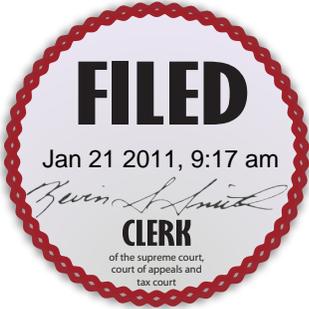


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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE)
PATERNITY OF B.W.)

D. W.,)
Appellant,)

vs.)

T. P.,)
Appellee.)

No. 71A05-1006-JP-455

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
The Honorable Barbara J. Johnston, Magistrate
Cause No. 71J01-0609-JP-001190

January 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Daniel W. (“Father”) appeals the St. Joseph Probate Court’s modification of legal and physical custody of the parties’ minor son, B.W., in favor of Tiffany P. (“Mother”) and argues that the trial court abused its discretion in modifying custody.

We affirm.

Facts and Procedural History

Mother gave birth to B.W. on June 7, 2004, and on September 6, 2006, Father filed a petition to establish paternity. On October 23, 2006, paternity was established by stipulation and Mother and Father were awarded joint legal and physical custody, with B.W. spending nearly equal time with both parents. Father was ordered to pay child support directly to Mother in the sum of \$92.00 per week.

Father obtained an ex parte civil order for protection against Mother on August 21, 2007. No hearing was held on the protective order, but the evidence presented at a later hearing established that Father sought the protective order after an altercation that occurred at his apartment when Mother came to pick up a child support check. After an argument with Father, Mother took a game set belonging to Father and attempted to leave with it. Father testified that when he tried to take the game back, Mother “jumped on” him and kicked him in the groin. Tr. p. 165. Mother denied attacking Father and testified that Father had grabbed her by the arm and tried to pull her out of her car, leaving bruises on her arm. Mother testified that she did not call the police because she did not want Father to get into trouble. Father, however, did contact the police and ultimately obtained a protective order, which Mother did not contest. Mother was also

charged with criminal mischief and battery arising out of the same incident. She eventually pleaded guilty to criminal mischief, and the battery charge was dismissed.

Also in August 2007, Mother pleaded guilty to an operating while intoxicated offense in Noble County. Mother was sentenced to spend five days in jail, but she failed to report to jail on October 5, 2007 as ordered. As a result, a warrant was issued for Mother's arrest. Mother was arrested in April 2008, and subsequently sentenced to six months of day reporting.

Upon learning of Mother's arrest, Father filed a petition for emergency custody on April 15, 2008, which the trial court denied. Shortly thereafter, Father, who was represented by counsel, presented Mother with a proposed stipulation under which joint legal and physical custody would be modified to sole legal and physical custody in Father, with Mother exercising parenting time as agreed by the parties or, in the absence of an agreement, in accordance with the Indiana Parenting Time Guidelines. The stipulation stated that "Mother's schedule is too irregular and her availability too unpredictable" for her to serve as B.W.'s joint legal or physical custodian. Appellant's App. p. 21. Mother, who had lost her job and her home as a result of her recent legal troubles, signed the stipulation without the advice of counsel. The stipulation was approved by the trial court on June 3, 2008.

Despite the modification in custody, B.W.'s schedule of overnights with Mother continued with little interruption. That is, B.W. spent nearly equal time with Father and Mother, spending five days with one parent and two days with other, and alternating that

schedule every week. In January 2009, Mother began a new job where she continues to work standard daytime hours Monday through Friday. Mother also became engaged and moved in with her fiancé, who owns a home in which B.W. has his own bedroom. Mother's fiancé has a positive relationship with B.W. and is supportive of B.W.'s relationship with Father.

During the summer of 2009, Father began "partying and going out" more often than he had in the past, and as a result, B.W. began spending significantly more overnights with Mother than with Father. Tr. p. 104; Appellee's App. p. 30. During this time, Mother began investigating the Montessori educational philosophy and became interested in sending B.W. to a local Montessori school. Mother made multiple attempts to discuss the option with Father, but Father ignored her suggestions and did not inform her of any other plans for then-five-year-old B.W.'s schooling. Unaware that Father had already enrolled B.W. in a parochial nursery school, Mother enrolled B.W. in the Montessori school on August 16, 2009. Two days later, when Mother was informed that Father had enrolled B.W. in another school, she immediately withdrew B.W. from the Montessori school.

Mother participated actively in B.W.'s education at the nursery school, but she was soon convinced that the school did not meet B.W.'s educational needs. Mother was concerned that the children at the school were "quite a bit younger" than B.W., and she characterized the school as a "play school." Tr. p. 50. Additionally, Mother was dissatisfied that the school only offered a half-day program, and B.W. spent the latter part

of the day with a babysitter. Mother communicated these concerns to Father and again expressed her belief that the Montessori school would best suit B.W.'s educational needs, but Father continued to ignore her requests.

