MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Rodney T. Sarkovics
Sarkovics Law
Carmel, Indiana

ATTORNEYS FOR APPELLEE

Emily J. Barry
Jacob C. Salathe
Kristin N. Korbacher
Webster & Garino LLC
Westfield, Indiana

IN THE COURT OF APPEALS OF INDIANA

Cynthia Zimla,
Appellant-Respondent,

v.

Joseph Mercer,
Appellee-Petitioner.

October 6, 2023

Court of Appeals Case No. 23A-DC-363

Appeal from the Hamilton Circuit Court

The Honorable David A. Shaheed, Senior Judge

Trial Court Cause No. 29C01-1701-DC-362

Memorandum Decision by Judge Pyle

Judges Vaidik and Mathias concur.

Pyle, Judge.

Statement of the Case

[1] Cynthia Zimla ("Mother") appeals the trial court's order denying her request to relocate to Georgia with her then six-year-old daughter E.M. ("E.M."). Concluding that the trial court did not clearly err in denying Mother's request, we affirm the trial court's judgment.

[2] We affirm.

Issue

> Whether the trial court clearly erred when it denied Mother's request to relocate with E.M.

Facts

[3] Mother and Joseph Mercer ("Father") (collectively, "Parents") are the biological parents of E.M., born in June 2016. Parents each have an older child from a previous relationship. Parents were married in December 2014, but separated in January 2016, prior to E.M.'s birth. Parents' dissolution of marriage was filed in January 2017, when E.M. was approximately six months old, and on August 16, 2018, the trial court entered a Decree of Dissolution. Pursuant to the Decree, Parents agreed to joint legal custody of E.M. and a parenting-time schedule where, Monday through Friday, Mother would have E.M. during the day while Father worked, and Father would have E.M. from 5 p.m. to 9 p.m. and every other weekend.

[4] On August 28, 2018, Mother filed a Notice of Intent to Relocate to Missouri based upon her pending marriage to Justin Zimla ("Justin"), a United States

Army staff sergeant then stationed at an army base in Missouri.[1] On September 7, 2018, Father filed an objection to the relocation. Parents resolved the matter by a mediated agreed entry approved by the trial court on November 27, 2018, whereby Mother rescinded her relocation request, and Parents agreed to the following: they would continue their joint legal custody of E.M., Mother would have primary physical custody of E.M., and Father's parenting time would increase and include every Tuesday overnight, extended weekends from Friday through Sunday, nonconsecutive weeks of vacation over the summer, and special days and holidays.

[5] On August 7, 2019, Mother filed a Verified Petition for Modification of Custody, Visitation and Support. Parents resolved the matter by another mediated agreed entry, approved by the trial court on November 22, 2019. The November 2019 agreed entry provided that Parents would continue to share joint legal custody of E.M., Mother would continue to have primary physical custody of E.M., and Father would have parenting time with E.M. on Mondays and Wednesdays overnight and alternating weekends that included overnight stays on Sundays. Regarding future relocation requests, the agreed entry provided: "Mother shall abide by Indiana's relocation statute and shall be required to file a Notice of Intent to Relocate in the event her relocation changes the child's school district" and that "[t]he parties shall specifically

[1] Mother married Justin Zimla ("Justin") in August 2019. She did not move to Missouri but did spend three weeks in Missouri each year of the marriage during the spring and summer. Mother's marriage to Justin was dissolved in November 2021.

agree, in writing, [to] any proposed preschool or educational change for [E.M.]." (Mother's App. Vol. 2 at 70, 71).

[6] Mother and Father both have ties to central Indiana and have extended family residing in Marion County and Hamilton County. During the proceedings relevant to this appeal, Father was living in a house located in Arcadia, Indiana, and had been employed by the City of Carmel Water Department for the last seven years. His employment required him to be on call – bi-weekly from Friday to Friday – which meant that he often missed parenting time due to work. Father had contingency plans for E.M.'s care in the event he was called in to work during his parenting time.

[7] Father's older son, and E.M.'s half-brother, C.M., who was approximately ten years old during the relevant proceedings, lives with Father and has a close relationship with E.M. Father's home is located near the home of his cousin, Stephanie Duffy, and her children, with whom E.M. is very close.

