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**IN THE
COURT OF APPEALS OF INDIANA**

ALISSA McDIVITT,

Appellant,

vs.

MATTHEW McDIVITT,

Appellee.

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No. 89A04-0810-CV-573

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause No. 89D02-0602-DR-028

May 22, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Alissa McDivitt (“Mother”) filed a notice in Wayne Superior Court of her intent to relocate. In response, Matthew McDivitt (“Father”) filed a motion to prevent the relocation of the parties’ two children and a petition to modify custody. The trial court entered an order granting Father custody upon Mother’s proposed move. Mother appeals and presents two issues, which we reorder and restate as: (1) whether the trial court abused its discretion in concluding that the proposed relocation was not in the best interests of the children; and (2) whether the trial court erred by entering an order which granted Father custody upon Mother’s relocation.

We affirm.

Facts and Procedural History

Mother and Father were married on June 3, 2000, and had two sons, D.M., who was born in 1995, and C.M., who was born in 2004. While married, the parties and their children lived near Boston, Indiana, but with a postal address of Richmond, Indiana. By way of a summary dissolution decree issued on March 15, 2007, the parties were divorced. Pursuant to the settlement agreement incorporated into the dissolution decree, Mother and Father had joint legal and shared physical custody over the children.¹

On February 1, 2008, Mother filed a notice of her intent to move to Oakwood, Ohio. On March 27, 2008, Father filed a motion seeking to prevent Mother’s relocation

¹ Specifically, the schedule for physical custody of the children is as follows:
Mondays: With [Mother] commencing at 8:00 a.m. until Tuesdays as provided for below;
Tuesdays: With [Father] commencing after school in the case of [D.M.], who will ride the school bus to [Father]’s residence, and commencing at 5:00 p.m. in the case of [C.M.], until Wednesdays at 8:00 a.m.;
Wednesdays: With [Mother] commencing at 8:00 a.m. until Friday at 8:00 a.m.;
Fridays: With [Father] commencing at 8:00 a.m. until Monday at 8:00 a.m.

Appellant’s App. p. 16.

and a petition to modify custody to award him sole physical custody of the children. The trial court held a hearing on these matters on August 11, 2008. Prior to ruling on the matter, the trial court interviewed D.M. in chambers. On August 25, 2008, the trial court entered detailed findings of fact and conclusions of law, which state in relevant part:

Mother's proposed move is from Richmond, Indiana to Oakwood, Ohio, a suburb of Dayton, Ohio, a drive of approximately 45 minutes to an hour from Richmond. Mother contends that the move is warranted and necessary because her education and job status has changed from being a nurse to a nurse practitioner. For the last several years, Mother has worked at Good Samaritan Hospital in the Dayton, Ohio area and commuted from Richmond. Now, however, Mother has the possibility of working for a cardiologist group as a nurse practitioner in Dayton where she can earn substantially more money, and she does not want to make the commute from Richmond to Dayton. Mother believes that if this position with the cardiology group should work out, that she will work four (4) days per week, although her hours on those four days may be slightly longer than the usual 8 hour day.

In addition, Mother feels that she has no support system in the Richmond, Indiana area and she has friends in the Dayton, Ohio, area, including a cardiologist with whom she is involved. Mother also believes that the school system to which the children would go is better than that in the Richmond area.

Mother acknowledges that it has never been her intention to consider any option other than moving to the Dayton, Ohio area. Although there may be nurse practitioner positions opening in the Richmond, Indiana area, especially given the soon to be opened new Reid Hospital in Richmond, a regional hospital for eastern Indiana and western Ohio, Mother testified that she has never considered obtaining her nurse practitioner license in Indiana. Mother has considered only the option of moving to the Dayton, Ohio area, with or without the children. Indeed, Mother testified that if this court orders that the children shall remain in Richmond, that she will proceed with her plans to move even if that means leaving the children behind.

