ATTORNEY FOR APPELLANT:

PERRY D. SHILTS
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

KENDRA GOWDY GJERDINGEN
Mallor Clendening Grodner & Bohrer LLP
Bloomington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF N.S.L. by his next friend,	)	
KAREN S. GRAMLING,	)	
Appellant-Respondent,	)	No. 02A03-0609-JV-419
vs.	)	
STEVEN A. LEFEBVRE,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Stephen M. Sims, Judge
Cause No. 02D07-0003-JP-69

April 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Karen S. Gramling (Mother), as next friend of her minor son, N.S.L., appeals from the trial court's order modifying the child support agreement between Gramling and N.S.L.'s father, appellee-petitioner Steven A. LeFebvre (Father). Specifically, Mother argues that the trial court erred in concluding that there was a substantial change in one or more of the relevant statutory factors such that Father is now entitled to custody of N.S.L. She also contends that the trial court erred in failing to rule on her 2004 petition to modify child support. Finding, among other things, that the evidence in the record does not support a modification of the parties' child support agreement, we reverse the judgment of the trial court in part and remand with instructions to rule on Mother's petition to modify child support, to determine the retroactivity of the support modification, if any, and to reconsider Mother's request for attorney fees in light of our ruling herein.

FACTS

N.S.L. was born on September 1, 1999, to Mother and Father, who were not married but had been involved in a romantic relationship for ten years. Following his birth, N.S.L. lived with Mother, and on July 6, 2001, an order was entered approving the parties' stipulation granting Mother sole legal custody of the boy. The order took into consideration the possibility of Mother relocating with N.S.L. to Florida: "[Father] agrees that should [Mother] choose to relocate the minor child to the State of Florida, and provided [Father] has advanced notice of such relocation, he shall be responsible for the minor child's transportation expenses in connection with the visitation periods." Appellant's App. p. 46.

Mother relocated to Florida in August 2001, accompanied by N.S.L., Mother's other son, Nathan, who was approximately ten years old at the time, and Mother's emancipated daughter, Jill. The family moved to Orlando, where Jill, her husband, N.S.L.'s maternal grandmother, and N.S.L.'s maternal uncle still reside.

Following Mother's relocation to Orlando, Mother and Father, who resides in Fort Wayne, maintained a personal relationship until September 2003. Since the relocation, Father has had approximately 100 days of parenting time with N.S.L. each year.

Between August 2001, when Mother relocated to the Orlando vicinity, and December 2004, Mother and the children changed residences at least six times in the Orlando area. The reasons for the various moves included: residing in a short-term rental until a larger 3-bedroom apartment became available, renting a residence that Mother hoped to purchase although she was ultimately unable to do so, moving to avoid an untenable increase in rent, and moving into a good school district when it was time for N.S.L. to start kindergarten. Mother, N.S.L., and Nathan have lived in the same clean, 1300-square-feet, 3-bedroom apartment since December 2004, and in July 2006 Mother signed a one-year renewal lease for the same residence. Father never criticized these moves prior to this litigation and Mother emphasizes that all of the changes of residence were made by her choice and were not forced upon her because of circumstances beyond her control.

After relocating to Florida, Mother seldom worked, instead living off of her savings so that she could provide continuous care and supervision for her two sons. She planned to become a substitute teacher at N.S.L.'s school once he became a full-time

first-grade student. Father's typical work day begins at 6:30 in the morning and ends at 5:30 in the evening, and he also works a number of hours during the weekend. When N.S.L. stays with Father, therefore, it is Father's wife, Stephanie, who is N.S.L.'s primary caretaker.

