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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE PATERNITY OF C.C.,)
)
M.L. (Mother),)
)
Appellant,)
)
vs.) No. 15A01-1009-JP-534
)
J.C. (Father),)
)
Appellee.)

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
The Honorable Kimberly Schmaltz, Magistrate
Cause No. 15C01-0607-JP-76

May 25, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

M.L. (“Mother”) appeals the trial court’s order modifying physical custody of her son, C.C., in favor of the child’s father, J.C. (“Father”). We affirm.

Issues

Mother raises four issues, which we combine and restate as follows:

- I. whether the magistrate who heard this case should have recused herself; and
- II. whether the trial court properly ordered modification of physical custody.

Facts

C.C. was born in 2006, and Father’s paternity was established shortly thereafter by agreed order. In May 2007, after Mother and Father’s relationship ended and they no longer lived together, the trial court entered an order establishing custody and support. Mother and Father were granted joint legal custody of C.C., and Mother was granted primary physical custody. Father’s visitation was to follow the Indiana Parenting Time Guidelines, with the rules for children three and older to apply once C.C. reached eighteen months of age. Father also was ordered to pay \$90 per week in child support.

Sometime in 2008, Mother and Father voluntarily agreed to a parenting schedule that left C.C. in Father’s care for periods of time greatly in excess of those provided by the Parenting Time Guidelines. This agreement came about as a result of Mother’s work schedule at a law firm, Father’s more flexible work schedule as an Indiana State Trooper, and the desire to avoid extensive time in daycare for C.C. As a general rule, on

Mondays, Tuesdays, and Wednesdays, Mother would drop off C.C. at daycare at 7:30 a.m. and Father would pick up C.C. at approximately 11:45 a.m. On Mondays and Tuesdays, Father would keep C.C. until about 6 p.m., when he would take C.C. to the home of Mother's father, who lived across the street from Mother. When Mother arrived home from work shortly thereafter, she would retrieve C.C. from her father.

On Wednesdays, Father would keep C.C. until about 8 p.m., because Mother worked until 11 p.m. on that day. Father again would bring C.C. to Mother's father's house, and Mother would retrieve C.C. at about 11:30 p.m. On Thursdays, Father would pick C.C. up from speech therapy at approximately 11:00 a.m. Afterwards, C.C. would not return to Mother's care until as late as 1:30 p.m. on Saturday. Mother would keep C.C. the remainder of the weekend, and the schedule would begin again on Monday. Father continued paying child support while this schedule was in place.

On December 4, 2009, Father filed a petition requesting that he be granted primary physical custody of C.C. and that his support obligation be terminated. The trial court scheduled a hearing on the matter for July 7, 2010, to be held by a magistrate. Two weeks before the hearing was to be held, Mother's employment at the law firm was terminated. On August 17, 2010, the trial court ordered that C.C.'s physical custody be modified so that during the school year, he would stay with Father from Monday through Friday. Mother would have parenting time with C.C. from Friday after school through the following Monday morning, plus a three-hour visit on Wednesdays, with summer

vacation and holidays being evenly split. The trial court also terminated Father's support obligation and did not impose a support obligation upon Mother. Mother now appeals.

Analysis

I. Recusal

We first address Mother's contention that the magistrate who presided over the July 2010 custody hearing, and who signed the modification order approved by the trial court, should have recused herself from considering this matter on the basis of actual or perceived bias. The basis for Mother's argument is her assumption that Father, as a State Trooper, must have had occasion to testify before the magistrate in a number of traffic and criminal matters and, therefore, the magistrate would have been more inclined to believe Father's testimony and/or to rule in his favor.

We say Mother's "assumption," because she never objected to the magistrate presiding over this matter. There is no evidence in the record regarding how many times, if ever, Father has actually testified before the magistrate in various matters. Generally, a party must move for disqualification of a judge at the earliest opportunity after having knowledge, or reason to know, of facts that would require disqualification. See Calvert v. State, 498 N.E.2d 105, 107 (Ind. Ct. App. 1986). If a party does not move for recusal after learning or having reason to know of such facts, then the party waives any objection to the judge presiding over the case. Schmitter v. Fawley, 929 N.E.2d 859, 862 (Ind. Ct. App. 2010). Mother has waived any objection to the magistrate presiding over this case.

