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:

CRYSTAL G. ROWE
New Albany, Indiana

ATTORNEY FOR APPELLEE:

KURT R. HOMANN
Collier Homann Siamas & Perkins
Crawfordsville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

T.E. and T.E. as Next Friend of A.M.H.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 54A04-0811-JV-650
	)	
S.H.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Peggy L. Quint Lohorn, Judge
Cause No. 54C01-9707-JP-155

May 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

T.E. ("Mother") appeals the trial court's grant of a petition for modification of child custody filed by S.H. ("Father"). Mother raises one issue, which we revise and restate as whether the trial court abused its discretion by granting Father's petition to modify custody. We affirm.

The relevant facts follow. On July 7, 1997, Mother filed a petition to establish paternity of her child, A.M.H., who was born on May 1, 1997. On November 6, 1998, the trial court approved an agreed entry that stated: (1) Mother was A.M.H.'s biological mother; (2) Father was A.M.H.'s biological father; (3) Mother and Father would have joint custody of A.M.H.; and (4) Mother would have primary care, custody, and control of A.M.H.

On May 17, 2006, A.M.H. was admitted to the hospital because he was "extremely aggressive at school," had made suicidal statements, and had attempted to jump out of a moving vehicle. Respondent's Exhibit at 3. On May 25, 2006, A.M.H. was released from the hospital.

In fall 2006, A.M.H. began the fourth grade and exhibited verbal outbursts, physical outbursts, and did not complete his homework. Due to A.M.H.'s behavior and diagnosis as emotionally handicapped, the school corporation recommended that A.M.H. transfer schools, and Mother agreed. When A.M.H. started at his new school, he appeared troubled, nervous, and anxious. A.M.H. received mostly F's during the first semester of fourth grade. At the end of the second semester of the fourth grade, A.M.H. received "a couple of F's for the semester grade and then some B's and C's." Transcript

at 34. When A.M.H. was inconsistent in the classroom, it was "very difficult" for the school to contact Mother. Id. at 52. The school developed a plan for A.M.H., but Mother's involvement in the plan was "[c]aring, but inconsistent, very inconsistent." Id.

In February 2007, A.M.H. stated to his counselor that he was upset with Nicholas Wolford, Mother's ex-husband, because Wolford had moved back in with the family. A.M.H. also stated that he would do whatever it took to break Mother and Wolford apart because he hated Wolford. A.M.H. told his teacher that he did not want to go home and wanted to kill Wolford. On March 5, 2007, Mother married Wolford again. That same evening, A.M.H. was admitted to the psychiatric hospital. In June 2007, Wolford left Mother, and Mother moved seven times between June 2007 and the time that Mother established her current residence in October 2007.

On July 24, 2007, Father filed a petition for permanent injunction and affidavit for temporary restraining order without notice and affidavit for contempt. The trial court scheduled a hearing on Father's petition for August 29, 2007, and awarded Father temporary primary physical custody.

After Father was granted temporary primary custody of A.M.H., A.M.H.'s fifth grade report card reveals that he had two A's, an A-, a B, three C+'s, and a B-. Between fall 2007 and spring 2008, A.M.H. became "happier" and "more secure," and "made a big turn around all together." Id. at 73-74. In the beginning of the fifth grade, A.M.H. did not want to be at school, but at the end A.M.H. was "involved with everything." Id. at 73.

On June 10, 2008, Father filed a petition to modify custody. On June 12, 2008, Father filed a request for special findings of fact and conclusions of law, and, after a hearing, the trial court entered its special findings of fact and conclusions thereon along with the following:

* * * * *

III. Judgment

IT IS THEREFORE ORDERED by the Court as follows:

> 1. It is in the best interests of [A.M.H.] that the parties shall continue to have joint legal custody of [A.M.H.] and [Father] shall have primary physical care and custody of [A.M.H.] subject to the right of [Mother] to have parenting time pursuant to the Indiana Parenting Time Guidelines.

Appellant's Appendix at 24.

The sole issue is whether the trial court abused its discretion by granting Father's petition to modify custody. 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. 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, in part that "[t]he court may not modify a child custody order unless: (1) 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 § 31-14-13-2]." Ind. Code § 31-14-13-6.[1] Ind. Code § 31-14-13-2 lists the following factors:

> (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.