[8] Mother, E.M., and Mother's older son, J.Z., lived together in Westfield, Indiana. E.M. attended school in the Westfield Washington School District.

[9] Mother's family owns and operates Agave Incorporated, a Mexican restaurant business. Mother's sister, Evelyn Veloz ("Evelyn"), is the named owner of the business. Mother, Mother's other sister, Frida Stephens ("Frida"), Mother's mother, Rosa Santa Olalla ("Grandmother Rosa"), and Grandmother Rosa's husband all work in the business. The family operates two restaurant locations

in Fishers and Carmel, Indiana. Mother was employed as a server at the Indiana restaurants and earned approximately $30,000 per year.

[10] Evelyn, who was living in the Columbus, Georgia area with her husband and children, saw an opportunity to expand the family business. In December 2021, she opened another restaurant in Columbus, Georgia. The restaurant was larger in square footage, compared to the Indiana locations, and did not contend with competition from other Mexican restaurants in the area. Mother, Frida, and Grandmother Rosa planned to relocate to Georgia, due to the expansion of the business. The family members' plan was for Mother to become the operations manager of the Georgia restaurant and earn approximately $60,000 per year.

[11] On October 16, 2021, Mother advised Father that she had unenrolled E.M. from her school in the Westfield Washington School District. Based on the conversation, and prior to Mother filing a request to relocate, Father preemptively filed, on October 21, 2021, a Verified Objection to Relocation that included a motion for stay, a motion for rule to show cause, and a motion to modify custody, parenting time, and child support. The following day, the trial court entered an Order Setting Hearing on Relocation and Stay on Relocation of Child. The trial court's order provided that Mother could relocate to Georgia but not with E.M. Specifically, the trial court ordered E.M. to remain in her current school district and not relocate. (Father's App. at 2). On October 25, 2021, Mother filed her Notice of Intent to Relocate to Georgia.

[12] On December 1, 2021, the trial court held a preliminary hearing on Mother's relocation request. On December 10, 2021, the trial court issued a temporary order, permitting Mother to relocate E.M. to Georgia pending a final hearing. The trial court determined that "the family reasons and [Mother's] potential to benefit financially, both individually and as part of a family business meet the 'legitimate [purpose for the relocation] test'" and there was "no credible evidence of 'pretext'[,]" as Father had alleged. (Mother's App. Vol. 2 at 95). The trial court explained:

> [Mother] is a member [of] a family well established in the food service business and seeking to expand in Georgia, where there are opportunities for growth. Mother has an essential role in the new establishment in Georgia and would double her income from $30,000 per year to $60,000 per year as a manager. In addition, as a part of the management team in the family business, she would be responsible for the Indiana restaurants and would travel to Indiana on a quarterly basis. She would bring [E.M.] with her on those trips so that Father could enjoy additional parenting time.

(Mother's App. Vol. 2 at 95). The trial court then found that relocation was in E.M.'s best interest and determined that Father's parenting time would include, "[w]henever[] Mother is in Indiana in her management role with the restaurant

business on a quarterly basis[;] E.M.'s full summer break[; and E.M.]'s spring break[.]"[2] (Mother's App. Vol. 2 at 98).

[13] Mother relocated to Georgia with E.M. and J.Z., and E.M. lived in Georgia with Mother from approximately January through May 2022. Mother's home in Georgia was within walking distance of the private school E.M. attended and the restaurant where Mother worked. In addition to her managerial job at the restaurant, Mother had started a real estate business with her sister, Evelyn.

[14] On January 7, 2022, shortly after Mother had relocated to Georgia, the trial court ordered the appointment of a guardian ad litem ("the GAL"). The GAL completed her investigation, and on April 21, 2022, filed her twenty-six (26) page report with the trial court. The GAL's recommendation was that relocation was not in E.M.'s best interest.

[15] In the spring of 2022, Grandmother Rosa and her husband transported E.M. to Indiana so that Father could exercise his parenting time with E.M. over E.M.'s spring break. However, Father's parenting time with E.M. was abruptly cut short by an emergency that arose at the Georgia restaurant, requiring Grandmother Rosa's husband to return to Georgia. Mother offered Father the opportunity to complete the second week with E.M. However, due to Father's work schedule and the travel expenses associated with an unplanned trip to

[2] Father was to be responsible for transportation costs associated with parenting time but did not have to pay child support to Mother in light of the anticipated costs.

