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IN THE
COURT OF APPEALS OF INDIANA

T.L.M.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-1008-DR-930
	)	
	)	
V.M.,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David A. Shaheed, Judge
The Honorable Victoria M. Ransberger, Magistrate
Cause No. 49D01-0109-DR-1523

August 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

T.L.M. ("Father") appeals the trial court's denial of his verified petition for modification of custody. Father presents two issues, which we consolidate and restate as whether the trial court abused its discretion when it denied Father's petition. We affirm.

The relevant facts follow. Father married V.M. ("Mother") in December 1995 and had a child, T.M., who was born in September 1997. Father and Mother separated in 2001, and the trial court issued a decree of dissolution of marriage on January 6, 2003. In the decree, the court ordered that the parties have joint legal custody of T.M., that Mother have primary physical custody, that Father have visitation pursuant to the Indiana Parenting Time Guidelines, and that Father pay child support to Mother.

On June 8, 2009, Father filed a Verified Petition for Modification of Custody and to Establish Tax Exemption ("Petition for Modification") and a Request for Evaluation by the Domestic Relations Counseling Bureau ("DRCB").[1] In the Petition for Modification, Father asserted that there had been a substantial change in circumstances and that it was in the best interest of T.M. for Father to have primary physical custody. In support of his arguments, Father stated that T.M. had excessive school absences and failing grades, that Mother placed T.M. in the care of an individual with a lengthy criminal history, that Mother lived in close proximity to a residential area known for illegal drug activity, that Mother was no longer employed, and that Mother was in an unstable mental state.

[1] A copy of the request for evaluation is not included in the record. The DRCB refers to the Domestic Relations Counseling Bureau of the Circuit and Superior Courts of Marion County.

On June 11, 2009, Mother filed a petition for modification of child support.[2] On June 19, 2009, the court ordered the parties to mediation, which was unsuccessful. On July 9, 2009, the trial court granted Father's request for an evaluation.

Sharon Carl, a clinical social worker with the DRCB, interviewed Mother, Father, and T.M. regarding appropriate custody and parenting time arrangements and prepared and filed with the court a report dated November 7, 2009. According to the report, during the interview T.M. "related incidents that occurred during the past several years," including that Mother had "whipped" him on at least two occasions, Mother did not allow him privacy in either the bathroom or his bedroom and "barge[d] in," and Mother intentionally made negative comments to T.M. about Father. Respondent's Exhibit A at 5. The report indicated that T.M. described an occasion in which Mother had taken medication that made her "woozy," causing her to fall asleep, and T.M. called a friend to help her to bed which resulted in T.M. being whipped and punished for calling someone for help. Id. at 4. The report provided information regarding a psychological evaluation of T.M. in which the psychologist recommended that T.M. participate in psychotherapy due to the incidents of domestic violence between Father and Mother that T.M. had witnessed. The report also noted that there were concerns about T.M.'s medication[3] and Father not ensuring that T.M. takes it as prescribed.

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[2] A copy of Mother's petition is not included in the record.

[3] [T.M.] takes several medications including Detrol, Cordura, Zyrtec, Advair, and Miralax to control his multiple medical conditions. T.M. suffers from kidney disease, bladder spasms, chronic asthma, and chronic constipation.

The report also acknowledged that T.M.'s desire to live with Father "may be influenced by adults in his life rather than statements arrived at independently by [T.M.]. However, it is not unusual for a male child [T.M.'s] age to express an interest in living with his father, and there is benefit to him to experience male role modeling." Id. at 10. Carl concluded the report with a recommendation that T.M. reside primarily with Father.

On January 26, 2010, Father filed a motion for an *in camera* interview of T.M. On February 1, 2010, Mother filed an objection to Father's motion for an *in camera* interview and a motion to reinstate the guardian *ad litem* ("GAL").[4] On February 8, 2010, the court denied Father's motion for an *in camera* interview.

On February 10, 2010, the court ordered that the GAL be reinstated to conduct one visit with T.M. per Mother's request and ordered the GAL to submit a written report to the court. The GAL, who has known T.M. for approximately four years, filed his written report with the court on February 23, 2010. The GAL's report states that Mother and Father were "communicating directly now" without having T.M. play the intermediary between them and because of this "[T.M.] appears to be enjoying life more." Exhibit I at 1. The GAL observed that T.M. was more confident than before and that T.M. believes that "his ability to see both parents regularly has enhanced his life" by being able to engage in a variety of activities with each of them. Id. The GAL recommended in his report that the "current joint custody arrangement remain intact . . .

[4] A GAL had been appointed at Mother's request during previous proceedings involving T.M. in 2005 and 2008.

." Id. at 2. At trial the GAL recommended that the parties share joint physical and legal custody.

The trial court conducted a two-day hearing regarding the Petition for Modification on May 26, 2010 and June 9, 2010, at which the parties presented evidence which included the reports of Carl and the GAL, and the court heard testimony from Mother, Father, Carl, the GAL, and Andre Gilbreath, who is Mother's twenty-eight-year-old son.