Mother enrolled N.S.L. in kindergarten at Bear Lake Elementary School in August 2004 when he was four years old; because of his young age, he struggled during his first year of school. N.S.L. repeated his kindergarten year in 2005-06 and did much better. Indeed, at the conclusion of that year, his teacher, Susan O'Leary, reported that he "has mastered the necessary skills in all of the academic areas for promotion to first-grade." Appellant's App. p. 507. He received an award for academic and social growth and received the certificate of achievement as the annual extra special person, which is given to the child who has shown the most academic improvement over the course of the school year. O'Leary reported that Bear Lake was a five-star elementary school, that she had no academic concerns regarding N.S.L., and that Mother was very involved with N.S.L.'s education, having lunch with the boy at school several times during the school year, contacting O'Leary regarding his progress, and attending the awards ceremony.

Throughout N.S.L.'s early childhood, he went to bed with a "sippy cup" filled with a beverage. This habit resulted in N.S.L. having a number of cavities at a very early age. After undergoing some significant corrective dental procedures, N.S.L.'s dentist determined in March 2006 that N.S.L.'s dental health was reasonable for a child his age and that he was on a normal path of dental development.

Beginning in late October 2004, N.S.L. spent fifty-six days with Father in Fort Wayne as part of Father's annual parenting time. On November 15, 2004, Father filed a petition to modify custody and attempted to restrain Mother from taking N.S.L. back to Florida while the custody case proceeded. The trial court denied the request for a restraining order, and N.S.L. returned to live with Mother in Florida on December 10, 2004. On December 3, 2004, Mother filed a petition for modification of support and modification of parenting time arrangements.

As part of his litigation strategy, Father hired a psychologist, Stephen Ross, to conduct a custodial evaluation. Dr. Ross completed his evaluation on July 31, 2005, and updated his evaluation on May 10, 2006, just prior to the commencement of trial. Among other things, Dr. Ross concluded as follows:

> This evaluator has no doubt that the parties have a sincere love for and interest in caring for [N.S.L.] It has been readily observed by this evaluator that [N.S.L.] appears to get along well with both parents and that he is free of any anxieties or fears associated with his parents. . . .
>
> Regarding [Father], he definitely has the economic asset of residing in a well-furnished home. He appears to be financially stable and is in a position to provide more materially to [N.S.L.] than [Mother] would be. He is currently in, what appears to be, a stable relationship with his wife. Having two parents (or parental substitutes) providing care to a child is probably an advantage to single parenthood. . . .
>
> . . . This evaluator has some concerns about [Father's] use of corporal punishment as a disciplinary technique. . . . This evaluator does not necessarily see [Father] as abusive but he needs to reconsider his use of corporal punishment in trying to discipline his son.

Additionally, [Father] does appear to have some controlling tendencies to him which could negatively affect his relationship with his son. . . .

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[Mother] . . . does not appear to be suffering from any significant psychological difficulties which would negatively impact her ability to parent her son. She appears to possess positive parental characteristics regarding how she should raise her son and does not perceive parenting [N.S.L.] to be a stressful experience . . . .

However, this evaluator is concerned about the number of moves [N.S.L.] has had to experience over the past few years. Given his academic problems and the potential for his having an attentional deficit, residential stability will be absolutely important for his success.

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[N.S.L.'s] testing suggests an average IQ along with academic achievement consistent with his level of intellectual functioning . . .

This evaluator firmly believes that at this juncture in [N.S.L.'s] life, the involvement of his father is extremely important. The psychological data concerning fatherless households strongly suggests that, at least for boys, behavioral and psychological problems are endemic when father are absent. More so, it has been this evaluator's experience that when fathers have a distant relationship with their children, specifically boys, these boys develop more psychological and behavioral problems. Such could happen with [N.S.L.]. His return to Fort Wayne, rather than allowing [Father] more time with [N.S.L.] in Florida, appears to be a step in the right direction for [N.S.L.]

For this reason, this evaluator is more likely to recommend that [Mother] return to the Fort Wayne area to afford [N.S.L.] the opportunity to have a relationship with his father. . . . Although this evaluator cannot necessarily say that [Mother] is a bad mother, this evaluator does believe that [Father's] absence in [N.S.L.'s] life at this juncture will be detrimental to his son's academic and emotional developments. . . .

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> From this evaluator's perspective, [Mother] has not sufficiently provided for her son's dental needs . . . .