Georgia, Father was unable to complete his parenting time with E.M. E.M. and Grandmother Rosa traveled back to Georgia with Grandmother Rosa's husband. Father was unable to exercise additional parenting time with E.M., prior to E.M.'s summer break, as Mother did not return to Indiana on a quarterly basis to monitor the Indiana restaurants. Mother had told the trial court at the preliminary hearing that she would be making those trips.

[16] The final hearing on Mother's relocation request was held on July 28, 2022. The trial court heard testimony from Mother, Father, Father's grandfather, Grandmother Rosa, Evelyn, and the GAL. The GAL testified that in compiling her report,

> [She had] looked at the factors of [E.M.'s] education, the stability of both parents, a dispute between the parties that Father had previously agreed to the relocation, concerns Mother had about Father's fitness to parent, Mother's desire for [E.M.] to have a better life and her belief that her better life is in Georgia[.]

(Tr. Vol. 2 at 82-83). The GAL also testified to Mother's and Father's respective concerns regarding the other parent's ability to parent E.M.

[17] When the GAL was asked on direct examination for her recommendation regarding Mother's relocation to Georgia, the GAL testified:

> If [Mother] chooses to remain [in Georgia], I – I think it's in [E.M.]'s best interest that Father have primary physical custody. This is very difficult. I – I don't want to – I hate being in the position to have to make that recommendation. They're both good parents. They both love [E.M.]. But when I walk through

> the weight of everything that I – I looked at, it just adds up to that being in her best interest to be [in Indiana].

(Tr. Vol. 2 at 86-87).

[18] The trial court issued a final order on August 5, 2022. The trial court determined initially that Mother's proposed move to Georgia was in good faith and for a legitimate reason, specifically stating:

> The initial inquiry focused on Mother's reasons for the move and whether there was a legitimate purpose for the relocation. The GAL Report raised questions on the actual financial benefits to Mother based upon a cash flow analysis. Notwithstanding [the] GAL['s] reservations, based upon the testimony of all witnesses, the Court finds that Mother's relocation was for legitimate reasons and her financial conditions has [sic] improved as a result of the move.

(Mother's App. Vol. 2 at 32).

[19] However, the trial court denied Mother's request to relocate E.M. to Georgia based upon a best interests determination. In that respect, the trial court explained:

> It is obvious that [E.M.] has two devoted and loving parents[,] . . . she enjoyed a healthy connection with both parents' families[, and] . . . she has a connection with her siblings from both sides of the family.
>
> The connection between [E.M.] and her Father has suffered as a direct consequence of the move. There is no substitute for personal interaction between family members and that has

> suffered due to the distance. Where [E.M.] would see her Father and her Father's family numerous times during the week, their contact have [sic] been reduced to sporadic cell phone calls, which only last a few minutes. Both the amount of family interaction and the quality of that interaction has suffered. Brief and awkward phone calls are not a comparable substitute to shared physical custody during each week.
>
> * * * * *
>
> The GAL reported that [E.M.] misses Indiana and her Father. Although she is only six years old and her comments cannot be persuasive for the Court, they should not be ignored in considering her "best interest". . . .
>
> The last seven months have been in stark contrast to [E.M.]'s early years in Indiana. There are obvious benefits for [E.M.] over the last seven months as she has observed the successful business-women on her Mother's side of the family establish a restaurant in Georgia. However, [E.M.]'s relationship with her Father has been the casualty of the move. It would not be in [E.M.]'s best interests for the Court to favor the Mother's entrepreneurial vision for her daughter at the expense of a healthy, nurturing relationship with her Father. Therefore, the Court finds that it is in [E.M.]'s best interests to reside with her Father in Indiana.

(Mother's App. Vol. 2 at 33, 35).

[20] The trial court also ordered, in relevant part, that

> Father shall have primary physical custody of [E.M.;] . . . [i]f Mother remains in Georgia, she will have parenting time consistent with . . . the [Indiana Parenting Time Guidelines], where distance is a factor[;] . . . [and i]n the event Mother elects

> to return to Indiana, the parties shall continue to share joint legal and physical custody of [E.M.] pursuant to the Mediated [Agreed Entry] of 2019. However, the parties may agree to vary parenting time to accommodate their work schedules.

