under the divorce settlement, Mother also was awarded the former marital residence. She agreed to pay all expenses in connection with it, hold Father harmless for any liability or responsibility thereon, and refinance the home within ninety days.

Mother attempted to refinance the home three times but was denied financing due to low income. At some point Mother also quit her job and stopped making mortgage payments. Father began receiving calls from debt collectors saying that he owed them

money. On August 18, 2009, Father filed an information for contempt against Mother in Vanderburgh Superior Court alleging failure to follow the terms of the divorce settlement.

Meanwhile, Mother filed a Notice to Relocate on August 26, 2009. Mother informed the court of her intent to move to Columbus, Indiana, with her two children. Mother sought relocation purportedly to alleviate financial problems, be closer to her immediate family, find work, go to school, and move in with a new fiancé. Father filed an objection to Mother's Notice to Relocate. Father further requested primary physical custody of S.W. so that S.W. could continue to reside in the Evansville area.

The trial court convened a hearing on all pending issues in February 2010. Several witnesses testified, including Mother, Father, Father's parents, and Mother's brother, mother, and two sisters-in-law. The court received, in part, the following evidence:

- Columbus, Indiana, is approximately three hours' driving distance from Evansville.
- Father works in retail Monday through Saturday. He has worked for his employer for over eight years. Father once declined a promotion so he could spend more time with S.W. Because of his job, travelling to and from Columbus to visit S.W. would "be a hardship" for Father.
- Father's primary concern is that if Mother were allowed to relocate with S.W., Father would "lose the relationship and bond" that he and S.W. share.
- S.W. spends time with Father's parents and has a close relationship with them. He sees them about three days a week during Father's parenting time.
- S.W. and E.C. have a close relationship as well.

- Mother became engaged to a man who lives in Columbus.
- Mother quit her job in anticipation of relocating. She has not secured new employment.
- Mother's father and one of three brothers live in Evansville. Her mother and two other brothers live in Floyds Knobs, Indiana. Floyds Knobs is two hours from Evansville and one hour from Columbus.
- S.W. begins kindergarten in the fall.
- Mother was unable to refinance the former marital home, and she began falling behind in mortgage payments.
- Mother was able to make mortgage payments while employed in Evansville.

The trial court both granted Father's request to modify custody and held Mother in contempt. The court found as follows:

Issues presented to the court are Mother's Notice to Relocate, Father's objection therein, and Father's I/C regarding real estate debt. Court makes the following findings:

1. Mother's Notice to Relocate cites five reasons:
 - A. Financial tensions
Court finds Mother resigned her employment to move.
 - B. Closer to immediate family
Court finds one brother and father live in Evansville area. After Mother's move, her mother and two brothers will reside on[e] hour away from her, rather than one hour and forty minutes, where her brother and father will now reside two hours and forty minutes away.
 - C. Find work
Court finds Mother resigned employment to move.
 - D. Go to school in Indianapolis
Court heard no evidence of any school enrollment plans.
 - E. Marriage
Mother has moved to residence of boyfriend in Columbus, IN and reports that she is recently engaged.

2. Parties currently have joint custody, with the mother having primary physical custody. Father exercises his parenting time every Sunday at 10:00 A.M. to Wednesday mornings.
3. Father, at an earlier point in time changed his work hours to be home more hours, and has maintained a good relationship with Son.
4. The child will begin school in the fall of 2010 with the accompanying school activities.
5. Driving distance: is approximately three hours one way.
6. Father's work sch[e]dule is not conducive to weekends off, but works well with the Sunday to Wednesday parenting time.
7. Father's immediate family reside[s] in local area and see[s] the child on a regular basis.
8. [The parties'] child has a close sibling relationship with older brother (not a child of father).
9. Wife has fallen behind in home mortgage since she resigned her employment.
10. Wife made good faith effort to refinance home, but was unable to do so.

Court rules that the father should have primary physical custody of Child due to difficulty in maintaining the close father/son relationship. Should child relocate, with school beginning in the fall, it would be even harder to maintain the relationship. Court notes that Mother has the absolute right to relocate for personal reasons and has met her statutory burden to show the move was not to th[w]art Father's visitation. Mother to have parenting time guid[el]ines. Parties to submit proposed support worksheets within seven (7) days. As to the contempt issue Court finds Mother in contempt for her failure to make payments, and collections efforts are affecting Father. Mother is to make suitable arrangements to stop the collection efforts against Father, to purge herself of contempt.

Appellant's App. p. 26-27 (capitalization omitted). Mother now appeals.

Discussion and Decision

Mother raises several issues which we consolidate and restate as: whether the trial court erred by (I) modifying custody and (II) finding her in contempt.

I. Modification of Custody

Mother first argues that the trial court erred by modifying custody in favor of Father.

