MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kayla Stout (n/k/a Kahler),
Appellant-Petitioner,

v.

Patric Stout,
Appellee-Respondent.

June 21, 2022

Court of Appeals Case No. 21A-DR-2929

Appeal from the Howard Circuit Court

The Honorable Stephen Roger Kitts, II, Special Judge

Trial Court Cause No. 34C01-1310-DR-909

Bradford, Chief Judge.

Case Summary

[1] Kayla Stout ("Mother") and Patric Stout ("Father") (collectively, "Parents") were previously married and are the biological parents of two children, M.S. and O.S. (collectively, "the Children"). After their marriage was dissolved, Mother was awarded primary physical custody, Father was awarded parenting time, and they shared joint legal custody. In the years following the dissolution of their marriage, Mother and Father both resided in Kokomo. In October of 2020, Mother filed a notice to relocate with the Children to Plainfield. Father objected to this move and requested a change of custody. Following a hearing, the trial court determined that it was in the Children's best interests for the Children to live in Kokomo and for primary physical custody to be awarded to Father. Mother challenges this determination on appeal. We affirm.

Facts and Procedural History

[2] Parents were previously married and are the parents of the Children. Parents' marriage was dissolved by order of the trial court on December 15, 2014. Upon issuing its order dissolving Parents' marriage, the trial court granted Mother primary physical custody of the Children, awarded Father parenting time with the Children, and ordered that Parents share joint legal custody. Both Mother and Father resided in Kokomo following the dissolution of Parents' marriage, apart from Father's periods of overseas military deployment.

[3] On October 9, 2020, Mother filed a notice of intent to relocate with the Children from Kokomo to Plainfield. On October 27, 2020, Father filed an objection to Mother's notice and a motion to modify custody. Following an evidentiary hearing, the trial court issued an order on November 19, 2021, in which it denied Mother's request to relocate with the Children and granted Father's request to modify custody, awarding Father primary physical custody of the Children.

Discussion and Decision

I. Standard of Review

[4] The Indiana Supreme Court has held that "[i]n a custody modification matter, the standard used by a trial court and that used on appellate review are not the same." *In re Marriage of Richardson*, 622 N.E.2d 178, 179 (Ind. 1993). "The trial judge is entrusted with the responsibility for determining whether there has been a change in circumstances so substantial and continuing as to make the existing order unreasonable." *Id.* "In the appellate review of such determinations, as in other cases tried by a court without a jury, the judgment should not be set aside 'unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Id.* (quoting Ind. Trial Rule 52(A)).

[5] "We review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *In re Richardson*, 622 N.E.2d

at 178). In explaining why courts of review grant deference to the trial court in custody matters, the Indiana Supreme Court has stated that courts of review

> are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965).

[6] "The standard of review to determine whether a trial court has abused its discretion in modifying a support order is well settled." *Meehan v. Meehan*, 425 N.E.2d 157, 161 (Ind. 1981). "We do not weigh the evidence nor judge the credibility of witnesses, but rather consider only that evidence most favorable to the judgment, together with the reasonable inferences which can be drawn therefrom." *Id.* "If, from that viewpoint, there is substantial evidence to support the finding of the trial court, it will not be disturbed, even though we might have reached a different conclusion had we been the triers of fact." *Id.* Stated differently, "[o]n 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." *Brickley*, 247 Ind. at 204, 210 N.E.2d at 852. "The concern for finality in custody matters reinforces this doctrine." *Baxendale v. Raich*, 878 N.E.2d 1252, 1258 (Ind. 2008).

II. Relevant Statutory Authority

A. Request to Relocate

[7] When a court has previously issued a custody order, a parent who intends to relocate with their children must file an intent to move with the court that issued the prior custody order. Ind. Code § 31-17-2.2-1(a). The nonrelocating parent must then file a response that includes either a statement that the nonrelocating parent does not object to the relocation or a statement that the nonrelocating parent objects to the relocation of the children and a motion requesting: "(i) a temporary or permanent order to prevent the relocation of the child; and (ii) the modification of a custody, parenting time, grandparent visitation, or child support order as a result of the relocation." Ind. Code § 31-17-2.2-5(a). The relocating individual then "has the burden of proof that the proposed relocation is made in good faith and for a legitimate reason." Ind. Code § 31-17-2.2-5(e). "If the relocating individual meets the burden of proof under subsection (e), the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the best interest of the child." Ind. Code § 31-17-2.2-5(f).

B. Custody Modification

[8] With respect to a modification of a prior custody determination, Indiana Code section 31-17-2-21 provides that

> (a) The court may not modify a child custody order 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 that the court may consider under section 8 … of this chapter.

(b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.

Indiana Code section 31-17-2-8 provides, in relevant part, that

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (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.