Father testified that he had been employed full time as a design engineer for two years and has been afforded a flexible work schedule. Father also testified that he has resided in his Washington Township condominium for two years with his current wife, with whom T.M. also has a positive relationship. Mother testified that she lives in an apartment in Center Township and was unemployed until August 2009 when she obtained part-time employment working nineteen hours a week. Both parents testified that they have provided T.M. with his own room and personal belongings in their respective homes and that they participate in his school activities.

Mother's son, Gilbreath, who is not Father's biological son and was not interviewed by Carl as part of the DRCB evaluation, testified that Father introduced him to alcohol and marijuana and was verbally abusive. Gilbreath also testified that Father took his virginity when Gilbreath was a junior in high school. Gilbreath sought to protect T.M. from going "through the same thing that [he] went through" by testifying about Father. June 9, 2010 Transcript at 66.

On July 26, 2010, the court issued an order, which contained thirty-two findings of facts, eighteen conclusions of law, and twelve paragraphs under the heading "Judgment" which denied both Father's Petition for Modification and Mother's petition for modification of child support.

The issue is whether the trial court abused its discretion when it denied Father's Petition for Modification. 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 that the existing custody arrangement

should be altered. Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007). 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 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.

Father argues that a modification of custody is in the best interest of T.M. and that the court's order failed to consider each of the pertinent statutory elements and is therefore reversible error. Specifically, Father asserts that the court failed to consider the change in the age of T.M. and the implications of his gender; the wishes of T.M. and Father; T.M.'s adjustment to his home with Mother and school; Mother's physical and mental health; and the pattern of family violence by Mother. Father appears to argue that the court abused its discretion in failing to follow or explain why it elected to act in contravention to the recommendations of the DRCB evaluator and the GAL. Father also argues that Gilbreath "acknowledged that he previously made substantially similar allegations against his natural father" and that he "admitted that he has previously been convicted of a crime of dishonesty (i.e., theft)." Appellant's Brief at 24.

Mother argues that the court did not abuse its discretion in denying Father's Petition for Modification and that there is no evidence supporting a substantial change in circumstance. Mother argues that there was insufficient evidence presented to show why the age of the child necessitated a change of custody. Mother argues that the evidence showed that she "participated in activities" at T.M.'s school, that Father "only visited the school two or three times in the years 2009-2010" and had only spoken to T.M.'s teacher "very briefly and never discussed [T.M.'s] academic progress," and that Father does not supervise T.M. "to see if he takes his medicine at his home." Appellee's Brief at 4-5. Mother also points to Gilbreath's testimony that Father had molested him, verbally abused him, and introduced him to alcohol and marijuana.

Initially, to the extent Father contends that the court abused its discretion in failing to follow the recommendations of Carl, the DRCB evaluator, and the GAL, we note that while such recommendations or opinions may be proper considerations in custody modifications, the court was not required to accept them. See Clark v. Madden, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000) (noting that "the fact-finder is not required to accept the opinions of experts regarding custody").

To the extent Father asserts that the trial court's failure to consider each of the statutory criteria set forth in Ind. Code § 31-17-2-8 constituted an abuse of discretion, we observe that the Indiana Supreme Court has held: "The court must consider factors that are relevant, including but not limited to those explicitly listed in the statute. Although a court is required to consider all relevant factors in making its determination, it is not required to make specific findings." Russell v. Russell, 682 N.E.2d 513, 515 (Ind. 1997)

(footnote and citations omitted). Also, in Baxendale v. Raich, the Indiana Supreme Court noted the statute's "nonexclusive list of factors." 878 N.E.2d 1252, 1254 (Ind. 2008). See also Kanach v. Rogers, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001) (rejecting the argument that the trial court is required to enter findings specifying which factors have changed and noting that "[h]ad our legislature intended to require trial courts to enumerate specifically in their orders those individual factors, it presumably would have articulated that requirement; we decline to engraft onto the statute a requirement the legislature did not articulate").

A number of Father's arguments essentially request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. See Fields, 749 N.E.2d at 108. With respect to T.M.'s education and Father's concerns regarding T.M.'s academic progress, the court entered the following findings:

> 8. [T.M.] attends Greater Morning Star Christian Academy and has attended this school for five years. [T.M.] has only missed one day of school in the 2009-2010 school year and his grades have improved significantly.
>
> 9. Father did not know [T.M.]'s grades for the 2009-2010 school year, had only been to [T.M.]'s school two or three times during this year and had not met with any of his teachers to discuss his progress.
>
> 10. Mother regularly volunteers at [T.M]'s school and discusses his progress with his teachers.

Appellant's Appendix at 28.

The record reveals support for these findings. Mother testified that she visited T.M.'s school at least two or three times a week and met with his teachers to discuss his academic progress. Mother also testified that she had volunteered with the drama

department, participated in field trips with T.M., and transports him to various functions. In addition, Mother testified that T.M. has never experienced any bullying at his school. Father testified that he had visited T.M.'s school approximately two or three times during the 2009-2010 academic school year and had not spoken with any teachers in regards to T.M.'s academics. Father also indicated that T.M.'s grades had significantly improved in the past year.

