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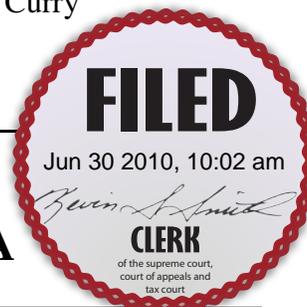
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**IN THE
COURT OF APPEALS OF INDIANA**



IN RE THE MARRIAGE OF:)

THADDEUS J. ZYSK,)

Appellant-Respondent,)

vs.)

JENNIFER K. ZYSK,)

Appellee-Petitioner.)

No. 48A02-0912-CV-1236

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Jack L. Brinkman, Master Commissioner
The Honorable George Pancol, Jr., Judge
Cause No. 48D02-0901-DR-70

June 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Thaddeus J. Zysk appeals the trial court's order granting appellee-petitioner Jennifer K. Zysk's request to relocate with the parties' two minor children to California. Thaddeus argues, essentially, that there is insufficient evidence supporting the trial court's conclusions that Jennifer's intended move is made in good faith and for legitimate reasons and that the move would be in the children's best interests. Finding no error, we affirm.

FACTS

Jennifer was born in California and lived in Los Angeles from age two through high school. She and Thaddeus met and began dating when both lived in California. Thaddeus moved to Indiana in April 2002 for employment reasons, and Jennifer followed in September 2002. Jennifer and Thaddeus were married on August 21, 2004. Two children were born of the marriage: a daughter, Ha.Z., born April 25, 2007, and a son, Hu.Z., born July 15, 2009, during the pendency of the dissolution proceedings.

Neither Jennifer nor Thaddeus intended to reside permanently in Indiana, and neither one has any family members in Indiana. Jennifer's mother, father, stepfather, grandparents, stepsiblings, cousins, uncles, and aunts reside in southern California. Thaddeus's sister, niece, and friends reside in California; his mother and sister live in Pennsylvania.

On January 21, 2009, Jennifer filed a petition to dissolve the marriage. The trial court eventually entered a provisional order awarding temporary custody of Ha.Z. to Jennifer, and Ha.Z. has lived with Jennifer since that time. Hu.Z. has lived with his mother since his birth.

On May 26, 2009, Jennifer filed a notice of intent to relocate to California. Thaddeus objected to the planned relocation. The trial court held a hearing on all pending issues, including custody and relocation, beginning on September 21, 2009.

At the hearing, Jennifer explained that she has worked for Insurance Services Organization for seven years and that her employer agreed to let her make a lateral transfer to Los Angeles. Jennifer will work from home with phone, internet access, and a vehicle supplied by her employer.

After moving to Los Angeles, Jennifer and the children will live in the same townhouse where she lived for most of her childhood with her mother and father. Jennifer's mother uses part of this townhouse as an office for two days a week; the home is otherwise unoccupied and Jennifer and the children will be able to live there free of charge. Jennifer's mother and stepfather live approximately eight miles from the townhouse.

On November 23, 2009, the trial court entered an order awarding sole custody of the children¹ to Jennifer and granting her request to relocate to Los Angeles. In pertinent part, the trial court found as follows:

20. . . . the Court finds that Mother's desire to relocate is made in good faith and for a legitimate reason. Mother and Father had discussed moving back to the west to be closer to her family. Father has no family, nor does Mother, in the State of Indiana. Mother's desire was to return to California at some time, and did not think that the relocation to Indiana from California in 2002 would be a permanent location to the Midwest. . . . Mother is anxious to be back home [in California] near her extended

¹ Thaddeus does not appeal the trial court's custody decision.

family. Mother believes her family will be involved routinely with her and her children. . . .

21. The Court finds that Mother has met her burden that the proposed relocation is made in good faith and for legitimate reasons. . . . Mother wants to be closer to her family and have her family involved in her children's lives. . . . Currently, there is no opportunity for family members, including grandparents, aunts or uncles and cousins to participate in the lives of the Zysk children, if they would stay in Indiana. Father does not have a close relationship with any of his family members Father's mother has not ever been to the State of Indiana to visit her granddaughter, [Ha.Z.] . . . The children are young and the stability of continuing to be with their Mother is a very important factor in this case. Father has had limited contact with his newborn son and cannot have developed any bonding with him because the parties separated before his birth. . . . The Court finds that the stability of the children would most definitely be promoted by the move as opposed to the move undermining the children's stability. Because the children as so young and are not involved in any activities gives more weight to Mother's move being supportive of the children's stability. The Court finds that Father presented no evidence as to why it would not be in the children's best interest to relocate to the State of California other than that he wanted to be involved in their lives and he thought that he would not be able to do that if they moved. . . .