In November 2009, Mother, Father, and their attorneys all participated in a four-way conference in an attempt to resolve their disagreements.¹ After the conference, Father had almost no contact with B.W. for nearly three weeks. During this time, Mother became aware of an opening at the Montessori school that would only be available for a short time. After unsuccessfully attempting to contact Father, and believing that Father had "washed his hands of" B.W., Mother pulled B.W. out of the nursery school and enrolled him in the Montessori school. Tr. p. 53.

In mid-December 2009, Father resumed contact with B.W., and subsequently agreed that B.W. should remain at the Montessori school. Father informed Mother that his work schedule had changed and requested that the parenting time schedule be altered accordingly. Mother and Father agreed that from that time forward, Father would pick B.W. up after he got off work at around 8:30 p.m. on Sunday, and B.W. would remain with Father until Wednesday morning, when Father would drop him off at school. Mother would pick B.W. up from school on Wednesdays, and B.W. would remain with Mother until Father picked him up on Sunday night.

Mother filed a petition to modify custody, support, and parenting time, and the trial court held a hearing on May 18, 2010. At the conclusion of the hearing, the court

¹ On the record before us, it is unclear what, if any, agreements were reached during the conference.

took the matter under advisement. On May 25, 2010, the trial court issued an order, accompanied by findings of fact and conclusions of law, awarding Mother sole legal custody and primary physical custody of B.W. Father was awarded parenting time in accordance with the Indiana Parenting Time Guidelines and ordered to pay child support in the amount of \$92.00 per week. Father now appeals.

Standard of Review

Where, as here, the trial court enters findings of fact *sua sponte*, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has not found. Julie C. v. Andrew C., 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). We will set aside the trial court’s specific findings only if they are clearly erroneous, that is, when there are no facts or inferences drawn therefrom to support them. Id. at 1255-56. In reviewing the trial court’s findings, we consider only the evidence most favorable to the judgment and the reasonable inferences therefrom, and we will not reweigh the evidence or judge witness credibility. Id. at 1256. We will affirm a general judgment on any legal theory supported by the evidence. Id. at 1255.

Discussion and Decision

Father argues that the trial court abused its discretion by modifying custody in favor of Mother. “We review custody modifications for an abuse of discretion, with a ‘preference for granting latitude and deference to our trial judges in family law matters.’” Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (quoting In re Marriage of Richardson,

622 N.E.2d 178, 178 (Ind. 1993)). An abuse of discretion occurs where the decision is against the logic and effect of the facts and circumstances before the court. In re Paternity of B.D.D., 779 N.E.2d 9, 13 (Ind. Ct. App. 2002). In reviewing a trial court's decision modifying custody, we will not reweigh the evidence or judge credibility of witnesses, and we consider only the evidence most favorable to the judgment and any reasonable inferences flowing therefrom. In re Paternity of J.J., 911 N.E.2d 725, 727-28 (Ind. Ct. App. 2009).

A modification of custody may be made only upon a showing that the modification is in the best interests of the child and that there is a substantial change in one or more of the factors the court may consider under Indiana Code section 31-14-13-2 (2008).² Ind. Code § 31-14-13-6 (2008). Indiana Code section 31-14-13-2 requires the court to consider all relevant factors, including:

- (1) The age and sex of the child.
- (2) The wishes of the child's parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parents;
 - (B) the child's siblings; and
 - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and community.

² Citing Lamb v. Wenning, 600 N.E.2d 96 (Ind. 1992), Father claims that in order to support a custody modification, the petitioner must establish that the existing custody arrangement is unreasonable, that is, a petitioner must show "a change in circumstances so decisive as to make a change in custody necessary for the welfare of the child." Appellant's Br. at 14. This standard arose from a statute governing only dissolution proceedings, and is therefore inapplicable to paternity proceedings such as the case before us. See Joe v. Lebow, 670 N.E.2d 9, 17 (Ind. Ct. App. 1996). Moreover, both the paternity and dissolution statutes regarding custody modifications were amended in 1994 and now contain virtually identical language, which requires only a showing of a substantial change in circumstances and that modification is in the best interests of the child. Id. at 17. Thus, the standard cited by Father is both obsolete and inapplicable to the case before us.

- (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

Father first argues that the trial court's finding that "[n]o evidence of domestic violence exists" was clearly erroneous. Appellant's App. p. 15. Both Mother and Father testified that domestic violence had occurred between them on one occasion in the past, but they both claimed the other was the perpetrator. However, the alleged incident took place in August 2007, more than a year before Mother and Father entered into the stipulation giving Father sole legal and physical custody of B.W. In considering the foregoing "best interests" factors, the trial court is strictly limited to consideration of changes in circumstances which have occurred since the last custody decree. Mundon v. Mundon, 703 N.E.2d 1130, 1133-34 (Ind. Ct. App. 1999). Thus, the trial court's finding is more properly understood as a finding that no evidence of domestic violence *within the relevant time frame* exists, and this finding is not clearly erroneous.

