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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF S.M.K. and J.E.K., BY JACKLYN M. KUNZE, now METCALFE (Mother),	)	
Appellant/Cross-Appellee,	)	
vs.	)	No. 50A03-1101-JP-39
JAMES CARL KUNZE, JR. (Father),	)	
Appellee/Cross-Appellant.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable A. Christopher Lee, Special Judge
Cause No. 50D01-0406-JP-4

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jacklyn M. Kunze ("Mother"), pro se, appeals the trial court's denial of her motion to modify custody. James Carl Kunze, Jr. ("Father") cross-appeals and raises the issue of whether the trial court erred in denying his motion for attorney's fees.

We affirm.

ISSUES

Mother raises the following issues:

1. Whether the trial court abused its discretion in determining that modification of custody was not warranted.

2. Whether the trial court abused its discretion in not ordering an investigation and report pertaining to the custodial circumstances.

On cross-appeal, Father raises the following issue:

3. Whether the trial court abused its discretion in denying Father's motion for attorney's fees.

FACTS

On November 18, 2005, the trial court issued an order modifying the then-existing joint custody order regarding Father's and Mother's relationship with their children, S.M.K. (born in 2000) and J.E.K. (born in 2002). The trial court found that "the existing joint custody order is unworkable because of the inability of the parents to work together for the best interests of these children; the Court believes that custody with the father is in the children's best interests." (Mother's App. 1). In its attached "Memorandum of Opinion," the trial court determined that custody with Father "was better for the children in that he has proven the more stable of the two parents and has shown a better ability to

make appropriate life's [sic] choices in their best interests." (Mother's App. 2-3). The trial court also determined that Mother "perhaps has more potential for socioeconomic upward ability, but thus far her potential has been unrealized." (Mother's App. 3).

On August 30, 2010, Mother filed a verified petition for modification of custody, alleging that a substantial change of circumstances in the home environments of both Father and Mother necessitated the modification. Specifically, Mother alleged the following: (1) Father maintains an unsafe home environment by owning two pit-bulls; (2) Father maintains an unsafe home environment by purchasing and gifting pocket knives to S.M.K. and J.E.K.; (3) Father engages in "verbally abusive relationship conduct" with Jessica Balboa ("Jessica"), his girlfriend and the mother of his youngest child, S.K.; (4) Father engages in "verbally abusive conduct" with S.M.K. and J.E.K.; (5) S.M.K. and J.E.K. have "an aggressive and physically violent relationship" with Jessica's nine-year-old son, T.B.; and (6) Father is unemployed and "has not held any form of significant employment for a period of time." (Mother's App. 4-5). In the petition, Mother alleged that she is employed and has established "a stable home environment with her current husband and the siblings of [S.M.K. and J.E.K.], with whom [S.M.K. and J.E.K.] share a positive relationship." (Mother's App. 5). In light of the alleged circumstances, Mother requested that the trial court grant her temporary physical custody and appoint a guardian ad litem or other court-appointed individual to conduct "a custody evaluation for the Court's benefit in resolving this matter." (Mother's App. 5-6). Mother further requested that the trial court grant her "all just and proper relief due her in the premises." (Mother's App. 6). Father answered and requested attorney's fees.

After a hearing, the trial court denied Mother's petition for modification and Father's request for attorney's fees. With regard to the petition for modification, the trial court stated in its written order that "[i]n making this denial, the Court finds that there has not been a substantial and continuing change of circumstances warranting a modification of custody." (Mother's App. 12). The particular circumstances of the case are discussed below.

DECISION

1. Modification of Prior Custody Order

Mother contends that the trial court abused its discretion by not determining that there have been a number of substantial changes in circumstances that warrant modification of the 2005 custody order. For the sake of clarity, we will consider below each alleged substantial change under the heading designated by Mother in her brief.

