

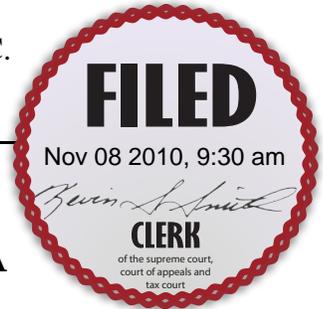
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**IN THE
COURT OF APPEALS OF INDIANA**

A.L.C.,)
)
Appellant-Respondent,)
)
vs.)
)
J.H.,)
)
Appellee-Petitioner.)

No. 82A01-1003-DR-149

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Mary Margaret Lloyd, Judge
Cause No. 82D04-0403-DR-257

November 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

A.L.C. (“Mother”) appeals the dissolution court’s partial grant of her petition to modify custody with respect to her three minor children with J.H. (“Father”). Mother presents three issues for our review:

1. Whether the dissolution court properly considered each of the statutory factors in ruling on her petition to modify.
2. Whether the dissolution court abused its discretion when it ordered that Mother’s parenting time shall continue to be supervised.
3. Whether the dissolution court abused its discretion when it ordered Mother to bear the full cost of supervised parenting time with her children.

We affirm in part, reverse in part, and remand with instructions.¹

FACTS AND PROCEDURAL HISTORY

Mother and Father were married and have three minor children. After Mother and Father divorced in 2004,² they agreed that they would have joint legal custody of the children, but that Father would have primary physical custody. The parties also agreed that Mother would pay \$50 per week in child support.³

From 2004 until 2008, Mother had regular parenting time with the children, initially two days per week, but she eventually had the children every other weekend for

¹ We remind Mother’s counsel that the appendix on appeal in a civil case shall include only “those parts of the record on appeal that are necessary for the Court to decide the issues presented.” Ind. Appellate Rule 50(A)(1). More importantly, Appellate Rule 50(A)(2)(d) provides that the appendix shall contain “the portion of the Transcript that contains the rationale of decision and any colloquy related thereto, if and to the extent the brief challenges any oral ruling or statement of decision.” Here, Mother has inexplicably reproduced the entire transcript in the appendix.

² Mother has since remarried.

³ Mother is currently more than \$10,000 in arrears. She does not appeal the dissolution court’s denial of her petition to modify child support.

overnights. In March 2008, Mother petitioned the court, seeking joint physical custody of the children.⁴ However, in November 2008, Mother, who had been struggling with an addiction to crack cocaine, had a relapse. Accordingly, Mother enrolled in a program at a drug and alcohol treatment center.

As a result of Mother's relapse, the dissolution court ordered that Mother's parenting time with the children be reduced to two hours per week and only under supervision. And as of September 2009, because the parties could not agree on a family member or friend to supervise Mother's visits, the court ordered that the visits occur at South Evansville Community Outreach ("SECO"). The dissolution court ordered the parties to split the cost of the supervised visitation.

At the hearing on Mother's petition to modify custody, Mother presented evidence that, other than her relapse in November 2008, she had been drug-free since approximately September 2007. And Mother testified that she had participated in various substance abuse recovery programs, a parenting class, and an anger management class. In addition, Mother graduated from Roger's Hair Academy in 2009. However, Mother also testified that she was still serving probation for a prostitution conviction in 2007.⁵ And Father presented evidence that Mother has not been drug-free during the time period she had alleged, and Father maintains that Mother continues to abuse drugs. Indeed, Father presented recorded statements made by Mother's current husband in 2009, C.C., wherein C.C. stated that Mother had abused Lortab, without a prescription, as well as

⁴ Mother has not included a copy of her petition to modify custody in the appendix on appeal.

⁵ Mother testified that her criminal history includes three convictions for prostitution.

methamphetamine. In addition, C.C. stated that Mother had called her two daughters “bitches” and had physically abused her son. Appellant’s App. at 578.

