MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Amanda L. Smith,
Appellant-Petitioner,

v.

Andrew Ellermann,
Appellee-Respondent.

July 7, 2021

Court of Appeals Case No. 20A-JP-2060

Appeal from the Vanderburgh Superior Court

The Honorable Leslie C. Shively, Judge

Trial Court Cause No. 82D01-1410-JP-1114

Bradford, Chief Judge.

Case Summary

[1] Andrew Ellerman ("Father") and Amanda Smith ("Mother") have one child together, C.E. Father, who lived in Princeton, located in Gibson County, notified Mother of his plans to move to Knox County, where C.E. attended daycare, he and his wife worked, and his family attended church. Mother lives and works in Evansville, located in Vanderburgh County, and, as one part of the physical custody arrangement, sees C.E. once a week after school for a mid-week visitation. Father, who has physical custody and modified joint legal custody, has the authority to make final decisions concerning C.E. so long as he gets Mother's input. In February of 2020, Father and Mother discussed C.E.'s future enrollment in kindergarten. While Mother suggested that C.E. attend school in Gibson County or a parochial school which charges tuition, Father ultimately decided that C.E. would attend school in Knox County, where C.E. had also gone to daycare.

[2] Mother filed a petition to modify custody, parenting time, and child support on February 24, 2020, arguing that C.E. attending school in Knox county and Father's move would negatively affect Mother's finances and her ability to exercise her rights to co-parent C.E. Before the hearing on Mother's petition, Mother filed a report with the Department of Child Services ("DCS") alleging that C.E. told her and maternal grandmother that Father and paternal grandfather had given him beer when he was at Father's house. Following two hearings on the matter, on October 22, 2020, the trial court denied Mother's motion to modify custody, denied Mother's request for a midweek overnight,

and increased Mother's child support obligation. Mother appeals, arguing that the trial court exhibited bias toward her; that it abused its discretion in considering certain evidence, determining that Father's move was in good faith, and denying Mother's petition for a change in custody; and that its fact-finding, conclusions, and calculation of child support were clearly erroneous. We affirm.

Facts and Procedural History

[3] Father and Mother have one child, C.E., born December 1, 2014. Father has had physical custody of C.E. since September of 2015 and modified joint legal custody since January of 2016. Pursuant to the parties' modified joint legal custody arrangement, Father can make the final decisions regarding C.E., so long as he provides Mother with an opportunity for meaningful input on decisions.

[4] In 2015, the trial court ordered that, due to her criminal charges and conduct, Mother's parenting time would be supervised. Eventually, the trial court found that Mother's conduct had improved, and, in 2018, awarded Mother more parenting time in accordance with the Indiana Parenting Time Guidelines ("the Guidelines"), with her midweek parenting time taking place in Princeton so that C.E. could go to bed at a reasonable hour. In 2019, Mother moved from the north side to the south side of Evansville, farther from Princeton, where C.E. lived with Father, and Knox County, where C.E. was in daycare.

[5] C.E. began daycare in Vincennes in 2016 and attended that daycare until he began kindergarten in August of 2020, also in Knox County. In 2017, Father and Father's wife, Tara, purchased their house in Princeton to be closer to Evansville, where she worked. Father, who has worked in Knox County throughout these proceedings, commuted from Princeton to Knox County for work and to drop C.E. off at school. Father and Tara's two other children are also in daycare in Knox County. Mother lives and works in Evansville. C.E. also attends church with Father and Father's family in Knox County. C.E.'s paternal grandparents live approximately two miles from the church and attend services there. C.E. has played basketball at the Knox County YMCA since he was three years-old, with Father as the coach. Father is also active in Knox County volunteer work, serving as a Kiwanis board member and Junior Achievement of Southwest Indiana teacher and board member.

[6] When Tara began her position at Good Samaritan, located in Knox County, Father and Tara decided to build a house in Knox County because they both worked there, the children attended school there, and many other aspects of their lives occurred there. Father notified Mother by letter on March 17, 2020, of his intent to relocate before the construction of the house had begun but after the land had been purchased. In February of 2020, Father and Mother met to discuss schooling options for C.E. Father, who had researched options in Knox County and Gibson County, including Owensville Elementary, explained to Mother that it was logistically impractical for C.E. to attend school anywhere other than Knox County, mostly due to the one hour time difference between

Knox County and other counties.[1] For instance, Father learned that Owensville Elementary in Gibson County, which is in the Central Time Zone, has a drop-off time as early as 7:30 a.m., making it impossible for him to drop off C.E. and get to work at 8:00 a.m. in Knox County, which is in the Eastern Time Zone. Mother suggested schools south of Knox County and schools which charge tuition, but Father felt that these options were prohibitively far away from his place of employment and that it would be impractical or overly expensive. After discussing the options with Mother, Father decided that C.E. would attend South Knox Elementary.

