ATTORNEY FOR APPELLANT:

JOHN WILLIAM DAVIS, JR.
Davis & Roose
Goshen, Indiana

ATTORNEY FOR APPELLEE:

KEVIN L. LIKES
Likes & Kraus
Auburn, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE PATERNITY OF: C. K.	)	
KELLI R. YORK,	)	
Appellant-Petitioner,	)	
vs.	)	No. 57A04-0707-JV-404
JOSEPH ALAN KEESLING,	)	
Appellee-Respondent.	)	

APPEAL FROM THE NOBLE CIRCUIT COURT
The Honorable G. David Laur, Judge
Cause No. 57C01-0012-JP-11

December 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Kelli York ("Mother") appeals the trial court's grant of a petition for modification of child custody filed by Joseph Keesling ("Father"). Mother raises five issues, which we revise and restate as:

I. Whether the trial court had authority to amend its order modifying custody; and

II. Whether the trial court abused its discretion by modifying custody.

We affirm.[1]

The relevant facts follow. Mother and Father had C.K., born on November 10, 2000, out of wedlock. On December 15, 2000, the trial court entered an order confirming paternity and establishing that the parties agreed to have joint custody of C.K. and that Mother would have primary custody and Father would have reasonable visitation.

After C.K. was born, he lived with Mother and Mother's parents. In 2006, C.K.'s maternal grandmother became sick. In March 2006, Mother told Father that she might need him to take C.K. for some extra time. After C.K.'s maternal grandmother died, C.K. developed "behavioral problems" and "thr[ew] fits" for Mother. Appellee's

[1] While Mother cites to the transcript in her brief, the record does not include a copy of the transcript. We remind Mother that Ind. Appellate Rule 50(A)(2) requires the appellant to include in her appendix the "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal." Father included a copy of the transcript from the April 16, 2007 hearing, which is certified by the court reporter.

We remind Mother that Ind. Appellate Rule 43, which governs the form of briefs, states that the "typeface shall be 12-point or larger in both body text and footnotes" and "[a]ll printing in the text shall be double-spaced except lengthy quotes and footnotes shall be single-spaced."

Appendix at 25. Mother took C.K. to Michiana Behavioral for counseling. In March 2006, Mother called Father to take C.K. because C.K. "had behavioral problems," for C.K.'s safety, and for Mother's sanity. Id. at 22. Mother told Father that "she could not handle" C.K. Id. at 43. Father took C.K. and did not notice anything out of the ordinary with C.K. or have any trouble with him. C.K. lived with Father, Father's girlfriend, and her daughter.

In October 2006, Father filed a motion for modification of custody. In November, after a pretrial conference attended by both parties, the trial court entered the following order:

* * * * *

> The Court confers with counsel and finds and orders as follows:
>
> 1. The Court determines that the parties had informally agreed that [C.K.] would reside with [Father] through the school year.
>
> 2. The Court indicates to counsel that the parties should continue to permit [C.K.] to reside with [Father] during the school year as agreed, until further order of this Court.

* * * * *

Appellant's Appendix at 24.

In December 2006, the guardian ad litem submitted a report, in which she indicated that Mother stated that C.K. made significant improvements in his behavior. The guardian ad litem recommended that Father "be granted primary and physical custody as this is consistent with what [C.K.] has become accustom [sic] to over the past

seven months." Id. at 32. In April 2007, the guardian ad litem submitted another report that indicated that her original recommendations were still in C.K.'s best interest.

In April 2007, the trial court held a hearing. Mother testified that she and Father agreed that C.K. would stay with Father until C.K. dealt with his grief and anger and that it was just for the school year. Father testified that there was never an agreement that the arrangement was going to be only for the school year. Father also testified that he repeatedly asked Mother how long C.K. would stay with him and Mother never gave Father an answer.