Generally, we review trial court determinations in child custody modifications for an abuse of discretion. *Green v. Green*, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006). Our supreme court has expressed a "preference for granting latitude and deference to our trial judges in family law matters." *In re Paternity of BA.S.*, 911 N.E.2d 1252, 1254 (Ind. Ct. App. 2009) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178 (Ind. 1993)). The Court recently re-emphasized this preference, stating that appellate courts afford such deference because of the trial judge's "unique, direct interactions with the parties face-to-face . . . ." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). "Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, our trial judges are in a superior position to ascertain information and apply common sense,

particularly in the determination of the best interests of the involved children." *Id.* In reviewing the trial judge's ruling, we may neither reweigh the evidence nor assess witness credibility, and we will consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. *In re Paternity of P.R.*, 940 N.E.2d 346, 351 (Ind. Ct. App. 2010). In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered. *Id.*

Modifications of custody subsequent to a paternity determination[1] are made according to Indiana Code section 31-14-13-6, which provides that a trial court may not modify a child custody order unless (1) the modification is in the best interests of the children and (2) there is a substantial change in one or more of the factors that the court may consider under Indiana Code section 31-14-13-2. Indiana Code section 31-14-13-2 provides that the trial court is to consider all relevant factors, including:

> (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

[1] This ongoing action was originally filed as a paternity case.

(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 . . . .

a. Interactions and Relationships

Mother first contends that Father's home has substantially changed since the 2005 custody order. She emphasizes that Jessica has moved into the house with her two children and that Father and Jessica have a child. Such change is inevitable, and standing alone, does not constitute a substantial change warranting modification of custody. Indeed, Mother's home has also changed with the addition of a husband and child.

Mother also contends that the trial court ignored her testimony that a substantial change has occurred because S.M.K. is afraid of Jessica's nine-year-old, T.B., who allegedly tried to stab S.M.K. in the stomach with a pocket knife before chasing her to a neighbor's house while wielding the pocket knife. Mother also emphasizes a photograph that depicts bruises allegedly inflicted by T.B. upon S.M.K.'s neck.

The trial court heard Father's testimony that he has not observed any undue conflict between the children in his house. The trial court also heard Father's testimony that S.M.K. has not informed him of any problem with T.B. Further, Father testified that he did not observe any bruises on S.M.K.'s neck. The trial court credited Father's

testimony, and we will not reassess the credibility of the witnesses or reweigh the evidence.

Mother further contends that Father recently has stopped taking S.M.K. and J.E.K. to visit with Mother's grandparents. However, Mother does not show how Father's actions constitute a substantial change, especially in light of her failure to take the children for visits to her grandparents when she has physical custody of them.

Mother finally contends that the evidence should be interpreted to indicate that that although S.M.K. and J.E.K. have many relatives on their Father's side that live near their Plymouth home, they do not have close relationships with those relatives. Mother points to testimony by Father's aunt, Kathryn Bottorff ("Kathryn"), as proof that there are many relatives but no close relationships. We initially note that Mother does not contend that any lack of "close" relationships is a change of circumstances that has occurred since the 2005 order. Furthermore, our examination of the record shows that Kathryn testified that she interacted with S.M.K. and J.E.K. "four (4) or five (5) times a month." (Tr. 81). She further testified that Father, along with S.M.K. and J.E.K., visit the large extended family periodically. We cannot say that the trial court abused its discretion in concluding that there has not been a substantial change in relationships.

b. Physical and Mental Health

Mother contends that the trial court abused its discretion in not finding that Father's change in physical health is a substantial change of circumstances requiring modification. Mother points to Father's testimony that he is awaiting a determination on his claim for disability. She emphasizes Father's testimony that he cannot stand for

periods exceeding a half hour and that he has lumbar disc disease, carpal tunnel syndrome, and migraines. She also emphasizes that apparently a physician has ordered a lift restriction of ten pounds. She argues that a person who cannot lift his children in a time of emergency should not have custody of them.

The trial court, which heard the testimony and observed the witnesses, reasonably could have concluded that Mother's lack of stability, as evidenced by her frequent moves, offsets any negative effect of Father's change in physical health. In short, the trial court reasonably could have determined that in light of Mother's lack of stability, it is in the best interest of the children to live with Father, who has provided them with the stability of living in a single location while he battles his physical limitations. Furthermore, the lift restriction appears to relate to aggravation of Father's carpal tunnel syndrome. If so, it does not limit his ability to respond to an emergency situation.