Mother contends that the Court should allow her to take the children with her and that the current access plan could remain the same. However, Mother has failed to fully consider how her new job and relocation would practically and in reality affect that access plan. Mother herself acknowledged that there would be times when she would be required to work late. The travel involved, while not as great as in a move to Florida or

Arizona, would nevertheless be significant when considering *several days travel each week*. Moreover, after school activities would be drastically affected. [D.M.] is very involved in basketball and 4-H, and under the current access schedule there would be little or no time for after school activities on Tuesdays, Fridays, or weekends.

While the expense of utilizing Father's access time would not be significant if the move were to occur, the hardship to Father would be great. Father is employed as [a] UPS driver and in addition has a small produce stand on his farm. . . . As noted above, however, the record is replete with references to [D.M.]'s involvement in basketball and 4-H activities. [D.M.] is not the average young man that enjoys basketball for its fun and comraderie [sic]. Instead, he comes from a Hoosier family well known for its basketball prowess. His aunt is a former Miss Indiana Basketball and [D.M.] is already learning the finer points of the game. His 4-H involvement has already led him to receive a Reserve Champion and Grand Champion awards. Father has been extremely involved in these activities with [D.M.] and the travel time and distance involved in utilizing Father's parenting time will only affect [D.M.]'s ability to be involved in these activities.

If the parenting time were to remain the same as suggested by Mother, then there would be several days where [D.M.] would not be able to practice or play or show his animals, or Father would have to forgo his time with [D.M.] in order that [D.M.] could remain involved in these activities in the Dayton area. The Court finds this hardship to be substantial and the feasibility of preserving the relationship between the children and Father under the current arrangements unsatisfactory and unworkable.

It is worth noting that there was no evidence that Mother's proposed move is intended to thwart Father's parenting time. Nor was there any evidence that the Father's opposition to the proposed move is intended to attack Mother in any way. In fact, the evidence was refreshing in that, except for slight disagreements between the parties in style or intentions, the record is devoid of "parent bashing."

The Court finds Mother's proposed relocation to be in good faith and for legitimate reasons. As such, the burden then shifts to Father as the nonrelocating parent to show that the relocation is not in the children's best interest. *Rogers v. Rogers*, 876 N.E.2d 1121 (Ind. Ct. App. 2007).

The Court further finds that Father has met his burden of proof and shown that the proposed relocation is not in the best interests of the children.

* * *

Under the current parenting time scheme that was agreed to by the parents, Father has the children with him four nights per week. Father's access on Friday commences at 8:00 o'clock A.M. so that if Father is not working on that particular Friday, the children could be with him as early as 8:00 o'clock in the morning. Father has maximized his parenting time. He continues to reside in the marital residence where he has lived for the last nine years. The residence is a lovely old brick home located on a 40 acre farm in the Richmond, Wayne County, Indiana area. Testimony at trial and photographs admitted into evidence depict an old-fashioned Hoosier setting. There is extensive room for play and activities, farm animals, pets, large garden, fruit tree, playground, state of the art basketball court, pond, creek, and woods. This almost idyllic setting has provided the McDivitt children with an excellent environment in which to grow and thrive. Father went so far as to testify that he believed that he was providing an environment much like that of *Little House on the Prairie*. While such a description may be somewhat exaggerated or even appear "corny" (no pun intended), this Court is convinced that the description was heartfelt and meant to show the very best of what Indiana has to offer [the McDivitt] children.

As pointed out many times, and it cannot be overemphasized, Father is extremely involved in the activities of the children, especially [D.M.], as he is the older son. [D.M.] is involved in basketball including playing on an AAU team that travels the area. [D.M.]'s participation in 4-H involves activities throughout the year in raising and showing farm animals and gardening. Father has had a hand in these activities, showing [D.M.] the finer points of the game of basketball and working with him in raising and showing animals.

[D.M.] enjoys his school and has friends. [D.M.] would continue to go to school in the Richmond Community School system if he remains with Father. [D.M.] has friends in the area where Father resides including a close friend next door to Father. [D.M.] also has friends through his AAU team, other basketball teams, Boys & Girls Club of Wayne County, and 4-H activities.