Mother argues there was no showing that modification was in A.M.H.'s best interest or based upon a substantial change. Specifically, Mother challenges the trial court's findings and conclusions related to: (A) A.M.H.'s interrelationships; (B)

[1] The trial court and the parties cited Ind. Code §§ 31-17-2-21 and 31-17-2-8, which are applicable to determining custody in dissolution proceedings, while Ind. Code §§ 31-14-13-6 and 31-14-13-2 are applicable to determining custody in paternity proceedings. The paternity and dissolution statutes, however, contain virtually identical language.

A.M.H.'s academic progress; (C) A.M.H.'s stability in Father's custody; and (D) Mother's responsibility. As to each challenge, Mother 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. A.M.H.'s Interrelationships

1. Finding 32

Mother argues that the evidence does not support the trial court's Finding 32, which states, "There are no current reports or evidence of any kind suggesting [A.M.H.] has any conflicts of any serious nature with his sibling group in [Father's] household." Appellant's Appendix at 21. Mother argues that A.M.H. was sexually abused by his stepbrother. While portions of the record indicate that A.M.H. reported that his stepbrother abused him, the record also reveals a handwritten note that mentions allegations of abuse and states that "[t]hese allegations have been reported to CPS and were found unsubstantiated." Respondent's Exhibit 2. Further, Father testified that A.M.H. "moved in and blended right in like he hasn't missed a beat. He gets along with the other kids good, some days better than others, they're kids." Transcript at 178. Stepmother testified that A.M.H. and the other children "get along very, very well." Id. at 134.

2. Conclusion 2

Mother also argues that the trial court clearly erred by entering Conclusion 2, which states:

> Since the prior custody order of February 2006, the presence of Nicholas Wolford, husband of [Mother], in the life of [A.M.H.] has become an extremely significant factor and the child's interrelationship and interaction with that person, who is in the position of a step-parent, was part of the reason for [A.M.H.]'s hospitalization and poor academic progress during the 2006, 2007 school year.

Appellant's Appendix at 23. Mother argues that "[A.M.H.]'s emotional disability and depression led to his hospitalization and poor academic progress, not Wolford." Appellant's Brief at 22.

The record reveals that in February 2007, A.M.H. stated to his counselor that he was upset with Wolford because Wolford had moved back in with Mother. A.M.H. also stated that he would do whatever it took to break Mother and Wolford apart because he hated Wolford. A.M.H. told his teacher that he did not want to go home and wanted to kill Wolford. The week before A.M.H. was admitted to the hospital, A.M.H. stated to his counselor that he wanted to live with Father. On March 5, 2007, Mother married Wolford again. That same evening, A.M.H. was admitted to the psychiatric hospital.

Mother also argues that the evidence demonstrates that Mother and Wolford no longer reside together and that A.M.H. would not be living with Wolford. The record reveals that Mother had twice been married to Wolford, and those marriages ended in divorce. While Mother and Wolford separated in June 2007 and Mother testified at the July 2008 hearing that she had no intention of getting back together with Wolford, the record reveals that Mother visited Wolford in jail in May 2008. We do not reweigh the evidence and judge the credibility of witnesses. Fields, 749 N.E.2d at 108.

B. A.M.H.'s Academic Progress

Mother challenges the following findings regarding A.M.H.'s academic progress:

> 28. [A.M.H.] made extraordinary progress with remarkable improvements in his behavior, his attitudes, and his academic progress. At the start of the fifth-grade at Sommer Elementary School, [A.M.H.] was not doing required cursive writing, he was a reluctant and poor reader; he exhibited attention-seeking behavior, and he had poor self-esteem. As the semester went on, [A.M.H.]'s behavior in class improved dramatically. By the end of the 2007-2008 year, [A.M.H.] was an avid reader and received a reading award.
>
> * * * * *
>
> 30. [A.M.H.] finished the fifth grade at Sommer Elementary School with 3 A's, 2 B's and 3 C+'s; and his grades for all three trimesters showed steady progress in all courses except for Math were he went from a B- to a C+. He was a student working at grade level, with good attendance and a love of reading. [A.M.H.] was polite, friendly and pleasant although occasionally needing redirection due to his lack of focus and his ability to be easily distracted. He was no longer on any medication and his fifth grade teacher recommended that he be completely mainstreamed with no co-taught classes. (Petitioner's Exhibit E)

Appellant's Appendix at 20-21. Mother also challenges the trial court's following conclusion:

> 3. There has been a substantial, significant and continuing change in circumstances regarding [A.M.H.]'s educational progress. [A.M.H.] has progressed from a failing student with significant behavioral and emotional problems to a happy, well-adjusted student who is reading and performing at or above grade level and passing or excelling at all his academic subjects.