Appellant's App. p. 459-62. In his updated evaluation, Dr. Ross

> remained convinced that this boy needs to have both parents involved in his life and since [Father] and [Mother] both have family residing here in Fort Wayne, Fort Wayne appears to be one of the most logical sites for [N.S.L.] to return to. . . .
>
> I am concerned that [Father] has shared information with [N.S.L.] about [Mother] and about the legal process. This tends to violate some of my standard rules of not involving children in the legal issues. . . . Nonetheless, I do not believe that [Father] doing this negates my recommendation of [N.S.L.] returning to Fort Wayne to be raised both by [Mother] and by [Father], conjointly.

Id. at 502.

In September 2005, N.S.L. became involved in a youth hockey program in Florida. He was very successful in this program and was invited to be a member of the travel hockey team. Mother believes that participating in this sport affords N.S.L. an opportunity to learn discipline and structure and exposes him to positive paternal figures. Dr. Ross opined that this hockey program was a positive activity for N.S.L. and that Mother's encouragement of his participation was good parenting.

Trial on all pending issues, including custody, parenting time, and support, commenced on June 2, 2006. On August 16, 2006, the trial court entered its judgment and issued findings of fact and conclusions of law at Father's request. The final order provides, in pertinent part, as follows:

> 13. MODIFICATION OF CUSTODY
>
> A. The Court finds that since the last custody order, there has been a substantial and continuing change in one or more of the factors that

this Court may consider under I.C. 31-14-13-2. The Court finds that a modification of the present custody and parenting time is in the best interests of the parties' child.

B. The Court finds that [N.S.L.] is a male, now six years of age. The minor child is at an age when his relationship with [Father] is important and when Father can have a great impact on the child's development.

C. The Court finds that although not a determining factor for this Court due to the child's age, the minor child has expressed to Dr. Ross a desire to stay with [Father] . . . .

D. The Court finds that the minor child has developed a close relationship with Father's stepson . . . and a relationship with his stepmother. The Court finds that [Father] and the minor child have a close, loving relationship. The Court finds that [Mother] and the minor child have a close, loving relationship.

E. The Court finds that [Mother] has not appropriately attended to the minor child's dental issues.

F. The Court finds that [Mother's] employment has been and continues to be unstable, and her repeated relocation of the minor child from one residence to another since she relocated to Florida has not provided the minor child with stability. The Court finds that such continuous moves are not in the minor child's best interests.

G. The Court finds that the minor child's present residence in the state of Florida is not in his best interest.

H. The Court finds that it presently is in the child's psychological best interest that he be returned to Indiana.

I. The Court finds that joint legal custody is not a viable option in this cause.

J. The Court finds that it is inappropriate for the Court to attempt to order [Mother] to change residence from Florida to Allen County, Indiana.

K. The Court finds that it is in the best interest of [N.S.L.] that custody be modified effective August 16, 2006. [Father] is now awarded custody of said unemancipated child effective August 16, 2006.

Appellant's App. p. 35-36. Mother now appeals.

DISCUSSION AND DECISION

Mother argues that the trial court erred in modifying the parties' child custody agreement. She also argues that the trial court erred in failing to rule on her petition for modification of support and in refusing to require Father to be responsible for her attorney fees. As we consider these arguments, we observe that where, as here, a party requests findings of fact and conclusions of law pursuant to Trial Rule 52(A), we first determine whether the evidence supports the findings and then whether the findings support the judgment. Borth v. Borth, 806 N.E.2d 866, 869 (Ind. Ct. App. 2004). We may not set aside the findings or the judgment unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. In re the Paternity of Z.T.H., 839 N.E.2d 246, 249 (Ind. Ct. App. 2005). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). A finding is clearly erroneous when a review of the evidence leaves the Court with the firm conviction that a mistake has been made. Id. We review conclusions of law de novo. Id.