In addition to friends, [D.M.] and [C.M.] are extremely close to Father's family. Father's mother, Melba, has consistently been the alternate care provider for the children when either parent is in need of alternate child care. Father's brother has been actively involved in [D.M.]'s life. The closeness of this family cannot be overstated. The extent to which the extended McDivitt family is involved, likewise, cannot be overstated nor can its positive effects. Melba McDivitt, in particular, has made a substantial contribution to this family and it is clear to this court that she is

the matriarch of the family. To break the McDivitt children from the closeness of this extended family is not in their best interests.

While Mother contends that the Oakwood Schools are significantly better than those in Richmond, the Court heard no evidence that [D.M.] was doing poorly in school or that his educational needs were not being fulfilled by the Richmond Community School system. The same is true with pre-school for [C.M.]. Both parents spent a considerable amount of time in attempting to convince the court that one or the other pre-school was significantly better. The Court concludes that the *quality* of education, whether middle school, high school, or pre-school, is not a significant factor *in this case* when comparing those in Oakwood, Ohio and Richmond, Indiana. What is more of a factor is that [D.M.], in particular, is well-adjusted, comfortable, and acclimated in the Richmond school system.

Father is engaged to be married and by all accounts the relationship between the children and Father's fiancé is most favorable. Mother is involved with a doctor in Dayton, but Mother does not appear to have a great deal of knowledge about him and indicates that there is no reason, at this time, to involve him with the children because she is not sure where the relationship is headed.

Under the facts before the Court, this Court finds that Father has met his burden of proof under Indiana's "new" relocation statute and Father has proved that there is a substantial change in one or more of the factors which the court may consider under I.C. 31-17-2-8, and that modification is in the best interests of the children. As Mother has indicated that she intends to move irrespective of whether or not she is permitted to move with the children, the terms of the Court's Dissolution of Marriage Decree should be modified immediately upon Mother's relocation and Father shall have custody of the children at that time. Once Mother has moved and custody has been changed, Mother shall have parenting time in accordance with the Indiana Parenting Time Guidelines and Father's child support shall be terminated. As was agreed to by the parties, the Court sets [the] cause for further hearing at a later date in order to further establish more appropriate and case specific parenting time and child support, once Mother has moved, obtained her new employment, and has had work hours established.

IT IS THEREFORE ORDERED that upon Mother's move to Oakwood, Ohio, the terms of the Dissolution of Marriage Decree are changed to provide that custody of the parties' two (2) minor children, namely: [D.M.] and [C.M.], are [sic] granted to Father . . . and Mother shall have parenting time pursuant to the terms and conditions of the Indiana Parenting Time Guidelines.

Appellant's App. pp. 10-14. Mother now appeals.

Standard of Review

Because the trial court here entered specific findings of fact and conclusions of law pursuant to Indiana Trial Rule 52:

we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Swadner v. Swadner, 897 N.E.2d 966, 971 (Ind. Ct. App. 2008) (quoting Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007)). In addition to this standard of review, “our supreme court has expressed a ‘preference for granting latitude and deference to our trial judges in family law matters.’” Id. (quoting In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993)). This is so because appellate courts are in a poor position to look at a cold transcript of the record, and conclude that the trial judge “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.” Id. (quoting Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002)).

The New Relocation Statute

An initial child custody order is determined in accordance with the best interests of the child. Baxendale v. Raich, 878 N.E.2d 1252, 1254 (Ind. 2008) (citing Ind. Code § 31-17-2-8 (2004) (“Section 8”). Pursuant to Section 8, the trial court is to consider “all relevant factors” in determining the child’s best interest, including a non-exclusive list of

factors.² Id. Under the general provision for modification of child custody, modification is permitted only if the modification is in the best interest of the child and there has been “a substantial change” in one or more of the factors listed in Section 8. Id.

