

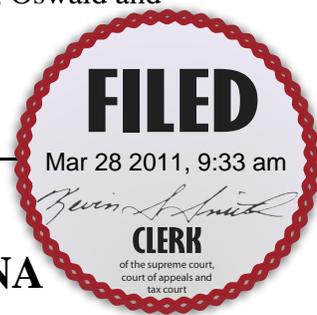
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

STEVEN L. WHITEHEAD
Princeton, Indiana

ATTORNEY FOR APPELLEE:

JERRY D. STILWELL
Bamberger, Foreman, Oswald and
Hahn, LLP
Princeton, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

G.F., Father,)
)
Appellant,)
)
vs.)
)
R.F., Mother,)
)
Appellee.)

No. 26A01-1008-DR-395

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jim R. Osborne, Judge
Cause No. 26C01-0406-DR-83

March 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

G.F. (“Father”) appeals the trial court’s denial of his petition for modification of child custody regarding his son, L.F. Father raises one issue which we revise and restate as whether the trial court abused its discretion by denying his petition to modify custody of L.F. We affirm.

The relevant facts follow. Father and R.F. (“Mother”) married on July 29, 2000. Three weeks later, Father, a staff sergeant in the United States Army, was stationed overseas. Mother and Father had one son, L.F., who was born in November 2001. From September 2003 until September 2008, Father saw L.F. twice. At some point, Mother moved to Princeton, Indiana.

On June 22, 2004, Mother filed a petition for dissolution of marriage. On April 25, 2005, the court granted dissolution of the marriage and granted Mother custody of L.F. subject to visitation by Father. Father moved to El Paso, Texas at some point and married A.F. on September 26, 2007.

In December 2008, Mother and Father agreed that Father would be entitled to have L.F. for parenting time during spring break 2009. Before L.F.’s trip, Mother discussed L.F. with Father and informed Father that L.F. had Asperger’s syndrome, does not adapt well to change, has a tic, “does some things with his hand,” and is bothered by loud voices. Transcript Vol. II at 44. On the way home from the airport with L.F., Father noticed that L.F. was “having some facial gestures.” Id. at 45. After arriving at Father’s residence, L.F. “would walk a couple steps, and then . . . twirl . . . walk a couple more steps, and then . . . twirl.” Id. Father became concerned, called a nurse, and took L.F. to

the emergency room that evening.¹ Father then took L.F. to a pediatrician and a pediatric neurologist. The pediatric neurologist informed Father that L.F. “had a pervasive personality disorder similar to Asperger’s syndrome and that there was a three-point something, millimeter . . . spike wave discharge indicative of childhood absence epilepsy.” Id. at 52. Father administered medication prescribed by the doctor for two days.

Mother noticed that L.F.’s gums were swollen and bleeding when L.F. returned home from Texas. Mother refused to continue the medication because she knew L.F.’s history. Mother took L.F. to see Dr. David Robertson, Dr. Anup Patel, and Dr. Deborah Sokol. None of the doctors consulted by Mother ultimately recommended that L.F. be placed on any medication for seizures. Dr. Robertson concluded that L.F. did not have “clinical seizure” and did not recommend an anti-epileptic medication. Father’s Exhibit 6. Dr. Sokol concluded that L.F.’s history was not consistent with epilepsy.

On April 30, 2009, Father filed a petition for modification of child custody to that of joint custody. On May 27, 2009, the court granted Father’s petition for modification of custody “to that of joint custody with Mother being the primary residential parent” Appellant’s Appendix at 41. The court ordered “parenting time visitation by [Father] pursuant to the Indiana Parenting Time Guidelines where distance is a major factor.” Id.

On August 3, 2009, Father filed a petition for modification of child custody and requested primary custody. On March 16, 2010, Mother filed a motion for special

¹ Father testified that he became “really concerned” after noticing L.F.’s “rolling of the eyes, the drawing down of the face, [and] his arm kind of extending out” Transcript Vol. II at 46.

findings of fact and conclusions of law. On July 2, 2010, the court denied Father's petition for modification of custody.

The sole issue is whether the trial court abused its discretion by denying Father's petition to modify custody of L.F. We review custody modifications for an abuse of discretion and have 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). "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." Id.