With regard to the neighborhood in which Mother resides and the individuals that Mother allows to supervise T.M., the court entered the following finding:

> 11. Mother's neighborhood is lower income and could have illegal activity occurring in the vicinity of her apartment, but security officers patrol Mother's apartment complex. Mother has not left [T.M] in the care and custody of her brother who has a criminal history, nor allowed him to babysit for [T.M.].

Id.

The record reveals that Mother testified that she lives in a gated community that is guarded by site security during the day and the Indianapolis Metropolitan Police Department at night. In addition, Mother indicated that she believed that her neighborhood is a safe place for T.M. Mother further testified that she had never witnessed an arrest and had no knowledge of any drug dealing in her neighborhood. Mother acknowledged that her brother has a criminal record but testified that she has never left T.M. in his care.

With respect to Mother's mental and physical condition, the court entered the following findings:

> 13. Mother has applied for Social Security Disability because she suffered a work related injury three years ago. Although she is unable to do any lifting or overhead range of motion with her right hand, this does not affect her ability to care for [T.M.].
>
> 14. Mother has never been diagnosed with a mental health condition and does not take any medication for treatment of a mental health condition.

Id. at 29.

The record reveals that Mother testified that she suffered a work-related shoulder injury, has applied for social security disability benefits, and is currently employed nineteen hours a week. Mother also testified she has never had any mental health diagnosis and was not taking any kind of medication for any mental health condition.

With respect to concerns regarding T.M.'s health and medication, the court entered the following findings:

> 16. [T.M.] takes medication including Detrol, Cordura, Zyrtec, and Miralax to manage his kidney disease. Mother is very familiar with the medications and the dosages required for [T.M.] and supervises [T.M.] taking his medication when he is in her care and custody. When [T.M.] does not take his medication as prescribed he becomes constipated and sick.
>
> 17. [T.M.] does not like to take his medication and sometimes will not if he is unsupervised.
>
> 18. Father has had his parenting time restricted in the past for not monitoring [T.M.]'s medications. The DRCB evaluation stated that there were concerns with Father monitoring [T.M.]'s medication.
>
> 19. [T.M.] had parenting time with Father from May 28, 2010 until May 31, 2010. [T.M.] brought his medication which included 7 Detrol pills, 4 Cordura pills, and 4 Zytrec pills, all of which he should have taken. [T.M.] returned with 2 Detrol pills, 2 Cordura pills, and 2 Zytrec pills, which meant he did not take all the medication that he needed to control his medical condition.

Id. at 30.

The record reveals that T.M. has several medical conditions, including kidney disease, bladder spasms, chronic asthma, and chronic constipation, which require him to take multiple medications. Carl reported some concerns about Father's supervision of T.M. taking his medication as prescribed. Mother testified that Father fails to supervise T.M. and explained the medical consequences of T.M. not taking his medication.

With respect to Gilbreath's testimony, the court entered the following findings:

> 30. Mother's twenty-eight year old son, Andre Lamont Gilbreath, asked to testify on behalf of Mother on the second date of the hearing, June 9, 2010. Father did not object. Mr. Gilbreath, who is not Father's biological child, told the Court that when he was a junior in high school, Father molested him and he lost his virginity to Father. He also said that his birth father had molested him. He did not speak up at the time because he was afraid and he believed that the issue would be over since Father and his mother were divorcing. He has a close relationship with [T.M.], and decided to speak up now because he is concerned about [T.M.'s] safety and well being. He was visibly upset during his entire testimony, as was Mother.
>
> 31. Although the Court cannot possibly know whether molestation by [Father] occurred and Mr. Gilbreath was not interviewed by either the GAL or the DRCB evaluator, his testimony was compelling.

Id. at 31-32.

Again, the record reveals support for these findings in that Gilbreath testified that Father introduced him to alcohol and marijuana and was verbally abusive. Gilbreath also testified that Father took his virginity when Gilbreath was a junior in high school.

To the extent that Father argues that T.M.'s age and gender present a substantial change, the court entered the following findings:

> 40. Father states that [T.M.] is getting older and wishes to live with him.
>
> 41. The DRCB evaluation states that [T.M.]'s desire to live with his father may not be the result of his own independent thinking but may be influenced by other adults in his life.
>
> 42. Generally, the age of the child, viewed alone, is not a sufficient change of circumstances to be considered in a modification of custody. Malicoat v. Wolf, 792 N.E.2d 89 (Ind. Ct. App. 2003);
>
> 43. More weight is given to the wishes of a child if the child is at least 14 years old. I.C. Section 31-17-2-8.
>
> 44. [T.M.] is 12 years old, but will be 13 years of age in September.

Id. at 33.

The record reveals that Carl, the DRCB evaluator, did recommend that T.M. reside primarily with Father. However, Carl also acknowledged in her report that T.M.'s desire to live with Father "may be influenced by adults in his life rather than statements arrived at independently by [T.M.]." Respondent's Exhibit A at 10. We also note that T.M. is below the statutory age in which his wishes are deemed to have more weight in deciding custody issues.

Based upon the evidence in the record and the trial court's findings, we cannot say that the trial court abused its discretion by denying Father's petition to modify custody. See 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 court 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 for modification of custody of T.M.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.