[7] On February 24, 2020, Mother filed a petition to modify custody, child support, and parenting time. On March, 18, 2020, Mother filed her objection to Father's informal notice of intent to relocate. On June 29, 2020, Mother filed a petition for an emergency hearing because the final hearing date was scheduled after C.E.'s school start date in Knox County. The hearing was set for July, but eventually rescheduled to August 13, 2020, due to Mother being under a doctor's care due to illness.

[8] Before the hearing, Mother filed a report with the DCS, alleging that Father had let C.E. drink beer and had permitted C.E. to ride in a vehicle unrestrained.

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[1] While Knox County and seventy-nine other counties sit in the Eastern Time Zone, twelve counties in the northwest and southwest corners of our state operate in the Central Time Zone, which is one hour behind the Eastern Time Zone. *Time Zones*, https://www.in.gov/portal/files/TimeZones.pdf (last visited, June 1, 2021).

Mother never attempted to discuss beer-drinking with Father prior to contacting DCS and had broached the subject of seat-belt wearing only once over a year before the DCS report was filed, though Father appeared to have ignored her attempts to discuss the matter when she tried. Because Mother did not notify the trial court, Father, or Father's counsel that she had contacted DCS, Father was not made aware of the DCS investigation until he was contacted by DCS a day after the first hearing. On September 16, 2020, during the second hearing, Mother revealed the existence of the DCS report to the trial court and the trial court agreed to hear Mother's evidence on the DCS report.

[9] At the second hearing, the trial court reevaluated the parties' income to determine whether to alter child support. Father's long-time position is commission-based, and his 2019 income was comparable to his 2020 income. Father's child support worksheet used Father's gross weekly income of $1210.15 based on his 2019 W-2 income. Mother, who worked two jobs in 2019, had a yearly income of $45,670.00; however, she has recently received a promotion at one of her jobs, eliminating her need to work the second. Mother's child support worksheet showed her gross weekly income to be $1043.00. Mother also recently moved into a home with her fiancé, who pays their $1750.00 monthly rental payments, while Mother's expenses at home are limited to groceries and utilities.

[10] On October 22, 2020, the trial court issued its order. The trial court found that Father's intended relocation was not made in bad faith and that Father was acting within his final decision-making authority in choosing which school C.E.

attends. Further, the trial court denied Mother's request for an additional mid-week visitation day and increased Mother's weekly child-support obligation to $75.00 per week.

Discussion and Decision

[11] We will not set aside the findings or judgment of the trial court unless they are clearly erroneous. *M.S. v. C.S.*, 938 N.E.2d 278, 281–82 (Ind. Ct. App. 2010). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Est. of Reasor v. Putnam Cnty.*, 635 N.E.2d 153, 158 (Ind. 1994). "We […] consider only the evidence that is favorable to the judgment and the reasonable inferences flowing therefrom." *M.S.*, 938 N.E.2d at 281–82.

[12] We will not reweigh evidence or reassess witness credibility. *Id.* "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) (citing *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)).

I. Father's Relocation

[13] With regard to a request to relocate, we will not disturb a court order unless it is apparent that there has been an abuse of discretion. *Loeb v. Loeb*, 252 Ind. 96, 100, 245 N.E.2d 831, 833 (1969). "The trial court has abused its discretion only if it makes an erroneous conclusion that is clearly against logic and the natural

inferences to be drawn therefrom. Without some prejudice, reversible error does not exist." *Ind. Tri-City Plaza Bowl, Inc. v. Gluek's Est.*, 422 N.E.2d 670, 677 (Ind Ct. App. 1981). "[O]ur court has generally required that the moving parent demonstrate an objective basis—that is, 'more than a mere pretext'—for relocating. It is commonly understood in today's society that individuals move in order to live closer to family members, for financial reasons, and for employment opportunities." *Gold v. Weather*, 14 N.E.3d 836, 841 (Ind. Ct. App. 2014) (citing *T.L. v. J.L.*, 950 N.E.2d 779, 787 (Ind. Ct. App. 2011)); *see* Ind. Code. §§ 31-17-2.2-1, -5.

