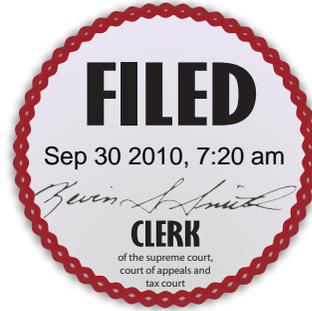


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE PATERNITY OF R.W.B.,IV.,)
)
K.K.,)
)
Appellant-Respondent,)
)
vs.)
)
R.W.B., III,)
)
Appellee-Petitioner.)

No. 78A01-1001-JP-79

APPEAL FROM THE SWITZERLAND CIRCUIT COURT
The Honorable W. Gregory Coy, Judge
Cause No. 78C01-0904-JP-49

September 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent K.K. (Mother) appeals the trial court's judgment granting appellee-petitioner R.W.B., III's (Father) petition for custody modification of their son R.W.B, IV (R.B.). Specifically, Mother argues that the trial court failed to apply the applicable statute for custody modifications. Additionally, Mother contends that even if this court concludes that the trial court applied the correct statute, there were insufficient facts to support the modification. Finding no error, we affirm judgment of the trial court.

FACTS

R.B. was born to Mother on July 4, 2008. Mother and Father were unmarried but resided together for a short time before separating in November 2008. Mother and Father remained friends and had regular contact for several months. During this time, Father was able to spend a satisfactory amount of time with R.B.

Eventually, Mother's and Father's relationship deteriorated, and they stopped having regular contact. Shortly thereafter, on April 1, 2009, Father filed a petition to establish paternity, custody, support, and visitation. On May 29, 2009, the trial court entered an order establishing that Father is R.B.'s biological father and granting parenting time according to the Indiana Parenting Time Guidelines. Additionally, the trial court granted Mother's request to continue the hearing as to the remaining matters so that she could obtain legal counsel.

On August 19, 2009, Mother and Father entered into and the trial court approved an agreement (the Agreement) resolving the issues of custody, parenting time, and child support. The Agreement provided that Mother and Father "shall have joint custody" of R.B. with Father having parenting time from "Monday evening at 6 p.m. until Thursday morning at 8

a.m. each week.” Appellant’s App. p. 12. Additionally, Father was to have three weeks of summer vacation with R.B. “with a 30-day advance notice” to Mother. Id. Mother was to have parenting time at all other times not otherwise designated to Father.

As for child support, the Agreement provided that Father was to pay \$26.27 per week “via an Income Withholding Order,” which was based on Father being credited with 182 overnight visits. Id. at 13. Mother and Father further agreed that “neither will allow use of illegal drugs, excessive use of alcohol, or smoking around [R.B.] nor will they allow members of family or friends to do so.” Id.

Shortly after Mother and Father entered into the Agreement, Father informed Mother that he wished to take R.B. on a three-week vacation to Connecticut in October 2009 to visit his grandfather. Mother did not object to the vacation and Father continued to exercise his parenting time as scheduled.

On September 28, 2009, Father drove to Mother’s residence to pick up R.B. for their scheduled trip to Connecticut. However, when Father arrived, Mother refused to allow him to take R.B. because of an incident that had happened on September 23, 2009. Mother stated that on that date, Father’s mother (Grandmother) was at a mutual neighbor’s house with R.B., was drinking alcoholic beverages, and then drove with R.B. unrestrained in the vehicle. Mother admitted that she did nothing about this situation and left R.B. at the neighbor’s house, but claimed that Grandmother told her that Father would arrive within the hour to pick up R.B.

After Mother refused to allow Father to take R.B. to Connecticut, he continued to try

to exercise his scheduled parenting time, but no one would answer the door even though he could hear the television. Father would also try to call Mother, but no one answered the telephone. In short, Father's records indicated that he made nine unsuccessful attempts to exercise his parenting time.

On November 6, 2009, Father filed a petition for custody modification and citation for contempt, alleging that there had been a change in circumstances, namely, that he had been denied parenting time. The trial court held a hearing on December 22, 2009.

On December 23, 2009, the trial court entered written findings of fact. The trial court noted, in part, that Mother admitted that she was in contempt of court by refusing to allow Father to exercise his parenting time and that the demeanor of both parties in court raised concerns as to whether either party could act maturely and in R.B.'s best interests. The trial court further observed that Mother was "immature and incapable of following the Court's direction, regardless of the possible penalties," pointing out that Mother did not seem to care about the possible consequences to R.B. of being denied time with Father. Appellant's App. p. 32. Similarly, the trial court noted that Father had behaved irresponsibly by allowing a friend to drive his truck "to the point of flipping it over and severely damaging it." Id.

The trial court concluded that "split custody arrangement" will not work under these circumstances, observing that there had already been a "significant departure" from the Agreement, which was less than four months old. Id. at 31. The trial court further concluded that it was in R.B.'s best interests to be placed in Father's custody and granted primary custody to Father. The trial court ordered that Mother be entitled to parenting time according

to the Indiana Parenting Time Guidelines and that she should pay child support in an amount to be determined.¹ Mother now appeals.

DISCUSSION AND DECISION

I. Custody Modification

Mother argues that that the trial court erred when it modified custody. We review custody modifications for an abuse of discretion granting wide latitude and deference to our trial courts in family law matters. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). In reviewing findings of fact, this court will first determine whether the evidence supports the findings and then whether the findings support the judgment. Id. On appeal, we “shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Id. (quoting Ind. Trial Rule 52(A)). A judgment is clearly erroneous when the evidence does not support the findings, when the findings fail to support the judgment, or when the trial court applies the wrong legal standard to properly found facts. Id.