On July 1, 2006, our legislature replaced the former relocation statute with Indiana Code chapter 31-17-2.2, an entirely new chapter governing relocation in child custody cases. See Baxendale, 878 N.E.2d at 1255. This new chapter was summarized in Baxendale as follows:

“Relocation” is “a change in the primary residence of an individual for a period of at least sixty (60) days,” and no longer requires a move of 100 miles or out of state. [Ind. Code] § 31-9-2-107.7. A “relocating individual” is someone who “has or is seeking: (1) custody of a child; or (2) parenting time with a child; and intends to move the individual’s principal residence.” Id. § 31-9-2-107.5. A “nonrelocating parent” is someone “who has, or is seeking: (1) custody of the child; or (2) parenting time with the child; and does not intend to move the individual’s principal residence.” Id. § 31-9-2-84.7. Upon motion of either parent, the court must hold a hearing to review and modify custody “if appropriate.” Id. § 31-17-2.2-1(b). In determining whether to modify a custody order, the court is directed to consider several additional factors that are set out in section 31-17-2.2-1(b) and are specific to relocation. In general, the court must consider the financial impact of relocation on the affected parties and the motivation for the relocation in addition to the effects on the child, parents, and others identified in Section 8 as relevant to every change of custody.

Id. at 1255-56 (footnotes omitted).

² These factors are: (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 years of age; (4) the interaction and interrelationship of the child with (A) the child’s parent or parents, (B) the child’s siblings, 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; (8) evidence that the child has been cared for by a de facto custodian. I.C. § 31-17-2-8 (2004).

Under chapter 2.2, there are two ways to object to a proposed relocation: a motion to modify a custody order under Indiana Code section 31-17-2.2-1(b), and a motion to prevent the relocation of a child under Indiana Code section 31-17-2.2-5(a). See Swadner, 897 N.E.2d at 976 (citing Baxendale, 878 N.E.2d at 1256 n.5). If the non-relocating parent does not file a motion to prevent relocation, then the relocating parent with custody of the child may relocate. Id. If the non-relocating parent does file a motion to prevent relocation, then the relocating parent must first prove that “the proposed relocation is made in good faith and for a legitimate reason.” Id. (quoting I.C. § 31-17-2.2-5(c)). If the relocating parent meets this burden, then the burden shifts to the non-relocating parent to show that “the proposed relocation is not in the best interests of the child.” Id. (quoting I.C. § 31-17-2.2-5(d)). Under either a motion to prevent relocation or a motion to modify custody, if the relocation is made in good faith “both analyses ultimately turn on the best interests of the child.” Id. (quoting Baxendale, 878 N.E.2d at 1256 n.5). Finally, the trial court shall take into account the following factors in considering the proposed relocation:

- (1) 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.
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation 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 individuals 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).

1. Best Interest of the Children

In the present case, the trial court concluded that Mother had met her initial burden as the relocating parent of proving that her proposed relocation was made in good faith and for a legitimate reason. The burden then shifted to Father to establish that the proposed relocation was not in the best interests of the children. Upon appeal, Mother claims that the trial court erred in concluding that Father had met this burden. Given our standard of review and the facts and circumstances of the present case, we are unable to agree.³

The evidence favorable to the trial court's decision supports the trial court's conclusion that remaining in the Richmond area with Father was in the best interests of the children. There was no evidence that the children were doing poorly in school. Regardless of which school system was "better," the trial court specifically found that the children were doing fine in their current setting. Further, there was extensive evidence that the children, D.M. in particular, were heavily involved in athletics and extra-curricular activities in the Richmond area. There was also evidence that Father's family was closely involved with the children's upbringing, especially Father's mother, who provided child care. With Mother approximately one hour away in Ohio, the ability of the children, especially D.M., to maintain their close involvement with the local

³ Because we conclude that Father met his burden of showing that Mother's proposed relocation was not in the best interests of the children, we do not address Father's argument that the trial court erred in concluding that Mother's proposed relocation was made in good faith and for a legitimate reason.

community would be seriously hampered. Given the facts and circumstances of the present case, the trial court could reasonably determine that Mother's proposed relocation was not in the best interests of the children. See Baxendale, 878 N.E.2d at 1258 (child's improved school performance, proximity to his older brother and grandmother, established athletic and extra-curricular relationships, proximity to other family members who provided temporary child care all supported trial court's decision to change custody to allow child to remain in Indiana with father when mother relocated to Minnesota); Swadner, 897 N.E.2d at 977 (even where mother presented evidence that could have supported a decision that relocation would be in the children's best interest, where father presented evidence that supported the opposite conclusion, the trial court's decision in favor of father was not an abuse of discretion).