III. Analysis

[9] The trial court determined that Mother met her burden to prove that the relocation was being made in good faith and for a legitimate reason. *See* Ind. Code § 31-17-2.2-5(e). The burden then shifted to Father to prove that relocation was not in the Children's best interests. *See* Ind. Code § 31-17-2.2-5(f). The trial court was also required to consider the Children's best interests when determining whether a modification of custody was warranted. Ultimately, the trial court determined that relocation was not in the Children's best interests and that modification of primary physical custody from Mother to Father was in the Children's best interests. Mother does not challenge the trial court's determination that relocation to Plainfield was not in the Children's best interests, focusing her argument on appeal solely on whether the trial court abused its discretion in determining that it was in the Children's best interests to modify custody and grant Father primary physical custody.

[10] With respect to the best interests of the Children, the trial court made the following findings and conclusions thereon:

> Following the Decree, [Mother's] living arrangements were highly unstable. She apparently lived with both of her divorced parents at some point, as well as with an aunt, before living with several boyfriends, moving when those relationships ended, until she found herself in a new relationship while living with a boyfriend who was also her current landlord. Predictably, her landlord/boyfriend moved toward eviction when he was no longer her boyfriend. Because her mother, who had offered assistance with rent on previous occasions, could not take her in on this occasion, (and, in [sic] event, was under no obligations to

do so,) [Mother] moved in with the latest boyfriend, to whom she is now married. This relocation took her from Kokomo to [Plainfield]. [Mother] and her new husband (and blended family), who initially worked together, have both since moved on to other jobs.

Meanwhile, [Father] was being deployed overseas, which resulted in disruptions of child support payments pursuant to an Income Withholding Order. Having returned to the States, he still resides in Kokomo, with his new wife (and blended family.) He is still paid by the military and still provides insurance to the children through his service. The schedule for his military obligations apparently fluctuates, and he has had at least five different jobs since the Dissolution Decree was issued.

The children have subsequently been enrolled in school in Avon,[1] where the younger child is struggling, as he apparently has been having behavioral issues and declining academic performance in comparison to his school record in Kokomo.

III. CON[C]LUSIONS OF LAW

A. Prong One: Good Faith/Legitimate Reason

There is no meaningful argument about whether her move violated the requirements of [Indiana Code section] 31-17-2.2-l; her moved [sic] was in excess of the limitations placed on distance, and she made the move without an Order permitting it. These facts are not in dispute. Rather, [Mother's] argument is that because she was being evicted by a former boyfriend for starting a new relationship and did not have family to take her in, she had to take the first job she could get, and that job took her to

[1] Although Mother moved to a home with a Plainfield address, the record indicates that following the move, the Children were enrolled in the Avon school district.

Avon, so her move in violation of the statutory rules for the move was one of necessity, especially since [Father] was being shipped out anyway.

This is not an extraordinarily sympathetic set of circumstances.

These are extremely unfortunate circumstances of her own making.

Narrowly speaking, necessary employment and reasonable housing are generally the bases for determining "good faith" and a "legitimate reason." In these circumstances, the question is more properly whether [Mother's] actions were merely pretextual to circumvent [Father's] Parenting Time.… It is not the Court's position that the record reflects that kind of intent. What the record reflects is a general pattern of behavior in which [Mother] essentially does whatever she feels like doing, regardless of other considerations. While the Court is not entirely comfortable calling that "good faith," it cannot say that it rises to the level of "bad faith," given the lack of specific intent. Because the trial court is not in a position to create a new category of "not-bad-faith," it will simply decline to find bad faith and accept that employment is a legitimate reason for the move, the timing of Respondent's deployment causing the only unavoidable (and highly relevant) complication.

B. Prong Two: The Best Interests of the Children

… [T]he following considerations are the inquiries in this cause:

> [Indiana Code section] 31-17-2.2-l(b):
> (l) 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;

> And pursuant to [Indiana Code section] 31-17-2.2-1(b)(6), [Indiana Code section] 31-17-2-8, as follows:
> [Indiana Code section] 31-17-2-8:
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community[.]

1. Distance and Hardship

Meeting between the residences of the parties increases the distance for both by approximately 25 miles; testimony suggested that a worst-case scenario of a one-way commute could result in a two-hour drive, an estimate the Court considers to be on the far outside of the possibilities. In any event, viewing that with the access the children have to electronic communication, the Court cannot find that there is a hardship (as opposed to an inconvenience) here on either party.

Other factors in [Indiana Code section] 31-17-2.2-l(b) having been addressed in the "good faith" analysis, the Court refers to [Indiana Code section] 31-17-2-8.

2. The Family Environment

Here, the Court analyses the child's adjustment, specifically whether the younger child is adjusting to the relocation. He is not. His grades are deteriorating at school and his behavior is deteriorating at school. [Mother] suggests that the child just needs more time to adjust to the relocation; [Father] suggests the child needs stability. [Mother] suggests that her patterns of behavior should be disregarded, and, even if they did indicate instability, they should be less objectionable than [Father's] instability, which at least includes complications caused by his military service and employment during COVID, an assertion with which the Court does not agree.

> Having determined that distance and communication are not factors, the Court next looks to the environments of the homes. The testimony is that [O.S.] has left friends behind, who he apparently still sees when in Kokomo. Further, [Father] has extended family in Kokomo, while [Mother] does not appear to have [any] in either location. It appears that while [Mother] may have started her new life in Avon, [O.S.] has not.
>
> (Here, the Court notes that the evidence and testimony about the children almost entirely centered around [O.S.]. [M.S.] is not alleged to have been as disturbed by the move as [O.S.]. Nonetheless, it would not be the Court's inclination to separate them.)
>
> The Court also gives considerable weight to whom seems to have had more concern about the interests of the children in the first place.

