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ATTORNEY FOR APPELLANT:

THOMAS A. HARDIN
Shine & Hardin
Fort Wayne, Indiana

APPELLEE PRO SE:

J.H.D.
Smyrna, Tennessee

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF K.E.B,	)	
	)	
J.A.B.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 02A04-1008-JP-533
	)	
J.H.D.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN SUPIOROR COURT
The Honorable Thomas L. Ryan, Senior Judge
Cause No. 02D07-0201-JP-13

June 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

J.D. ("Mother") sought, and the trial court granted over objection of J.B. ("Father"), permission for Mother to relocate from Fort Wayne, Indiana to Tennessee with the parties' daughter, then-ten-year-old K.B., and modified custody by granting primary physical custody to Mother attendant to the relocation. Father appeals and raises two issues, which we consolidate and restate as whether the trial court's judgment allowing relocation of K.B. is clearly erroneous. Concluding the trial court's judgment is not clearly erroneous, we affirm.

Facts and Procedural History

K.B. was born in Fort Wayne, Indiana in 1999. Mother and Father lived together with K.B. for a time. In 2002, Father's paternity was established and Mother and Father were granted joint legal custody. The parties' agreement, incorporated into the trial court's order, provided for equally shared physical custody of K.B., equally shared payment of daycare, medical, and educational expenses, and that neither party would pay child support. At all relevant times prior to the trial court's appealed order, Mother and Father resided in the Fort Wayne area and K.B. spent half of her time at each parent's residence.

Since approximately 2004, Mother has been married to K.D. ("Husband"), a sergeant in the United States Army who was employed full time by the Indiana Army National Guard. Husband and Mother have two children together, who accordingly are K.B.'s younger half-siblings. Mother has been employed as a retail store manager earning $26,000 to $27,000 per year.

Since 2005, and continuously except for a one-month period, Father has lived with M.H., to whom he was engaged at the time of the trial court's hearing. M.H.'s twin daughters reside in Father's household. In addition, Father and M.H. have a son, J.B., who accordingly is K.B.'s younger half-brother.

K.B. has done well in school, excelling academically and maintaining good peer relationships. K.B. also has a group of friends in Fort Wayne, has participated in the Fort Wayne Children's Choir, and is in good health. The trial court found K.B. enjoys "loving, parental relationship[s]" with both Mother and Father. Appellant's Appendix at 18.

In May 2008, Mother and Father filed a Verified Stipulation Modifying Visitation and Parenting Time. As adopted by the trial court, the stipulation provided for continued joint legal and physical custody of K.B. and a "week on/ week off parenting time schedule . . . which shall result in [K.B.] living in each of parties' home on an alternating seven (7) day a week basis." Id. at 42. The stipulation also contained agreements pertaining to K.B.'s church attendance with Mother, daily telephone contact by each parent while K.B. is in the other parent's care, and holiday parenting time.

In March 2009, Mother filed a petition for contempt and for modification of custody. The parties proceeded to mediate their dispute. On February 4, 2010, the trial court issued an order approving their mediated agreement which provided, among other things, that Mother and Father would keep joint legal custody of K.B. and "shall continue the parenting time on a shared equal basis with alternating weeks, as per the prior Court Order." Id. at 66. The agreement also provided that both Husband and M.H. would be acceptable childcare

providers and would not trigger Mother's or Father's right of first refusal regarding parenting time.

In "roughly . . . February [or] March" of 2010, Husband learned that his full-time, civilian contract position with the Army National Guard would not be renewed as expected and would end on or about April 10, 2010. Transcript at 69. Husband interviewed for three jobs within the Army National Guard in Fort Wayne but was unsuccessful. He then applied for, was offered, and accepted a full-time, permanent civilian position working with military recruiters that is located in Nashville, Tennessee, with a salary of approximately $38,000 per year. Husband continues, however, his part-time military employment with the Indiana Army National Guard, which requires him to serve one weekend per month and two weeks during the summer for pay of $7,000 to $8,000 per year and health insurance benefits.

On or about April 27 and 28, 2010, Mother filed a notice of intent to relocate with K.B. to Smyrna, Tennessee, which is near Nashville, and a motion to modify custody in which she sought primary physical custody in connection with the relocation. Mother's notice gave the date of the proposed relocation as on or about August 1, 2010. As the sole reason for the relocation, Mother's notice stated "[Mother] and her husband are relocating . . . in order for [Mother]'s husband to secure employment." Appellant's App. at 72. Mother later testified that she would move with Husband to Tennessee regardless of whether relocation of K.B. was approved. She also testified that after the relocation, she would provide childcare for the children during Husband's working hours and in her remaining time would seek to complete her college degree and obtain part-time employment.