The dissolution court denied Mother’s request that she be awarded joint physical custody, and the court issued the following relevant findings and conclusions:

[A. 2] a. That the Court considered all the above factors [enumerated in Indiana Code Section 31-17-2-8].

b. That the Court further elaborates regarding the following factors:

i) The interaction of the children with the Mother has had some history of inappropriate communication by the Mother to the children. In an e-mail to one of the children dated May 23, 2009, the Mother refers to child support owed to the Father and a personal injury claim where she is represented by the law firm of Woods and Woods in the following manner: “they put a lean [sic] on my wood wood [sic] to pay [J.H.] [sic] 10,900 so im [sic] firing them. he [sic] won’t get shit from me I [sic] graduate in 10 days. hope [sic] you okay. I [sic] will always love you.” Additionally, the mother has called the children “Bit__” on multiple occasions. The children are aged ten, nine, and eight years old. Child support discussions are not appropriate to discuss with a child at any age, nor are using curse words to children acceptable.

ii) A review of the mental and physical health of the individual shows on June 5, 2009, the Mother was observed overnight by mental health professionals after she displayed “suicidal ideology.” Furthermore, during Thanksgiving of 2008, the Mother relapsed on cocaine.

iii) The Mother’s household has also had several incidents of domestic and family violence. The Mother’s current husband was convicted of domestic violence in an incident that occurred in front of the children. In the above incident, the children’s Step-Father threw a plastic item at the Mother and instead struck the minor child, [Sh.H.] Both [Sh.H.] and her sister, [Sa.H.] were present when this incident occurred. The Mother testified that afterwards she took the children to jail to visit their Step-Father. In May or July of 2009, police were dispatched to the Step-Father’s mother’s house because the Mother and Step-Father got into another altercation. In

August of 2009, the Father was supervising the Mother's parenting time when the Mother started an argument, cursed out the Step-Mother and threw a camera at the pregnant Step-Mother. Once again, the children were present.

3. The Court DENIES Mother's request to change custody and finds it would be in the best interest of the children to continue with supervised parenting time since the Court finds a potential exists that unsupervised parenting time might endanger the children's physical health or significantly impair the children's emotional development.

B. The Court continues its order of October 15, 2009[,] granting Mother daily telephone communication with the children.

C. On September 4, 2009, the Court temporarily ordered the Mother's parenting time to be supervised by SECO. Both parties testified that parenting time has been far less confrontational, and Court reports from SECO have been positive. The Court notes Father's complaint of financial strain from SECO's costs. The Court further notes Mother gives cash to the children to go to the Fall Festival and provides expensive gifts and crafts during parenting time. The Court further finds that the Mother's behavior at the August 2009 parenting time necessitated a third party supervisor in the first place. The Court further finds the temporary order of September 4, 2009[,] is in the children's best interest and shall become the permanent order of the Court. The only change in the order is that from this date forward, the Mother shall be solely responsible for the SECO supervision cost per week. Father's responsibility to pay one-half (1/2) of the SECO cost ceases from this date forward.

D. The Court GRANTS Mother's request that Father is ordered to provide Mother with all medical information involving the minor children.

* * *

F. The Mother's request to modify child support in accordance with the Indiana Child Support Guidelines is DENIED based upon the fact that the Mother offered no evidence to support said modification, nor supplied child support worksheets.

Id. at 25-27. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Modification of Custody

Mother first contends that the dissolution court “failed to consider all of the appropriate factors in ruling on Mother’s 2008 Petition to Modify.” Brief of Appellant at 16. In Spoor v. Spoor, 641 N.E.2d 1282, 1284-85 (Ind. Ct. App. 1994), this court explained our standard of review:

Upon an initial custody determination, the trial court presumes that both parents are equally entitled to custody. However, in a petition to modify custody, the petitioner must demonstrate the existence of changed circumstances so substantial and continuing as to make the existing custody order unreasonable. The standard is in place to avoid the disruptive effect of moving children back and forth between divorced parents and to dissuade former spouses from using custody proceedings as vehicles for revenge. Accordingly, it has long been recognized that the welfare of the children is paramount and is promoted by affording them permanent residence rather than the insecurity and instability that follow changes in custody. This is so even though at any given point in time the noncustodial parent may appear capable of offering “better” surroundings, either emotional or physical.

