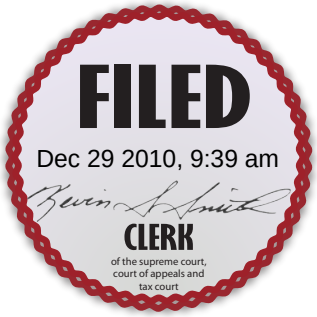

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IN THE COURT OF APPEALS OF INDIANA

VILMA (STRUSS) PAPA,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 64A03-1008-DR-428
	)	
NICHOLAS STRUSS,	)	
	)	
Appellee-Respondent.	)	
	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Special Judge
Cause No. 64D02-0211-DR-9544

December 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Vilma (Struss) Papa ("Mother") filed a notice of intent to relocate to the State of Washington with her minor son, and Nicholas Struss ("Father") responded with a motion to modify custody and requested a hearing. At the beginning of the hearing, the trial court realized that Mother had filed a notice of intent to relocate the year before which another judge had denied and thus denied Mother's notice of intent to relocate without finishing the hearing. Mother contends this was error.

When a trial court considers a notice of intent to relocate when a nonrelocating individual, such as Father, files a motion to modify custody, the court is required to consider the factors listed in Indiana Code section 31-17-2.2-1(b) and to receive evidence on those factors. Because the trial court did not do so here, we reverse the trial court and remand for such a hearing.

Facts and Procedural History

Mother and Father have two children, only one of which is still a minor, J.S. When Mother and Father divorced in 2003, Mother was awarded physical custody of J.S. At some point, Mother got remarried to Dennis Papa.

In 2009, Mother filed a notice of intent to relocate. Another judge in Porter Superior Court held a hearing, interviewed J.S. in camera, and issued findings of fact and conclusions of law denying Mother's notice of intent to relocate.

On June 17, 2010, Mother filed a second notice of intent to relocate. In this notice, Mother alleged that she intended to move to the State of Washington on September 1, 2010, because her husband, Dennis Papa, is employed as a microbiologist

with the State of Washington; her husband has a home in Mazama, Washington; the school system there is one of the best in the entire state; and "since the prior notice of intent to relocate, there has been a change of circumstances in that my son, [J.S.], is now thirteen (13) years of age, and has expressed a desire to relocate to the State of Washington with me." Appellant's App. p. 3.

Father filed an objection to Mother's notice of intent to relocate and requested the court to set the matter "for a full evidentiary hearing." *Id.* at 6. Father sought a temporary and permanent order restraining Mother from relocating to the State of Washington with the parties' child. A few days later, Father filed a petition for modification of support and custody. He alleged that "[i]n the event Mother relocates without the parties' child, it is in the best interest of the minor child that Respondent/Father, be awarded custody and a reasonable amount of support be paid to [Father] for the benefit of the parties' child." *Id.* at 10. Father again asked that the matter be set for a hearing and, "after the presentation of evidence," that the trial court grant his petition and award him a reasonable attorney's fee.[1] *Id.*

On July 23, 2010, the parties and their counsel appeared before the trial court for a hearing on Mother's notice of intent to relocate. Each party also filed a motion for findings of fact and conclusions of law. The trial court opened the hearing as follows:

> I notice this same issue was litigated . . . back in September of last year findings of fact and conclusions of law were filed after a lengthy hearing, if you look at it, and this petition appears to want to litigate the same facts.

[1] There are two ways to object to a proposed relocation under the relocation chapter: a motion to modify a custody order, Ind. Code § 31-17-2.2-1(b), and a motion to prevent relocation of the child, *id.* § 31-17-2.2-5(a). *Baxendale v. Raich*, 878 N.E.2d 1252, 1256 n.5 (Ind. 2008). Father objected on both grounds.

> Now, initial question that comes up is, what is the substantial and continuing change of circumstances that you rely on to file this petition?

Id. at 22. Mother's attorney referred the court to paragraph five of Mother's June 17 notice of intent to relocate, in which she alleged that J.S., who was then thirteen years old, had expressed a desire to relocate to the State of Washington with Mother. Mother's attorney confirmed that J.S. had expressed that desire to him as well. The trial court, however, was not convinced. The trial court said that in 2009, another judge had issued an eighteen-page order concluding that it was in J.S.'s best interests to remain in Indiana. Therefore, the court concluded:

> At this point, whether the child said he wanted to go or stay, would have no bearing and it would not be a change in circumstances so substantial and continuing as to make that prior order unreasonable. It goes into much more than just the desire of the child. And the child while approaching 14 is still under 14.
>
> Based on that, I find that there has been no substantial change in circumstances and conditions so as to make the prior order unreasonable and I deny the petition at this point.

Id. at 23. As for the parties' requests for findings of fact and conclusions of law, the trial court believed that it "made them on the record at this point." *Id.* at 25. Mother now appeals the denial of her notice of intent to relocate.

