ATTORNEY FOR APPELLANT:

LISA K. ROSENBERGER
Vevay, Indiana

ATTORNEY FOR APPELLEE:

JEFFREY A. FLORES
Madison, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOSHUA BURRESS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 78A01-0701-JV-3
	)	
RHONDA RITCHIE,	)	
	)	
Appellee.	)	

APPEAL FROM THE SWITZERLAND SUPERIOR COURT
The Honorable John D. Mitchell, Judge
Cause No. 78D01-0005-JP-3

August 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Joshua Burress ("Father") appeals from the trial court's denial of his petition to modify custody regarding his minor daughter, L.R. Father presents a single issue for our review, namely, whether the trial court abused its discretion when it denied his petition to modify custody.

We affirm and remand in part.

FACTS AND PROCEDURAL HISTORY

Father and Rhonda Ritchie ("Mother") are the parents of L.R., who was born out of wedlock in 2000. Mother has suffered from bipolar disorder since before L.R. was born, and she treats her illness with medication. However, Mother must be hospitalized from time to time as part of her treatment. In 2001, pursuant to the parties' agreement, the trial court ordered that Mother would have primary physical custody of L.R., with Father having frequent visitation. The parties both lived in Vevay. Mother has another minor daughter, L.P., from a previous relationship. L.P. has lived with her father, with Mother having substantial visitation.

In 2005, Mother moved with L.R. to South Bend to be close to her parents.[1] L.P. and her father also moved to the South Bend area. Mother did not notify Father of the move. As a result, on May 20, 2005, Father filed an "Emergency Petition for Return of Minor Child" with the trial court, a "Verified Application for Contempt Citation," and a petition to modify custody. The trial court granted the petition to return L.R. to Father's

[1] L.R. missed approximately one month of school as a result of the move. However, she had completed enough school that year that she was able to attend school at the next grade level the following year.

custody that day. And after locating L.R. in South Bend at the end of June, Father took custody of L.R., and Mother had visitation.

On January 20 and May 12, 2006, the trial court conducted hearings on the petition to modify custody and contempt. The trial court took the matters under advisement. On September 5, the trial court issued an order finding Mother in contempt, but the court ordered that Mother should retain primary physical custody of L.R. The trial court found and concluded in relevant part as follows:

> 2. Subsequent to May 25, 2001, the Petitioner moved her residence to South Bend, Indiana, which is in excess of One Hundred (100) miles from Vevay, Indiana;
>
> 3. No notice was given to the Respondent prior to the change of residence.
>
> 4. The Petitioner suffers from a bipolar disorder which at times has been extremely disabling;
>
> 5. The Respondent has at times had problems with alcohol and drugs;
>
> 6. The Petitioner was pregnant with another child on the date of the hearing;
>
> 7. The Petitioner was in contempt of the Court's order for failure to allow Respondent visitation;
>
> 8. The factors set forth in IC 31-14-13-2 have not changed since May 25, 2001;
>
> 9. Due to the change of residence of the Petitioner to South Bend, Indiana, visitation should be modified; and
>
> 10. The Petitioner should be punished for being in contempt of the Court's prior order.
>
> **IT IS NOW ORDERED, ADJUDGED AND DECREED** by the Court:
>
> 1. The parties shall retain joint legal custody of said child;

> 2. The Petitioner shall retain primary physical custody of the child;
>
> 3. The Respondent shall be granted visitation rights to said child on the third full weekend of each month from 7 P.M. on Friday to 7 P.M. on Sunday, for a period of one (1) week during the Christmas holiday season, for a period of one (1) week during the Easter holiday season and for Three (3) months of each summer with the Petitioner having the right to have visitation with said child on the third weekend of each month from 7 P.M. on each Friday to 7 P.M. of each Sunday of said weekends;
>
> 4. The Petitioner is committed to the Switzerland County Detention [center] to serve ninety (90) days of imprisonment all of which is suspended; and
>
> 5. The Petitioner shall be on probation for a period of one (1) year upon the conditions that she comply with the provisions of this order.

Appellant's App. at 23-24.