The standard, however, does not require a trial court to find that the present custodial parent is unfit prior to granting a change. The changes asserted in the petition are to be judged in the context of the whole environment. A trial court’s inquiry in proceedings to modify a custody decree is strictly limited to consideration of changes in circumstances which have occurred since the last custody decree.

And in Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002), our Supreme Court stated:

We review custody modifications for abuse of discretion, with a “preference for granting latitude and deference to our trial judges in family law matters.” In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993) (affirming trial court judgment shifting primary custody of children to father). 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. Id. at 179 (citing Ind. Trial Rule 52(A)).

Indiana Code Section 31-17-2-21 provides in relevant part:

- (a) The court may not modify a child custody order unless:
 - (1) the 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 8 and, if applicable, section 8.5 of this chapter.
- (b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.

And Indiana Code Section 31-17-2-8 provides:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no 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 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, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Mother's sole contention on appeal is that the dissolution court failed to consider each statutory factor. In particular, Mother states that she is "entitled to the [dissolution court's] thorough consideration of the facts presented at trial and an analysis of those facts within the context of the statutory scheme required by Indiana law." Brief of Appellant at 17. But the dissolution court stated that it considered each of the factors set out in Indiana Code Section 31-17-2-8. And the court specifically addressed the factors of the interaction of the children with Mother, Mother's physical and mental health, and evidence of a pattern of domestic or family violence in Mother's home. To the extent that Mother contends that the dissolution court was required to make a specific finding with respect to each statutory factor, she has not supported that contention with citation to relevant authority.

In Green v. Green, 843 N.E.2d 23, 27 (Ind. Ct. App. 2006), this court remanded to the dissolution court for "an evaluation of the evidence that fully considers [the statutory factors under Section 8]." But in that case, the dissolution court had not issued any findings and our review of the evidence led to our uncertainty "as to which of the section 8 factors the trial court considered important or as to the manner, if at all, in which each factor was evaluated." Id. at 27. Here, in contrast, the dissolution court stated that it had considered each statutory factor and it made specific findings on what it found to be the most significant factors.

Further, our review of the evidence on appeal shows that the dissolution court's findings are supported by the evidence. While we agree with Mother that the dissolution court appears to have misconstrued a post Mother submitted on C.C.'s MySpace page,⁶ there was ample evidence that Mother has a history of inappropriate interactions with the children. Mother does not deny that she has, on occasion, called her daughters "bitches." And Mother does not deny C.C.'s report of physical abuse by Mother against her son. To the extent Mother argues that the evidence does not support the dissolution court's finding on this factor, she merely asks that we reweigh the evidence, which we will not do. The evidence supports the dissolution court's determination on this factor.

Mother also maintains that the wishes of the children support modification of custody. But, again, her contention amounts to a request that we reweigh the evidence. Regardless, neither party directs us to evidence regarding the wishes of the children, so it is not a significant factor. We reject Mother's suggestion that the evidence that the children "enjoyed" their supervised visits with Mother, without more, indicates their desire to live with her. Brief of Appellant at 19.

In sum, Mother has not demonstrated that the dissolution court abused its discretion when it denied her petition to modify custody. The evidence supports the court's findings and the findings support its conclusions. And our review of the record leaves us with a firm belief that the dissolution court properly considered each statutory factor.

⁶ Mother wrote a message to C.C. using a MySpace account that appeared to belong to one of Mother's daughters, and the dissolution court thought that Mother had written the message, which contained an expletive, to her daughter. Regardless, the evidence, as a whole, supports the dissolution court's conclusion that Mother's interactions with the children have been inappropriate at times.