Id. at 23.

The record reveals that when A.M.H. was in Mother's custody and in the fourth grade, A.M.H. exhibited verbal outbursts, physical outbursts, and did not complete his

homework. A.M.H. received mostly F's during the first semester of fourth grade. At the end of the second semester of the fourth grade, A.M.H. received "a couple of F's for the semester grade and then some B's and C's." Transcript at 34. Cindy Huddleston, one of A.M.H.'s teachers, said that A.M.H.'s progress in spring 2007 did not "go very well." Id. at 56. When A.M.H. was inconsistent in the classroom, it was difficult for the school to contact Mother. Huddleston testified that the success or failure of the plan developed by the school system administration and the teachers is dependent on the degree of parental involvement, and that Mother's involvement in A.M.H.'s plan was "[c]aring, but inconsistent, very inconsistent." Id. at 52.

After Father was granted custody of A.M.H., A.M.H.'s fifth grade report card reveals that he had two A's, an A-, a B, three C+'s, and a B-. Mother argues "the record reveals that, over the course of the year that [A.M.H.] resided with Father, [A.M.H.]'s grades – with the exception of spelling – showed no improvement." Appellant's Brief at 22. The record reveals that A.M.H's grades for English, Handwriting, Reading, Science/Health remained the same. A.M.H.'s grades for Spelling, Art, Music, and Social Studies improved. Between fall 2007 and spring 2008, A.M.H. became "happier" and "more secure," and "made a big turn around all together." Transcript at 73-74. In the beginning of the fifth grade, A.M.H. did not want to be at school, but at the end, A.M.H. was "involved with everything." Id. at 73. Once again, Mother asks that we reweigh evidence and judge the credibility of witnesses, which we cannot do. Fields, 749 N.E.2d at 108.

C. A.M.H.'s Stability in Father's Custody

1. Finding 37

Mother challenges the following finding:

> 37. On one occasion since February, 2006 Child Protective Services investigated a complaint at [Father]'s home involving [Father]'s admitted striking of his stepson in the nose. Father characterized the incident as accidental when his stepson walked up behind him; no further CPS involvement was taken, no abuse was substantiated, and no criminal charges were generated.

Appellant's Appendix at 22. Specifically, Mother argues that Finding 37 "significantly discounts the suitability of Father's home and previous investigations from Child Protective Services." Appellant's Brief at 23. Mother points to a CPS investigation into Father's home in March or April 2008 in which CPS contacted Father and Stepmother based upon a complaint that their animals were defecating and urinating on the floor and that Father and Stepmother were not properly cleaning up after them. However, CPS determined that the claim was unfounded. Mother also points to the CASA's report which she claims substantiates the claim that Father's house was unsanitary. The CASA's report states that Father's home "is rather small and appears to be a struggle to keep clean with the number of children, pets, and stuff in the home." Appellant's Appendix at 28. However, the report also states that A.M.H. had his own bedroom and that the home is located on a quiet street in a small town. Stepmother testified regarding Father's house as follows:

> [W]e have one dog, three cats and the cats are indoor outdoor cats. We have lived in that house for almost seven years. There are seven

> people. Everyone has their own bedroom except for myself and my husband and it is an old home that is oddly configured. So I see where [the CASA] can say rather small because some of the bedrooms are a little small, but they are still complete bedrooms. But like I say I took umbrage with the struggle to keep clean with the amount of stuff and pets and children because we have the exact same amount of children in our home as [Mother] does when [A.M.H.] is with her. So I'm very strongly objecting to that statement. I'm also objecting to the fact that rather [sic] small. We're buying our house, it's got enough square feet for seven people so there shouldn't be a problem. Nobody has to share a room.

Transcript at 154. Based upon the record, we cannot say that the trial court clearly erred by making this finding, and, again, we cannot reweigh evidence and judge witness credibility. Fields, 749 N.E.2d at 108.