The Indiana Supreme Court explained the reason for this deference in Kirk:

While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, 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 Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

Therefore, "[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." Id. In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered.

Id. We may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

When reviewing the trial court’s findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

The child custody modification statute provides that “[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8]” Ind. Code § 31-17-2-21. Ind. Code § 31-17-2-8 lists the following factors:

- (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.

Father argues that the evidence does not support several of the trial court's findings and that the findings do not support the conclusions or judgment. As to each challenge, Father asks that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Fields, 749 N.E.2d at 108.

A. Findings

1. Finding 17

Father challenges the emphasized portion of Finding 17, which states:

17. Dr. Robertson did an MRI brain scan on June 3, 2009 and an EEG on the same date. The EEG was interpreted by Dr. Anup Patel of Capital Neurology in Indianapolis. The conclusion of Dr. Robertson was that he did not recommend any type of anti-epileptic medication and did not believe that [L.F.] had any form of epilepsy. An additional EEG was done

August 13, 2009 by Dr. Patel with a single spike-wave discharge noted. *After review of the EEG, both Dr. Robertson and Dr. Patel were still of the opinion that [L.F.] did not have any form of epilepsy and no medication was needed.*

Appellant's Appendix at 33 (emphasis added). Father points to Dr. Patel's August 13, 2009 report,² which stated:

DIAGNOSIS: This is an abnormal EEG due to:
Presence of spike and wave discharge seen in the right centrotemporal region.

CLINICAL INTERPRETATION: This abnormal EEG is suggestive of potential epileptogenicity in the right centrotemporal region. **PLEASE NOTE:** This abnormality occurred only once during the entire proceeding.

Father's Exhibit 7.

The following exchange occurred during the redirect examination of Father:

Q . . . Capitol Neurology, this would be the third doctor, Dr. Patel. "This abnormal EEG is suggestive of potentially epileptogenicity to the right in the centrotemporal region." Okay. Suggestive of – basically what he's saying is it's suggestive of epilepsy?

A I would assume so. I'm not a medical person.

Transcript Vol. III at 64. During cross-examination of Mother, the following exchange occurred:

Q . . . Is it your understanding, based upon what Dr. Patel wrote based on what Dr. Robertson said, that [L.F.] doesn't have epilepsy?

² Father quotes portions of several medical reports but does not cite to the record. We remind Father that Ind. Appellate Rule 46(A)(8)(a) provides that "[e]ach contention must be supported by citations to . . . the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22." Ind. Appellate Rule 22(C) provides that "[a]ny factual statement shall be supported by a citation to the page where it appears in an Appendix, and if not contained in an Appendix, to the page it appears in the Transcript or exhibits, e.g., Appellant's App. p.5; Tr. p. 231-32."

A That was my understanding.

Id. at 154. Mother testified that Dr. Robertson and Dr. Patel concluded that L.F. did not have epilepsy and that no doctor, besides the doctor in Texas, recommended that L.F. be on any seizure medication. In a letter dated October 6, 2009, Dr. Robertson wrote: “[L.F.] has now had 3 EEGs with only 1 showing generalized seizure discharges and recent EEG showing a single spike wave discharge. Given clinical history, non-focal exam and normal MRI, I do not feel the patient has clinical seizure and I do not recommend anti-epileptic medication.” Father’s Exhibit 6. Father asks that we reweigh evidence and judge the credibility of witnesses, which we cannot do. Fields, 749 N.E.2d at 108. We cannot say that Finding 17 is clearly erroneous.

2. Finding 13

Father challenges the emphasized portion of Finding 13, which states:

13. In Texas [L.F.] was diagnosed with having childhood absence epilepsy. Father was given instructions in the event of a convulsive seizure by [L.F.]. *[L.F.] had no convulsive seizures in Texas during Spring break 2009 and has had no convulsive seizures prior to or since that date.* The Texas medical records were forwarded to Dr. Bruce Brink who at the time was the treating physician for [L.F.].

Appellant’s Appendix at 32 (emphasis added).

Father argues that this finding disregards Father’s testimony, the history taken at the emergency room, the diagnosis by the doctor in Texas that L.F. had childhood absence epilepsy, and the testimony of a mental health consultant and L.F.’s teacher that L.F. stares off into space.

