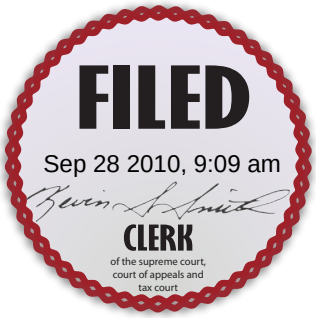

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IN THE COURT OF APPEALS OF INDIANA

D.C., Father,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A03-0912-CV-609
	)	
K.C., Mother,	)	
	)	
Appellee.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
And The Honorable Cheryl A. Williamson, Magistrate
Cause No. 45C01-0208-DR-522

September 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

D.C. ("Father") appeals the trial court's order that granted the petition of Ki.C. ("Mother") to modify the existing custody of the parties' minor daughter Ka.C. ("Ka.").

We affirm.

ISSUE

Whether the trial court abused its discretion when it changed custody of Ka. from Father to Mother.

FACTS

The marriage of the parties was dissolved on July 6, 2004. The dissolution order incorporated the parties' agreement that they would have joint legal custody of Ka. (born November 17, 2002), and Mother would have primary physical custody.

In the early morning hours of March 12, 2006, Mother operated her vehicle while intoxicated. Ka. was in the vehicle with her. Mother was arrested, and Ka. was placed in foster care by the Department of Child Services ("DCS"). Child welfare authorities advised that Ka. could not be released to Father or Mother. Father and Mother then met with Father's attorney, who drafted an agreement that Father have sole custody. On March 13, 2006, an "agreed order" was issued, reflecting the agreement by Father "and [Mother], pro se," that the existing child custody and support be modified to grant Father "sole physical and legal custody" of Ka., that Mother have supervised visitation, and that Father's support obligation of Ka. "cease." (App. 22, 23).

On October 21, 2008, Mother filed a verified petition for amendment of the agreed order. Mother asserted that after her March 2006 arrest and the placement of Ka. in

foster care, the parties had agreed to Father's custody of Ka. "pending the disposition of" her criminal charges and the resulting CHINS proceedings. (App. 27). She further asserted that she had subsequently "satisfactorily completed all requirements" of her probation following her plea of guilty to operating while intoxicated with a minor and the recommendations of DCS, resulting in the dismissal of the CHINS proceedings. Finally, Mother alleged that the intent of the modification order was a temporary change of custody for her to comply with said requirements, but that Father had failed "to initiate and/or cooperate with proceedings for the return of primary physical custody" of Ka. to Mother as intended. (App. 28).

For two days, August 28, 2009, and October 21, 2009, the trial court heard the testimony of Father, Mother, and its appointed Guardian Ad Litem (GAL) for Ka. Testimony by Father and Mother indicated that following the March 13, 2006 custody modification order, Ka. remained primarily in Mother's physical custody in Valparaiso, with informal supervision by Father, Ka's maternal grandmother, and other members of mother's family. Father worked as a law enforcement officer in Chicago and performed part time security there, and generally spent nights and weekends in Valparaiso with Mother and Ka. Late in the summer of 2006, Mother advised Father that she no longer wished to have a sexual relationship with him and that they should simply interact as co-parents of their daughter. As a result, Father then resumed living with his sister and brother-in-law in their home forty-five minutes from downtown Chicago in Bloomingdale, Illinois; took Ka. with him to that home; and placed Ka. in a daycare facility nearby.

Around this same time period,[1] Mother was walking home from a wedding during the local Popcorn Festival when she was arrested and charged with public intoxication. On October 5, 2006, pursuant to a plea agreement, Mother entered a guilty plea to the earlier charge of operating while intoxicated with a minor passenger and the recent charge of public intoxication.

Thereafter, Ka. resided with Father at the home of his sister and brother-in-law. Father worked in downtown Chicago on weekdays as well as some evenings; Ka. was in a daycare facility during the day and often cared for by Father's sister and brother-in-law in the evenings. Mother's ability to travel to Bloomingdale was often limited by transportation issues, and her parenting time with Ka. was further limited by Mother's evening and weekend employment – the times when Ka. was not in daycare.

Mother completed all requirements of her probation, including substance abuse evaluation[2] and counseling. She was involved in no further alcohol-related incidents.[3] Mother testified at length about the developmental and family-related activities that Ka. had been involved in while in her custody and her desire to renew those activities with Ka. Mother testified about her extended family in the Porter County area, its frequent family activities, and the love of that family for and commitment to Ka. Mother testified at length concerning her history of keeping Father advised of Ka.'s daily life when Ka.

