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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF JILL A. GLUSAK, n/k/a JILL A. WOLBER,	)	
Appellant-Petitioner,	)	
vs.	)	No. 37A03-0701-CV-22
JOSEPH GLUSAK,	)	
Appellee-Respondent.	)	

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable J. Philip McGraw, Judge
Cause No. 37D01-003-DR-82

August 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jill A. Glusak (Mother), n/k/a Jill A. Wolber, appeals the trial court's order modifying custody of B.G., one of the three children born during her marriage to Joseph Glusak (Father). Mother presents the following restated issue for review: Did the trial court abuse its discretion by modifying custody of B.G.?

We affirm.

Mother and Father were married on March 3, 1990. They had three children together during the marriage: H.G., born September 23, 1990; A.G., born March 7, 1995; and B.G., born December 4, 1998. The parties separated in December 1999, and the trial entered an agreed order dissolving the marriage on February 20, 2001. Pursuant to the parties' agreement, Mother was granted primary physical custody of the children and the parties shared joint legal custody. Father was granted reasonable visitation and ordered to pay $224 per week in child support.

On February 14, 2005, Father filed his first petition to modify custody.[1] While the petition for modification was pending, on May 9, Father filed an emergency petition to modify custody with respect to A.G. Following the emergency hearing, the trial court found that an emergency existed and granted temporary custody of A.G. to Father.[2] While in Father's custody for about a year, ten-year-old A.G. was evaluated and treated by several medical professionals for significant emotional and behavioral disorders.

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[1] Father alleged, in part, that Mother's new husband "is a frequent user of alcohol and because of his drinking and other matters is not a good role model for the children". *Appellant's Appendix* at 19. Father further alleged that A.G. was in special education classes and suffering from emotional problems.

[2] The basis of the emergency is unclear, as Mother failed to include the emergency petition or the court's order in her appendix.

Father explained A.G.'s behavior as follows: "She was very defiant; biting; hitting; having problems getting along with others; she didn't like the word 'no'. It wasn't typical of a kid acting up. It was, I knew she had problems." *Emergency Hearing Transcript* at 21. He further testified that A.G. was diagnosed with bi-polar disorder, traumatic stress disorder, ADHD, and one other disorder that he could not remember. In light of her conditions, A.G. was placed on a number of medications and regularly taken to counseling while in Father's care. A.G., however, continued to demonstrate "severe emotional, mental, and social difficulties." *Appellant's Appendix* at 23.

In May 2006, Mother and Father entered into an agreed order regarding the petition to modify custody. Specifically, they agreed it was in A.G.'s best interest to be returned to the physical custody of Mother, with specific conditions regarding the continued treatment of the child's special needs. In addition, Mother agreed that the children would be placed on her husband's employer-provided health insurance. Further, Father agreed to withdraw his petition to modify custody with respect to B.G. and H.G.

After A.G.'s return, Mother took the child off her prescribed medications and failed to follow through with the conditions of the agreed order. A.G.'s behavior did not improve, and she and her siblings often fought. Mother agreed that the household was in "turmoil because of [A.G.] residing there." *Emergency Hearing Transcript* at 13.

On October 21, 2006, the turmoil culminated in the removal of A.G. from Mother's home by the Newton County Department of Child Services (the DCS). During an altercation between the siblings in the home, which took place while Mother was present, eleven-year-old A.G. called 911 for help. When the police arrived, they found

A.G. to have bruises, bite marks, and numerous welts. Mother later admitted the welts were from her spanking A.G. with a spoon several days earlier and the bite marks came from B.G. during the fight. A.G. was removed from the home and taken to the hospital for treatment and documentation of her injuries.[3] She was subsequently adjudicated a CHINS and placed into the residential program at ResCare Youth Services in Greencastle, Indiana.