Next, Father objects to the trial court's findings regarding Mother's actions in enrolling B.W. in the Montessori School. The trial court found that although Mother lacked the legal authority to enroll B.W. in the Montessori school because Father was the sole legal custodian, she nevertheless acted in B.W.'s best interests in so doing. The trial court found that Mother had exhibited a "keen interest" in B.W.'s education and attempted to contact Father many times to discuss B.W.'s educational options, but that Father failed to respond. Appellant's App. p. 16. The court also noted that B.W.'s kindergarten report from the Montessori school showed that at the time he entered the

program, five-year-old B.W. exhibited behaviors more commonly seen in four-year-old children. The court found that B.W. had benefitted from the Montessori program and would have fared better if he had been able to begin the program at the beginning of the school year rather than in December. The court found further that “[b]ut for Father’s resistance, [B.W.] could have started school with the rest of his class.” Appellant’s App. p. 16.

Father, however, claims that Mother’s actions in withdrawing B.W. from the nursery school and enrolling him in the Montessori school showed “a flagrant disregard for the custodian [sic] parent’s right to determine where B.W. would attend school.”³ Appellant’s Br. at 17. Thus, Father appears to argue that Mother’s decision to enroll B.W. in the Montessori school should have weighed against a modification of custody to Mother, rather than in Mother’s favor.

Father’s argument is simply a request to reweigh the evidence, which we will not do. The evidence most favorable to the trial court’s findings establishes that Mother took an active interest in B.W.’s education and that Father refused to communicate with Mother regarding B.W.’s educational options. The evidence also establishes that Mother

³ Without citation to the record, Father accuses the trial court of being “biased toward the [M]ontessori school” because the court noted at the hearing that one of her grandchildren attended the same school. Appellant’s Br. at 17. We have carefully reviewed the transcript, and we see no evidence of this purported bias. Although the court mentioned that her grandson attended the Montessori school, she also indicated that her other grandchildren attended parochial schools, like the one Father had chosen for B.W. After Father indicated to the court that he was willing to allow B.W. to stay at the Montessori school, the trial court stated, “I believe that it’s a good program. It might not be what I would do or I might do it, but I’m saying it’s not going to harm the child, okay?” Tr. p. 21. Thus, the trial court did not express bias toward the Montessori school; rather, it simply indicated that the school was a viable educational option for B.W. Moreover, the trial court’s finding that B.W. had benefitted from the Montessori program was based on the kindergarten report Mother submitted into evidence, not the trial court’s personal preferences.

only enrolled B.W. in the Montessori school after Father abruptly dropped out of B.W.'s life for a period of time and failed to respond to Mother's attempts to contact him. Furthermore, Father eventually agreed that it was in B.W.'s best interests to remain at the school. Under these facts and circumstances, we cannot conclude that the trial court erred in concluding that Mother's and Father's relative levels of interest and involvement in B.W.'s education supported a modification of custody in Mother's favor.

Next, Father argues that the trial court's findings regarding the positive changes in Mother's life since Father was awarded sole custody are insufficient to support a modification of custody. The trial court made the following relevant findings:

A substantial change of circumstances exists in the instant case. Mother is no longer "unreliable" or "unavailable." She is ready, willing, and able to be the primary caregiver for her son.

* * *

Mother has overcome a difficult period in her life that she admits was of her own doing. She has accepted her sanction and changed events in her life. Mother has made [B.W.] a priority in her life. [B.W.] spends most of his time with her.

Appellant's App. p. 16. Father argues that these changes cannot support a modification in custody because "[c]hanges in the noncustodial home, absent changes in the custodial home as well, have never supported a change in permanent physical custody." Appellant's Br. at 17 (citing Drake v. Washburn, 567 N.E.2d 1188, 1190 (Ind. Ct. App. 1991) ("A modification is not warranted if the evidence establishes a change only in the noncustodial parent's lifestyle."), trans. denied.).

While changes in the noncustodial home are not in themselves enough to support a modification of custody, a trial court is permitted to consider such changes in making its

modification decision. Williamson v. Williamson, 825 N.E.2d 33, 41-42 (Ind. Ct. App. 2005); Bryant v. Bryant, 693 N.E.2d 976, 979 (Ind. Ct. App. 1998), trans. denied. Thus, the trial court did not err in taking Mother's changed circumstances into account in making its custody modification determination.