2. Contingent Order

Mother also claims that the trial court's order is improper in that it awarded Father custody conditionally upon Mother's relocation to Ohio. Mother focuses on that part of the trial court's order which states, "upon Mother's move to Oakwood, Ohio, the terms of the Dissolution of Marriage Decree are changed to provide that custody of the parties' two (2) minor children . . . [is] granted to Father[.]" Appellant's App. p. 14 Mother claims this is improper, citing Bojrab v. Bojrab, 810 N.E.2d 1008 (Ind. 2004).

In Bojrab, the trial court's dissolution decree contained the following provision regarding child custody:

[the wife] is granted the custody of the parties' minor children The best interests of the children are served by requiring that they remain in the Allen County, Indiana community. Accordingly, the grant of custody of

the parties' minor children is subject to maintaining their residence in Allen County, Indiana. In the event the [wife] decides to relocate outside Allen County, Indiana, without the agreement of the [husband] or further order of this court, custody of the children shall be granted to the [husband].

Id. at 1011. Upon appeal, the wife argued that the trial court erred in granting a prospective, automatic change of custody upon wife's relocation. This, the wife claimed, violated the statutory requirement that custody modifications be based on a substantial change regarding the factors in the child custody modification statute. Id.

The Bojrab court held that an automatic change of custody upon the wife's relocation would be inconsistent with the requirements of the custody modification statute. Id. at 1012. However, the court also noted that the trial court's order also stated that "the grant of custody of the parties' minor children is subject to maintaining their residence in Allen County, Indiana." Id. Thus, the court held that "[w]hile the automatic future custody modification violates the custody modification statute, the conditional determination of present custody does not. The latter is a determination of present custody under carefully designated conditions." Id. If the wife violated these conditions, the basis for the custody order was undermined, and the husband could seek modification under the custody modification statute. Id. at 1012-13. "Construed in this manner," the court wrote, "the trial court's custody order is not improper." Id. at 1013.

Although Mother claims that Bojrab supports her position that the trial court's order here is improper, we think Bojrab is distinguishable from the present case. In Bojrab, the trial court had entered an initial custody order which could be read to automatically change custody upon the happening of a future event, *regardless* of the

presence of a substantial change in the statutory factors. See id. at 1012. In the present case, by contrast, the trial court's order was entered after a hearing on Mother's petition to relocate and Father's motion to prevent her relocation and modify custody. Thus, the change of custody was not automatic; it was ordered only after a hearing concerning the children's current situation and how they would be impacted by Mother's proposed relocation. Further, the trial court here ordered a change of custody after following the procedures set forth in the relocation statutes. In other words, the problem with the trial court's order in Bojrab was that it could be read to order an *automatic* change of custody *without* reference to the applicable statutory requirements for such a change in custody. That is certainly not what happened here.

Further, we reject Mother's argument to the extent it suggests that there is no evidence that she has, in fact, moved to Ohio. Mother testified before the trial court that she planned to move to Ohio very soon, regardless of the trial court's decision regarding the custody of the children. At the time the trial court entered its order, the Mother had evidenced every intention of moving, and she cannot now claim that the trial court's order is erroneous because she may not have moved.

Moreover, if Mother did not move, then, pursuant to the language of the trial court's order, the original custody arrangement would apparently still be in effect. We therefore also disagree with Mother's contention that the trial court did not find that a change in custody, even without her move to Ohio, would be in the children's best interests. The trial court's order, and indeed this whole controversy, is based on Mother's representation to the court that she planned to move to Ohio. The change of custody to

Father is premised on Mother's move to Ohio. And again, Mother gave every indication to the trial court that she was moving regardless of the trial court's decision regarding custody.⁴

Conclusion

The trial court did not abuse its discretion in concluding that Mother's proposed relocation was not in the best interests of the parties' children. Nor did the trial court err in ordering that Father be granted custody of the children when Mother moved to Ohio.

Affirmed.

BAILEY, J., and BARNES, J., concur.

⁴ Because of our conclusion, we need not address Father's contention that Mother's notice of her intent to move should be treated as a petition to modify custody.