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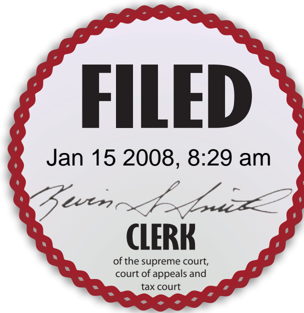

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IN THE
COURT OF APPEALS OF INDIANA

BRADLEY BRUNO,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0705-CV-428
	)	
AMANDA D. SKOBEL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D13-0402-DR-267

January 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Bradley Bruno ("Father") appeals the trial court's dismissal of his petition to modify custody. He raises several issues, which we consolidate and restate as: whether the trial court erred when it dismissed his petition.

We affirm.

FACTS AND PROCEDURAL HISTORY

Father and Amanda Skobel ("Mother") were married on January 11, 1997, and the marriage produced one child, B.B. They divorced in April 1999, and Mother was awarded custody of B.B. In October 2004, Mother and Father entered into an agreed entry, modifying their parenting time so that they shared equal time with B.B. At that time, both parents had remarried. On May 4, 2006, Mother filed a Notice of Intent to Move with the trial court because Mother's spouse received a promotion and had relocated to the Riverview, Michigan area in August 2005, and Mother planned to move there with B.B. Father filed a petition to modify custody on May 9, 2006, which was based upon Mother's intention to relocate to Michigan. Mother moved to Michigan with B.B. at the end of August 2006.

On August 31, 2006, Father filed a petition for Temporary and Permanent Injunction to prevent Mother from relocating B.B. A hearing was held on Father's request for an injunction on September 19, 2006. After the hearing, the trial court granted Father's request and recommended that he retain temporary physical custody of B.B. pending a final hearing. Mother filed a motion to reconsider, and after a hearing on October 24, 2006, the trial court vacated the injunction and restored custody to Mother, who had moved back to the Indianapolis area. The trial court ordered Mother not to remove B.B. from the jurisdiction of the court. Mother filed a second Notice of Intent to Relocate on December 20, 2006, which

indicated that she was moving back to Indianapolis and staying at her mother's residence until a final resolution was made on the custody modification. Father filed an objection to this notice and again requested custody of B.B.

A hearing on the issue of permanent modification of custody was held on March 7, 2007. At the beginning of the hearing, Mother made an oral motion to dismiss the modification petition that was filed on May 9, 2006. The trial court heard argument from the parties, and granted Mother's request for dismissal. It found that the October 24 order had restored the "status quo," and that Father's objection to Mother's second relocation notice was not a petition for custody modification. *Tr*. at 12, 14; *Appellant's App*. at 61. The trial court also found that the allegations in Father's modification petition were moot because Mother was residing with B.B. in Indianapolis, and that Father's alleged change in circumstances, that Mother was living with the maternal grandparents, was not a basis for modification because it was a result of the trial court ordering Mother to stay in Indianapolis in its October 24 order. *Appellant's App*. at 61-62. Further, the trial court stated that any future modification petition filed by Father could not allege changed circumstances that were the "result of this court's order." *Tr*. at 14. Father now appeals.

DISCUSSION AND DECISION

Father argues that the trial court erred when it granted Mother's oral motion to dismiss his petition for custody modification.[1] Because the trial court entered findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Orlich v. Orlich*, 859 N.E.2d 671, 673-74 (Ind. Ct. App. 2006). First, we determine if the evidence supports the findings and second, whether the findings support the judgment. *Id.* at 674. We consider only the evidence most favorable to the judgment, together with the reasonable inferences that can be drawn therefrom. *Id.* We do not reweigh the evidence or judge the credibility of the witnesses. *Id.* We will only set aside the trial court's findings and conclusions if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Staresnick v. Staresnick*, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005). A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

We note that Mother has failed to file an appellee's brief. In such a situation, we will not undertake the burden of developing arguments for Mother. *Cox v. Cantrell*, 866 N.E.2d 798, 810 (Ind. Ct. App. 2007), *trans. denied*. We apply a less stringent standard of review,

and we may reverse the trial court's decision if the appellant can establish *prima facie* error. *Id*. *Prima facie* means "at first sight, on first appearance, or on the face of it." *Id.*

It is the universal practice of courts in Indiana to dismiss an appeal when it becomes unnecessary to decide the question presented. *Bremen Public Schs. v. Varab*, 496 N.E.2d 125, 126 (Ind. Ct. App. 1986). "An issue becomes moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or when no effective relief can be rendered to the parties." *Ind. High Sch. Athletic Ass'n, Inc. v. Durham*, 748 N.E.2d 404, 410 (Ind. Ct. App. 2001). "When the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them." *Id.*