The record reveals that Mother testified that L.F. had not had a seizure since he returned from Texas. Mother testified that L.F. will stare out into space for a few seconds but had not observed that behavior in a long time and that she immediately has his attention when she says something to him. The record also reveals that Dr. Sokol stated in her report:

Previous workup by Dr. David Robertson lead to conclusion that the patient does not have absence epilepsy or any epilepsy for that matter. Reviewing the history, I do not feel that the patient's history is consistent with epilepsy. He has had 3 EEGs with one showing generalized seizure discharges reportedly in Texas. Repeat EEGs have shown a single-spike wave discharge only. MRI was also normal. . . . There is no need to start antiepileptic medication in this patient, as there are no signs or symptoms of epilepsy.

Mother's Exhibit 2. Considering this evidence and the evidence related to Finding 17, we cannot say Finding 13 is clearly erroneous.

3. Finding 19

Father challenges Finding 19, which states:

19. There has been no testimony that Mother has failed to provide for the medical needs of [L.F.]. In order to meet the medical needs of [L.F.], Mother has taken all of her personal and sick days from her place of employment and has even been required to take some FLMA [sic] leave days, as testified to by her immediate supervisor.

Appellant's Appendix at 33. Without citation to the record, Father argues that this finding is clearly erroneous because there is evidence that Mother removed L.F. from an anti-seizure medication against the advice of doctors, Mother failed to mention the

staring spells that L.F. experienced to Dr. Robertson or Dr. Sokol, and that Mother is more interested in winning custody than in addressing L.F.'s medical needs.

Mother testified that the medication prescribed for L.F. in Texas has very serious side effects and L.F. experienced one of those side effects. Specifically, Mother noticed that L.F.'s gums were swollen and bleeding when he returned home from Texas. Mother also testified that she refused to continue the medication prescribed in Texas because she knew L.F.'s history. Mother also testified that Dr. Robertson never suggested any medication for L.F. and that Dr. Patel never prescribed any medication. As previously mentioned, Dr. Robertson and Dr. Sokol ultimately concluded that L.F. need not be placed on any medication for seizures. Again, Father asks that we reweigh evidence and judge the credibility of witnesses, which we cannot do. Fields, 749 N.E.2d at 108.

4. Finding 21

Father challenges the emphasized portion of Finding 21 which states:

21. Kathleen Johnson[, the guardian ad litem,] has recommended a change of custody to Father, however, Kathleen Johnson did testify that during the past several months she had numerous communications with Father by telephone; that she saw [L.F.] perhaps 6 to 8 times including random visits in public places (last talked to in 2009); that she only talked to Mother perhaps two times (last in 2009); never checked out any of the proposed witnesses that Mother had recommended; did not know where Mother lived; had never visited Mother's home; had not seen [L.F.'s] bedroom; and did not know his school performance from last semester at the time of the last hearing.

Kathleen Johnson gave testimony about an abnormal EEG in Texas, but again there has been no subsequent abnormal EEG requiring medication or further medical treatment for [L.F.]. She testified it was difficult for [L.F.] to have a relationship with his Father, but the Court finds specifically

there is a distance factor involved, *and no testimony was offered regarding any behavior by [Mother] trying to alienate [L.F.] from his Father.*

Appellant's Appendix at 34 (emphasis added).

Father points out that Johnson testified that she thought Mother "made it very difficult for [Father] to have a relationship with [L.F.]" and that "at times [Mother's] focus has not necessarily been on what's best for [L.F.] but proving [Father] wrong." Transcript Vol. III at 18. Father points to his testimony that two weeks after L.F. returned to Indiana L.F. told him: "Dad, you're the same; You haven't changed; You've – you're, you know, you're – I don't love you anymore, but I do love you sometimes when we make deals." Transcript Vol. II at 59. Father also points to evidence that Mother told L.F. about the possibility of living with Father so that L.F. could be prepared in some way because L.F. does not accept change well.

Initially, we observe that the court also entered the following finding:

25. Both Father and Kathleen Johnson apparently have a belief that Mother says negative things about him to [L.F.]. There was no testimony to that effect. In fact, testimony was that Father's photograph is placed in [L.F.]'s bedroom. Neither Father nor Kathleen Johnson provided the Court with any evidence of Mother doing inappropriate things to alienate [L.F.] from his Father.