Mother also contends that Father's ongoing learning disability affects his ability to help S.M.K. and J.E.K. with their homework. The record, however, shows that Father has made the children's education a priority; and he has procured tutors to help them with their homework. Although J.E.K. had a slow start in school, recent report cards from his school show that he is now succeeding at age-appropriate levels. Indeed, Father worked out a summer visitation schedule with Mother which allowed J.E.K. to go to summer school without Mother having to do the driving. Recent report cards also show that S.M.K. is doing well in school.

Mother further contends that Father's dependence on government assistance warrants modification. In support of this contention, she cites *Farley v. Farley*, 172

Ind.App. 120, 130, 359 N.E.2d 583, 589 (1977), wherein a panel of this court opined that "public policy favors the award of custody of a child to a parent who will support the child and end its dependency upon the taxpayer for support."

The record indicates that Jessica's income pays many of the household bills, but that government funds pay for rent, some utility bills, and the children's medicine. The record also indicates that Mother has begun and has left a number of jobs since the 2005 custody order, and that her testimony about her current position in "e-commerce" neither defined the job nor the income derived therefrom. The record further indicates that state prosecutors were confounded on a number of occasions by Mother's lack of permanent addresses as they tried to serve Mother with notices of rule to show cause hearings concerning her non-payment of support. The court could have reasonably concluded that it was not in the best interests of the children to remove the children from the home and school district they have known since the 2005 custody determination.

c. Age and Sex of the Children

Mother contends that modification is warranted because S.M.K. is nearing puberty. Mother argues that her daughter "needs her mother more than when she was younger." Mother's Br. at 12.

The fact that a child has grown older "does not in itself constitute a substantial change in circumstances. If it did, every custody order would be subject to automatic modification as the child grows older." *Bryant v. Bryant*, 693 N.E.2d 976, 978 (Ind. Ct. App. 1998), *trans. denied.* Here, Mother fails to provide any evidence that S.M.K.'s best interests are not being served under the current custody arrangement.

d. Failure to Share Information with Mother

Mother contends that the trial court abused its discretion in not finding that a substantial change occurred because Father failed to provide Mother with school information. Father testified, however, that he at one time provided the school with Mother's address so that she would receive notices of school activities and the children's grades. However, Mother did not update the address after each of her frequent moves. In addition, the children's report cards, which were entered into evidence, clearly instruct parents that the school provides a twenty-four hour online system that enables the parents to monitor their children's progress on the Internet. The parent may receive a user name and password by contacting the school. Mother did not indicate that she used this valuable informational tool or that Father prevented her from doing so.

Mother also contends that Father failed to provide her with needed information about the children's medical needs. She argues that she did not know that J.E.K. was on medicine to treat his attention deficit disorder until she saw J.E.K. pull out his hair as a side effect of the medicine that the family doctor had prescribed to combat the disorder. In addition, Mother contends that Father has not provided her with insurance cards.

Father testified that he calls Mother about any "really big" doctor's appointments. (Tr. 56). He further testified that J.E.K. was pulling out his hair before he was put on the medicine, not after. He testified that Mother's single complaint about lack of notification has been over the placement of both children on the medicine for treatment of their respective disorders. He testified, however, that Mother's observation of the subsequent improvement in the children quieted her complaint.

We note that Indiana Parenting Time Guideline section 1(D)(4) states that the custodial parent should notify the noncustodial parent if a child "is undergoing evaluation or treatment" or is experiencing "any medical emergencies or illness . . . that requires medical attention." Although it appears that Father did not comply with this section of the Guidelines, we cannot say that the trial court abused its discretion in finding that this single indiscretion did not require modification. Any possibility of future lack of notice can be prevented by an agreement between the parents or by trial court order.

Father also testified that he possesses the insurance information and the insurance cards, and he stated that he did not provide either to Mother. Indiana Parenting Time Guideline section 1(D)(5) provides that a parent "who has insurance coverage on the child shall supply the other parent with current insurance cards" and relevant insurance information. Although Father's failure to provide the cards and information do not require a change in custody under the circumstances, such provision should be made.

