MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Matthew J. McGovern
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IN THE COURT OF APPEALS OF INDIANA

Joseph Morrison,
Appellant-Respondent,

v.

Angela Morrison,
Appellee-Petitioner.

January 27, 2021

Court of Appeals Case No. 20A-DR-1071

Appeal from the Gibson Superior Court

The Honorable Robert Krieg, Judge

Trial Court Cause No. 26D01-1404-DR-33

Weissmann, Judge.

[1] After his Indiana coal mine employer cut hours and prepared for layoffs, Joseph Morrison (Father) quit and immediately found a much better job at an Alabama coal mining company where his now wife and father-in-law had just begun working. Father filed a notice of intent to relocate from Indiana to Alabama with P.M., his then nine-year-old son, for whom Father had primary physical custody. The child's mother, Angela Morrison (Mother), objected and sought custody of P.M. The trial court denied Father's relocation request. Although it found Mother had neglected central aspects of P.M.'s care, the court also ordered an automatic change of custody if Father moved to Alabama to join his wife, their young son, and her children. The trial court also ordered Father to pay Mother's attorney fees of $15,869.45.

[2] We conclude Mother failed to prove the Alabama move was not in P.M.'s best interest. We also conclude the trial court abused its discretion in awarding attorney fees where the evidence clearly shows they were not warranted. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Facts

[3] Father and Mother divorced in March 2017. At that time, they were ordered to share legal custody of P.M. and to exercise equal parenting time. But Father sought appointment of a guardian *ad litem* three months later and soon petitioned for modification of custody based on Mother's alleged lack of stability. In June 2018, the trial court granted Father's petition and awarded

him primary custody of P.M. Mother then filed a petition for contempt against Father, alleging he had deprived Mother of parenting time after P.M. suffered extensive bug bites at Mother's home.

[4] Father earned $29 per hour as an electrician at a failing Southern Indiana coal mine, which cut his work hours to four days per week in April 2019. Father's coworker and domestic partner, Danyalle Carter (Stepmother), accepted a job with a mining company in Alabama. Father was offered a job as mine foreman at the same Alabama company at a salary of $115,000 plus bonuses of up to $65,000. Father quit his electrician's job in Indiana 2-1/2 weeks before the Indiana mine laid off 184 people. On October 15, 2019, Father filed a notice of intent to relocate to Alabama and married Stepmother nine days later. Stepmother already had moved to Alabama with their toddler and her two older sons. Father delayed his start at the Alabama mine so he could comply with the existing parenting time order as to P.M. in Indiana.

[5] Mother objected to Father's relocation request and sought custody of P.M. A month later, the guardian *ad litem* appointed by the trial court recommended the trial court allow Father to relocate with P.M. to Alabama and order parenting time for Mother every other weekend and during most of the summer. After a hearing in November 2019, the trial court temporarily blocked Father's relocation with P.M. and set the matter for hearing in March 2020. Father remained living in Gibson County with P.M. while Stepmother, the sole income earner for their family, lived and worked in Alabama while living with her parents.

[6] Four months later, the guardian *ad litem* indicated he could not make a recommendation as to who should have primary physical custody of P.M. if Father moved to Alabama. The guardian *ad litem* noted that P.M. expressed continued excitement about moving to Alabama but also indicated he would miss his mother.

[7] In March 2020, Father filed a motion for contempt against Mother, alleging she was delinquent in her payments for child support and medical expenses. Father later sought an order barring Mother's boyfriend, Benjamin Whittington, and his four children from unsupervised contact with P.M. That motion indicated Whittington angrily struck P.M. in the mouth and Whittington's daughters filmed a video with P.M. in which the girls engaged in simulated sexual acts while dancing to lewd music. Father also accused Whittington of smoking marijuana.

[8] After two more hearings, the trial court entered findings of fact and conclusions of law denying Father's request to relocate but allowing Father to maintain physical custody of P.M. The trial court ordered Father to inform the court within two months whether he would reside in Alabama. If Father indicated he would, the trial court ruled that primary physical custody of P.M. would transfer automatically from Father to Mother. The trial court also ordered Father, who then was unemployed and heavily in debt, to pay Mother's $15,869.45 attorney bill.