Appellant's App. p. 16-20. Thaddeus now appeals.

DISCUSSION AND DECISION

The trial court made specific findings of fact and conclusions thereon in granting Jennifer's request to relocate. Accordingly, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). In reviewing the order being appealed, we will neither reweigh the evidence nor assess witness credibility, instead considering only the evidence that supports the trial court's judgment together with all reasonable

inferences to be drawn therefrom. In re M.B. and P.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996).

We will set aside the judgment only if the findings or judgment are clearly erroneous. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). A finding is clearly erroneous when there are no facts or inferences to be drawn therefrom that support it. M.B., 666 N.E.2d at 76. A judgment is clearly erroneous when it is unsupported by the findings and conclusions entered thereon. In re Adoption of H.N.P.G., 878 N.E.2d 900, 904 (Ind. Ct. App. 2008), trans. denied, cert. denied. We have a “preference for granting latitude and deference to our trial judges in family law matters.” In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993).

Indiana Code section 31-17-2.2-1 et seq. governs a parent’s desire to relocate with his or her children. Where, as here, the nonrelocating parent files a motion seeking to prevent the relocation of a child, the General Assembly has explained the parties’ respective burdens as follows:

- (c) The relocating individual has the burden of proof that the proposed relocation is made in good faith and for a legitimate reason.
- (d) If the relocating individual meets the burden of proof under subsection (c), the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the best interest of the child.

I.C. § 31-17-2.2-5. The terms “good faith” and “legitimate reason” are not statutorily defined.

Here, the record reveals that neither Jennifer nor Thaddeus have any family members in Indiana. Instead, Jennifer's immediate and extended family members nearly all reside in southern California, in or near to Los Angeles. She has close and healthy relationships with many family members, and believes that they will be involved in her children's lives following the move. When Jennifer moved to Indiana to be with Thaddeus, they did not intend the move to be permanent; instead, they discussed moving back west at some point in time. In moving back to Los Angeles, Jennifer and her children will be able to live, for free, in the home in which she grew up. Her employer has approved a lateral transfer of employment, so she will be able to continue in her job. Based on this record, we cannot conclude that the trial court's conclusion that Jennifer had established that the proposed relocation to California is being made in good faith and with legitimate reasons. Thaddeus's arguments to the contrary amount to a request that we reweigh the evidence and assess witness credibility, a practice in which we do not engage.

Given that Jennifer met her burden, the burden shifted to Thaddeus to establish that the relocation would not be in the children's best interests. Thaddeus presented no evidence in this regard aside from his understandable desire to remain involved in his children's lives. Although we certainly sympathize with the position in which Thaddeus finds himself, and do not intend to minimize the difficulty of this situation, this court has held that a custodial parent's move out of state, by itself, is not sufficient to reach a conclusion that a change of custody is warranted. Rogers v. Rogers, 876 N.E.2d 1121, 1131 (Ind. Ct. App. 2007), trans. denied.

Here, the record reveals that at the time of the hearing, Hu.Z. was two months old, still breastfeeding, and had only ever been in his mother's care. Ha.Z. was two years old, and although Thaddeus had helped Jennifer at times in caring for Ha.Z., her mother has always been Ha.Z.'s primary caregiver and Ha.Z. has lived solely with Jennifer since the petition to dissolve the marriage was filed. Given the young age of the children, the trial court found that removing them from Jennifer's care would cause far greater harm to them than moving to California. Under these circumstances, we do not find that the trial court erred by finding that Thaddeus failed to sustain his burden of establishing that relocation is not in the children's best interests.

As an aside, we note that the trial court explicitly stated that Jennifer's mother has offered to pay for Thaddeus to fly to California every two to three months. In the event that this arrangement no longer continues to work, the trial court ordered Jennifer and Thaddeus to share equally in Thaddeus's travel expenses. The trial court also explicitly set forth Thaddeus's parenting time rights after the children relocate with Jennifer, and Father does not appeal that determination. Although it is always difficult when a marriage dissolves and the custodial parent seeks to relocate a significant distance away from the noncustodial parent, Thaddeus will continue to have opportunities to see and parent his children after the move takes place. We find that the trial court did not err by granting Jennifer's request to relocate with the children to California.²

² To the extent that Thaddeus seems to raise a due process argument regarding the order in which the custody and relocation determinations were made below, we find that he has waived this issue for failure to request a bifurcation or otherwise raise it with the trial court.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.