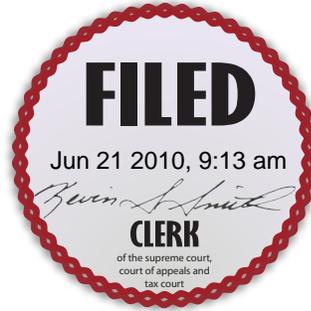


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD A. BROWN,
Appellant-Petitioner,

vs.

MARY BROWN WHITLEDGE,
Appellee-Respondent.

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No. 82A01-0912-CV-608

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D04-0504-DR-354

June 21, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Richard Brown (“Father”) appeals the dissolution court’s grant of a petition to modify child custody filed by Mary Brown Whitledge (“Mother”). We affirm.

Issue

Father raises one issue, which we restate as whether the dissolution court erred by modifying child custody.

Facts

Father and Mother were married and had two children together, R.C., born in September 1990, and D.C., born in November 2002. R.C. is now an adult and is not a subject of this custody modification proceeding. In 2005, Father and Mother separated. The trial court granted a dissolution of the marriage in bifurcated proceedings, leaving custody issues to be determined at a later date.

After both Mother and D.C. tested positive for methamphetamine, a child in need of services (“CHINS”) action was filed regarding R.C. and D.C. In December 2005, Mother was charged with dealing in methamphetamine as a Class A felony, but the charges were later dismissed. On January 20, 2006, the CHINS court ordered that Father’s aunt, Lila Arvin, and her husband have custody of D.C. and R.C. due to Mother’s drug usage and Father’s anger issues and inappropriate behavior. Father was allowed only supervised visitation.

The Arvins filed a petition with the dissolution court seeking custody of the children. On December 1, 2006, the dissolution court held a hearing regarding custody of the children. At the time of the hearing, the Arvins were seeking only custody of R.C.

and had abandoned their request for custody of D.C. Over the objection of the Arvins, the dissolution court granted custody of both R.C. and D.C. to Father. Mother was not granted visitation with the children except as ordered by the CHINS court. The Arvins were granted visitation with the children once a month.

At some point, the CHINS proceeding was dismissed. In May 2007, Mother filed a petition seeking parenting time with D.C. On July 23, 2007, the dissolution court granted supervised parenting time to Mother. In October 2008, Mother filed a petition to modify custody of D.C.

In March 2009, the dissolution court appointed a court-appointed special advocate (“CASA”). The CASA initially believed that placement of D.C. with Father was in D.C.’s best interest. As the CASA’s interaction with Father increased, she changed her mind. D.C. informed the CASA that Father punished D.C. for stating that he wanted to spend time with Mother. In June 2009, the CASA filed a report with the dissolution court recommending that Mother have custody of D.C. The CASA observed that D.C. appeared more comfortable with Mother and interacted more with her. After filing her report, the CASA called Father, and Father hung up on her. When the CASA called back, Father said that she was not allowed to call him, that her report to the dissolution court was a lie, that she was “barren because it was God’s will,” and that she was a “spun Catholic.” Tr. pp. 111, 206. Father yelled at the CASA, and the CASA testified that she felt intimidated by a parent for the first time in seven years in acting as a CASA. In his testimony, Father admitted making these statements to the CASA. Father testified that the CASA’s report was not truthful, “so [he] figured [he would] enlighten her a little bit

with the truth.” Id. at 206. After receiving the CASA’s report, the dissolution court entered an interim order allowing Father and Mother to have equal parenting time.

After a hearing on Mother’s petition for modification of custody, the dissolution court entered findings of fact and conclusions thereon granting Mother’s petition. The dissolution court found a substantial change in several of the factors necessary to modify custody. In particular, the dissolution court found a substantial change in the “mental and physical health of the individuals involved.” App. p. 22. The dissolution court found:

Father’s anger towards the Mother which was evident in both his dealings with the CASA and during his testimony and time in Court is a major factor in the Court’s decision. The Father[’s] demeanor while testifying, including pointing repeatedly at the Mother during his testimony, the tone of his voice, and body language made it abundantly clear that he possesses a high level of personal animosity and resentment towards the Mother. This fact was also verified by a number of witnesses who testified to the Father’s anger against the Mother.

Id. at 22-23. The dissolution court also found a substantial change in the “interaction and interrelation with the child” factor. Id. at 23. The dissolution court noted that “Father has yelled obscenities at the Mother in front of the minor child. . . . This conduct by the Father is completely inappropriate and not in the child’s best interest.” Id. The dissolution court found that Father routinely referred to Mother as “whore” and “f***ing whore” even when D.C. was present. Id. The dissolution court noted that Father was estranged from his own family except for his mother, which would “impact on the child’s community and adjustment to the community and his family.” Id. The dissolution court also found Father’s treatment of the CASA was “completely inappropriate” and

“reflect[ed] poorly on his character and on his ability to parent” D.C. Id. at 23-24. In considering D.C.’s interaction and interrelationship with his parents, the dissolution court placed a high value on the CASA’s testimony that D.C. seemed “more relaxed and more normal in [his] relationship with the Mother than with the Father.” Id. at 24. The dissolution court granted Mother’s petition to modify custody, gave custody of D.C. to Mother, and granted Father parenting time pursuant to the Indiana Parenting Time Guidelines.