Discussion and Decision

[9] Father raises three issues on appeal. First, he claims the trial court's findings, which reveal inadequacies in Mother's parenting and home environment, do not support its judgment denying Father's request to relocate. Second, Father asserts the trial court abused its discretion in ordering an automatic change of custody contingent on a future event. Third, Father argues the trial court improperly ordered him to pay Mother's attorney fees because the court did not reveal its reasons for the attorney fee award or find Father had the ability to pay it.

[10] Where, as here, the trial court enters findings of fact and conclusions of law *sua sponte*, those findings control only as to the issues they cover. *Dana Companies, LLC v. Chaffee Rentals,* 1 N.E.3d 738, 747 (Ind. Ct. App. 2013), *trans. denied.* Where there are no specific findings, a general judgment standard applies, and we may affirm on any legal theory supported by the evidence adduced at trial. *Id.* Where findings exist, we must decide whether the evidence supports the findings, and whether the findings support the judgment. *Id.* Findings and conclusions will be set aside only if they are clearly erroneous: that is, when the record contains no facts or inferences supporting them. *Id.*

Mother did not file an appellee's brief. Under such circumstances we apply a less stringent standard of review and do not assume Mother's burden of presenting arguments against reversal. *Rickman v. Rickman*, 993 N.E.2d 1166, 1167 (Ind. Ct. App. 2013). Father need only establish *prima facie* error—"error

at first sight, on first appearance, or on the face of it"—to obtain reversal. *Jacob v. Vigh*, 147 N.E.3d 358, 360 (Ind. Ct. App. 2020). But even under this prima facie standard, we remain obligated to apply the law correctly to the facts in the record to determine whether reversal is warranted. *Tisdale v. Bolick*, 978 N.E.2d 30, 34 (Ind. Ct. App. 2012).

I. Notice to Relocate

[11] Father first claims the trial court's findings and conclusions are defective and do not support its judgment denying Father's request to relocate. We agree.

[12] At issue is Indiana Code § 31-17-2.2-1 (2019), which governs efforts by a parent to relocate with a child. Once Father filed his notice of intent to move and Mother objected and sought physical custody of P.M., the trial court was obligated to consider the following factors: (1) distance involved; (2) hardship and expense for Mother to exercise parenting time; (3) feasibility of preserving the relationship between Mother and P.M. through suitable parenting time, including consideration of the financial circumstances of the parties; (4) whether Father engaged in an established pattern of conduct to promote or thwart Mother's contact with the child; (5) Father's reasons for seeking relocation and Mother's reasons for opposing it; and (6) factors affecting P.M.'s best interests. Ind. Code § 31-17-2.2-1(c).

[13] Father bore the burden of showing that the proposed relocation is in good faith and for a legitimate reason. *See* Ind. Code § 31-17-2.2-5(e). Once met, the burden shifted to Mother to show that the proposed relocation is not in P.M.'s

best interests. I.C. § 31-17-2.2-5(f). After finding Father met his burden, the trial court concluded Mother also met hers. The trial court specifically found:

> 1. That because the distance involved in the proposed relocation to Parrish, Alabama is at least a six-hour drive, one way, it could create an undue hardship and expense on Mother to exercise alternating weekend parenting time.
>
> 2. That it is not feasible to preserve the relationship between Mother and the Child through suitable parenting time.
>
> 3. That Mother, who is the non-relocating individual, has established a pattern of conduct by Father, who is the relocating individual, which thwarted Mother's contact with the Child.

[14] App. Vol. II pp. 141-142.

[15] Father challenges the trial court's conclusion that Mother established the move was not in P.M.'s best interests, as well as the court's findings underlying that conclusion. Father notes he offered to provide all transportation of P.M. between Indiana and Alabama at his expense. Father also proposed an expansion of Mother's existing parenting time by adding holidays and nearly all of P.M.'s summer vacation.