Father filed a motion to correct error, which the court denied. Father asked the trial court for an emergency stay of that order pending appeal, which the trial court granted. Accordingly, L.R. has lived with Father since June 2005. This appeal ensued.

DISCUSSION AND DECISION

We review custody modifications for an abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." Apter v. Ross, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003) (quoting Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002)), trans. denied. We will not reweigh the evidence or judge the credibility of the witnesses. Leisure v. Wheeler, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005). Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences from that evidence. Id.

Indiana Code Section 31-14-13-6 provides in relevant part:

> The court may not modify a child custody order 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 of this chapter.

(Emphasis added). And Indiana Code Section 31-14-13-2 provides:

> The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including 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 violence by either parent.

This court explained the noncustodial parent's burden of proof in a custody modification proceeding in Simons v. Simons, 566 N.E.2d 551, 554-55 (Ind. Ct. App. 2001), as follows:[2]

[2] Simons involved a custody modification post-dissolution. Here, Father and Mother were never married, but paternity was established. Because the relevant statutes are identical regarding both post-dissolution and paternity custody issues, the case has the same precedential value.

> In an action to modify a custody order, the noncustodial parent seeking custody has the burden of establishing that the original or existing custody order should be modified due to a substantial and continuing change in circumstances. In a modification hearing, the trial judge must consider the evidence with the best interests of the child or children uppermost in his or her mind as the paramount concern. With regard to a decision to modify a child custody order, the trial court must determine that the changed circumstances warranting modification must be of a decisive nature and such changed circumstances will support a modification order only if such order is necessary for the welfare of the child or children involved, thereby conclusively establishing that the existing custody order is unreasonable.
>
> * * *
>
> The noncustodial parent must show something more than isolated acts of misconduct by the custodial parent to warrant a modification of [a] child custody order; the noncustodial parent must show that changed circumstances regarding the custodial parent's stability and the child's well-being are substantial and continuing.

(Emphases added).

Here, Father contends that the trial court "did not properly assess" several of the factors listed in Indiana Code Section 31-14-13-2. Brief of Appellant at 5. In particular, Father maintains that the evidence pertaining to the following factors supports the modification of custody: the wishes of the parents; the interaction and interrelationship of L.R. with her parents and other relatives; L.R.'s adjustment to home, school, and community; and the mental and physical health of everyone involved. In essence, Father contends that had the trial court properly assessed those factors, the court would have concluded that granting him primary custody of L.R. was in L.R.'s best interests. We cannot agree.

The trial court explicitly found that none of the statutory factors had changed since custody was initially awarded to Mother in 2001. And there is ample evidence in

the record to support that finding. There is no evidence that Mother's bipolar disorder is any worse than it was in 2001. The evidence shows that L.R. has close bonds with her relatives in South Bend. There is no indication that L.R. suffered as a result of Mother having taken her out of school early in the Spring of 2005. Finally, Mother's noncompliance with the custody agreement is "not appropriate grounds for switching custody." See Pierce v. Pierce, 620 N.E.2d 726, 730 (Ind. Ct. App. 1993) (noting generally court should not punish parent for noncompliance with a custody agreement with modification; only in cases of "egregious violations of custody where the child's welfare is at stake should a court modify a custody order."), trans. denied. Father's argument on appeal amounts to a request that we reweigh the evidence, which we will not do. The trial court did not abuse its discretion when it denied Father's petition to modify custody and subsequent motion to correct error.

It is unfortunate that the parties' young child, who has been living with Father for the past two years under the temporary custody order, will be uprooted yet again and returned to Mother's home at this late date. This court has always observed that "stability and permanence" are paramount in custody cases. See Cunningham v. Cunningham, 787 N.E.2d 930, 935 (Ind. Ct. App. 2003). However, the evidence and our standard of review dictate this result. Because the school year has already commenced, we remand to the trial court with limited jurisdiction to determine whether the emergency stay should continue in effect while the certification of our decision on appeal is pending.

Affirmed and remanded.

MATHIAS, J., and BRADFORD, J., concur.