In light of this incident, on October 31, 2006, Father filed the instant petition to modify custody of B.G.[4] In addition to the allegations made in his earlier petition to modify custody, Father claimed that Mother's household was an unsafe environment for B.G. and that an emergency existed. At the conclusion of the emergency hearing on November 14, 2006, the trial court found that no emergency existed.[5] Thereafter, a hearing on the petition to modify custody was held on December 14, 2006.

At the November and December hearings, Father expressed concern about the safety, supervision, and stability in Mother's household. In particular, he emphasized the serious incident involving A.G. and the other children's reaction to it. Apparently, Father felt B.G. and H.G. seemed to blame A.G. for everything and acted like her removal was

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[3] While the pictures were not included in the record before us, Father testified that the pictures "sickened" him and that it "looked like she was in a street fight." *Id*. at 26.

[4] Father did not seek custody of H.G. due to her age of sixteen and her stated desire to stay with Mother.

[5] The court concluded no emergency existed because A.G. was out of the home, explaining:

> If [A.G.] was in that home, he's out. I'm gonna tell you right now. You know, I would even consider moving [H.G.] out because we can't have that kind of violence in our home. The girl is a disturbed young lady that needs treatment. Either she gets treatment or we're gonna have a problem, so that's the way it is.

Id. at 64.

"not a big deal". *Id.* at 26. At the emergency hearing in November, Father explained in part why he thought a change in custody was in his son's best interest:

> I, I think the house is very unstable. I think there, there's a, a history of sickness in [Mother's] family. I think she needs to be evaluated. I'm really concerned about my kids. I don't want [Mother's husband, Todd,] to be a role model for my son. The drinking, it's always in an uproar. Their [sic], the kids are turned against [A.G.]

Id. at 28. Father testified he was concerned about B.G.'s safety and "just waiting for something else to happen." *Id*. at 30. He opined that while his eight-year-old son was doing well in school, B.G. seemed to be starting to exhibit the same pattern as A.G.

Father, a president of a corporation, resides in a 7000 square foot residence with his wife and teenaged stepdaughter. B.G. has his own room at his Father's. B.G. gets along well with his stepsister, as well as with his father. There is also no indication of any problems between B.G. and his stepmother. Father indicated that he and his current wife could provide B.G. with needed structure and counseling. Father felt he could provide a better environment for raising B.G. and curb some of the behaviors that apparently were acceptable to Mother. In the event he obtained custody, Father acknowledged B.G. would have to switch to another nearby elementary school.

Mother has been B.G.'s primary caregiver for his entire life. She is the nurse at B.G.'s elementary school and transports him to and from school. At the time of the hearings, B.G. was well adjusted to his current elementary school. His teacher testified that he was an average second-grade student with excellent attendance, who exhibited no unusual behavior in the classroom. Mother and Todd's home – at 1000 square feet – is substantially smaller than Father's and it has more occupants, as Todd's two sons often

stay overnight. B.G. has a good relationship with his stepbrothers, as well as H.G. He has a friend in the neighborhood with whom he plays almost daily.

There is no evidence in the record regarding B.G.'s relationship with Todd, aside from Father's allegation that Todd had been violent with the children on several occasions. Father also alleged Todd drank too much. Todd's drinking appears to have been an issue of concern for the trial court at the emergency hearing in May 2005, involving A.G., as Todd evidently struck A.G. across the face while he had been drinking. Todd did, in fact, testify at the 2005 emergency hearing that he would stop drinking. Mother, however, admitted at the recent emergency hearing in November 2006 that Todd was still drinking alcohol, but she claimed not to intoxication.

At the conclusion of the modification hearing on December 14, 2006, the trial court granted Father's petition to modify custody of B.G., giving him physical custody of the child. Mother now appeals. Additional facts will be provided below as necessary.

Under Indiana Code Ann. § 31-17-2-21 (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007), a court may not modify a child custody order unless modification is in the child's best interests and there is a substantial change in at least one of several factors that a court may consider in initially determining custody. These factors include:

> (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.
(8) Evidence that the child has been cared for by a de facto custodian….