[16] The trial court viewed Father's various proposals as unreasonable for the following reasons: "distance involved and the amount of time the Child must be in a vehicle traveling, prohibitive cost to Mother, age of the Child, interference with the Child's extra-curricular activities, and/or a reliance upon a number of parties in helping to execute the plan who at any time may decide to no longer

shoulder the burden of helping in the exchanges." App. Vol. II p. 138. Father correctly notes the record contains no evidence the move would interfere with P.M.'s extracurricular activities. Nor is there any evidence that any of the family members enlisted to help in driving P.M. would refuse to do so.

[17] P.M. already had been commuting with Father for weekend visits to Alabama during Father's parenting time. The guardian *ad litem* noted P.M. expressed excitement about such travel. Although six hours in a vehicle is a long time for a child, it would happen under Father's plan only two weekends per month and at the beginning and close of longer holiday or summer visits.

[18] The record does not support the trial court's conclusion and underlying findings indicating Mother would suffer undue hardship and that her relationship with P.M. could not be preserved if P.M. moved with Father to Alabama. Under Father's initial proposal, Mother's parenting time would expand, and her parenting time transportation costs could be minimal or non-existent. Although Father's plan called for his family members to assist in transportation, the evidence does not support the trial court's speculation that transportation would be unavailable if a family member stopped assisting. Father made clear that he would do whatever was necessary to preserve Mother's parenting time. The trial court had the ability—through contempt or later modification of custody—to keep Father to his word.

[19] The propriety of the trial court's finding that Father engaged in a pattern of disrupting Mother's parenting time is a closer question. Specifically, the trial

court found that Father and Stepmother "wrongly used [allegations of bed bug bites] to justify denying Mother her parenting time." App. Vol. II p. 138. This finding is based on evidence that, for about a month in Summer 2019, Father refused to allow P.M. to stay at Mother's home, where P.M. had suffered numerous bug bites on his leg. Father suspected the bites were from bed bugs. P.M.'s school did, too, and confiscated P.M.'s backpack. Validating Father's concerns, school officials further recommended Father and Stepmother seal P.M.'s backpack in a plastic bag whenever it was removed from Mother's home.

[20] When Mother refused to fumigate her house at Father's expense, Father called the Indiana Department of Child Services, which found Mother's home appropriate. Medical records later showed P.M.'s many bites likely were from mosquitoes. Yet, after Mother failed to administer medication to P.M.'s bites, P.M. developed a staph infection which spread to Stepmother and two siblings. Mother also acknowledged having a flea problem in her home that had required her to "bomb" the house periodically. And P.M. reported to the school nurse that his blanket at Mother's home was infested with fleas.

[21] As Father notes, this prolonged incident was the only time he interfered with Mother's parenting time during his two years as P.M.'s primary custodian. The record also contains no evidence that Father acted with malicious intent. Father did not prevent Mother from visiting P.M.; he just would not allow P.M. to spend time in her unfumigated house. This evidence, when considered

together, does not support the trial court's finding that Father engaged in a "pattern" of thwarting Mother's parenting time.

[22] The evidence also does not support the trial court's finding that Mother proved the Alabama move was not in P.M.'s best interests. The trial court acknowledged "Mother does not demonstrate an appropriate level of interest and participation in the Child's life for someone who requests primary legal custody." App. Vol. II p. 137. The trial court proceeded to find:

> Mother could not accurately state what size shoe the Child wears, how much he weighs, what concerns the school has for the Child, how much school he has missed, what his position in soccer is, who his healthcare providers are, and which days her parenting time falls on. Mother does not take the proper initiative to have the Child adequately prepared for school on days following her overnights. At times, Mother sends the Child to school without his homework completed or with the parental signature missing on school documents. The Child may come to school without glasses or dental appliances, dressed in either the same unwashed clothing from the prior day or in poorly fitting mismatched clothing, carrying a backpack containing dirty laundry, and/or arriving late. Neither the school nurse nor the Child's teacher had ever seen Mother, prior to coming into court to testify. The Youth First Counselor has also never met her. Each school official testified that Father and Stepmother actively participate in the Child's academics and take the necessary care to ensure his well-being. Mother does not participate in school events, parent-teacher conferences, or on-line communications with Child's teacher, school nurse, or school counselor, in any manner set up by the school and available to her. The teacher testified she can clearly distinguish which parent the Child has spent the night before with on any given school night, by his demeanor, appearance, and preparedness.