Analysis

The issue is whether the dissolution court erred by modifying child custody. In doing so, the dissolution court entered sua sponte findings of fact and conclusions thereon. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When a court has made special findings of fact, we review sufficiency of the evidence using a two-step process. Id. First, we must determine whether the evidence supports the dissolution court’s findings of fact. Id. Second, we must determine whether those findings of fact support the dissolution court’s conclusions. Id.

Findings will only be set aside if they are clearly erroneous. Id. “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, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id.

A. Dissolution Court's Findings

On appeal, Father argues that one of the dissolution court's findings is not supported by the evidence. The dissolution court found:

[T]he Court in considering paragraph 4(a), the child's [interaction and relationship] with his parents, places a high value on the CASA's credible testimony that her observations were that the minor child was more relaxed and more normal in his relationship with the Mother than with the Father.

App. p. 24. Father argues that the CASA's testimony does not support this finding.

The CASA testified that, initially, she believed that custody should remain with Father. However, after her investigation and talking to D.C., she had concerns regarding Father as a parent. D.C. informed the CASA that he was punished for telling her that he wanted to see Mother more often. The CASA noted that D.C. seemed to have more playtime with Mother and stepfather than with Father. Later in her testimony, the CASA was asked whether D.C. seemed more comfortable with Mother than with Father, and the CASA responded: "It appeared to be that way in my initial visit with both parents. . . . I did have the opportunity to go back to the mother's home and see that interaction. I was not permitted by the father to go back to his home." Tr. p. 100. Given the CASA's testimony, we conclude that the evidence supported the dissolution court's finding.

B. Substantial Change

Indiana Code Section 31-17-2-21(a) provides that a dissolution 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 or more of the factors that the court may consider under Indiana Code Section 31-17-2-8. Indiana Code Section 31-17-2-8 provides that the dissolution court is to consider all relevant factors, including:

- (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 dissolution court here found substantial changes in several of the factors mentioned in Indiana Code Section 31-17-2-8. In particular, the dissolution court focused on the following factors: (1) the mental and physical health of all individuals

involved; (2) the interaction and interrelationship of the child with his parents; and (3) the child's adjustment to his community. The dissolution court's decision was based mainly on Father's demeanor toward Mother and inappropriate conduct in front of D.C.

On appeal, Father argues that no substantial change has occurred since the initial custody determination. According to Father, the dissolution court found a substantial change as a result of his bad behavior and that the dissolution court was fully aware of his bad behavior prior to the initial custody decision. Thus, Father argues that his bad behavior cannot be a substantial change in circumstances.

At the time of the initial custody determination, Mother was addicted to methamphetamine. Mother is now drug free and has demonstrated an ability to care for D.C. Prior to the dissolution court's initial custody determination, D.C. had been cared for by the Arvins. However, the Arvins were seeking custody of R.C., but they were no longer seeking custody of D.C., leaving only Father seeking custody of D.C. at that time. Although the dissolution court may, or may not, have been aware of Father's bad behavior when it granted custody of D.C. to Father, Mother clearly presented evidence of a substantial change regarding the effect of Father's behavior on D.C.¹

¹ In support of Father's assertion that the dissolution court was aware of his bad behavior at the time it awarded custody of D.C. to him, Father cites a lengthy CHINS court order from January 20, 2006. However, it is unclear whether that order was in the clerk's record for the dissolution court proceedings. There is little in the record presented to us of bad behavior evidence presented to the dissolution court. The Arvins' December 2006 memorandum in support of their request for custody of R.C. discusses Father's behavior, but that memorandum concerns mainly Father's conduct toward R.C. Although the dissolution court apparently held a hearing on the Arvins' petition for custody, we were not provided with a transcript of that hearing.

Mother presented evidence that Father often threatened Mother in front of D.C. Mother's adult daughter, Randie Dale, heard Father say to Mother, "I'm going to kill you," and "I'm going to get you b****." Tr. p. 17. During one visit with Mother, D.C. was scared that Mother would be killed and ducked when he was in the car with her because he was afraid that bullets would come through the window. Father had told D.C. that Father was going to kill Mother and that D.C. should duck if he heard shots. After one visit, when Mother dropped D.C. off, D.C. turned around to tell Mother goodbye and Father said, "you talk to that whore on your own time, get in the car" Id. at 145.

On January 31, 2009, during Mother's visitation, D.C. complained of a stomach ache, and Mother called Father to inform him. Lila could hear Father shouting at Mother over the phone. Father said, "you f***ing whore. You have molested him." Id. at 50. Mother also called Father to inform him that D.C. had blood in his stool. Father said that Mother was a "crazy b****" and that she was harming D.C. Id. at 150.

Father often calls Mother names in front of D.C., including "whore," "Ferris whore hooker," and "meth addict." Id. at 145. D.C. covers his ears and puts his head down. On one occasion, he rolled on the ground and started screaming and crying for Father to stop. During D.C.'s open house at school, in front of D.C.'s teacher and class, Father said to Mother, "you're nothing but a piece of sh**. . . . you need to exit the building now. Do you understand me. Exit the building you piece of sh**." Id. at 147. D.C. was embarrassed and cried.

Father is apparently unable to communicate with Mother without resorting to yelling and name calling. Father's behavior is completely inappropriate and harms D.C.

The dissolution court's conclusion that substantial changes have occurred in several factors as a result of Father's behavior and the harm to D.C. as a result of Father's behavior is not clearly erroneous.

Conclusion

The dissolution court did not err when it found substantial changes warranting a modification of custody. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.