Moreover, the court made findings regarding other significant changes which, in combination with the changes in Mother's household, would support a custody modification in favor of Mother. First, the trial court found that B.W. was spending significantly more time with Mother than with Father, concluding that within the 304-day period from June 1, 2009 until March 28, 2010, Mother cared for B.W. for 190 days. Thus, although Father was the sole legal and physical custodian, B.W. was with Mother approximately sixty-three percent of the time. See Rea v. Shroyer, 797 N.E.2d 1178, 1184 (Ind. Ct. App. 2003) (affirming custody modification in part because the child had lived with the noncustodial parent for over seventy percent of the time in the year prior to the hearing).

Second, the trial court found that Mother had taken an active interest in B.W.'s education and acted in his best interests with regard educational options, while Father had failed to respond to Mother's requests to discuss B.W.'s education. Finally, the trial court found that Father's job "requires him to be available to his employer several evenings per week[,] while Mother's job allows her to work a "five-day, daytime hour schedule."⁴ Appellant's App. p. 15. These findings, which essentially concern changes

⁴ Father claims that his and Mother's relative work schedules cannot support a modification of custody because he "has been employed by Bone Fish Restaurant for a number of years and traditionally had worked evening hours."

in the home Father provides to B.W., in combination with the positive changes in Mother's household, support a modification of custody in favor of Mother.

Father also argues that the trial court's finding that Father failed to pay work-related daycare expenses as ordered in the June 3, 2008 custody order was clearly erroneous. Specifically, the trial court found as follows:

The court also noted that the stipulation agreed upon provided that Father shall be responsible for timely paying the charges associated with work-related daycare for [B.W.]. Testimony was heard concerning the unpaid daycare charges. The court concludes that Father failed in this obligation.

Appellant's App. p. 16. Father argues that this finding is clearly erroneous because the unpaid daycare charges accrued prior to the June 3, 2008 custody modification, while Mother was obligated to pay daycare expenses.

The evidence presented at trial established that the unpaid daycare charges predated the June 3, 2008 custody order, under which Father was ordered to pay for work-related daycare. Mother testified that the charges were her responsibility, but claimed that she was unable to pay the charges because Father was not paying child support as ordered. Tr. pp. 108-11. Thus, the trial court's finding regarding the unpaid daycare charges was clearly erroneous. However, under the facts and circumstances of this case, we conclude that the error was harmless.

Appellant's Br. at 17. However, Mother and Father both testified that Father's work schedule changed in December 2009. Tr. pp. 54 -55, 185. Thus, the evidence establishes that Father's work schedule has changed since the last custody determination.

At the hearing, Mother and Father each testified that the other had failed to satisfy various financial obligations concerning B.W. At one point, in response to such testimony, the trial court stated:

We're not going to talk about any more bills. That's it. I'd really, really, really like you folks to understand that I want to know why I should modify this custody. Not about who paid what, I frankly don't care. I don't care. . . . I can tell you that I'm not really interested in who paid the bills. I'm not. I'm more . . . interested in [B.W.]'s welfare.

Tr. p. 191. Moreover, the trial court focused most of its findings on the fact that B.W. was spending more time with Mother than Father, Mother's "keen interest" in B.W.'s education, and the positive changes in Mother's household since the last custody determination. Appellant's App. p. 15. Thus, in light the fact that accurate findings support the modification of custody in favor of Mother, we conclude that the trial court's single erroneous finding was superfluous and harmless. See Kanach v. Rogers, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001) ("Superfluous findings, even if erroneous, cannot provide a basis for reversible error.").

Finally, Father contends that the trial court's failure to make a specific finding that the custody modification was in B.W.'s best interests requires reversal of the trial court's decision to modify. We disagree.

When ordering a modification of child custody, a trial court is not required to make special findings absent a request by a party. Id. Moreover, as we explained above, when a trial court enters findings *sua sponte*, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the

court has not found. Julie C. v. Andrew C., 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). We will affirm a general judgment upon any legal theory consistent with the evidence. Id.

Although not required to do so, the trial court entered findings *sua sponte*. The findings do not explicitly conclude that the modification in custody was in B.W.'s best interests. However, based on the trial court's extensive findings, we are able to determine that the trial court concluded that it was in B.W.'s best interests that custody be modified to Mother. Specifically, the trial court found that B.W. was already spending more time with Mother than Father and that Father's job requires him to work several evenings per week, while Mother's job allows her to work a standard five-day, daytime schedule. The trial court also found that Mother exhibited a "keen interest" in B.W.'s education and that she had made many positive changes in her life since the last custody determination. Appellant's App. p. 15. All in all, these findings are sufficient to establish that the trial court found that the custody modification was in B.W.'s best interests.

For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion in modifying custody in favor of Mother.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.