On April 16, 2007, the trial court entered the following order:

* * * * *

> The Court now finds and orders as follows:
>
> 1. The parties are awarded Joint Legal Custody of [C.K.], and [Father] is granted primary physical custody.
>
> 2. [Mother] shall exercise parenting time as set out in the Indiana Parenting Time Guidelines, with her midweek and the Sunday following her weekend parenting hours extended to overnight. [Mother] shall, on those extended overnights, transport [C.K.] to school or the child care provider in the morning.
>
> 3. Each party shall be notified of scheduled medical, dental, and school activities, as set out in the Indiana Parenting Time Guidelines.
>
> 4. [Mother] shall pay child support of $5.00 per week, commencing April 20, 2007, and continuing each week thereafter until further order of the Court.

* * * * *

Id. at 1-2.

On May 16, 2007, Mother filed a motion to correct error.[2] On May 21, 2007, the trial court denied Mother's motion to correct error and entered the following order:

* * * * *

> The Court examines [Mother's] Motion to Correct Error and notes as follows:
>
> 1. In reviewing the status of the case, the Court noted that no final custody had been entered in this cause and that the parties had been functioning pursuant to a provisional order and an out of Court modification of that provisional order by the parties themselves.
>
> 2. The Court considered the evidence submitted and the Guardian Ad Litem report and, in entering it's [sic] final custody and parenting Order, used the "best interest of the children" standard, as set out in IC[ ] 31-14-3-2.
>
> 3. Motion to Correct Error DENIED.

Id. at 3.

On June 5, 2007, Mother filed a motion to reconsider the motion to correct error, and the trial court set a hearing on the motion for July 31, 2007.[3] On June 19, 2007, Mother filed a notice of appeal. On July 16, 2007, the trial court entered the following amended order:

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[2] The record does not contain a copy of Mother's motion to correct error.

[3] The record does not contain a copy of Mother's motion to reconsider the motion to correct error.

Court examines [Mother]'s Motion to Reconsider Motion to Correct Errors and Respondent's Response thereto. Court now corrects its order of April 16, 2007, as follows:

1. Pursuant to IC-31-14-13-2 and IC 31-14-13-6, the Court considered the following:

    a. [Mother] had voluntarily placed the minor child with [Father] because she couldn't control him and because she was having marital difficulties. The parties disputed whether at that time the intent was permanent placement, but that dispute is not controlling here.

    b. [Father] enrolled the child in school and the child has done well in his new school, as evidenced by the testimony of his teachers. When the child came to Middlebury he was immature, slightly behind in his social and educational skills. All of this has greatly improved.

    c. The child has developed a close relationship with his father, his father's girlfriend, and their family. The child is flourishing in this environment and to remove him and place him back with [Mother] would be harmful.

    d. [Mother] exhibited instability in her personal life, she frequently relocated, and was unable to control the child.

    e. The GAL Report cited many reasons why the child should remain with the [Father] and the Court agrees with those reasons cited.

2. Based upon the above, the Court finds, pursuant to IC 31-14-13-6 that the modification of the prior order is in the best interest of the child and that there is a substantial change in factors as required by IC 31-14-13-2.

3. [Father] is granted primary physical custody of [C.K.], and the parents [sic] joint legal custody status continues.

4. [Mother] shall exercise parenting time as set out in the Indiana Parenting Time Guidelines, with her midweek and the Sunday

following her weekend parenting hours extended to overnight. [Mother] shall, on those extended overnights transport [C.K.] to school or the child care provider in the morning.

5. Each party shall be notified of scheduled medical, dental, and school activities, as set out in the Indiana Parenting Time Guidelines.

6. [Mother] shall pay child support of $5.00 per week, commencing April 20, 2007, and continuing each week thereafter until further order of the Court.

* * * * *

Id. at 4-6.

I.

The first issue is whether the trial court had authority to amend its order modifying custody. Mother contends that the trial court did not have jurisdiction to amend the custody order in response to Mother's motion to reconsider the motion to correct error. Mother argues that she filed her motion to correct error "asserting, among other things, that the order changing custody was 'contrary to the evidence and contrary to law because there [was] no evidence of a substantial change in one or more of the factors specified by IC 31-14-13-2 in Mother's home."[4] Appellant's Brief at 3. Mother also indicates that she filed her motion to reconsider the motion to correct error and pointed out "that a final custody order had been entered on December 15, 2000, and that consequently the proper standard for consideration of Father's motion seeking

[4] Bracketed text appears in Mother's brief.