Father filed a motion to prevent relocation of K.B. and a motion for modification of custody, parenting time, and child support, requesting that he be granted sole legal and primary physical custody in the event Mother relocates.

On July 30, 2010, the trial court held an evidentiary hearing on Mother's motion to modify custody and Father's motion to prevent relocation of K.B. Mother appeared pro se and was the only witness to testify on her behalf, while Father appeared with counsel and testified along with M.H. and several of his family members. At the conclusion of the hearing, the trial court announced its ruling to maintain the parties' joint legal custody but grant Mother's request to relocate K.B.'s primary residence to Smyrna, Tennessee and grant Mother primary physical custody.

On August 6, 2010, the trial court issued its findings of fact and conclusions of law, confirming its judgment announced in open court. The trial court's findings include:

> G. [K.B.]'s Age and Gender
>
> 1. The Court finds that [K.B.] is a ten-year old, female child, soon entering her pre-teen years from which the Court infers will likely involve substantial changes in [K.B.]'s physical, mental, and emotional health.
>
> 2. Without diminishing the importance of [Father]'s paternal male influences, the Court finds that [K.B.]'s sex and age infer and invoke natural needs for maternal female assistance to [K.B.] in the inevitable process of female maturation.
>
> H. [K.B.]'s Extended Family
>
> 1. The Court finds that [K.B.] is likely to maintain her relationships with extended maternal and paternal family members in the Fort Wayne, Indiana, area.
>
> 2. The Court finds that [K.B.] does not have significant extended maternal or paternal family members in the Smyrna, Tennessee, area.
>
> I. [K.B.]'s Friends
>
> * * *

2. The Court finds that [K.B.]'s gregarious personality and easy social ability has promoted friends and relocation to Smyrna would afford [K.B.] the opportunity to extend her circle of friends.

J. [K.B.]'s Spiritual Needs

1. The Court finds that [Mother] is a member of the Morman [sic] Church and [K.B.], while in her care, regularly attends Sunday church services and activities.

2. The Court finds that [Father] does not participate in organized religious services or activities with [K.B.].

K. [K.B.]'s Health Care

1. The Court finds that [Mother] places substantial importance on professional health care for [K.B.], that is medical and dental, and pays more than her share for the expenses . . . .

* * *

4. The Court finds that [K.B.]'s health is currently good.

* * *

M. [K.B.]'s Education

* * *

2. [K.B.]'s Academic Performance

a. The Court finds that [K.B.] is a well-adjusted, gregarious, and an academically excellent student with excellent grades and ISTEP test scores with good teacher and peer relationships.

b. The Court infers that [K.B.] is likely to continue her academic and social success regardless of the school at which she attends.

* * *

N. [K.B.]'s Extra-Curricular Activities

1. Children's Choir

a. The Court finds that [K.B.] has participated in the Fort Wayne Children's Choir for the last three (3) years and that comparable children's choir opportunities are available in Smyrna, Tennessee.

2. [K.B.]'s Extra-Curricular Scholastic Activities Comparison

a. The Court finds that [Mother] investigated and determined that more diverse and challenging extra-curricular activities are available in the Smyrna, Tennessee school.

3. [K.B.]'s Other Extra-Curricular Activities

a. The Court finds that [K.B.]'s current life activities and experiences, which both parents provide, are positive and include sports, biking, crafts, cooking, music, books, which are also available to [K.B.] in Smyrna, Tennessee.

Appellant's App. at 18-20. The trial court concluded that "[Mother] has sustained her burden in proving by a preponderance of the evidence that the proposed relocation of [K.B.]'s primary residence is made in good faith and for legitimate reasons" and that "[Father] has not sustained his burden of proof by a preponderance of the evidence that the proposed relocation of [K.B.]'s residence to Smyrna, Tennessee, is not in [K.B.]'s best interest." Id. at 23. In addition, the trial court adopted Mother's proposed parenting time schedule, with slight modifications, allowing Father to exercise extended parenting time for nearly the entirety of summer vacations, in addition to one weekend per month during the school year and over Christmas and spring vacations.

Father now appeals the trial court's judgment permitting relocation of K.B.[1] Additional facts will be supplied as appropriate.