We review custody modifications for an abuse of discretion, affording substantial deference to our trial courts in family law matters. *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009). We shall not set aside the trial court’s findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ind. Trial Rule 52(A); *J.H.*, 903 N.E.2d at 457. A judgment is clearly erroneous when the evidence does not support the findings, when the findings fail to support the judgment, or when the trial court applies the wrong legal standard to properly found facts. *J.H.*, 903 N.E.2d at 457.

Custody determinations are made in accordance with the best interests of the child. Ind. Code § 31-17-2-8; *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008). When evaluating the child’s best interests, courts must consider all relevant factors including:

- (1) The age and sex of the child.
- (2) The wishes of the child’s parent or 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 parent or parents;
 - (B) the child’s sibling; and
 - (C) any other person who may significantly affect the child’s best interests.
- (5) The child’s adjustment to the child’s:
 - (A) home;
 - (B) school; and
 - (C) 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

I.C. § 31-17-2-8; *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1256-57 (Ind. Ct. App. 2010).

A custody order ordinarily may not be modified unless “(1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of

the factors [enumerated in Section 31-17-2-8].” I.C. § 31-17-2-21; *Browell v. Bagby*, 875 N.E.2d 410, 413 (Ind. Ct. App. 2007), *trans. denied*.

Where a parent seeks modification in response to a notice of intent to relocate, the court shall take into account:

- (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.

I.C. § 31-17-2.2-1(b). The court must hear evidence on each of these six factors before modifying custody due to relocation. *In re Paternity of J.J.*, 911 N.E.2d 725, 731 (Ind. Ct. App. 2009); *Wolljung v. Sidell*, 891 N.E.2d 1109, 1113 (Ind. Ct. App. 2008). The court must also take into account the factors listed under Section 31-17-2-8, though it need not find a substantial change in one of them before modifying custody. *Baxendale*, 878 N.E.2d at 1256-57.

When an individual seeks to prevent relocation of a child, the relocating parent has the initial burden of showing that the proposed relocation is made in good faith and for a legitimate reason. I.C. § 31-17-2.2-5(c). If that burden is met, the nonrelocating individual must prove that “the proposed relocation is not in the best interest of the child.” *Id.* § 31-17-2.2-5(d).

Here, Father sought a custody modification in response to Mother's notice of intent to relocate. The trial court received testimony that (1) Mother's proposed residence in Columbus is three hours from Evansville; (2) Father's work schedule is not conducive to weekend parenting time; (3) offering Father only weekend visitation would practically eliminate Father's parenting time and strain his relationship with S.W.; (4) Mother's relocation was not intended to thwart Father's contact with their child; (5) Mother sought relocation to live with her new fiancé, be closer to her family, solve financial problems, and find work, though in the process Mother quit her job without getting a new one, and Columbus is actually farther away from some of her family members; and (6) Father's immediate family lives in the Evansville area and sees S.W. on a regular basis, and S.W. has a close relationship with E.C. The trial court heard evidence on all six factors listed under Section 31-17-2.2-1(b). Mother met her initial burden by producing evidence that her relocation was sought in good faith and for legitimate reasons. Father met his burden by introducing evidence that the relocation was not in the best interests of S.W. The trial court rendered findings accordingly. The evidence supports the court's findings, and the findings in turn sustain a conclusion that awarding Father primary physical custody is in S.W.'s best interests. We therefore cannot say the trial court abused its discretion by modifying custody.

II. Finding of Contempt

Mother next argues that the trial court erred in holding her contempt.

To be held in contempt, a party must have willfully disobeyed a court order. *Hamilton v. Hamilton*, 914 N.E.2d 747, 755 (Ind. 2009). The order allegedly violated

must have been so clear and certain that there could be no question as to what a party must do, or not do, and so there could be no question regarding when the order is violated. *Swadner v. Swadner*, 897 N.E.2d 966, 973 (Ind. Ct. App. 2008). In the absence of a money judgment, contempt is an available remedy for noncompliance with a dissolution decree. *See* Ind. Code § 31-15-7-10; *Mitchell v. Mitchell*, 871 N.E.2d 390, 395 (Ind. Ct. App. 2007). The determination of whether a party is in contempt is a matter left to the discretion of the trial court. *Id.* We will reverse a trial court's contempt findings only if there is no evidence or inferences drawn therefrom to support them. *Id.*

Mother and Father's divorce settlement required Mother to pay all expenses on the marital home, including mortgage payments, and to hold Father harmless from any liability thereon. Mother was formerly employed and able to pay the mortgage. Mother voluntarily quit her job, and she has not yet secured new employment. As a result, Mother has stopped making her mortgage payments, and collections agents have sought payment from Father. These facts together sustain a finding that Mother has willfully disobeyed the terms of the parties' divorce decree. We therefore cannot say the trial court abused its discretion by finding Mother in contempt.

For the reasons stated, we affirm the judgment of the trial court in all respects.

Affirmed.

MAY, J., and ROBB, J., concur.