Discussion and Decision

Mother contends that the trial court erred by denying her notice of intent to relocate without holding an evidentiary hearing on the matter. Mother specifically argues that the trial court erroneously found that there needed to be a substantial change in circumstances, which is the standard for a general custody modification and not a custody

modification within a relocation case, before it could consider her notice of intent to relocate to the State of Washington with her son J.S.

We initially note that Father did not file an appellee's brief. We will not undertake the burden of developing arguments for the appellee. *In re Paternity of J.J.*, 911 N.E.2d 725, 727 (Ind. Ct. App. 2009). 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.*

Indiana Code section 31-17-2-8 ("Section 8") provides that, in general, an initial child custody order is determined "in accordance with the best interests of the child." *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008). The court is also to "consider all relevant factors" in determining the child's best interests, including a nonexclusive list of factors such as the wishes of the child, the interrelationship of the child with parents, siblings, and others who may significantly affect the child's best interests, and the child's adjustment to the child's home, school, and community. Ind. Code § 31-17-2-8.

The general provision governing custody modification is found in Section 31-17-2-21 ("Section 21"). *Baxendale*, 878 N.E.2d at 1255. Modifications are 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 that the court considered under Section 8 in the initial custody determination. Ind. Code § 31-17-2-21(a).

Relocation in child custody cases has its own chapter, Chapter 2.2, which was added to the Indiana Code on July 1, 2006. Pursuant to Indiana Code section 31-17-2.2-1:

> (a) A relocating individual must file a notice of the intent to move with the clerk of the court that:
>
> (1) issued the custody order or parenting time order; or
>
> (2) if subdivision (1) does not apply, has jurisdiction over the legal proceedings concerning the custody of or parenting time with a child;
>
> and send a copy of the notice to any nonrelocating individual.
>
> (b) Upon motion of a party, *the court shall set the matter for a hearing to review and modify, if appropriate, a custody order*, parenting time order, grandparent visitation order, or child support order. . . .

(Emphasis added). In determining whether to modify a custody order, the court is directed to consider factors that are set out in Section 31-17-2.2-1(b):

> (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.

Relocation, however, does not require modification of a custody order. *Baxendale*, 878 N.E.2d at 1256.

Our Supreme Court determined in *Baxendale* that Section 21 does not require a change in one of the original Section 8 factors before a change may be ordered after a relocation. *Id.* at 1256-57. The Court reasoned:

> First, chapter 2.2 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 (emphasis added).

Thus, contrary to what the trial court here found, there does not have to be a substantial change in one of the original Section 8 factors before considering a notice of intent to relocate. Rather, where, as here, a nonrelocating individual files a motion to modify custody in response to a relocating individual's notice of intent to relocate, the trial court is required to consider the factors listed in Section 31-17-2.2-1(b) when deciding whether to modify custody. *Wolljung v. Sidell*, 891 N.E.2d 1109, 1113 (Ind. Ct. App. 2008); *see also* I.C. § 31-17-2.2-1(b) ("Upon motion of a party, the court shall set the matter for hearing to review and modify, if appropriate a custody order . . . . The court *shall take into account* the following in determining whether to modify a custody

order . . . ." (emphasis added)). And the court cannot do so without such evidence in the record. *Wolljung*, 891 N.E.2d at 1113. Although the relocation statutes do not require findings of fact, at a minimum there must be evidence in the record on each of the factors listed in Section 31-17-2.2-1(b).

Based on these above principles, Mother has established prima facie error in the trial court's denial of her notice of intent to relocate for the reason that she did not demonstrate a substantial change in circumstances. This is because our Supreme Court has said that such a showing is not required. Moreover, our appellate courts have said that when considering a notice of intent to relocate when a nonrelocating individual has filed a motion to modify custody, the trial court is required to consider the factors listed in Section 31-17-2.2-1(b) and to receive evidence on those factors. Accordingly, Mother has established prima facie error in the trial court's failure to hold a hearing on Mother's notice of intent to relocate and Father's motion to modify custody during which it could have received evidence on each of the statutory factors. We therefore reverse the trial court and remand for such a hearing.

As a final note, we appreciate the trial court's concerns that (1) Mother had filed a notice of intent to relocate the year before (which another Porter Superior Court judge thoughtfully denied) and (2) the only factors Mother alleged that had changed were that J.S. was a year older and apparently wanted to move to the State of Washington with Mother (which Father disputed). We appreciate the trial court's sensitivity to the difficult situation J.S. faced of choosing between two parents less than a year later. However, there is no time restriction contained in Chapter 2.2 concerning when a relocating

individual can file another notice of intent to relocate or even in Chapter 2 concerning when a party can file another petition to modify custody. *Cf.* Ind. Code § 31-16-8-1 (requiring twelve months from issuance of last child support order before child support can be modified or revoked). Therefore, there were no time restraints on Mother's ability to file another notice of intent to relocate. But we point out that the court may consider on remand the timing and circumstances of repetitive notices of intent to relocate under Indiana Code section 31-17-2.2-1(b)(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." (emphasis added)).

Reversed and remanded.

BAKER, C.J., and BARNES, J., concur.