App. Vol. II p. 137.

[23] Mother does not have physical custody of any of her three children. The trial court determined only two years earlier that P.M.'s best interests dictated Father have primary physical custody. The trial court's findings and the evidence also show Mother met her child support obligation only after the State intervened and intercepted her tax refund. Mother also failed to reimburse Father for her $2,811.24 share of medical expenses for P.M. Mother relies on her boyfriend for housing and takes home only $250 to $275 per week. As a result, Father historically had paid all or most of P.M.'s educational, extracurricular, and medical expenses. Yet, Father has no job in Indiana. In Alabama, he has the promise of a job paying up to $180,000 and a potential household income of up to $255,000.

[24] P.M. is close to Stepmother's children—two boys close in age to him—and to P.M.'s younger half-brother. Yet, all three boys live with Stepmother in Alabama, where she works to support all of them. Although P.M. has extended family in Indiana, the record contains troubling evidence as to P.M.'s experiences in Mother's home. This includes the flea problem, P.M.'s lack of an assembled bed, and, most notably, violence by Mother's boyfriend toward P.M.

[25] The trial court correctly found, and Mother does not challenge, that Father had met his burden of proving his move was in good faith and for a legitimate reason. *See Paternity of X.A.S. v. S.K.,* 928 N.E.2d 222, 228 (Ind. Ct. App. 2010),

trans. denied (disapproving implication that custodial father "was required to choose between marriage and his responsibilities as a parent"); *Rogers v. Rogers*, 876 N.E.2d 1121, 1130-1132 (Ind. Ct. App. 2007), *trans. denied* (affirming trial court's approval of relocation request where parent accepted out-of-state job with high pay where no full-time position was available in Indiana).

[26] We conclude Father has exceeded a prima facie showing that the trial court erred in finding Mother proved Father's relocation with P.M. to Alabama was not in P.M.'s best interests. *See X.A.S.*, 928 N.E.2d at 227-230 (reversing trial court's denial of custodial father's relocation request to join his new wife at her Naval station in California when father recently lost his job but offered to pay transportation costs for mother's parenting time). We therefore reverse and remand with instructions to grant Father's request to relocate with P.M.[1]

II. Attorney Fees Award

[27] Father's final claim is that the trial court abused its discretion in requiring him to pay Mother's entire attorney fees of $15,869.45. Indiana Code § 31-17-2.2-1(f) authorizes a trial court to award "reasonable attorney fees" as to a post-dissolution relocation request.

[28] The trial court has broad discretion in awarding attorney fees and will be reversed only upon an abuse of that discretion. *Goodman v. Goodman*, 94 N.E.3d

[1] In light of this disposition, we need not address Father's separate claim that the trial court erroneously ordered an automatic change of custody only effective if Father moved to Alabama.

733, 751 (Ind. Ct. App. 2018), *trans. denied*. An abuse of discretion occurs when the award is clearly against the logic and effect of the facts and circumstances before the court. *Bessolo v. Rosario*, 966 NE.2d 725, 733 (Ind. Ct. App. 2012), *trans. denied*. "In assessing attorney's fees, the trial court may consider such factors as the resources of the parties, the relative earning ability of the parties, any misconduct which directly results in the other party incurring additional fees, and other such factors bearing on the reasonableness of the award." *Id.*

[29] Father, who was unemployed, testified his financial situation was dire. He had depleted his savings and withdrawn retirement funds with substantial penalty. He had borrowed money from friends and family. His own litigation expenses were $20,000, and the family's credit card balances were high, all due to his efforts to relocate with P.M. The Record does not reflect the trial court's consideration of any of the factors necessary to enter a reasonable award of attorney fees. Moreover, those factors dictate the opposite result. Based on the logic and effect of these facts and circumstances before the court and the applicable law, we find an abuse of discretion in the order requiring Father to pay Mother's attorney fees. *Bessolo v. Rosario*, 966 N.E.2d 725, 733 (Ind. Ct. App. 2012), *trans. denied*. Accordingly, we reverse the award of attorney fees.

[30] The judgment of the trial court is reversed and remanded for further proceedings.

Mathias, J., and Altice, J., concur.