[1] Father's testimony in this regard is equivocal; and Mother testified that it occurred five days after Ka.'s placement by Father in the Bloomingdale daycare facility.

[2] Mother testified that she had undergone three substance abuse evaluations and had never been diagnosed as a substance abuser.

[3] There was no evidence of any alcohol-related incidents prior to the one in March of 2006.

had been in her custody, but testified that since Ka. had lived with Father in Bloomingdale, he neither provided such information to her nor responded to her calls in that regard.[4] She testified that while living with Father Ka. became increasingly defiant and insistent on having her own way and unwilling to accept consequences for inappropriate behavior. Finally, Mother testified that she was willing to participate in counseling with Father on co-parenting; that Ka. needed "both [parents] to be one hundred percent involved"; and that although she was seeking to be "the physical custody parent" of Ka., "with joint custody with [Father]," she believed that Father should have "equal parenting time" when he was "available." (Tr. 270, 268, 269).

During Father's testimony, he acknowledged that he and Mother had "more" co-parenting problems than he had realized and that he now recognized the need for counseling in that regard. (Tr. 128). Father testified that he believed his custody of Ka. should continue because Mother had "made bad decisions"; specifically, her 2006 "DUI with [his] child in the car," and her public intoxication arrest. (Tr. 81). According to Father, he was "more stable, more secure" and provided Ka. "a better structure of life," with a consistent daily routine. (Tr. 85). He requested that the trial court specifically order "a set time for daily phone calls, [and] a set time for parenting time" for Mother. (Tr. 114).

The GAL's report recommended that custody remain with Father "for purposes of stability for" Ka. (App. 33). Nevertheless, the GAL testified that Ka. "need[ed] to be

[4] Father did not deny this.

with her mother as much as possible," and that Ka. had a "very, very positive and strong" relationship with Mother, with a "significant and strong" bond between them. (Tr. 145).

On December 1, 2009, the trial court issued its order granting a change of physical custody. It noted that Indiana Code section 31-17-2-8 provided that modification of an existing custody order requires that such be "in the best interests of the child," and that there be "a substantial change in circumstances." (App. 16). It further noted that Indiana Code § 31-17-2-8 "sets out the factors the Court must consider in deciding whether a change of custody is in the best interest of the child," and stated that the Court had "taken into account the totality of the circumstances and all the factors set forth in the statute, as well as all other evidence produced at the trial of this matter." *Id.* The trial court then found that the evidence indicated that "the parties intended the arrangement" changing custody pursuant to the March 16, 2006, agreed order "to be temporary." *Id.* The trial court further found that Mother had "produced convincing evidence of a substantial change of circumstances that would warrant a change in custody," including her successful completion of the terms of probation and the lack of any further incidents indicating that she had an alcohol problem; and facts as to the respective work schedules of the parties and the involvement of their respective families in Ka.'s life. *Id.* The trial court concluded that Mother had "carried her burden of proof that a substantial change of circumstance ha[d] occurred that warrant[ed] a change in child custody." (App. 18). It ordered the "terms of the previous custody order . . . reinstated," with the parties having joint legal custody of Ka. and Mother having primary physical custody. *Id.*

DECISION

Pursuant to Indiana law, a court may not modify a child custody order unless modification is in the child's best interest and there is a substantial change in one of the several factors that a court may consider in initially deciding custody. *Kirk v. Kirk*, 770 N.E.2d 304, 306 (Ind. 2002) (citing Ind. Code § 31-17-2-21[5]). Although both parents are presumed equally entitled to custody in the initial custody determination, "a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered." *Id.* at 307.

We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. *Id.* Accordingly, we set aside a judgment modifying custody "only when [it is] clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." *Id.* Thus, "it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal. *Id.*

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[5] These factors are:

(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 interrelationships 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 defacto custodian . . . .

Father first argues that the trial court abused its discretion when it "erroneously focused on what it felt to be the temporary nature of the parties' agreement to change custody from Mother to Father." Father's Br. at 8. We note that the trial court did not "feel" such but rather found that "[t]he evidence indicated that at the time the Agreed Order was signed, the parties intended the arrangement to be temporary." (App. 16).

Father argues that there is "no evidence to support this finding." Father's Br. at 9. However, the trial court had earlier noted that the Agreed Order was drafted by Father's dissolution attorney – a fact that is uncontroverted. It further found that Mother "did not have an attorney representing her in connection with the agreement." (App. 16). The Agreed Order itself states that Mother was "pro se." (App. 22). The trial court found that "[a]t the time the Agreed Order was signed, the parties were concerned about having their daughter released from foster care following Mother's" arrest for driving while intoxicated. (App. 16). Such was supported by the testimony of both Father and Mother. Therefore, the evidence does support the trial court's finding that the parties' intent at the time they signed the Agreed Order was that the custody change be temporary.[6]

Father also asserts that the trial court's order must be reversed because various findings are "either erroneous or do not support a change of custody." Father's Br. at 14. We address these contentions in turn.