[14] Mother argues that the trial court abused its discretion by finding that Father's request to relocate was made in good faith, and that his move is merely a pretextual attempt to prevent her from being more involved in C.E.'s life. We disagree. The record bears out, and the trial court relied on, significant justification for Father's desire to move. Father's job, located in Knox County, would require a significant commute that could be reduced by fifty minutes if Father were able to move closer. Father and C.E. have relatives in Knox County. C.E. attends church with Father and Father's family in Knox County. C.E. is involved in extra-curricular activities in Knox County and has been for several years. Further, it is not simply that Father is moving from one county to another; he is building a home from the ground up in Knox County, which is not generally done flippantly or purely out of spite. We are unpersuaded that the trial court abused its discretion by finding Father's relocation to be in good faith.

II. Modification of Custody, Child Support, and Parenting Time

A. Custody Modification

[15] "The relocation of a custodial parent does not require modification of a custody order. But, when the nonrelocating parent seeks custody in response to a notice of intent to relocate with the child," the trial court shall take into account certain factors in determining whether to modify a custody order. *Wolljung v. Sidell*, 891 N.E.2d 1109, 1112 (Ind. Ct. App. 2008) (internal citations omitted). Specifically, Indiana Code section 31-17-2.2-1(b) states that a trial court, when considering a modification petition in response to a relocation request, 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 […]
>
> (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.

[16] Mother argues that the court prevented her from presenting evidence related to the best interest of the child factors pursuant to Indiana Code section 31-17-2-8 during the relocation phase of the trial. In particular, Mother argues that the trial court's decision to limit the relocation hearing to certain lines of questioning violated Indiana law by willfully ignoring information concerning the best interests of the child standard when hearing evidence on relocation. We disagree. Here, the trial court supported its decision to allow Father to relocate farther away from Mother, relying on evidence that C.E. was well adjusted to his life in Knox County, that he had relatives in Knox County, that preventing Father's relocation would have him commuting fifty more minutes each day while allowing the relocation would not substantively change Mother's commute time during her midweek visits, that Mother recently relocated fifteen minutes further away from C.E.'s school, references to the DCS report, and Mother's travel time from Gibson to Knox County. Given our preference for finality in custody proceedings, and because the trial court amply supported its decision to allow Father's relocation petition, we affirm the trial court's decision to allow Father's relocation.

B. Child Support Determination

[17] "We review an award of child support for an abuse of discretion." *Nowels v. Nowels*, 836 N.E.2d 481, 487 (Ind. Ct. App. 2005). "An abuse of discretion

occurs if the decision is clearly against the logic and effect of the facts and circumstances before it or if it has misinterpreted the law." *Id.* at 489. In the Guidelines, the commentary to Guideline 3A explains,

> There are numerous forms of income that are irregular or nonguaranteed, which cause difficulty in accurately determining the gross income of a party. Overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional are all illustrations, but far from an all-inclusive list, of such items. Each is includable in the total income approach taken by the Guidelines, but each is also very fact sensitive.

Indiana Code section 31-16-8-1 states that a modification of child support may be made "upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable[.]"

[18] Mother argues that the trial court's decision to raise her child support obligation was clearly erroneous, suggesting that the trial court erred by using two different evaluative methods to determine Father's and Mother's income, favoring Father.[2] While it is true that the trial court used Father's W-2 gross weekly income to determine Father's income and used Mother's year-to-date

[2] Mother also argues that the trial abused its discretion by failing to take into consideration the significant transportation costs Mother will be obligated to incur due to the geographic distances between her home and work and Father's home and C.E.'s school. We disagree. Not only did Father testify that he would honor the same drop-off location to exchange C.E., Mother relies on an argument which suggests that C.E.'s move may subject her, in the future, to added travel if C.E. continues and increases participation in extracurricular activities in Knox County. The possibility of extracurriculars that Mother chooses to attend are insufficient and too ambiguous to prove that the trial court abused its discretion. Further, we note that Mother recently moved to southern Evansville, increasing her distance from Gibson County, Father's former home, and Knox County, where C.E. has always attended daycare.

calculation to determine her income, the trial court did not do so erroneously. Mother testified that she had recently received a promotion that would leave her hourly rate the same, but would increase her commission structure, and that she was still receiving residual payments on past sales. Further, Mother testified that because she now lives with her fiancé who pays $1750.00 in rent, she only needs to pay for groceries and utilities. Finally, Mother's trial counsel proposed that, for the purposes of child support evaluation, her weekly income be determined to be $1043.00 and that her 2019 W-2 income be used to calculate her income. The trial court did not abuse its discretion by considering the above information when increasing Mother's child support obligation.