Appellant's Appendix at 35. Father does not challenge this finding. We also observe that Mother indicated that she did not do anything to alienate L.F. from Father. To the extent that there may have been some testimony that Mother may have made it difficult for Father while the court's finding stated that there was "no testimony" offered, we cannot say that this finding affects the outcome of the case.

B. Conclusions

Father appears to argue that the findings do not support the conclusions or judgment. The court entered the following conclusions:

4. I.C. 31-17-2-8(4) concerns the interaction and interrelationship of a child with his parent or parents; siblings; and any other person who may significantly affect the child's best interests. There has been no testimony of [L.F.] not having strong interaction and interrelationship with his Mother and other persons who significantly affect his best interests.
5. I.C. 31-17-2-8(5) concerns the child's adjustment to the child's home, school and community. There has been no testimony offered that [L.F.] is not well-adjusted at home, at school and within the community.
6. There has been insufficient evidence given to prove a substantial and continuing change of circumstances as to any of the factors set forth in Indiana Code 31-17-2-8.

Appellant's Appendix at 37-38.

Father argues that "the court made no specific finding that [L.F.] did have a strong interaction and inter-relationship with [Mother] and other persons who significantly affect his best interest." Appellant's Brief at 23-24. Father argues that "despite no such specific finding, the Court denies [his] petition for not disproving something the Court didn't specifically find in the first place." *Id.* at 24. Without citation to the record, Father argues that "[e]very IEP submitted on behalf of [L.F.]" does not support Conclusion 5 regarding L.F.'s adjustment to home, school, and the community.³ *Id.* Father also argues that there has been a substantial change in L.F.'s mental and physical health.

The court entered the following findings:

³ The record reveals that IEP stands for Individual Education Program. See Mother's Exhibit 4.

22. One characteristic of Asperger's Syndrome is the difficulty of a child having a change in routine. There would a [sic] significant change in routine to [L.F.] if Father were made his primary residential parent as [L.F.] would be moving to Texas with new surroundings, new individuals to meet and perhaps most importantly a new school.

23. [L.F.] has always attended school in Princeton; has certain classmates who have become friends; has a familiarity with his surroundings in attending school; has performed well for his abilities in school; and has an extended family located in the Princeton area.

Personnel from [L.F.'s] school gave testimony that Mother has always appeared at school functions for [L.F.]; that [L.F.] is appropriately dressed; and that Mother has followed recommendations of treatment from the school. [L.F.] will be entering a new building for school this Fall, and will in part be in the mainstream with other children his age in spite of his special needs.

Mother's Exhibit #4 was the most recent Case Conference Committee Report at school. This report did indicate that "[L.F.] is a very sweet young man"; that his ability to focus his attention has improved significantly since he began taking medication for ADHA; that his grades have improved as well as his confidence, self-esteem and overall mood.

24. [L.F.] is visited daily by his maternal grandmother; has frequent visits with his maternal great-grandmother; has an extensive family in and around the Princeton area which include numerous family get-togethers. No family member resides in Texas except Father.

Appellant's Appendix at 34-35.

Based upon these findings, which Father does not challenge, and the remaining findings and conclusions previously discussed, we conclude that Father's arguments are effectively a request that we reweigh the evidence and judge the credibility of the witnesses and that Father failed to demonstrate that modification is in the best interest of L.F. or that there was a substantial change in one of the necessary factors. The trial court

did not abuse its discretion by denying Father's petition to modify custody. See, e.g., Kirk, 770 N.E.2d at 308 (“We cannot say from the record that the trial court clearly erred in deciding to leave G.L. with her mother while continuing to exert the court's authority to re-establish G.L.'s relationship with her father.”); Cunningham v. Cunningham, 787 N.E.2d 930, 936-937 (Ind. Ct. App. 2003) (“Acknowledging the high degree of deference we must give to the trial court's decision, we conclude that the trial did not err when it denied Father's petition to modify custody.”).

For the foregoing reasons, we affirm the trial court's denial of Father's petition to modify the custody of L.F.

Affirmed.

ROBB, C.J., and RILEY, J., concur.