Here, the trial court dismissed Father's petition for custody modification because it found the allegations in the petition to be moot due to the fact that, at the time of the hearing, Mother resided with B.B. in the Indianapolis area and the status quo had been restored. Father's sole stated basis for a modification of custody in his petition of May 9, 2006 was that Mother intended to relocate to Michigan, which would not be in the best interest of B.B. At the time of the hearing, on March 7, 2007, Mother had moved back to Indiana and was

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[1] Father contends that he had three pending motions before the trial court at the time of the March 7 hearing: the May 9, 2006 petition for custody modification based upon Mother's first Notice of Intent to Relocate; the petition for temporary and permanent injunction; and the objection to Mother's second Notice of Intent to Relocate. The petition for injunction was originally ruled upon on September 19, 2006 when the trial court granted Father's petition and ordered an injunction to return B.B. to Indiana. Subsequently, the trial court vacated its order on October 24, 2006 because Mother agreed to come back to Indiana. At the time of the March 7, 2007 hearing, Mother had moved back to Indiana, and therefore, Father's petition for injunction was moot. As for the objection to Mother's second Notice of Intent to Relocate, the trial court stated that it realized that Father objected to Mother residing at her mother's home with B.B., but that the situation was necessitated by the trial court's order of October 24, 2006, ordering Mother not to remove B.B. out of the jurisdiction and that the situation was temporary until Mother could find a new home. *Tr*. at 13-14.

residing in the Indianapolis area with B.B. Therefore, the basis for Father's petition for custody modification was no longer a matter of real controversy between the parties, and the trial court did not err in dismissing it as moot.[2]

Affirmed.

BARNES, J., concurs.

ROBB, J., dissents with separate opinion.

The trial court also stated that Father was free to file a future petition for modification if Mother did not secure a permanent residence. *Id*. at 15.

[2] Father also contends that the trial court erred when it stated that he could only file a future modification petition if the petition alleged a change of circumstances that "is not in and of itself as a result of this court's order." *Tr*. at 14. Contrary to Father's argument, this statement by the trial court did not deny him due process. It simply restricted future petitions for modification to issues that had not been determined to be moot. As stated previously, the trial court made it clear that Father could file a future petition alleging a change in circumstances if Mother did not secure a permanent residence or other future change in circumstances.

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ROBB, Judge, dissenting

The majority states that the sole basis for Father's May 9, 2006, petition for a modification of custody was Mother's intent to move to Michigan. At the time of the hearing scheduled for March 7, 2007, Mother and B.B. had moved back to the Indianapolis area. The trial court found that the status quo had been restored, there was no longer a matter of real controversy between the parties, and Father's petition should therefore be dismissed. I respectfully dissent from the majority's determination that the trial court did not err in dismissing Father's petition to modify custody.

We have held that a parent's decision to relocate, in and of itself, is not grounds for a custody modification. See Green v. Green, 843 N.E.2d 23, 27 (Ind. Ct. App. 2006). Instead, custody may not be modified unless it is shown that modification is in the child's best interests and there is a substantial change in one or more of the factors set forth in Indiana Code section 31-17-2-8. See Ind. Code § 31-17-2-21. If the sole basis for Father's petition to modify custody was Mother's intent to move out of state, the petition should have been dismissed – and in fact, could have been

dismissed long before the scheduled hearing as legally insufficient. However, by the time of the scheduled hearing, Mother had filed a second notice of intent to relocate announcing her return to Indiana. Father then filed a response and objection, noting that the notice does not state whether the return to Indiana is temporary or permanent and alleging:

> Father objects to [M]other residing with her mother, her mother's husband, her two small sons and his daughter, all in one very small home as not being in his daughter's best interest. [B.B.'s] grades are suffering amidst the chaos of this environment and [F]ather believes it would be in [B.B.'s] best interest to reside with him. Mother has indicated she is in financial difficulties and [F]ather believes he is better able to support [B.B.] Mother's instability in moving to Michigan and . . . then returning to Indiana several months later are additional factors indicative of Mother's inability to make sound decisions and her inability to place [B.B.'s] needs above . . . her own.

Appendix of Appellant at 58.

It seems from the statements made by counsel for both sides at the hearing that Mother's return to Indiana is intended to be permanent. There is no evidence of record to support that, however. The record shows that after Mother had relocated to Michigan with B.B., she agreed to return to Indiana "pending custody [trial]." Id. at 48. Moreover, according to the allegations of what amounts to Father's second petition to modify, Mother and B.B. did not return to the "status quo" upon returning to Indiana. They are now living with Mother's family, Mother is experiencing financial difficulties, B.B.'s grades are suffering, and Mother's choices are causing instability in B.B.'s life. Under these circumstances, I cannot say that there is "no longer a matter of real controversy between the parties," slip op. at 5, and I believe that Father was entitled to a hearing on his petition to modify custody. I would therefore reverse the trial court's dismissal of his petition and remand for a hearing.