Discussion and Decision

I. Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to Father's request under Indiana Trial Rule 52(A). Our standard of review is well-settled:

> [W]e must first determine whether the record supports the factual findings, and then whether the findings support the judgment. On appeal, we will not set aside the findings or judgment unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. We therefore consider only the evidence favorable to the judgment and the reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility. A judgment is clearly erroneous when there is no evidence to support the findings, the

[1] Father has not requested the trial court or this court to issue a stay of the trial court's appealed order. According to the chronological case summary listing of their home address, Mother and K.B. relocated to Smyrna, Tennessee on or about August 2, 2010.

> findings do not support the judgment, or the trial court applies the wrong legal standard to properly found facts.

M.S. v. C.S., 938 N.E.2d 278, 281-82 (Ind. Ct. App. 2010) (quotations and citations omitted).

"In addition to the standard of review under Trial Rule 52, our supreme court has expressed a 'preference for granting latitude and deference to our trial judges in family law matters.'" In re Paternity of Ba.S., 911 N.E.2d 1252, 1254 (Ind. Ct. App. 2009) (quoting In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993)). Our supreme court has recently re-emphasized this principle, stating that we afford such deference because of trial judges' "unique, direct interactions with the parties face-to-face." Best v. Best, 941 N.E.2d 499, 502 (Ind. 2011). "Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, our trial judges are in a superior position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children." Id.; see also Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). Therefore, 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).

II. Grant of Relocation

A. Legal Standard

Under the relocation statutes enacted in 2006, a relocating parent must file a notice of intent to relocate and send a copy of the notice to any nonrelocating parent. Ind. Code § 31-17-2.2-1(a). A nonrelocating parent may object to relocation in either of two ways: by filing a motion to modify the custody order or by filing, within sixty days of receipt of the notice, a

motion to prevent relocation of the child. Baxendale, 878 N.E.2d at 1256 n.5; see Ind. Code §§ 31-17-2.2-1(b) (regarding motion to modify custody), 31-17-2.2-5(a) (regarding motion to prevent relocation). Upon request of either party, the trial court shall hold a full evidentiary hearing to grant or deny a motion to prevent relocation of the child. Ind. Code § 31-17-2.2-5(b). "The relocating individual 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(c). If the relocating parent meets that burden, "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(d).

In considering the proposed relocation and any attendant change of custody, 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 . . . 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.

Ind. Code § 31-17-2.2-1(b). The "[o]ther factors affecting the best interest of the child" include, by implication, the factors set forth for custody determinations and modifications under Indiana Code section 31-17-2-8. Baxendale, 878 N.E.2d at 1257. While a parent's relocation with the child may or may not trigger a modification of custody, a substantial

change in the circumstances listed in Indiana Code section 31-17-2-8 is not required for the trial court to modify custody attendant to relocation. Id. at 1256-57.

B. Reason for Relocation

Father challenges the trial court's conclusion that Mother's proposed relocation was in good faith and for a legitimate reason, arguing that relocation solely for Husband to secure employment does not amount to a good faith and legitimate reason. In the recently-decided case of T.L. v. J.L., No. 54A01-1008-DR-386, __N.E.2d__ (Ind. Ct. App., June 14, 2011), not yet certified, we clarified the meaning of good faith and legitimate reasons in the relocation context. First, we observed it is common in our society that people move in order to obtain or maintain employment, for financial reasons, or to live near family members, and we inferred that these and similar reasons are what the legislature intended in requiring that relocation be for "legitimate" and "good faith" reasons. Id., slip op. at 15-16 (citing Baxendale, 878 N.E.2d at 1254, 1256 n.5 (stating that relocation was proposed in good faith by parent who, after a one-year job search, moved from Indiana to Minnesota to accept an employment offer); In re Paternity of X.A.S., 928 N.E.2d 222 (Ind. Ct. App. 2010) (holding that trial court erred in denying petition to relocate filed by parent whose spouse's service in the Navy required move to California), trans. denied; Swadner v. Swadner, 897 N.E.2d 966, 976 (Ind. Ct. App. 2008) (concluding that relocation was in good faith and for a legitimate reason, when mother planned to relocate to reside with her parents, who could provide childcare while she worked, and mother "intended to reside with her parents until she had paid off all of her debts")); see also Beeson v. Christian, 583 N.E.2d 783, 788 (Ind. Ct. App.

1991) (concluding under predecessor to present relocation statute that mother's relocation to England was in good faith when Mother's current husband was transferred to England on a job assignment and was subsequently awarded a long-term position there).