I. Custody Modification

We review custody modifications for an abuse of discretion, with a preference to defer to the trial court in family law matters. Apter v. Ross, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003). When reviewing a decision to modify a custody arrangement, we may neither reweigh the evidence nor judge the credibility of the witnesses, instead

considering only the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. Leisure v. Wheeler, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005).

In an initial custody determination both parents are presumed to be equally entitled to custody, but a petitioner—here, Father—seeking a subsequent modification bears the burden of demonstrating that the existing custody order should be altered. Id. A court may not modify a child custody order unless the modification is in the child's best interest and there is a substantial change in one or more of the relevant factors. Green v. Green, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006); see also Ind. Code § 31-14-13-6. More specifically, custody modifications are warranted only when the movant has shown "a change of circumstances so decisive in nature as to make a change of custody necessary for the welfare of the child." In re Paternity of Winkler, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000). We apply this stricter standard to petitions to modify custody agreements because permanence and stability are considered best for the child's welfare and happiness. Lamb v. Wenning, 600 N.E.2d 96, 97 (Ind. 1992). The relevant factors to be considered by the trial court include the following:

> (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
> (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, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

I.C. § 31-14-13-2.

Turning to the present case, the trial court's ruling is essentially based on three primary factors: N.S.L.'s age and need to have a relationship with his father, Mother's lack of employment and frequent changes of residence, and N.S.L.'s poor dental hygiene while in Mother's care. As for N.S.L.'s age, we simply cannot conclude that the fact that a child has grown older can form the basis for a change in custody. If a child growing older were a valid basis for a change of this magnitude, our courts would be flooded with parents continually seeking modifications as their children grow older. This result runs entirely counter to our desire to give children a modicum of permanency and stability in their lives. Thus, in and of itself, N.S.L.'s age is not a valid reason to change the parties' custody agreement herein.

The trial court found that now that N.S.L. is six years old, his relationship with Father is important and Father can have a great impact on N.S.L.'s development. We do not quibble with that finding. It is equally true, however, that N.S.L.'s relationship with Mother is important and Mother can also have a great impact on his development. Indeed, the relationships with one's parents continue to be important throughout one's entire life.

The trial court seems to have based its conclusion on Dr. Ross's evaluation, which observed as follows:

> The psychological data concerning fatherless households strongly suggests that, at least for boys, behavioral and psychological problems are endemic when father are absent. More so, it has been this evaluator's experience that when fathers have a distant relationship with their children, specifically boys, these boys develop more psychological and behavioral problems. Such could happen with [N.S.L.].

Appellant's App. p. 461. As an empirical matter, it may be true that in general, boys have problems when their fathers are absent. But there is no evidence in the record here that, in fact, N.S.L. is headed down that path. And indeed, the record shows that Father has done an admirable job of maintaining a significant presence in N.S.L.'s life even though they live across the country from one another. We also note that it is no more appropriate to award custody of an older boy to his father merely because he is the father than it is to award custody of a younger child to his mother merely because she is the mother. See D.H. v. J.H., 418 N.E.2d 286, 290 (Ind. Ct. App. 1981) (holding that purpose of the statute protecting the best interest of the child is, in part, to overcome prior inappropriate presumption in favor of mothers to take care of children of tender years). In an ideal world, yes, N.S.L. would live a life with both parents equally present. But such is not the world in which we live. Mother and Father have done their best, given their original agreement, and nothing in the record shows a substantial change in the circumstances of N.S.L.'s life or relationship with Father such that a change in custody is warranted.

As to Mother's lack of employment, the record reveals that she chose to spend her time parenting N.S.L. and her other son rather than working. There is no evidence in the record that Mother had difficulty paying bills on time, putting food on the table, or

keeping N.S.L. clothed and safe. If Mother is able to remain solvent and care for her children by spending that which she has saved rather than by working outside the home, a court has no authority to direct her to seek employment. We should not require a parent to have a job for the sake of having a job. A job is a means to an end—financial health and well-being—and if Mother was able to achieve that end in another way that in no way affected her ability to parent N.S.L., her lack of employment cannot be a valid basis for a modification of custody.