C. Parenting Time

[19] Indiana Code section 31-14-14-2 states that the trial court "may modify an order granting or denying parenting time rights whenever the modification would serve the best interests of the child." "When reviewing a trial court's determination of a parenting time issue, we will grant latitude and deference to our trial courts, reversing only when the trial court abuses its discretion." *Gomez v. Gomez*, 887 N.E.2d 977, 983 (Ind. Ct. App. 2008). "A judgment is clearly erroneous if it is unsupported by the conclusions, and conclusions are clearly erroneous if they are unsupported by the findings." *A.G.R. ex. rel. Conflenti v. Huff*, 815 N.E.2d 120, 124 (Ind. Ct. App. 2004). "When reviewing the trial court's resolution of a parenting time issue, we reverse only when the trial court manifestly abused its discretion. If the record reveals a rational basis

supporting the trial court's determination, no abuse of discretion occurred." *Id.* at 125.

[20] Mother argues that the trial court erroneously claimed to award her additional visitation when it, in fact, did not. While Mother is correct that although the trial court referred to the time awarded in the October 22, 2020 order as "additional" parenting time, but in actuality awarded no additional parenting time, we are unpersuaded that the trial court abused its discretion or committed clear error. The trial court concluded that the parenting time it awarded was in C.E.'s best interests after declining to award Mother additional parenting time in the form of an overnight stay every Wednesday. It is not clear to us that the trial court intended to grant Mother more parenting time than she had. While the trial court did state on record that "[a]nd to be honest do I think that maybe [M]other should have some additional – some more parenting time? Probably and I will look into that," Tr. Vol. III p. 110, we defer to the trial court's ultimate decision to grant Mother parenting time in accordance with its final order. Further, Mother's parenting time presently aligns exactly with the Guidelines for a child of C.E.'s age, a fact which reduces our concern that Mother cannot exercise her owed parenting time. We affirm the trial court's parenting time determination, as remanding this case and forcing the trial court to grant additional parenting time, after it has already weighed C.E.'s best interests, contravenes our policy of deferring to the trial court. *See Gomez*, 887 N.E.2d at 983 ("When reviewing a trial court's determination of a parenting

time issue, we will grant latitude and deference to our trial courts, reversing only when the trial court abuses its discretion.")

III. Bias or Prejudice by the Trial Court

[21] Indiana law "presumes that a judge is unbiased and unprejudiced." *Garland v. State*, 788 N.E.2d 425, 433 (Ind. 2003). "To rebut this presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy." *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010). "Adverse rulings are insufficient to show bias per se." *Perry v. State*, 904 N.E.2d 302, 308 (Ind. Ct. App. 2009). "'To assess whether the judge has crossed the barrier into partiality, we examine both the judge's actions and demeanor.'" *Id.* at 1287–88 (quoting *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind. 1997)).

[22] The trial court has presided over multiple proceedings between the parties since 2014. Despite Mother never requesting that the judge recuse himself, Mother argues that the judge was biased against her and that the trial court's decision should be reversed and remanded for a new hearing before a new judge. (Appellant's Br. p. 18) Specifically, Mother argues that the judge made prejudicial statements regarding the DCS report that Mother filed, with respect to the parties' conduct, and why the parties were before the court.

[23] Mother contends that the judge made statements showing that he was impartial concerning Mother's filing of a DCS report, which was based on her allegation

that C.E. had said that Father and paternal grandfather allowed him to have beer, and that the judge had made up his mind before a hearing ever occurred. Mother points specifically to one statement in particular:

> BY THE COURT: Here's the thing. I'm really getting tired of parents, when we have a contested matter pending, using DCS as a leverage situation. We were in Court August 13th. Did this incident happen prior to August 13th?
>
> BY MR. PHILLIPS: It happened I believe a day or two before.
>
> BY THE COURT: Not a word was said. Nothing was — now here we are today — now we are going to have the grandmother testify about the mention of a subject to create the inference that Dad has done something wrong [….] [I]f you had the DCS person here talking about it, that's one thing, but I'm going to […] let's do this. She can testify, but I'm just going to tell you right now. I'm going to give it extremely little weight.

Tr. Vol. I p. 177. Mother correctly points out that her counsel did ask Father "Have you ever given C.E. – uh – any illegal substances[,]" a question which the trial court excluded because they were handling the relocation phase of the custody modification. Tr. Vol. I p. 86. However, we do not read the above quote to imply that the judge is admitting he had prejudged the evidence and was prejudiced against Mother for filing and bringing up the evidence supporting her DCS report, but rather that maternal grandmother's testimony, without a representative from DCS to testify, would bear little weight to establish any wrongdoing by Father.