I.C. § 31-17-2-8 (West, PREMISE through the 2007 Public Laws approved and effective through April 8, 2007). In determining whether modification would be in the child's best interests, however, the court must consider not only those factors specifically enumerated in the statute, but also any other relevant factors. *See Doubiago v. McClarney*, 659 N.E.2d 1086 (Ind. Ct. App. 1995), *trans. denied*; *see also Joe v. Lebow*, 670 N.E.2d 9 (Ind. Ct. App. 1996) (this includes "changes in circumstances of both the custodial and noncustodial parents and the resulting and potential advantages and disadvantages to the child"). "In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002).

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.'" *Id.* (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). Therefore, we neither reweigh the evidence nor judge the credibility of the witnesses. *Fields v. Fields*, 749 N.E.2d 100 (Ind. Ct. App. 2001), *trans. denied*. "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." *Kirk v. Kirk*, 770 N.E.2d at 307. Our Supreme Court has explained the reason for this deference:

> "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) (footnote omitted)). Therefore, on 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." *Kirk v. Kirk*, 770 N.E.2d at 307.

Mother initially argues the trial court "did not consider any of the factors used in under [sic] the child custody statute." *Appellant's Brief* at 10. Because the court allegedly failed to address the relevant statutory factors, Mother asserts the case should be remanded and the trial court directed to "enter findings in support of the modification." *Id*. Neither party, however, requested special findings. Therefore, the trial court was not required to enter findings in support of the modification. *See Kanach v. Rogers*, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001) (I.C. § 31-17-2-21 requires the court to consider the factors listed under I.C. § 31-17-2-8, "but in ordering a modification of child custody a trial court is not, absent a request by a party, required to make special findings").

In *Green v. Green*, 843 N.E.2d 23 (Ind. Ct. App. 2006), we found that the trial court appeared to have considered only the child's relationship with his Father and failed to consider several other relevant statutory factors. Therefore, we remanded to the trial court "for an evaluation of the evidence that fully considers those factors in determining whether modification is in the best interests of th[e] child." *Id*. at 27-28.

In the instant case, unlike *Green*, it is clear that the trial court considered the relevant statutory factors, as well as other non-statutory factors, in making its determination to modify custody. As noted above, the trial court did not and was not required to enter specific findings. The court's consideration of relevant factors, however, is apparent in its oral statement at the conclusion of the modification hearing:

> Well, and I talked, I've talked to everyone. [H.G.] has no intention of living with, actually has no intention of living with her father or her mother because she's not home very much is what I understand, or is what I remember from the last series that we had. And she pretty much goes and comes as she pleases and she does what she wants, and she's typical of a child very close to adulthood who's going to do what she wants when she turns eighteen (18).
>
> [A.G.], on the other hand, is a child that neither parent seems to be able to figure out what's going wrong. [A.G] causes extreme turmoil in either family that she lived with. She has emotional problems which may have been caused by the actions of both parties, and I don't know. All right?
>
> Then we have [B.G.], and I interviewed [B.G.] I asked him about the living conditions. I asked him about what went on. I asked him about the things that happened in the household and the different things. I asked him how he felt when he was living in each household. I did not ask him where he wanted to live, because that's none of his business at this particular point. You know, he's a second grader…and I get to make that decision. He doesn't.
>
> * * *
>
> Now to get back to the real facts, we have on certain occasions, five (5) children and two (2) adults living in a thousand square-foot house. It's a very small home.

We also have testimony as to where kids sleep because I asked everybody where they slept and how, you know, how they worked this out. And that was one of the things that [H.G.] said, well a lot of times I stay with my friends. So it doesn't make any difference where she was, and she didn't have any problem with the sleeping arrangements when she stayed at home.