As to the frequent changes of residence, it is true that Mother and N.S.L. moved six times between August 2001 and December 2004. But since December 2004, they have lived in the same 3-bedroom apartment, and Mother signed a one-year lease renewal in July 2006. Thus, in the twenty months prior to the trial court's decision herein, this family had been living a stable existence in the same residence. Although it was far from ideal to change residences so often during a relatively brief period of time, it is apparent from this record that Mother has been able to achieve a stable existence for herself and for N.S.L. Thus, given the evidence in the record regarding N.S.L.'s home, we cannot conclude that there was a substantial change in the circumstances of N.S.L.'s housing such that a change in custody is warranted.

As to N.S.L.'s dental health, Mother readily acknowledges that she made mistakes. Reply Br. p. 2. She emphasizes, however, that the record establishes that in March 2006, N.S.L.'s dentist found that his dental health was reasonable for a child his age and that he was on a normal path of dental development. Thus, it again becomes clear that in the period of time leading up to the trial, Mother was able to correct her past

mistakes and rectify the situation. At this time, N.S.L.'s dental health is perfectly normal. Consequently, this does not form a valid basis for a custody modification.

Our long-standing preference is to achieve and maintain stability and permanence for the child when it is at all possible. N.S.L. has lived in Florida for nearly all of his formative years, he has friends and attends school there, he takes part in a traveling hockey team, and he has extended family in the area. That he is lucky enough to also have a home in Fort Wayne with friends and family there does not mean that we can, or should, uproot him from his Mother's care in Florida.

In the end, the record reveals, Dr. Ross opined, and the trial court concluded, that N.S.L. has a close, loving relationship with both of his parents. In fact, Father and Dr. Ross believe that Mother should retain primary legal custody of N.S.L.; they merely attach the uprooting of herself and her children from her home and family as a condition to the arrangement. The trial court rightly concluded that it could not order Mother to relocate to Indiana.[1] We acknowledge that the trial court was in a difficult position. We acknowledge that in a perfect world, Mother and N.S.L. would live in the same state as Father. Indeed, in a perfect world, the family would not have fractured to begin with. But we must face the situation as we find it.

[1] We question whether the trial court properly ordered that Mother would have more parenting time than that allowed for by the Indiana Parenting Time Guidelines if, but only if, she moved from Florida to Fort Wayne. Assuming she remained in Florida, the trial court ordered that her parenting time would be allotted according to the Guidelines. Inasmuch as we reverse the trial court's decision on other grounds, we need not address this issue, but we note our discomfort with this seeming attempt to force Mother to relocate without explicitly doing so by offering her more time with her child should she choose to do so.

The parties initially agreed that Mother would have primary custody of N.S.L. and acknowledged from the beginning that Mother would likely move to Florida. She did. Neither she nor Father has been a perfect parent, if such a person exists. But ultimately, nothing in the record supports a conclusion that there has been a substantial change in circumstances since that time warranting a change in the parties' initial arrangement. Consequently, Father has not met his burden and we find that the trial court erred in modifying the custody agreement herein.

II. Modification of Child Support

Mother filed a petition for modification of child support on December 3, 2004. The trial court did not and has not ruled on that petition. In the order at issue herein, the trial court did, in fact, modify the parties' child support obligations, but the modification took effect on August 16, 2006. Although the trial court is not required to modify the child support retroactive to the date of the initial petition, it is permitted to do so. Quinn v. Threlkel, 858 N.E.2d 665, 674 (Ind. Ct. App. 2006). We remand this matter to the trial court with instructions to rule on Mother's petition and, if it grants the petition, make a specific determination as to whether the modification is retroactive or prospective in effect.

The judgment of the trial court is reversed in part and remanded with instructions to rule on Mother's petition to modify child support, to determine the retroactivity of the support modification, if any, and to reconsider Mother's request for attorney fees in light of our ruling herein.

FRIEDLANDER, J., and CRONE, J., concur.