[24] Further, Mother argues that the trial court made several statements that establish that the trial court was biased by the belief that Mother was merely

using the DCS report as leverage against Father, and that the judge should have recused himself. Specifically, Mother points to this statement by the judge:

> While this matter was pending the young man, C.E., at a family gathering, made some statement about drinking beer. I can recall my days when I was four or five making a similar statement in front of my aunt and uncle and a visiting relative which was not true, but little boys like to be provocative. But the fact that […] given [Father's] track record, no reasonable parent would believe that [Father] and along with his father was intentionally giving this child alcoholic beverages. The proper way it should have been handled is to use that messaging system on Our Family Wizard "Hey C.E. is over here talking about drinking beer. What the heck is going on?" and [Father] could've responded to that. But no, while this matter was pending seeking to get leverage, there is no question in mind of this court, that this is the whole purpose of it [….] [Father] not only has been a good parent, but he has a responsible job with Old National Bank, one of our institutions that is recognized in this community. What do you think – what do you think if his superiors get wind that he is being investigated by DCS? That's not going to help his career. Is that something he's going to list or is going to be considered at his next promotion? Of course not. It puts a blemish on his record.

Tr. Vol. III p. 110. We disagree with Mother's claim that the above statement establishes that the trial court judge was biased. While we recognize Mother's argument that DCS reports represent an important part of Indiana's systematic effort to ensure the safety of children in our state, by all accounts C.E. is a well-adjusted child. The judge expressed displeasure that Mother, on its review, is submitting a DCS report for leverage, but is not relying merely on bias and prejudice, but rather its evaluation during the hearing and the circumstances by

which the court came to find out about the DCS report. Regardless of Mother's counsel's attempt to bring up the DCS report to the trial court on August 13, it is hard to say that the singular question, which was outside the scope of the line of questioning, was enough to put the court on notice that Mother was proceeding with a DCS report. Further, the trial court's frustration that Mother did not attempt to communicate with Father in attempt to resolve the concern before turning to DCS does not necessarily demonstrate prejudice or bias, rather the trial court's preference toward amicable dispute resolution. Finally, as outlined throughout this opinion, there is ample evidence to support the trial court's conclusions that Father's relocation was in good faith, that he had the final decision-making authority to choose which school C.E. would attend, concerning Mother's parenting time, and concerning Mother's child support obligation. *Everling*, 929 N.E.2d at 1287 ("a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy.").

IV. Due Process

[25] "Child custody proceedings implicate the fundamental relationship between parent and child, so procedural due process must be provided to protect the substantive rights of the parties. *Bowman v. Bowman*, 686 N.E.2d 921, 924 (Ind. Ct. App. 1997). The admission of evidence is "left to the sound discretion of the court." *State v. Snyder*, 504 N.E.2d 7833, 787 (Ind. 1992). Further, "when evidence is improperly admitted in a bench trial, 'it is presumed that the trial

court disregarded all inadmissible evidence and weighed only the proper evidence in determining whether the plaintiff has carried [its] burden of proof.'" *Mann v. Russell's Trailer Repair, Inc.*, 787 N.E.2d 922, 929 (Ind. Ct. App. 2003) (quoting *D.W.S. v. L.D.S.*, 654 N.E.2d 1170, 1173–74 (Ind. Ct. App. 1995)). "The improper admission of evidence is harmless error when the judgment is supported by substantial independent evidence to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the judgment." *Id.*

[26] Mother argues that the trial court violated her due process rights by considering the DCS report in making its judgment but failing to give her an opportunity to cross examine the probity and veracity of the report. Mother relies on Indiana Code sections 31-17-2-12(a)-(d) in support of her contentions, but we disagree. First, these code sections, which afford due process rights to certain parties before family courts, apply to investigations ordered by the court at the request of a party or custodian and the right to cross examine the investigators, not to DCS reports which originate outside of the court. Moreover, Mother was given substantial leeway in presenting evidence of the allegations which underlie her DCS report, despite the court not having the DCS report during those hearings. Finally, the trial court, though it discussed the DCS report at some length in its final order, based its decision that Mother was using the DCS report as leverage based on Mother's "testimony and demeanor," dismissed the DCS report as unsubstantiated, and relied on numerous other reasons for upholding the decision. Appellant's App. Vol. II p. 98. At worst, we believe the trial court's

decision not to file the DCS report amounts to harmless error. *See Kimbrough v. Anderson*, 55 N.E.3d 325, 334 (Ind. Ct. App. 2016) ("An error is harmless when the probable impact of the erroneously admitted or excluded evidence on the factfinder, in light of all the evidence present, is sufficiently minor so as not to affect a party's substantial rights.").

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

Brown, J., and Tavitas, J., concur.