It is true, however, that a judge has discretionary power to disqualify himself or herself sua sponte if any semblance of bias or impropriety comes to light. Patterson v. State, 926 N.E.2d 90, 93 (Ind. Ct. App. 2010). Regardless, Mother's claim of actual or perceived bias must fail. We presume that a judge is unbiased, and an appellant must demonstrate actual personal bias to overcome that presumption. In re Estate of Wheat, 858 N.E.2d 175, 183 (Ind. Ct. App. 2006). "Merely asserting bias and prejudice does not make it so. The law presumes that a judge is unbiased and unprejudiced." Id. (quoting Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002)). In addition, the mere appearance of bias and partiality may require recusal if an objective person, knowledgeable of all the circumstances, would have a rational basis for doubting the judge's impartiality. Patterson, 926 N.E.2d at 94.

We cannot accept that the mere fact that a party to a case is a law enforcement officer, who may regularly appear before a particular judge in criminal matters, requires that judge to recuse himself or herself in a civil matter concerning that officer. We find such a proposition untenable. An allegation of bias or prejudice in such a situation simply must require more than just an officer's frequent appearance before a particular judge. Here, Mother has shown nothing more. There was no impropriety or error in the magistrate's hearing of this cause.

II. Change of Custody

We now turn to the merits of the decision to modify physical custody of C.C. The trial court here sua sponte entered an order that contained a number of findings. The

order does not contain any purported conclusions of law, except for the statements describing the ultimate change of custody. Sua sponte findings control only the issues they cover, and a general judgment standard of review will control as to the issues upon which there are no findings. In re Trust Created Under Last Will & Testament of Mitchell, 788 N.E.2d 433, 435 (Ind. Ct. App. 2003). “A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence.” Id. In reviewing a judgment, we will neither reweigh the evidence nor judge the credibility of the witnesses. Id.

We grant latitude and deference to trial courts in family matters. Heagy v. Kean, 864 N.E.2d 383, 388 (Ind. Ct. App. 2007), trans. denied. “Therefore, custody modifications are left to the sound discretion of the trial court, and we may reverse only for an abuse of that discretion.” Id. “[I]t 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.” Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (quoting Brickley v. Brickley, 247 Ind. 201, 210 N.E.2d 850 (1965)).

Modifications of custody in paternity cases are controlled by Indiana Code Section 31-14-13-6, which provides that a child custody order may not be modified unless modification is in the best interests of the child, and there is a substantial change of

circumstances in one or more of the factors that a court may consider under Indiana Code Section 31-14-13-2.¹ The factors under that statute are:

- (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.
- (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 2.5(b) of this chapter.

Courts should evaluate the impact of a change in any of those circumstances on the particular child at issue, because a change that would be inconsequential to one child might be devastating to another child. Heagy, 864 N.E.2d at 389. "We must give the

¹ Modification also may occur if there is a substantial change of circumstances in a factor or factors under Indiana Code Section 31-14-13-2.5, which governs de facto custodians. There are no de facto custodians here.

trial court latitude to determine whether a change is, or is not, substantial.” Id. A parent moving for modification of custody bears the burden of demonstrating a change in circumstances. Id. at 388.

At the outset, we note that we prefer to decide this case without entering into the swamp of character vilifications that Mother and Father traded regarding Mother’s dating practices and work schedule on the one hand, and alleged unethical or questionable behavior by Father as a State Trooper on the other. We also do not believe that modification of custody here relies upon improper consideration of evidence arising before the previous custody order, as Mother contends. Rather, we believe this case boils down most simply to the following: whether the fact that Father has been spending considerably more time with C.C. than was provided for in the original custody order justifies modifying that order to more accurately reflect the reality of the situation. We conclude that it does.

In its written order with findings, the trial court did not expressly indicate which statutory factors regarding custody had substantially changed since the time of the original custody order. That is not fatal to our review of the case, especially given that the findings were made sua sponte. We may affirm a general judgment with findings on any basis supported by the evidence. Mitchell, 788 N.E.2d at 435. We will assess whether there is evidence indicating a substantial change of circumstances with respect to any of the statutory custody factors.

First, we conclude that the parties' multi-year unofficial alteration of C.C.'s custody schedule is evidence of a substantial change in the wishes of both Mother and Father regarding custody, and also of C.C.'s interaction and relationship with Father. The original custody order provided visitation to Father in accordance with the Parenting Time Guidelines. Given C.C.'s age and the original custody order, Father's time spent with C.C. generally would have been limited to every other weekend, one evening per week, and scheduled holidays. See Ind. Parenting Time Guideline II(B)(1) (standard guideline for children three years of age and older).