2. Findings 24 and 25; Conclusion 4

Mother also challenges the following findings of the trial court:

> 24. Over the course of counseling with Mr. Uebinger, the violent imagery gradually faded away and [A.M.H.] began drawing pictures of houses and friends and more appropriate images. (Uebinger Deposition, Page 16, lines 8-14) [A.M.H.]'s life became more stable and consistent. (Uebinger deposition pages 40, 41)
>
> 25. [A.M.H.]'s suitability for medication therapies was fully addressed by Mr. Uebinger in cooperation with Dr. Amber Hussein, the family physician utilized by [Father]. (Uebinger Deposition, Page 12, page 52) [A.M.H.]'s mental health improved dramatically following the change of custody and cessation of prior medications.

Appellant's Appendix at 20. Mother also challenges the trial court's following conclusion:

> 4. There has been a substantial, significant and continuing change of circumstances regarding the emotional and mental health of [A.M.H.]. He has improved from an angry, disturbed and troubled child who dwelled on violence, living in a chaotic, unstructured and frequently

> relocating home environment; to a happy, well-adjusted child no longer in need of prescription medication and receiving significant benefit from individual psychotherapy arranged by his father.

Id. at 23. Mother appears to argue that the findings and conclusion are erroneous because Father failed to address A.M.H.'s emotional needs.[2]

Mother points to two incidents and argues that Father "has wholly failed to address [A.M.H.]'s emotional handicap, opting instead to ignore it and treat it like a normal behavioral problem." Appellant's Brief at 24. Specifically, Mother points to a 2006 investigation by the Sheriff's Department into allegations that Father struck his stepson, J.H., on the nose. The record reveals that Father accidentally struck J.H. on the nose when J.H. walked up behind Father. The Sheriff's Department talked to Father, but no charges were filed and CPS was not involved. Mother also points to an incident between A.M.H. and Stepmother. A.M.H. screamed in Stepmother's face, and Stepmother told A.M.H. that his behavior was not acceptable. A.M.H. was "very disrespectful," and Stepmother testified that she "popped"[3] A.M.H. in the mouth. Transcript at 150. Stepmother told Father what had happened, and Father said that A.M.H. had been punished enough.

---

[2] Mother mentions the prior allegation of molestation and argues that "[p]sychological therapy is not successful in a vacuum" and that "[b]ecause Uebinger was not provided with the necessary information to counsel [A.M.H.] appropriately, Findings 24 and 25 . . . are clearly erroneous." Appellant's Brief at 25 (footnote omitted). We have held that the record reveals that the allegations of sexual abuse were reported to CPS and found to be unsubstantiated. See supra Part A. Thus, we cannot say that the trial court erred on this basis.

[3] Stepmother testified, "I did not smack [A.M.H.]. I popped him. I was a ["]p["] like that. No harder than this." Transcript at 150. Stepmother also testified that A.M.H. did not cry because "it was a pop in the mouth[;] it wasn't a hit." Id.

We cannot say that the incidents relied upon by Mother indicate that Father failed to address A.M.H.'s emotional issues. Rather, the record reveals that Father took A.M.H. to Brad Uebinger, a professional psychotherapist, for counseling. Uebinger stated that A.M.H. was "very, very angry" when he began counseling. Uebinger testified that after his initial session with A.M.H., he did not recommend evaluation for possible medication. Uebinger counseled A.M.H. weekly during a part of 2007 and every other week in 2008. Between September 2007 and March 2008, Uebinger testified that A.M.H.'s progress was remarkable and "very impressive." Appellant's Appendix at 232. Based on the record, we conclude that the record supports the trial court's findings and the findings support the trial court's conclusion, and we do not reweigh the evidence and judge the credibility of witnesses. Fields, 749 N.E.2d at 108.

3. Findings 34 & 36

Mother challenges the following findings:

> 34. Father participates significantly in all areas of [A.M.H.]'s life including his education progress, [A.M.H.]'s counseling with Mr. Uebinger, and [A.M.H.]'s other athletic and community activities.
>
> * * * * *
>
> 36. [A.M.H.] has a good relationship with both his father and [Stepmother]. . . .