(Mother's App. Vol. 2 at 34, 36).[3]

[21] On August 25, 2022, Mother filed a motion to correct error, asking the trial court – in the event that Mother returned to Indiana – to (1) deny a modification of child support; and (2) deny a change in E.M.'s school district, as Mother wanted E.M. to attend school in the school district where Mother would reside, should Mother decide to return to Indiana. On November 7, 2022, Father filed a Petition for Contempt, alleging that Mother was disregarding the trial court's August 5, 2022 order by continuing to reside in Georgia while claiming residency in Indiana. The trial court held a hearing on Mother's motion to correct error, and on January 22, 2023, the trial court issued an order denying Mother's motion. The trial court also determined that Mother was not in contempt of the August 5 order and that Father was not entitled to attorney fees from Mother.

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[3] In its August 5, 2022 final order, the trial court also provided as follows regarding additional parenting time for Father, even though the trial court awarded primary custody of E.M. to Father: "Father shall receive five days of additional parenting time at a time agreeable to the parties to make up for missed parenting time during the Spring Break 2022[, a]s his parenting time was cut short due to an emergency in the family business, which required [E.M.]'s grandfather to return to Georgia[. A]nd Father could not adjust his schedule on short notice to return [E.M.]" (Mother's App. Vol. 2 at 36). However, the trial court denied Father's request to find Mother in contempt for wrongfully denying him parenting time during E.M.'s spring break.

[22] Mother now appeals the trial court's denial of her request to relocate to Georgia with E.M.

Decision

[23] Mother argues that the trial court clearly erred when it denied her request to relocate E.M. to Georgia. We disagree.

Standard of Review

[24] In this case, Parents did not request, and the trial court did not issue, specific findings of fact or conclusions of law. Accordingly, we review this case under a general judgment standard. *L.C. v. T.M.*, 996 N.E.2d 403, 407 (Ind. Ct. App. 2013). As our Supreme Court explained:

> In the absence of special findings, we review a trial court decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence. Judgments in custody matters typically turn on essentially factual determinations and will be set aside only when they are clearly erroneous. We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. The concern for finality in custody matters reinforces this doctrine.

Baxendale v. Raich, 878 N.E.2d 1252, 1257-58 (Ind. 2008) (citations and quotations omitted). "Trial courts are afforded a great deal of deference in family law matters, including relocation and custody disputes." *D.C. v. J.A.C.,* 977 N.E.2d 951, 957 (Ind. 2012).

Relocation

[25] Under certain circumstances, such as those in the present case, a parent intending to move residences must file a notice of that intention. *See* IND. CODE § 31-17-2.2-1. When a parent files a notice of intent to relocate, the nonrelocating parent may object by moving to modify custody or to prevent the child's relocation. I.C. § 31-17-2.2-5(a). When an objection is made, the relocating parent has the burden to establish that the proposed relocation is made in good faith and for a legitimate reason. *See* I.C. § 31-17-2.2-5(e). If that burden is met, the burden then shifts to the nonrelocating parent to show that the proposed relocation is not in the best interests of the child. *See* I.C. § 31-17-2.2-5(f).

[26] In considering the proposed relocation, the trial court must take into account the following factors:

> (1) The distance involved in the proposed change of residence.
>
> (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time[.]
>
> (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time . . . 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(c). The reference to other factors includes those factors applicable in an initial custody determination as set out in INDIANA CODE § 31-17-2-8. *Lynn v. Freeman*, 157 N.E.3d 17, 26 (Ind. Ct. App. 2020). Those factors include the child's age and sex; the child's relationship with parents, siblings, and others; and the child's adjustment to home, school, and the community. *Id.* When one parent is relocating, it is not necessary for the court to find a substantial change in one of these "other factors" before modifying custody. *See Baxendale*, 878 N.E.2d at 1257.

Best Interests of E.M.