Second, we observed that the resolution of relocation disputes ultimately turns on a judicial determination of the best interests of the child, part two of the two-prong standard. T.L., __N.E.2d at __, slip op. at 16 (citing Baxendale, 878 N.E.2d at 1256 n.5). "If part one, the requirement of a legitimate and good faith reason, posed an inordinately high bar for a relocating parent to meet, it could too often prevent trial courts from reaching part two and appropriately deciding the dispute based on the best interests of the affected child." Id.

Father contends that Mother's proposed relocation is in bad faith or for an illegitimate reason because Husband applied only for military-related jobs and soon accepted one outside of Indiana instead of focusing his job search on the Fort Wayne area for a protracted length of time. However, Mother testified as follows on questioning by Father's counsel:

> Q. . . . Why didn't [Husband] apply for any jobs outside of the Indiana Army National Guard?
> A. The military is what my husband knows.
> Q. Um-hum.
> A. Um, the employment process in this area, in the civilian world, are hard to come by. Um, he knows the military. He's been trained in the military. He has been with the military for over ten (10) years. Um, his chances of getting employment with a military job, full-time military job, are greater than being a civilian.

Tr. at 73. Moreover, Husband began his job search after his full-time employment in Fort Wayne ended involuntarily and upon short notice. If Husband had not been involuntarily unemployed and had merely sought a different or better-paying job, then we might conclude

Mother's reason for relocation was merely legal, not rising to the level of a legitimate reason, or was a mere pretext for seeking relocation and primary physical custody. Such is not the case here, however, and the evidence, though arguably conflicting, supports the trial court's conclusion that Mother proposed relocation in good faith.

Father also argues that evidence of bad faith is provided by the timing of Mother's request to relocate, which was filed less than three months after the trial court's February 4, 2010 order approving the parties' mediated agreement for continuation of equal, alternate-week parenting time. However, Mother testified that only in "roughly . . . February [or] March" of 2010 – i.e., late February or early March – did she learn Husband's employment would terminate instead of being renewed. Id. at 69. Thus, at the time Mother made the prior agreement for continued equal parenting time, the reason for relocation did not yet exist.

We additionally point out that there is no evidence of a pattern of conduct by Mother seeking to thwart Father's relationship with K.B. and no evidence that Mother sought relocation for the purpose of creating physical distance from Father. The trial court did not clearly err in its conclusion that Mother's relocation was proposed in good faith and for a legitimate reason.

B. Child's Best Interests

Once Mother established that the proposed relocation was in good faith and for a legitimate reason, the burden shifted to Father to prove that relocation was not in K.B.'s best interests. See Ind. Code § 31-17-2.2-5(d). Father argues that the trial court's determination

that he failed to meet this burden is clearly erroneous.[2] Because Father bore the burden of proof on this issue, his appeal is from a negative judgment. See Buckland v. Reed, 629 N.E.2d 1241, 1245 (Ind. Ct. App. 1994). We will reverse a negative judgment only if the evidence points unerringly to a conclusion different from that reached by the trial court such that the trial court's decision is contrary to law. J.W. v. Hendricks County Office of Family & Children, 697 N.E.2d 480, 481-82 (Ind. Ct. App. 1998).

Here, the trial court received evidence on a number of the factors set forth in Indiana Code section 31-17-2.2-1(b) as relevant to K.B.'s best interests. We will examine the evidence presented on each relevant factor in turn.

a. The Distance Involved. The distance between Fort Wayne and Smyrna, Tennessee is significant, approximately 450 miles. This factor cannot be determinative in and of itself, because the statute as written implies even a long-distance relocation can be in the best interests of a child. The distance does, however, bear on the trial court's consideration of the other factors.

b. The "feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time . . . including consideration of the financial circumstances of the parties." Ind. Code § 31-17-2.2-1(b)(3).[3] The parenting time schedule ordered by the trial court allows Father parenting time with K.B. for nearly the entire

[2] While not raising it as a separate issue, Father also argues that certain of the trial court's findings of fact are clearly erroneous. The trial court entered particularly lengthy and numerous findings of fact, and those few which we found were unsupported by the record, we have accordingly disregarded in our review of the issues.

[3] While the statute lists as a separate factor the "hardship and expense involved for the nonrelocating individual to exercise parenting time," Ind. Code § 31-17-2.2-1(b)(2), our analysis of this factor, for purposes of the best interests of the child, is subsumed into factor (b)(3).

summer, one weekend per month during the school year, and over Christmas and spring vacations. We acknowledge that the relocation will still affect Father's relationship with K.B., particularly because until now Father has been a joint custodial parent. However, this fact alone cannot be determinative because of how the relocation statute is written: if a relocation that deprives one parent of week-to-week time with the child could never be in the child's best interests, then the statute would not allow for a long-distance move when the nonrelocating parent has exercised such parenting time, nor would it allow for a modification of physical custody attendant to relocation, as it plainly does. See T.L., __N.E.2d at __, slip op. at 18.