Appellant's Appendix at 21-22. Mother argues that "Findings 34 and 36, which suggest that [A.M.H.] has a good relationship with Father and [Stepmother] and that Father participates significantly in all areas of [A.M.H.]'s life, are not supported by the

evidentiary record." Appellant's Brief at 25. Mother points to the CASA report, which states, "[A.M.H.] stated that his father did not spend enough time with just him . . . ." Appellant's Appendix at 29. At the hearing, the following exchange occurred during the direct examination of Father:

> Q. The Guardian Ad Litem report which I'm sure you've read and reviewed states that [A.M.H.] [i]s afraid of his dad, CASA state's [sic] that he stated to his CASA that he hates his father, then angry instead of hating. Dad doesn't spend enough time with me. What's your reaction to that?
>
> A. Shocked. For somebody that hates me he sure likes to come up and hug me. You know if I hated somebody I wouldn't want to be in the same room with him and he'll climb up on my lap to watch TV with me. So that's really shocking. When I read that I was totally shocked and taken back. And as far as him being afraid of me he doesn't act like he's afraid of me. He doesn't like it when I tell him to go clean his room or go do a chore sometimes because he'd rather be playing a video game or playing outside with one of his friends, but most kids don't.

Transcript at 186-187. Father also disagreed with the CASA report's statement that he was absent and said that the CASA was "completely wrong." Id. at 199. Mother argues that "[t]he evidence reveals that Father works outside the home and spends his free time coaching multiple sports and is, therefore, away from [A.M.H.] a significant amount of time." Appellant's Brief at 25. Father is president of a wrestling club and has involved his children in the club. Based on the record, we conclude that the record supports the trial court's findings.

D. Mother's Responsibility

1. Finding 20

Mother challenges the following finding:

> 20. The Court held a hearing and entered its order of August 29, 2007 which continued [A.M.H.] in the joint custody of his parents, but placed him in the physical custody of [Father]. Despite the Court's order that [A.M.H.] continue on his medication regime, and that [Mother] provide the child's medication to [Father] at the appointed exchange of custody, [Mother] released the child to [Father] with only the clothing on his back.

Appellant's Appendix at 19.

The record reveals that after the August 2007 order transferring primary custody of A.M.H., when Mother gave A.M.H. to Father, A.M.H. had nothing packed. A.M.H. had "the shirt on his back, a pair of shorts, no shoes, no socks, nothing else that was it." Transcript at 178. Mother did not give Father any medical records, prescription bottles, overnight clothes, books, or toys. Father contacted Mother a few days later and asked her about A.M.H.'s medicine, and Mother said that she would give Father the medicine but never did. Based upon the record, we conclude that the record supports the trial court's finding.

2. Finding 39

Mother challenges the following finding:

> 39. Mother has demonstrated an inability to work with or cooperate in a meaningful way with [A.M.H.]'s teachers and school administrators.

Appellant's Appendix at 22.

Mother argues that Father does not take responsibility for his actions or omissions and that Mother has consistently supported A.M.H. through his emotional trauma and

depression. The record reveals that when A.M.H. was inconsistent in the classroom, it was difficult for A.M.H.'s teacher to contact Mother. Huddleston testified that the success or failure of a plan developed by Huddleston, the school system administration, and teachers is dependent on the degree of parental involvement, and that Mother's involvement in A.M.H.'s plan was "[c]aring, but inconsistent, very inconsistent." Transcript at 52.

In summary, we conclude that the trial court's findings were not clearly erroneous, and that Mother's requests are that we reweigh the evidence and judge the credibility of witnesses, which we cannot do. Fields, 749 N.E.2d at 108. In light of the changes in A.M.H.'s interactions with Mother and Wolford, A.M.H.'s adjustment to school and academic improvements, and the improvement in A.M.H.'s mental health, we conclude that the evidence is sufficient to establish that modification is in the best interests of A.M.H. and that there were substantial changes in multiple factors listed in Ind. Code § 31-14-13-2. See Rea v. Shroyer, 797 N.E.2d 1178, 1184 (Ind. Ct. App. 2003) (holding that the trial court did not abuse its discretion when it modified custody); Barnett v. Barnett, 447 N.E.2d 1172, 1175 (Ind. Ct. App. 1983) (holding that instability of mother's life, considered with other factors, warranted modification of custody).

For the foregoing reasons, we affirm the trial court's grant of Father's petition to modify the custody A.M.H.

Affirmed.

CRONE, J. and BRADFORD, J. concur