[27] Mother argues that the trial court erred in determining that her requested relocation to Georgia was not in E.M.'s best interests. However, our review of the trial court's order reveals that the trial court carefully applied the facts of this case to the relevant statutory and best-interest factors, *see* I.C. §§ 31-17-2.2-1(c) and 31-17-2-8, and did not clearly err when it concluded that a relocation to Georgia was not in E.M.'s best interest.

[28] At the final hearing, the trial court heard testimony from six witnesses, including the GAL. The evidence revealed that distance was a factor in this

case, as Columbus, Georgia is a three-hour flight from Indiana and a ten-hour drive. After Mother relocated to Georgia with E.M. in December 2021, Mother did not return to Indiana on a quarterly basis to afford Father parenting time with E.M., as Mother had promised. And Mother and her family shortened Father's parenting time with E.M. over E.M.'s spring break because of an emergency that arose at the Georgia restaurant. Father was able to exercise only four overnight visits with E.M. between Mother's temporary relocation to Georgia in December 2021 and the beginning of E.M.'s 2022 summer break.

[29] The evidence also showed that it would have been difficult for Father to maintain a healthy relationship with E.M. if she remained in Georgia, as most of Father's communication with E.M. would be only through Facetime. As Father pointed out, the conversations with E.M. over the application were "short" and "difficult" due to E.M.'s young age. (Tr. Vol. 2 at 120).

[30] The evidence revealed that, prior to relocating to Georgia, E.M. attended preschool in Indiana and participated in gymnastics; E.M.'s best friend, her cousin, lived close to Father's house; and E.M. had a close relationship with her half-brother, C.M. Also, the evidence showed that E.M. has seven relatives living in Georgia and fifteen relatives living in Indiana.

[31] The trial court cited the following reasons to support its determination that relocation was not in E.M.'s best interest: E.M. enjoyed a healthy relationship with both Parents' families; E.M.'s relationship with Father had suffered due to E.M.'s temporary relocation to Georgia; Father's communication with six-year-

old E.M. had been reduced to sporadic cell phone calls that were brief and awkward; Mother had failed to make E.M. available for the parenting time that Mother had promised to Father;[4] E.M. missed her Father and Indiana; and, while Mother's vision to expose E.M. to her entrepreneurial spirit was beneficial, it should not come at the expense of E.M. forming a healthy and nurturing relationship with Father.

[32] As we have noted above, the standard of review is not de novo. *D.C.,* 977 N.E.2d at 957. "On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." *Id.* (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). We "will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." *Baxendale,* 878 N.E.2d at 1257-58.

[33] The evidence presented supports the trial court's determination that relocation was not in E.M.'s best interests. As a result, the trial court's denial of Mother's request to relocate E.M. is not clearly erroneous.

Insufficient Evidence

[34] Next, Mother argues that there was insufficient evidence in the record to support the trial court's denial of her request to relocate E.M. to Georgia.

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[4] Father was able to exercise parenting time over E.M.'s summer 2022 break.

Mother maintains that there were "two . . . reasons recited into the record to deny [her] relocation [request]": (1) that the distance between Parents' residences "damaged the relationship between [Father] and E.M.[,]" and (2) the GAL's recommendations, as set forth in the GAL's report. (Mother's Br. at 16). Mother contends that neither reason is "factually supported or reliable[,]" and neither supports a conclusion that relocation was not in E.M.'s best interests. (Mother's Br. at 16). Mother challenges the GAL's report on grounds that it is speculative and inaccurate. And Mother challenges the GAL's recommendations on grounds that they are based on "assumptions which greatly favored [Father.]" (Mother's Br. at 18). Mother also contends that the GAL "continued to support [Father]'s legal position and act as his advocate, . . . while finding fault with [Mother]'s parenting even when the facts were to the contrary." (Mother's Br. at 19). We cannot agree.

[35] The record contains substantial evidence supporting the GAL's report, the GAL's recommendations, and the trial court's judgment. Mother's arguments to the contrary amount to an improper request that we reweigh the evidence and assess witness credibility differently than the trial court did. Adhering to our standard of review, we decline. *See Baxendale*, 878 N.E.2d at 1257. We find no error here.

[36] Based on the foregoing, we conclude that the trial court did not clearly err by denying Mother's request to relocate E.M. Accordingly, we affirm the trial court's judgment.

[37] Affirmed.

Vaidik, J., and Mathias, J., concur.