[6] Father also argues that the trial court abused its discretion in this regard because the parties' intent in agreeing to a modification of custody is "not one of the enumerated factors set forth in the statute for consideration" when considering a modification of custody. Father's Br. at 9. Father provides no authority for the proposition that tin determining whether to modify custody, the trial court may consider only evidence as to the statutory factors. In *Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008), our Supreme Court noted the statute's "nonexclusive list of factors." *Id.* at 1254. Further, inasmuch as the trial court also expressly found that there had been a substantial change in circumstances and that it was in Ka.'s best interests to modify custody, the foregoing argument by Father would not be dispositive.

Father cites to the trial court's finding that Mother's nearby "family members . . . are available to assist with caring for the parties' child," (app. 17), and notes that the trial court "criticized Father for having his relatives provide child care" for Ka. Father's Br. at 14. However, we note that the trial court's latter statement was that Father's relatives "in fact . . . provided the bulk of the care for the child." (App. 17).

Father next cites to the trial court's finding that custody with Mother would "foster . . . a better grounding in [Ka.'s] ethnic/cultural background," (app. 17), and directs us to the GAL's testimony that Father had biracial friends and relatives and he had provided her with diversity books and dolls. We do not find the facts noted by Father to controvert the trial court's finding, given its role in assessing witness credibility. *See Kirk*, 770 N.E.2d at 307.

Father next appears to challenge the trial court's finding that Ka.'s behavior had become "disrespectful" and "out-of-control." (App. 17). He asserts that the "only evidence" in this regard is testimony that Ka. interrupted Mother when she was on the phone or cried for toys at the store. Father's Br. at 15. The evidence in this regard is not so limited as he portrays. Mother did testify that Ka. was no longer able to entertain herself, or engage in "independent play," thus needing "attention" all the time, even when Mother was on the telephone. (Tr. 406). Also, that

> [w]hen we go to the store, and no matter what store it is, whether it be a grocery store, whether it be the laundry mat, K[a.] has to have something purchased for her, has to. And if she doesn't get it, she will pout and throw some sort of fit all the way home. I've had conversations with – and he's smiling because he knows I'm right. I've had conversations with him about this, and he says, "Well, what do you want?" He buys her something every single time, no matter where they go. . . . . [I]n the last six months to a

> year when Ka. comes over, we can't go anywhere without her having the need to buy something or get something or do something. We could have an eight-hour day of activities, and without that ninth hour of being entertained, she – she just doesn't know what to do with herself. She can't just come home and just relax in her own home.

(*Id.* at 408). Mother also testified that Ka. had become "very disrespectful," having been "allowed to have back and forth conversation with adults," and that she "d[id]n't do things she [was] asked to do," and would not "accept any sort of punishment." (*Id.* at 245, 246). She further testified that when Ka. failed to behave as asked, "she thr[ew] a temper tantrum, a fit," and was unable "to do the consequences." (*Id.* at. 246). She further testified that Ka. "d[id]n't accept time-out," and would manipulate the truth. *Id.* According to Mother, "in the last year-and-a-half," Ka. had come to believe she could "get away with" things and "ha[d] no fear of consequences." (Tr. 247).

When the Agreed Order was entered in March of 2006, Mother faced an alcohol-related criminal charge and as a result, Ka. was in foster care and the subject of CHINS proceedings. Mother has completed all requirements necessary to resolve both the criminal and CHINS matters. She has a strong, loving bond with Ka., and has an extended family committed to participating in Ka.'s life -- including Mother's older son, Ka.'s half-brother, who has historically been very involved with Ka. Further, according to the GAL, Ka. needs Mother's presence in her life, and the existing arrangement has not fostered that. Mother is willing to provide information to Father about Ka.'s activities and to involve him in those activities. This and the evidence recounted earlier support the trial court's conclusion that there had been a substantial change in the parties' circumstances since the previous order, and custody with Mother is in Ka.'s best interest

– *i.e.*, that Mother met her burden of demonstrating that the existing custody order should be altered. *Kirk*, 770 N.E.2d at 307. Accordingly, we find no abuse of discretion here. *Id.*

Affirmed.

BROWN, J., and BRADFORD, J., concur.