[B.G.], and I'm going to be honest with you, he didn't seem to have a problem when he had to sleep on the floor. You, know, there were conflicts between him and the other boys. There will be conflicts. One of the things was that, that I think was kind of, that I had to read between the lines to get, was that he kind of felt that his stepfather, if it was a conflict between him and one of the boys, that those boys tended to win more often than he did. Well, okay, I can buy that.

The question is has there been a change in circumstances so continuing as it is not in the best interest of the child to remain where he's at. There has been a change in circumstances. Can the child be better provided and have a safer environment than where he was? Yes, he can.

The problem we have with the other environment is [A.G.] may return, and she was a catalyst for causing very violent situations. [H.G.]'s going to be leaving, and that would leave [B.G.] alone with, with [A.G.] and the other two (2) siblings not of, not his brothers, and I'm not sure in the situation, given all of the things that have occurred, that it is in his best interest.

He has no way to escape, and every child needs some place to escape, and he doesn't have one. He has nothing – no room that's really his that he can go sit, sit and do his things. He has to share, and, uh, you know, it is my personal opinion, based on my interview with, with the children before, that it's in his best interest that he lives with his father and mother has visitation, given the situation that exists today.

Did he say anything bad about either parent? You can ask my Court Reporter, no, he didn't. He had, he like [sic] the great things he gets to do with his Dad and he's got his own room and he's got all of these other things that he gets to do, and he really likes that. And by the way, he does get along with the older sibling in that household. That was not a problem. I think he kind of looked on her as a big sister that protects him. That's what I got out of that situation.

So it's going to be the Court's decision in this particular case that at this point it is in the best interest of [B.G.] to live with his father. I'm going to grant the change of custody.

* * *

The problem is whether this little boy will flourish better where I'm going to put him, and I, it is my opinion that he will. He needs his mother

> for visitation because, you know, he's very attached to her and he's very attached to his father.
>
> But at this particular point, given the circumstances we have, number one, you haven't started counseling, which you should have started a long time ago. We still have drinking in the home, which was another prohibitive thing. It wasn't supposed to occur and it still is occurring. Now I know he's a stepfather and so I really don't have jurisdiction over him. I just asked that it not occur, and things didn't happen the way they should have.
>
> So at this time I'm going to grant the Motion for Change of Custody.

Modification Hearing Transcript at 54-60.[6]

The only relevant factor the trial court failed to address was B.G.'s adjustment to his school and community. There was no dispute among the parties that the second-grader was well adjusted to school and his community. While a move to Father's house would necessitate a change in local elementary schools, the record reveals that B.G. would still live in the same general community and would not be far from his friends. Thus, even if the trial court failed to consider this factor, we do not believe remand is necessary.

Mother also argues that the trial court considered improper factors in determining the best interests of B.G. Most notably, she contends the court improperly considered the financial circumstances of the parties and Father's ability to provide B.G. with his own

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[6] On at least three occasions in her appellate briefs, Mother directly attributes the following statement to the trial court:

> And what I think should happen in this instance as far as [B.G.] is, yes, he's doing well in school; yes, he's he does not seem to physically be harmed, but I believe that it's in the best interest of [B.G.] to be with his father. If he does not flourish and if he regresses, then let's see if that happens, and then I'm sure that Mr. Glusak would say, 'Judge, I was wrong. He evidently is getting along better at her house than my house.'

Id. at 49. This excerpt, however, was part of Father's closing argument to the court. To the extent Mother's arguments on appeal are incorrectly directed to this alleged statement of the trial court, said arguments are without merit and will not be considered.

room and an environment in which to flourish. Initially, we cannot agree that the trial court's decision was based entirely, or even to a large extent, on the financial circumstances of the parties. Moreover, while not sufficient in itself to constitute a sufficient change to modify custody, "improvements in the non-custodial home are now proper considerations under the revised modification standard." *Bryant v. Bryant*, 693 N.E.2d 976, 979 (Ind. Ct. App. 1998) (recognizing a significant change to the custody modification statute), *trans. denied*.[7] As set forth above, the trial court must consider all relevant factors, not just those specifically enumerated in the statute. *See Doubiago v. McClarney*, 659 N.E.2d 1086.