Father testified that relocation will cause hardship and expense for him to exercise parenting time, but the evidence showed Father earns $564 in gross income per week, compared to Mother's imputed gross income of $490 per week. In addition, Father's fiancée, M.H., is employed and is presumably able to contribute toward Father's household expenses. Thus, the financial hardship of arranging parenting time falls on both parties, and the trial court mitigated the hardship to Father by noting it "assigned the lion's share of transportation expenses to exercise parenting time to [Mother]." Appellant's App. at 22. Specifically, the trial court ordered that Mother pay all of K.B.'s transportation expenses to and from Fort Wayne for K.B.'s summer and holiday parenting time with Father.

c. Pattern of Conduct by Relocating Parent. There is no evidence of a pattern of conduct by Mother to thwart Father's relationship with K.B., and the trial court found no such pattern exists. Tr. at 268 ("I don't find . . . the mother here . . . has promoted . . . any

interference with access to [K.B.], nor has she been sinister in making the decision to relocate."). Rather, the trial court commented positively that "I don't think I've seen two (2) more mature people who love a child more than you two love [K.B.]. And you're to be congratulated." Id. at 265. This factor supports the trial court's judgment because it demonstrates the parties' willingness to cooperate to ensure K.B. maintains strong relationships with both Mother and Father despite the distance involved in the relocation.

d. Reasons for Seeking or Opposing Relocation. Father testified that he believes remaining in Fort Wayne is in K.B.'s best interests and that he is concerned about the detrimental effect the relocation would have on K.B.'s relationship with him. Thus, Father's testimony indicates he has a good faith and legitimate reason for opposing relocation.

e. Other Factors. In addition to the factors listed in Indiana Code section 31-17-2.2-1(b), the trial court received evidence regarding K.B.'s relationships with Mother, Father, and extended family on both sides and her adjustment to school and community, and also considered her age and gender. See Baxendale, 878 N.E.2d at 1257 (noting that the "other factors" of Indiana Code section 31-17-2.2-1(b) include, by implication, the factors relevant to custody determinations and modifications under Indiana Code section 31-17-2-8).

K.B. has relatives in the Fort Wayne area with whom she interacts frequently and she is well-adjusted to her peers and group of friends. However, Mother testified that Mother's father, sister, and brother are available to visit K.B. in Tennessee and that visit schedules could be arranged so that those relationships would not be hindered. Tr. at 129-30. Mother testified that after the relocation, K.B. would likely keep her friendships with two of her

closest friends in Fort Wayne. Id. at 137. As the plan is for K.B. to spend summers in Fort Wayne, she will have the opportunity to maintain those friendships. She will also have the ability, over the summers and Christmas and spring holidays, to visit with Father's extended family in the Fort Wayne area. One of Father's extended family members testified implying that K.B. "would make friends in Tennessee." Id. at 253-54. Accordingly, the trial court found that K.B. is likely to expand her circle of friends upon the move to Tennessee and that, despite the contrary evidence presented by Father, she will maintain her relationships with extended family on Mother's and Father's sides.

The evidence showed K.B. was well-adjusted to her school in Fort Wayne and participated in the Children's Choir and other activities. However, Mother identified the school in Tennessee that K.B. would attend and verified that the school has a choir and that there is a children's choir in nearby Nashville. The trial court found that K.B. could participate in the same activities in Tennessee in which she has participated in Fort Wayne.

Applying our standard of review, the issue is not whether we would have made the same decision that the trial court did, but whether the trial court's findings that are supported by the evidence – disregarding those few that were unsupported – are sufficient to sustain its decision. Based on our review of the record, we must answer this question in the affirmative. We acknowledge Father presented evidence that would also have supported a conclusion that relocation was not in K.B.'s best interests. However, declining as we must Father's invitation to reweigh the evidence, the trial court did not clearly err in reaching its contrary conclusion. In closing, we note the trial court's positive comments regarding the parties'

parenting and their continued civil relationship, and we encourage Mother and Father to continue to cooperate to promote the best interests of K.B., whom both apparently love very much.

Conclusion

The trial court's judgment allowing Mother to relocate with K.B. is not clearly erroneous and is therefore affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.