Issue Two: Supervised Parenting Time

Mother contends that the dissolution court abused its discretion when it ordered that her parenting time continue to be supervised. Indiana recognizes that the right of a noncustodial parent to visit his or her children is a “precious privilege.” D.B. v. M.B.V., 913 N.E.2d 1271, 1274 (Ind. Ct. App. 2009) (quoting Duncan v. Duncan, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), trans. denied). Thus, although a court may modify a parenting time order when the modification would serve the best interests of the child or children, a parent’s visitation rights shall not be restricted unless the court finds that the parenting time might endanger the child’s physical health or significantly impair the child’s emotional development. Id. (citing Ind. Code § 31-17-4-2). A party who seeks to restrict a parent’s visitation rights bears the burden of presenting evidence justifying such a restriction. Id. at 1275. A parent’s right to visit with her child is subordinate to the best interests of the child. See Pence v. Pence, 667 N.E.2d 798, 800 (Ind. Ct. App. 1996).

Here, Father presented evidence that Mother continues to abuse drugs, does not take medication prescribed to treat her bipolar disorder, and has physically and verbally abused her children since the entry of the Dissolution Decree. And the dissolution court expressly found that unsupervised parenting time with Mother might endanger the children’s physical health or significantly impair their emotional development. Mother’s contention on this issue amounts to a request that we reweigh the evidence, which we will not do. The dissolution court did not abuse its discretion when it ordered that Mother’s parenting time continue to be supervised.

Issue Three: Cost of Supervised Parenting Time

Finally, Mother contends that the dissolution court abused its discretion when it ordered her to pay the full cost of supervised visitation with her children. The dissolution court had initially ordered that Father and Mother would share the cost of each supervised visitation, but following the hearing on Mother's petition to modify, the court stated as follows:

The Court notes Father's complaint of financial strain from SECO's costs. The Court further notes Mother gives cash to the children to go to the Fall Festival and provides expensive gifts and crafts during parenting time. The Court further finds that the Mother's behavior at the August 2009 parenting time necessitated a third party supervisor in the first place.

Appellant's App. at 27. Accordingly, the court ordered Mother to pay the full cost of the supervised parenting time.

On appeal, Mother maintains that, because she cannot afford the \$75 weekly fee to exercise her parenting time at SECO, the dissolution court's order effectively terminates her parental rights. Again, Mother has a right to visit her children, subject only to the restrictions the court has imposed in the best interests of the children. See Pence, 667 N.E.2d at 800. And while the court heard evidence regarding Mother's income and living expenses, its conclusion that Mother should pay the weekly fees appears to be based solely on vague evidence of gifts Mother has given to the children on occasion. Our review of the record does not indicate that the specific value or frequency of those gifts was ever offered into evidence. Regardless, the evidence shows that Mother's monthly income is \$674 and her monthly rent is \$485. From that evidence, it is clear that Mother cannot afford to pay the weekly SECO fees. We reverse the dissolution court's order that Mother pay the entire SECO fee and remand for a hearing to determine what, if

anything, Mother can afford to pay for supervised visitation. Further, the court shall consider Father's ability to pay for the visitation.

In any event, Mother shall not be required to pay to visit with her children if she cannot afford to pay. We recognize that Mother's prior bad behavior has necessitated the supervised parenting time. And the record shows that Father and Mother have been unable to agree on a family member or friend to supervise parenting time without cost. These circumstances make the dissolution court's task extremely difficult, and we have not found Indiana law directly on point to assist the court. The children's interests would be best served if Father and Mother would compromise and resolve this issue at no cost to either party. Otherwise, the dissolution court shall assess the cost of visitation to each parent according to each parent's ability to pay.

Conclusion

The dissolution court did not abuse its discretion when it denied Mother's petition to modify custody and ordered that Mother's parenting time continue to be supervised. On remand, we instruct the dissolution court to hear evidence regarding Father's and Mother's respective abilities to pay the cost of Mother's supervised visitation in determining who shall pay the weekly SECO fees if no other suitable, less costly arrangement can be accomplished.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and MATHIAS, J., concur.