

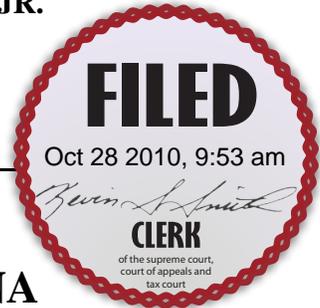
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE PATERNITY OF C.W.R.:)
)
C.W.,)
)
Appellant-Respondent,)
)
vs.)
)
F.R.,)
)
Appellee-Petitioner.)

No. 31A01-1002-JP-47

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable Richard G. Striegel, Special Judge
Cause No. 31C01-0502-JP-11

October 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

C.W. (Mother) appeals from the trial court's order denying her Petition to Modify Custody of C.W.R. Mother presents two issues for our review, which we reorder and restate as:

1. Did the trial court improperly limit Mother's petition prior to the start of the hearing?
2. Did the trial court abuse its discretion in refusing to modify custody pursuant to Mother's request?

We affirm.

C.W.R. was born out-of-wedlock on January 27, 2003.¹ On February 3, 2005, F.R. (Father) filed a paternity action in the Harrison Circuit Court with respect to C.W.R. An order establishing paternity was entered on February 11, 2005, and Mother and Father were awarded joint custody of C.W.R. Over two years later, on March 19, 2007, Father filed a petition to modify custody. In an order dated November 7, 2007, the trial court awarded primary physical custody of C.W.R. to Father. Mother appealed the custody determination, and this court remanded with instructions for the trial court to enter written findings of fact in support of its decision to award Father primary physical custody of C.W.R. *See In re the Paternity of C.W.R.*, No. 31A01-0712-JV-601. On September 9, 2008, while the appeal was still pending, Mother filed an emergency petition to modify custody. After a continuance of the first hearing, the court held a hearing on Mother's emergency petition on November 24, 2008. Thereafter, on December 8, 2008, the trial court entered an order, complete with findings of fact, in support of its custody determination. Mother did not appeal from the

¹ In a prior appeal, this court noted C.R.'s birthday to be January 20, 2003. *See In re the Paternity of C.W.R.*, No. 31A01-0712-JV-601 (Ind. Ct. App. Nov. 5, 2008).

December 8 order.

On August 24, 2009, Mother filed a petition to modify custody. In her petition, Mother raised issues arising since the trial court's award of primary physical custody in November 2007 but before the court's December 8, 2008 order. The trial court held a hearing on Mother's petition on November 30, 2009 and December 16, 2009. After preliminary discussions with the parties, it was agreed that the evidence would be limited to events occurring after the court's December 8, 2008 order. On January 7, 2010, the trial court entered its order denying Mother's petition to modify custody. Mother now appeals.

1.

Mother argues that the trial court abused its discretion in limiting her petition to issues raised in paragraphs 3(e), 3(f), and 3(h) prior to the start of the hearing. In Mother's petition for modification of custody, she identified eight circumstances, listed in paragraph 3 as (a) through (g), that she claimed warranted a change in custody. For context, we set them out as they appear in the petition:

a. That according to the Psychological Evaluation performed by Dr. David L. Wunsch on September 18, 2008, it stated that the minor child, [C.W.R.], has resided with his paternal grandparents . . . since August, 2007.

b. This is contrary to the Court's Order of November 7, 2007 and December 8, 2008.

c. That on August 3, 2008, while at the Jasper Indiana State Police Post, the minor child, [C.W.R.], reported to Trooper Gavin Wilson that he did not want to go home with the Petitioner/Father, as the father was inappropriately touching him and that he wanted his father to stop.

d. That on August 3, 2008, Judge Whitis of the Harrison Circuit Court verbally advised an FCM Supervisor to detain the minor child, [C.W.R.], and to place him with his paternal grandparents.

e. That the Petitioner/Father reported to FCM that he has not been alone with the minor child, [C.W.R.], therefore, giving the impression that he

is not and has not been exercising the custody granted to him on November 7, 2007 and December 8, 2008.

f. That on or about June 29, 2009, while the Respondent/Mother was exercising overnight parenting time with the minor child, [C.W.R.], the Respondent/Mother noticed bruising on the minor child's buttocks.

g. That the Petitioner/Father has required that all transportation for the Respondent's/Mother's parenting time be provided by the mother, contrary to the Court's Order and the Indiana Parenting Time Guidelines.

h. That the minor child, [C.W.R.], has expressed his desire to live with his Mother.

Appellant's Appendix at 12-13.