Appellant's App. Vol. II pp. 42–46 (underlining in original).

[11] Mother argues that a few of the trial court's findings are contrary to the evidence, asserting that

> Mother did not testify that she was being evicted by a former boyfriend for starting a new relationship. [Appellant's App. Vol. II pp. 53–191.] Rather, Mother testified that she could no longer afford her rent, in part due to Father's failure to timely and regularly pay child support, as well as her youngest child needing to quarantine for a period of time. Id[.] at pp. 70–71, 74–75, 77. Mother did not testify that she did not have family to take her in. Id[.] at pp. 53–191. Mother testified that she had family in Kokomo, but those living conditions were not viable due to the size of their homes or [O.S.'s] severe allergy to dogs. Id[.] at pp. 78–79. Mother testified that she did have family to take her in, namely, her spouse. Id[.] at pp. 80. Mother did not testify that

> she had to take the first job she could get. Id[.] at pp. 53–191. Among other testimony, Mother testified that she took the job with Amazon in August 2019 after Father threatened to take the children away from her due to her working night shift. Id[. at p.] 63.

Appellant's Br. p. 15. To the extent that Mother challenges the accuracy of the trial court's findings relating to the reason why she moved out of her last home in Kokomo and whether employment at Amazon was the first opportunity provided to her, it is worth noting that the allegedly inaccurate findings were made in favor of Mother, *i.e.*, these findings were made in support of the trial court's determination that Mother had a legitimate reason for requesting to relocate to Avon. In any event, regardless of why her former landlord sought to evict Mother, it is uncontested that Mother had to move out of her last residence in Kokomo, and she did not have any other viable housing options there. Furthermore, regardless of whether Mother had other employment options available to her, she did, nonetheless, accept employment at Amazon.

[12] The parties agree that the trial court erred in finding that Mother did not have extended family in Kokomo. However, the fact that the Children had more family nearby in Kokomo arguably supports the trial court's determination that it was in the Children's best interests to live in Kokomo as neither party accuses the other of attempting to limit access to the Children for either of them or their families.

[13] In finding that it was in the Children's best interests to live with Father in Kokomo, the trial court relied on evidence indicating that O.S.'s education

suffered following the move to Avon and that O.S. did not adjust well to the move. As of the date of the evidentiary hearing, the Children had completed one semester in the Avon school system. Although Mother testified that O.S.'s grades stayed the same or slightly improved after he was enrolled in the Avon school district, the trial court heard evidence that O.S.'s standardized test scores decreased following his move to the Avon school system. Specifically, his language arts score fell from the fifty-second percentile to the twenty-seventh percentile, indicating what Father considered to be a "significant decline" in O.S.'s academic performance.

[14] As for the alleged behavioral issues at school, Mother acknowledged that O.S. was involved in at least one incident that resulted in him being suspended from school but claimed O.S. had been the victim of bullying and "acted out" due to his ADHD and "impulse control issues." Tr. p. 29. Mother further acknowledged that O.S. "wasn't able to walk away from the situation" and that "two children got hurt because of it." Tr. p. 29. Following another incident involving a fight on the bus, O.S. was suspended from the school-provided transportation. Mother admitted that O.S. had never been suspended from school when he lived in Kokomo.

[15] In addition, once moving to Plainfield, O.S. shared a bedroom with his four step-/half-brothers. O.S. does not have to share a room at Father's home. Mother testified that following the move, O.S. required Clonidine, which the parties acknowledged is a sleeping medication although Mother asserted that it was also "bridge between" O.S.'s other ADHD medications. Tr. p. 61. Father

testified that O.S. does not have trouble sleeping or require sleeping medication while at his home. Father also testified that it is his understanding the O.S. "does have trouble sleeping" at Mother's home "as he's on a sleeping medication to go with his ADHD medication." Tr. p. 98.

[16] Parents paint a conflicting portrait of how the move to Plainfield affected O.S.'s education and whether O.S. had adjusted well to the move. In finding that it was in O.S.'s best interests to reside with Father in Kokomo, the trial court credited the evidence indicating that the move to Plainfield negatively affected O.S. Mother's reliance on evidence which she claims demonstrates otherwise effectively amounts to a request that we reweigh the evidence, which we will not do. *See Meehan*, 425 N.E.2d at 161.

[17] Again, we will affirm the judgment of the trial court in custody determinations if "there is substantial evidence to support the finding of the trial court, … even though we might have reached a different conclusion had we been the triers of fact." *Meehan*, 425 N.E.2d at 161. In this case, the trial court was in the best position to assess the evidence and the witnesses and there is evidence in the record that supports the trial court's findings and conclusions thereon. As such, we will not disturb the trial court's determination that a change of custody was in the Children's best interests.

[18] The judgment of the trial court is affirmed.

Najam, J., and Bailey, J., concur.