Mother contends that the trial court abused its discretion because it failed to apply the modification statute. In paternity matters, Indiana Code section 31-14-13-6 provides that custody may not be modified 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 section 2 and, if applicable, section 2.5 of this chapter.

¹ The trial court also found Mother to be in contempt, but that issue is not raised in this appeal.

The factors to be considered under Indiana Code section 31-14-13-2 (Section Two) 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 considerations 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 interests.
- (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. . . .

Mother asserts that the trial court erred by focusing exclusively on the best interests of R.B., pointing out that the trial court did not find nor did Father establish a substantial change in circumstances to justify the custody modification. In support of this argument, Mother maintains that although the trial court characterized the custody arrangement provided in the Agreement as a "split custody arrangement," Father's parenting time consisted only of two and one-half days per week. Appellant's App. p. 30. Mother points out that she "was in fact the primary care giver and custodian under the Agreement." Appellant's Br. p. 13. In essence, Mother characterizes the custody arrangement under the Agreement as one in which

she possessed primary custody such that the modification was not merely from a joint custody arrangement to Father being granted primary custody, but rather, a modification from Mother having primary custody to Father having primary custody. Moreover, Mother contends that Father was required to show that it was no longer reasonable for her to retain primary physical custody.

The Agreement stated that the “parties shall have joint custody of their child . . . with shared parenting time as follows. . . .” Appellant’s App. p. 12 (emphases added). Consequently, we cannot agree with Mother’s characterization of the custody arrangement under the Agreement. Additionally, under the modification statute as stated above, Father was not required to show that the existing custody order was unreasonable.² See I.C. § 31-14-13-6.

Nevertheless, Father was required to show that there had been a substantial change in one or more of the Section Two factors. On this issue, Mother contends that Father failed to present any evidence of a substantial change and that the trial court failed to make any findings of a substantial change.

At the hearing, Father testified that when he told Mother that he wanted to take R.B. on vacation to Connecticut, she said that “everything was fine,” but that when he went to get R.B. from Mother’s residence approximately forty-five days later on September 28, 2009,

² Prior to 1994, in the dissolution context, the former Indiana Code section 31-1-11.5-22(d) permitted modification of custody only “upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable.” Joe v. Lebow, 670 N.E.2d 9, 16 (Ind. Ct. App. 1996).

Mother would not allow R.B. to leave with Father because of the alleged incident with Grandmother. Tr. p. 5. Father stated that he has not seen R.B. since around September 23, 2009.

When Mother was questioned regarding whether she had had any kind of conversation with Father regarding the alleged incident with Grandmother, Mother responded, “Nope, just yelled.” Id. at 29. Mother admitted that she had knowingly and willfully denied Father parenting time since September and that she was in contempt of court.

After hearing this and additional testimony, the trial court determined that Mother and Father agreed to have a “split custody arrangement of their son,” that Mother had agreed to allow Father to take R.B. to Connecticut, but then would not allow R.B. to go, and that as of December 23, 2009, Father had not seen R.B. since September 23 or 24, 2009. Appellant’s App. p. 30-31. The trial court concluded that “[i]t is obvious that a split custody arrangement will not work between these two parties; the paternity case has existed for slightly over 8 months and there has already been a significant departure from a previously agreed parenting arrangement which has been in place less than 4 months.” Id. at 31.

Although the trial court did not specifically state which Section Two factors it relied on, it is clear from the trial court’s findings that it considered several relevant factors and determined that there had been a substantial change in them. The most notable factor in which there had been a substantial change was the wishes of the parents. Only a few months

However, this standard was inapplicable to paternity cases for which custody modification was determined solely under the “best interests” standard. Id.

earlier, Mother and Father had entered into the Agreement under which they had agreed to a very specific parenting time schedule. And as stated earlier, Father and Mother both testified and the trial court determined that as of the December 23, 2009, hearing, Father had not seen R.B. since September 23, 2009.

The trial court also observed that Mother was “immature and incapable of following the Court’s direction, regardless of the possible penalties,” pointing out that Mother did not seem to care about the possible consequences to R.B. of being denied time with Father. Appellant’s App. p. 32. This is relevant to Father’s interrelationship with R.B. Moreover, contrary to Mother’s assertion that there was no evidence that R.B. “had been harmed or was otherwise in danger of harm,” appellant’s br. p. 13, it logically follows that R.B.’s mental health will be negatively impacted if he is denied time with Father. Accordingly, Father showed and the trial court found a substantial change in several Section Two factors, and the trial court did not err when it modified custody.

II. Parenting Time—Child’s Best Interest

Mother maintains that she reasonably believed that Father’s parenting time was not in R.B.’s best interest. This argument is perplexing, inasmuch as Mother’s reasonable belief that parenting time was not in R.B.’s best interest is not relevant to the issue of custody modification. Nevertheless, we will briefly address the argument.

Mother directs this court to Indiana Code section 31-14-14-1 for the proposition that a parent’s right to reasonable parenting time is not inalienable and must give way to the best interest of the child. Mother points out that she honestly believed that discontinuing

parenting time was in R.B.'s best interests because of the incident with Grandmother and because she held concerns regarding Father's use of alcohol.

Indiana Code section 31-14-14-1 provides that “[a] noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might . . . endanger the child’s physical health and well-being; or [] significantly impair the child’s emotional development.” (Emphasis added). Accordingly, under the plain language of the statute, if Mother believed that it was in R.B.’s best interests to have Father’s parenting time restricted, then her remedy was to file a petition with the trial court, which she did not do, and we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.