modification of custody was the standard of IC 31-14-13-6 requiring proof of a substantial change in one or more of the factors listed in IC 31-14-13-1 as well as proof that custody as modified would be in the best interests of the child." Id. at 4. A party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. Batterman v. Bender, 809 N.E.2d 410, 412 (Ind. Ct. App. 2004). Invited error is not subject to review by this court. Id. Because the trial court amended its order and relied on the standard pointed out in Mother's motion to reconsider the motion to correct error, we conclude that Mother invited any error, and the issue is not reviewable on appeal.[5] See Batterman, 809 N.E.2d at 413 (holding that appellant had invited error).

II.

The next issue is whether the trial court abused its discretion by granting Father's motion to modify custody. The modification of a custody order lies within the sound discretion of the trial court. Spencer v. Spencer, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997), reh'g denied. "We review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (quoting In re Marriage of Richardson,

[5] We note that Ind. App. Rule 8 states that "[t]he Court on Appeal acquires jurisdiction on the date the trial court clerk issues its Notice of Completion of Clerk's Record." The trial court amended its order on July 16, 2007, and the trial court clerk issued its notice of completion of the clerk's record on July 20, 2007.

622 N.E.2d 178, 178 (Ind. 1993)). The Indiana Supreme Court explained the reason for this deference in Kirk:

> 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. (citing Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "Therefore, '[o]n 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.'" Id. (quoting Brickley, 247 Ind. at 204, 210 N.E.2d at 852). We may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

The trial court entered findings of fact and conclusions thereon when it issued its order modifying custody. When reviewing the trial court's findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or

conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

Ind. Code § 31-14-13-6 (2004) governs the modification of a child custody order and provides, in part, that "[t]he 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 and, if applicable, section 2.5 of this chapter." Ind. Code § 31-14-13-2 (2004) 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 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.

"A change in conditions 'must be judged in the context of the whole environment,' and it is the 'effect upon the child . . . that renders a change substantial or inconsequential.'" In re Winkler, 725 N.E.2d 124, 128 (Ind. Ct. App. 2000) (quoting Lamb v. Wenning, 600

N.E.2d 96, 99 (Ind. 1992)). "Whether the effect is of such a nature as to require a change in custody is a matter within the sound discretion of the trial court." Id.

Mother argues that the evidence does not support the findings that: (A) she placed C.K. with Father because she could not control C.K. and because she was having marital difficulties; and (B) C.K. was immature and behind in his social and education skills. Mother also argues that her actions did not have any effect on C.K.

A. Mother's Inability to Control C.K.

Mother challenges that trial court's finding that Mother had voluntarily placed C.K. with Father because she could not control him and because she was having marital difficulties. Our review of the record does not reveal that Mother placed C.K. with Father because she was having marital difficulties. To the extent that the trial court found that Mother placed C.K. with Father due to marital difficulties, we conclude that the trial court clearly erred. The record reveals that Father testified that Mother called him to take C.K. because C.K. "had behavioral problems" and Mother asked Father to take C.K. for C.K.'s safety and for her sanity. Appellee's Appendix at 22. Mother merely requests that we reweigh the evidence with regard to her inability to control C.K., which we cannot do.

B. C.K.'s Development

Mother challenges the trial court's finding that "[w]hen [C.K.] came to Middlebury he was immature, slightly behind in his social and educational skills. All of this has greatly improved." Appellant's Appendix at 4. Our review of the record does

not reveal support for the finding that C.K. was "behind in his social and educational skills." Thus, we conclude that the trial court clearly erred by making this finding.

Mother does not challenge the trial court's findings that C.K. has "done well in his new school" and has "developed a close relationship with his father, his father's girlfriend, and their family." Appellant's Appendix at 4. Rather, Mother argues that C.K.'s improvement in Father's temporary custody is not enough to justify modification and that there was no evidence indicating a substantial change in Mother's home or that she exhibited instability in her personal life. A child's improving condition is part of a trial court's consideration of the child's best interests. Joe v. Lebow, 670 N.E.2d 9, 23 (Ind. Ct. App. 1996). However, evidence of a child's improving condition cannot fall within the trial court's consideration of a substantial change in one of the statutory factors. Id. In other words, without independent evidence of a substantial change in the custodial parent's home, evidence of a child's improving condition with the noncustodial parent will not by itself support a custody modification. Id.

