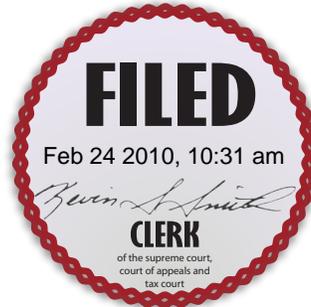


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:)
)
M.M.,)
Appellant-Petitioner,)
)
and) No. 49A02-0907-CV-644
)
B.M.,)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
The Honorable Kimberly D. Mattingly, Magistrate
Cause No. 49D05-0807-DR-32627

February 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner M.M. (“Father”) appeals the trial court’s order modifying custody and imposing child support payments on the motion of Appellee-Respondent B.M. (“Mother”). We affirm the custody order and affirm the support order conditioned on attachment on remand of a support worksheet consistent with the ordered amount.

Issues

Father raises two issues on appeal:

- I. Whether the evidence supports the trial court’s conclusion that a substantial and continuing change in circumstances justifies a change in custody from the arrangement approved in the original divorce decree; and
- II. Whether the child support order must be reversed because the trial court erred in failing to make particular findings or file a child support worksheet to support the child support order.

Facts and Procedural History

Father and Mother were married in Albuquerque, New Mexico on January 16, 1999, and one child was born of the marriage, A.M. They were subsequently divorced in New Mexico in 2001 and entered into a Settlement Agreement with a Parenting Plan. The Parenting Plan provided in pertinent part:

1. Legal Custody. We agree on joint custody of the minor child of the marriage and with the father having primary custody and secondary custody parent having reasonable visitation rights. We agree that we will consult and agree with each other before either of us makes a major change affecting our child in the areas of religion, residence, non-emergency medical care, education or major recreational activities. If agreement cannot be reached, then resolution will be reached by the methods set forth in the paragraph below called “Conflict Resolution.” Without agreement or resolution of any conflict by approved methods, there will be no major changes.

2. Time Sharing. Basic care of the child will be shared as our schedules permit, with the understanding that active and ongoing parent-child relationships should continue. Before the child reaches school age, the parents will drive halfway from their homes in New Mexico and Utah every three months to transfer the child to the other parent. Every effort will be made to keep the time sharing 186 days for the father and 179 days for the mother each year.

Appendix at 14-15. The parenting plan did not provide a detailed arrangement for A.M. once he began attending school.

Up until 2005, the parties alternated having care of A.M. approximately every four months. During the majority of this time, Father lived in Utah, and Mother lived in Indiana. Before the school year starting August of 2005, the parents verbally agreed that A.M. would reside with Mother for the school year during kindergarten, first and second grades and then A.M. would reside with Father for the next three school years. In 2008, when A.M. was to move to Utah to begin third grade, Mother filed a Verified Motion to Domesticate Foreign Decree, Modification of Custody, Support and Arrearage, and Request for Emergency Hearing. After a hearing on September 19, 2008, the trial court approved the domestication of the New Mexico divorce decree, awarded temporary custody of A.M. to Father and referred the parties to the Domestic Relations Counseling Bureau to mediate the custody dispute.

After the parties failed to resolve the custody conflict through mediation, the trial court held a hearing on the motion to modify custody and child support. On June 22, 2009, the trial court issued its order modifying custody whereby Mother would have custody of A.M. during the school year and Father would have custody during school vacations. As to child support, the court included that "Father shall pay Mother child support of \$164.72

consistent with the child support obligation worksheet filed herewith.” Appendix at 12.

Father now appeals.

Discussion and Decision

We first note that Mother did not file an Appellee’s brief. When an Appellee does not file a brief, we need not develop an argument for her, and we apply a less stringent standard of review. Vandenburgh v. Vandenburgh, 916 N.E.2d 723, 725 (Ind. Ct. App. 2009). We will reverse the trial court if the appellant is able to establish *prima facie* error, which is error at first sight. Id. The Appellee’s failure to submit a brief does not relieve us of our obligation to correctly apply the law to the facts in determining whether reversal is required. Id.

I. Modification of Custody

Custody modifications are reviewed for abuse of discretion, with a preference for granting latitude and deference to trial court 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)). This is because the trial court can observe the parties’ conduct and demeanor and listen to their testimony. Pawlik v. Pawlik, 823 N.E.2d 328, 329 (Ind. Ct. App. 2005), trans. denied. The value of such close proximity cannot be overstated in the matter of deciding custody, where courts are often called upon to make Solomon-like decisions in complex and sensitive matters. Id. at 329-30 (internal quotation omitted). We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment. Kirk, 770 N.E.2d at

307. On appeal, it is not enough that the evidence might support some other conclusion. Id. Rather, the evidence must positively require the conclusion contended for by the appellant before there is a basis for reversal. Id.

In reviewing a modification of custody order, we evaluate whether a change in one or more of the factors contained in Indiana Code Section 31-17-2-8 would lead us to the conclusion that a substantial change in circumstances has occurred and that modification is in the best interests of the child. See Ind. Code § 31-17-2-21; See also In re Paternity of M.P.M.W., 908 N.E.2d 1205, 1208 (Ind. Ct. App. 2009). It is error to modify a child custody order unless there is evidence in the record to support such a conclusion.