At the start of the November 30 hearing, the parties discussed the issues and scope of the evidence that would be heard in light of the fact that the parties were present for a three-hour hearing on November 24, 2008, during which evidence pertaining to some of the issues raised by mother in her current petition was previously heard,² and given the trial court's subsequent order entered on December 8, 2008. Ultimately, Mother's counsel agreed to withdraw the issues raised in paragraphs 3(a) and 3(b) upon being informed that Dr. Wunsch's report was not presented or relied upon by the court. With regard to the issues raised in paragraphs 3(c) and 3(d), it appears as though evidence relating to these allegations was presented during the November 24, 2008 hearing when the court heard evidence relating to this cause as well as a simultaneous CHINS proceeding brought by the State in response to allegations of abuse that were the subject of paragraphs 3(c) and (d). The parties agreed prior to the presentation of evidence that they would limit the evidence to matters occurring after December 8, 2008. The circumstances alleged in paragraphs 3(c) and (d) occurred prior to

² Mother was represented by different counsel during the November 24, 2008 hearing. Counsel for Mother for these hearings did not enter his appearance on Mother's behalf until July 10, 2009.

this date.³ The issue raised in paragraph 3(g) concerned transportation for the minor child and the court found such to be irrelevant to the custody modification petition. Mother's counsel did not object to removing this issue from further consideration by the court. The hearing continued with the parties presenting evidence as to the issues raised in paragraphs 3(e) (Father not exercising custody), 3(f) (bruising to minor child's buttocks), and 3(h) (minor child's desire to live with Mother).⁴

In limiting Mother's petition and therefore the scope of the evidence to be presented, the court prevented the needless presentation of evidence that was irrelevant to the issue of whether a substantial change in circumstances had occurred so as to warrant a modification of custody or on matters that had already been considered and ruled on by the court. The court simply limited the proceedings to the matter at hand. We find no error.⁵

2.

Mother argues that the trial court abused its discretion in refusing to grant her petition to modify custody. Specifically, Mother argues that the trial court ignored the evidence of bruising to C.W.R.'s buttocks and Father's inconsistent testimony as to the cause. Mother also argues that the trial court abused its discretion by "prejudging" the case before any evidence was presented. *Appellant's Brief* at 8.

Custody modifications are reviewed for an abuse of discretion, with a preference for

³ In its December 8, 2008 order, the court noted the testimony of a family case manager that all of Mother's allegations against Father "were unsubstantiated." *Appellant's Appendix* at 9. Father's counsel maintained that this finding was in reference to testimony from the November 24, 2008 hearing. The court even noted that "[t]hat issue [referring to paragraph 3(c)] was brought up" in the prior hearing. *Transcript* at 8.

⁴ Ultimately, no evidence was presented with regard to C.W.R.'s desire to live with Mother.

granting latitude and deference to our trial judges in family law matters. *Kirk v. Kirk*, 770 N.E.2d 304 (Ind. 2002). “Judgments in custody matters typically turn on essentially factual determinations and will be set aside only when they are clearly erroneous.” *Baxendale v. Raich*, 878 N.E.2d 1252, 1257 (Ind. 2008). We will not substitute our judgment if any evidence or legitimate inferences support the trial court’s judgment, and the concern for finality in custody matters reinforces this doctrine. *Baxendale v. Raich*, 878 N.E.2d 1252. *See also Kirk v. Kirk*, 770 N.E.2d at 307 (“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”) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

In support of her allegations of abuse, Mother presented four witnesses who each testified that in their respective opinions, the bruising on C.W.R.’s buttocks appeared to have been caused by a hand. Mother also submitted pictures of the bruising. Father testified and explained that C.W.R. sustained the bruising on his buttocks when he fell on some aluminum bleachers. Essentially, this is a matter of credibility, and the trial court clearly credited Father’s explanation over Mother’s allegations of abuse. We will not reweigh the evidence or second guess the trial court’s assessment in this regard. Mother failed to establish a substantial change in circumstances to support a modification of custody or that a change in

⁵ We also note that Mother failed to cite any authority in support of her argument, but rather summarily concluded that the trial court abused its discretion.

custody would be in C.W.R.'s best interest.

We also disagree with Mother's claim that the trial court made its decision prior to the presentation of evidence. During preliminary discussions, the trial court noted what it expected Father's evidence to be regarding placement of C.W.R. in the home of the paternal grandparents. Specifically, the court stated its belief that Father would argue he was not violating the custody order and explain that C.W.R. was placed with his parents as a result of the CHINS proceedings. The court stated that if such were the case, the court was inclined to reject Mother's argument. The court nevertheless found that "there is an issue that we're dealing with and that is where does the child actually reside. That's brought up, that's a legitimate issue." *Transcript at 70-71.*

Evidence was then presented and Father's testimony was consistent with what the court believed it would be. The court therefore rejected Mother's argument that the fact that C.W.R. primarily resides with his paternal grandparents constituted a substantial change in circumstances warranting a change in custody.⁶ Although the court stated its inclination to reject Mother's argument if the circumstances were as the court thought the evidence would reveal, the court was clear that it remained open to the evidence. The court made its final conclusion only after Mother presented no additional evidence of a substantial change in circumstances. Having reviewed the record, we cannot say the trial court abused its discretion.

Judgment affirmed.

⁶ We note that testimony revealed that Father's home is located some fifty feet from his parents' home.

BARNES, J., and CRONE, J., concur.