Mother also argues that the incident with A.G., which led to the eleven-year-old child's removal, was isolated, and the turmoil in the household was resolved upon her removal. Mother further contends there is no evidence in the record regarding A.G.'s possible return. We cannot agree. With respect to A.G.'s return, Father testified that he had been informed A.G. would be in ResCare for approximately six to nine months, possibly longer. Further, Mother's counsel stated, "I'm not suggesting that [A.G.] will need to be out of the house forever". *Emergency Hearing Transcript* at 61. To be sure, the child's eventual return was likely.

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[7] Mother relies heavily on authority decided pursuant to a prior version of the custody modification statute, "which allowed for modification only upon a showing of changed circumstances so substantial and continuing as to make the existing order unreasonable." *Van Schoyck v. Van Schoyck*, 661 N.E.2d 1, 5 (Ind. Ct. App. 1996), *trans. denied*. This is no longer the standard. Among other things, the amended provision "no longer requires a showing that the existing order is unreasonable." *Id*.; *see also Rea v. Shroyer*, 797 N.E.2d 1178 (Ind. Ct. App. 2003).

Moreover, the incident with A.G. was not isolated, though it may have been one of the most severe altercations in the home to date. Mother admitted that the home was in turmoil and the siblings often fought. What she did, if anything, in an attempt to ease such turmoil is unclear. In fact, it is reasonable to assume that Mother's failure to follow through with A.G.'s treatment and the specific conditions of the May 2006 agreed order amplified the turmoil and caused significant instability in the home. This incident, as well as A.G.'s removal and adjudication as a CHINS, constituted a substantial change in at least one of the statutory factors that a court may consider in initially determining custody. Thus, we turn to the best interests of B.G.

In light of the relevant factors the court should consider with respect to the best interests of the child, we cannot say that the trial court here abused its discretion. As noted above, there is evidence of instability in Mother's home and lack of follow-through by Mother, resulting in the removal of her injured, eleven-year-old daughter. Further, while there is not definite evidence of alcohol abuse by Todd in the record before us, it is clear that his alcohol use was a significant issue in the first emergency modification hearing – so much so that the court wanted Todd to stop drinking. The undisputed evidence before us, however, reveals Todd continued to drink even after he plainly testified he would stop.

With respect to the financial positions of the parties, we observe that it is not simply a matter of Father can offer more economic benefits to B.G. As the trial court observed, Mother's small home, which often houses seven people, offers no refuge to B.G. from the instability in the home. The living conditions in Father's home, as well as

the care Father and his wife can provide, offer privacy, stability, and an environment in which the eight-year-old child can flourish.

As Mother observes, B.G. has been doing well at his elementary school and is involved in sports in the community. Certainly, this indicates that the second grader has been able to function outside of the home, despite significant troubles in the home. We need not wait, however, until his home environment begins to affect the child's functioning. In all probability, B.G. will adapt well to the nearby elementary school, and contrary to Mother's intimation on appeal, the move to Father's home will not place B.G. into an entirely new community, away from his friends, and unable to participate in his sports. While the move will take him from the home of his oldest sister as well as A.G., upon her eventual return, the trial court found that sixteen-year-old H.G. is often away from the home anyway and B.G. has an obviously strained relationship with A.G.

The record reveals that B.G. loves his parents and that they both want physical custody of him. While it certainly would have been within the trial court's discretion to deny Father's petition for modification, on the facts before us we cannot say the court abused its discretion in reaching the contrary conclusion. A substantial change in at least one of the relevant statutory factors clearly occurred, and the trial court's finding that modification was in B.G.'s best interests is not clearly erroneous. Therefore, we affirm the trial court's order modifying custody and awarding custody of B.G. to Father.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.