Indiana Code Section 31-17-2-8 sets forth the factors relevant to custody are as follows:

- (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 (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; 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, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

The party seeking the modification bears the burden of demonstrating that the existing

custody order is unreasonable because, as a general proposition, stability and permanence are considered best for the child. Id.

Father argues that the evidence does not support the statement in the order that there have been “several substantial and continuing changes in circumstances of the parties since the entry of the New Mexico decree which warrant a modification of custody and parenting time.” Appendix at 12. Father seeks a reversal of the order on the basis that there is no substantial change in the circumstances to warrant a change from the parties’ prior oral agreement to have A.M. alternate school-year parental custody every three years. However, “no agreement between parties that affects custody, regardless of whether it is in the first instance or upon modification, is automatically binding upon the trial court.” In re Paternity of K.J.L., 725 N.E.2d 155, 158 (Ind. Ct. App. 2000). Thus, the trial court was not bound to look at only the circumstances since the parties’ oral agreement.

While not enumerating specific factors, the findings of the trial court clearly identify several substantial changes that warrant modification of custody. The first and most central factor was the age of the child. Specifically, the court found the prior parenting agreement to be unreasonable because A.M. had started school:

3. The terms of the said New Mexico decree were not reasonable and were impractical in that the decree called for the said minor child to relocate from state to state every three months without regard to the effect on the minor child’s development, education, and emotional well-being and stability.

App. at 7. The parties’ informal oral agreement also implicated A.M.’s adjustment to home, school, and community. While the evidence supports that A.M. adjusted well when Father

was granted temporary custody, the trial court found that the informal agreement would result in a “hardship of changing schools and moving across the country every three years.” App. at 11. Furthermore, the wishes of Mother to adhere to the informal agreement had changed. Mother clearly preferred that A.M. have continuity in his schooling and community:

11. Particularly noteworthy to the Court was Mother’s stance that if she did not prevail in her request for primary physical custody on a permanent basis, she preferred that [A.M.] reside in Utah permanently. Conversely, Father preferred to continue the 3 years on- 3 years off arrangement if he was unsuccessful in obtaining primary physical custody.

App. at 9.

Contrary to Father’s contentions, the culmination of the changes as detailed by the trial court supports the conclusion that a substantial change in circumstances has occurred. Father does not challenge the conclusion that modification was in the best interests of A.M. The trial court did not abuse its discretion in modifying custody.

II. Child Support

Second, Father contends that the child support order is not supported by relevant findings or a child support worksheet. “To determine whether a child support order complies with the child support guidelines, we must first know the basis for the amount awarded.” Walters v. Walters, 901 N.E.2d 508, 513 (Ind. Ct. App. 2009). “Such revelation could be accomplished either by specific findings or by incorporation [of] a proper worksheet.” Id. (quoting Heiligenstein v. Matney, 691 N.E.2d 1297, 1303 (Ind. Ct. App. 1998)).

The trial court order provides: “Father shall pay Mother child support of \$164.72 consistent with the child support obligation worksheet filed herewith.” App. at 12.

However, no worksheet is included with the order nor does any part of the order specify the basis for the amount of support. As Father does not contest the amount ordered but only that it is not supported by a worksheet filed by the court, we affirm on the condition that on remand the worksheet supporting the amount specified in the order is attached and filed with the order.

Affirmed as to modification of custody and affirmed as to child support conditioned on attachment of proper support worksheet on remand.

BAKER, C.J., concurs.

ROBB, J., concurs with separate opinion.

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ROBB, Judge, concurring

I concur with the majority’s decision but write separately to address concerns regarding Mother’s course of conduct leading to this litigation. The original divorce decree and the parties’ 2005 verbal agreement both called for roughly equal shared custody of A.M. even though Mother and Father at all times resided in separate states, resulting in A.M. frequently changing his state of residence. The 2005 agreement called for A.M. to attend kindergarten and first and second grades in Indiana, the following three years of school in Utah, and contemplated another move back to Indiana thereafter. Both parties knew or should have known this arrangement would impact A.M.’s adjustment to school and community by requiring him to move cross country multiple times during his formative years.

Yet Mother agreed to this arrangement in 2005, when A.M. came to live with her for three school years, and made no objection or protest until, according to her, “late May and early June” 2008, transcript at 236, when the time approached to give A.M. to Father at the end of that July. Rather than first attempting to mediate her custody dispute with Father, as required by the terms of the original divorce decree, Mother promptly filed this litigation on July 22, 2008. See id. at 224 (Father testified, “No,” when asked whether, until Mother filed her petition for modification, there was “ever any conversation . . . contrary” to the agreement that A.M. would return to Father for three school years starting in 2008.). Only upon filing her petition for modification did Mother raise the issue of A.M.’s need for a stable school and community environment. Mother’s abrupt change of position as soon as the parties’ verbal agreement no longer suited her desire to retain custody of A.M. concerns me.

This concern notwithstanding, I concur in the majority’s affirmance of the trial court’s finding that a substantial change of circumstances occurred since the original divorce decree, justifying a modification of custody from the decree’s terms. By making an informal deal in 2005 rather than seeking court approval of an agreed modification of the decree’s custody provisions, both Mother and Father assumed the risk the other party might thereafter petition a court for a different modification than the one to which they verbally assented. Because the trial court’s order modifying custody is not an abuse of its discretion, I concur in the majority opinion.