In summary, we conclude that the trial court properly exercised its discretion in determining under the circumstances of this case that modification of custody was not warranted. However, we encourage both parties to put the best interest of their children ahead of their personal interest and to share educational and medical information between themselves on a timely basis.

2. Investigation and Report

Mother contends that the trial court abused its discretion in not appointing a guardian ad litem or a court appointed special advocate to conduct an investigation into the allegations she made in her petition and at the custody hearing. Mother points to

issues involving (1) T.B.'s alleged violence; (2) Father's use of vulgar language around the children; (3) Father's possession of pit bulls; and (4) Father's disabilities.

Indiana Code section 31-17-2-12 states that a trial court *may* order an investigation and report concerning custodial arrangements for a child upon request of a parent and after evidence is submitted upon a petition in custody proceedings. The word "may" in a statute ordinarily implies "a permissive condition and a grant of discretion." *Romine v. Gagle*, 782 N.E.2d 369, 380 (Ind. Ct. App. 2003), *trans. denied*. We review a trial court's refusal to appoint a custody evaluator for an abuse of discretion. An abuse of discretion occurs when a trial court's ruling is clearly against the logic and effect of the facts and circumstances before the court. *Matzat v. Matzat*, 854 N.E.2d 918, 919 (Ind. Ct. App. 2006).

Here, as we state in our resolution of Issue 1, the trial court listened to the evidence and viewed the photograph that allegedly showed bruises inflicted by T.B. We do not believe that the trial court abused its discretion in deciding that the evidence lacked sufficient weight to warrant further investigation. It was within the trial court's discretion to assess the witnesses' credibility and to credit Father's testimony that the nine-year-old T.B. was not a danger to S.M.K. or J.E.K. It was also within the trial court's discretion to credit Father's testimony that he did not use vulgar language around S.M.K. and J.E.K. Furthermore, Mother could have produced the neighbor to testify regarding the knife incident, if such indeed had occurred.

Furthermore, Father did not own the pit bulls at the time the motion for modification for custody was filed. Accordingly, no investigation was necessary.

We addressed Father's disabilities in our discussion of Issue 1. As a result, we cannot say that the trial court's exercise of discretion to refuse to open an investigation is clearly against the logic and effect of the facts and circumstances before it.

3. Attorney's Fees

On cross-appeal, Father contends that the trial court erred in not ordering Mother to pay his attorney's fees. Indiana Code section 31-14-18-2 permits the trial court to order payment of attorney's fees. In making such an award, the trial court should consider the parties' resources, their economic condition, and their respective ability to earn an adequate income through employment. *In re Paternity of A.J.R.*, 702 N.E.2d 355, 363 (Ind. Ct. App. 1998). A trial court's attorney's fee order is reviewed for an abuse of discretion. *Id*. at 364.

Here, Father contends that an attorney's fee award is warranted because "the trial court took evidence that implied that Mother was upwardly mobile." Father's Br. at 11. Father emphasizes that he, on the other hand, awaits a determination on his petition for disability benefits.

The only evidence of Mother's earning power is her testimony that she has been involved in "e-commerce" for the last three years. There is no evidence defining what e-commerce entails or establishing how much Mother earns. Also, the transcript page indicated by Father in his brief does not establish that Mother is "upwardly mobile"; indeed, it indicates that Mother frequently changes residences and that not every change is "upward." (Tr. 25). At most, the record establishes that the 2005 custody order stated that Mother "perhaps has more potential for socioeconomic upward mobility, but thus far

her potential has been unrealized." (Mother's App. 3). There is no evidence of Mother's upward mobility or potential thereof at the time Father's request was made. Furthermore, the extent of father's disability is still unresolved. We cannot say that the trial court abused its discretion.

CONCLUSION

Mother has failed to establish that the trial court abused its discretion in concluding that the evidence does not show either substantial changes of circumstances requiring modification of custody or the need for appointment of an individual to conduct an investigation into Mother's allegations. Father has failed to show that the trial court abused its discretion in denying his request for attorney's fees. We hereby encourage both parties, in the future, to put the best interest of the children to the forefront in an effort to cooperate in their rearing.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.