Instead of this visitation schedule, Father, for a period of over two years and with Mother's full consent, spent more time with C.C. during his waking hours than Mother. Father also continued paying his support obligation to Mother during this time period. Mother does not deny the veracity of this evidence. The trial court's modification of custody merely approximates and formalizes a long-standing practice of the parties, while absolving Father of his responsibility to pay support for a child who was in his care for more hours than Mother every week. We do not think that a trial court necessarily abuses its discretion when it modifies an existing child custody order in such a way to approximate what the parties have already informally agreed, by their conduct, is an appropriate custodial arrangement for their child.

We also believe that this is a case in which the change in the child's age assists in justifying the modification of custody. The trial court in its order expressed concern that C.C. would soon begin formal schooling, and that it would be in C.C.'s best interests to

have a more stable home life during school weeks, rather than the frequent shuffling between Mother, Father, and Mother's father's home that had been occurring. It was not an abuse of discretion for the trial court to reach such a conclusion and to conclude that Father's longstanding flexibility in his work schedule provided the best opportunity for weekly stability in C.C.'s living situation.

Mother argues, in part, that modification of C.C.'s custody in favor of Father will discourage custodial parents from complying with Parenting Time Guideline I(C)(3), which states that if the custodial parent needs additional child care, "the parent needing the child care shall first offer the other parent the opportunity for additional parenting time." We considered and rejected a similar argument in Rea v. Shroyer, 797 N.E.2d 1178 (Ind. Ct. App. 2003). There, although the mother technically had physical custody of the child, the child actually spent nearly seventy percent of her time with the father in the fourteen months before the trial court modified custody in favor of the father. We held that the modification of custody did not violate the public policy, embodied in the Parenting Time Guidelines, of encouraging custodial parents to grant extra parenting time to the non-custodial parent. Id. at 1184. We noted, "This is not a situation where a non-custodial parent was allowed an extra month of visitation in the summer or a few extra days or weekends during the year." Id. Here, similarly, Father was not granted a modicum of additional parenting time on an occasional basis, but became C.C.'s primary waking-hours caregiver, for a period of over two years before the modification hearing. Modification of custody under these circumstances does not violate public policy.

Mother also contends that there was no evidence that C.C. was harmed by the existing custody order; indeed, all of the evidence seems to indicate that C.C. is a well-adjusted child. This argument, however, strikes us as supporting the trial court's action. The parties had already, de facto, modified the 2007 custody order. C.C. was well cared-for under that de facto modification. The trial court essentially formalized that de facto modification. We also observe that a policy of encouraging stability for the child is an important consideration when deciding custody modification petitions. Joe v. Lebow, 670 N.E.2d 9, 20 (Ind. Ct. App. 1996). The evidence here is that the granting of the modification petition, formalizing what had already been the case for over two years, was the course of action most likely to guarantee stability for C.C. See Rea, 797 N.E.2d at 1184. Mother's wish to return strictly to the terms of the 2007 order, by contrast, would be an action that would create more instability in C.C.'s life.

As for Mother's contention that her recent unemployment, which occurred shortly before the modification hearing, would justify returning to the terms of the 2007 order, we believe it was not abuse of discretion for the trial court to consider the entirety of the evidence regarding the previous two years, rather than just what had occurred in the previous two weeks. In other words, it would not be unreasonable to presume that at some point, Mother will obtain full-time employment again, and as between Mother and Father, Father has demonstrated an ability over a long period of time to adjust his schedule to maximize the amount of time he can spend with C.C.

We realize, of course, that many working parents, single or otherwise, often face difficult childcare situations. We do not wish to convey the impression that we are in any way “punishing” Mother for allowing Father to spend much additional time with C.C. while she worked. However, the underlying principle underlying the paternity and dissolution statutes regarding child custody is the same: the best interests of the child. In re Paternity of K.J.L., 725 N.E.2d 155, 157 (Ind. Ct. App. 2000). Keeping that in mind, we cannot say the trial court here abused its discretion in concluding that between Mother and Father, C.C.’s best interests are served by placing him in Father’s primary physical custody.

Conclusion

Father’s employment as a State Trooper did not require the magistrate who heard this cause to recuse herself, and there is sufficient evidence to support the modification of physical custody in favor of Father. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.