Mother relies on Joe, in which this court held that "[c]hanges in the noncustodial home, absent changes in the custodial home as well, have never supported a change in permanent physical custody." Joe, 670 N.E.2d at 21 (citing Pierce v. Pierce, 620 N.E.2d 726 (Ind. Ct. App. 1993), trans. denied; Drake v. Washburn, 567 N.E.2d 1188, 1190 (Ind. Ct. App. 1991), trans. denied). The court held that this principle applies to prohibit courts from basing a change in permanent physical custody upon evidence of changes in a child's condition occurring during the period in which the physical custody of that child

has been transferred to the noncustodial parent pursuant to an emergency petition. Id. at 22.

Here, in March 2006, Mother called Father to take C.K. because C.K. "had behavioral problems" and asked Father to take C.K. for C.K.'s safety and for her sanity. Appellee's Appendix at 22. Mother also told Father that "she could not handle" C.K. Id. at 43. The record also reveals that Mother had four or five jobs over the past five years and moved four times in the past five years. Mother asks that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Fields, 749 N.E.2d at 108.

In summary, we conclude that the trial court made two findings that were clearly erroneous. We must consider whether the remaining findings support the judgment. Yanoff, 688 N.E.2d at 1262. The remaining findings indicate that Mother voluntarily placed C.K. with Father because Mother could not control C.K. and that Mother exhibited instability in her personal life. We cannot say that these findings are clearly erroneous. "[T]he noncustodial parent must show something more than isolated acts of misconduct by the custodial parent to warrant a modification of child custody; the noncustodial parent must show that changed circumstances regarding the custodial parent's stability and the child's well-being are substantial." Wallin v. Wallin, 668 N.E.2d 259, 261 (Ind. Ct. App. 1996). We cannot say that any one factor warrants a change of custody in the present case. However, the consideration of all the factors is sufficient to establish that modification is in the best interests of the child and a

substantial change has taken place in the interaction and interrelationship of the child with the child's parent or parents, the child's adjustment to their home and community, and the health of all of the individuals involved.[6] See Rea v. Shroyer, 797 N.E.2d 1178, 1184 (Ind. Ct. App. 2003) (holding that the trial court did not abuse its discretion when it modified custody); Barnett v. Barnett, 447 N.E.2d 1172, 1175 (Ind. Ct. App. 1983) (holding that modification of custody was warranted).

For the foregoing reasons, we affirm the trial court's grant of Father's petition to modify the custody of C.K.

Affirmed.

BARNES, J. and VAIDIK, J. concur

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[6] Mother argues that the trial court's order permanently modifying custody in derogation of the parties' agreement to place the child temporarily in the custody of the noncustodial parent is contrary to public policy favoring cooperation between parents with respect to the upbringing of their children and the alleviation of parenting problems. We addressed a similar argument in Rea v. Shroyer, 797 N.E.2d 1178, 1184 (Ind. Ct. App. 2003). In Rea, we held that "[t]his is not a situation where a non-custodial parent was allowed an extra month of visitation in the summer or a few extra days or weekends during the year." 797 N.E.2d at 1184. Similar to the circumstances in Rea, Mother voluntarily gave C.K. to Father and C.K. remained with Father for approximately seven months before Father filed his motion for modification of custody.

Mother also argues that the trial court committed prejudicial error when it entered its order granting temporary custody to Father without holding an evidentiary hearing. Mother argues that she was prejudiced because "the trial court created a necessary condition for circumstances the trial court later took into consideration as determinative when rendering it [sic] decision to change custody." Appellant's Brief at 26. Mother failed to object on this basis or present this argument to the trial court. "A party may not advance a theory on appeal which was not originally raised at the trial court." Hay v. Hay, 730 N.E.2d 787, 793 (Ind. Ct. App. 2000). Consequently, Mother has waived this argument. See, e.g., id. at 794 (holding that father waived his argument where the father failed to present the argument to the trial court).