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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE PATERNITY OF B.L.A.S.	)	
JERRY L. BRODIE,	)	
Appellant-Respondent,	)	
vs.	)	No. 84A04-0705-JV-248
ALICIA SHOTTS,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable R. Paulette Stagg, Magistrate
Cause No. 84C01-0010-JP-782

January 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jerry L. Brodie ("Father") appeals the trial court's order that denied his emergency petition to modify custody of his son, B.L.A.B. ("B.").

We affirm.

ISSUE

Whether the trial court abused its discretion when it denied Father's petition.

FACTS

Alicia Shotts ("Mother") gave birth to B. on September 25, 2000. An agreed paternity judgment of March 21, 2001, established Father's paternity and provided that Mother would have primary physical custody of B., with Father having reasonable visitation.

In the summer of 2006, Mother was living in a four-bedroom house in rural Parke County with her sons C. (born 8/13/1996), E. (born 11/29/1998), and B., and her daughter A. (born 3/8/2004).[1] On June 5, 2006, E. and A. were napping inside the house; Mother was working in the yard; B. was also in the yard; and C. was mowing the grass on a riding law mower. Mother went inside for a drink of water and then heard B. screaming. B. had climbed on the back of the lawnmower to ride, fallen off, and been run over. B. was transported to Methodist Hospital in Indianapolis, where he was treated for nearly a month. B. suffered the loss of his little toe on his left foot and a small portion of his heel; lacerations to his buttocks, back, and right hand, and broken fingers on his right hand.

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[1] Father is only the father of B.

On June 20, 2006, Father filed an emergency petition to modify physical custody of B. Father has not included the petition, or Mother's response thereto, in his Appendix. However, statements by the trial court and Father's counsel alluded to the issue that a "change in circumstances" could warrant modification of custody and that the petition had alleged the following: B. suffered "very serious injuries" when run over with a lawn mower being operated by his older half-brother; social workers were investigating the allegation that Mother was unable to "supervise or care for the children; and Mother "lack[ed] judgment and ability to supervise." (Tr. 170, 171, 174).

The trial court heard evidence on March 5, 2007. A teacher and the director from B.'s kindergarten program, in which B. had participated since August 14, 2006, testified that he had nearly perfect attendance, was never tardy, and was always nicely dressed and clean. The teacher, a veteran of more than twenty years in the kindergarten classroom, described him as "one of the most loving kids" she had ever met. (Tr. 4). The teacher had observed a pattern -- B. would "get upset and . . . cry" late in the day on some days, once even throwing up; she "asked" the reason, and learned "it was on the days that his dad was supposed to pick him up and he didn't want to go." (Tr. 5). Both women had observed that after a visit with Father, B. would be "rude" and "kind of mean" to the other children. (Tr. 7, 17). Both testified that B. was an average student and performed at grade level. The teacher testified that as of March 2007, B. exhibited no "effects from" the injuries to his right hand and had recovered from his foot injuries. (Tr. 14). The teacher also testified that Mother had helped in the school's after-school program. Both

had met Mother, as all three brothers attended the same school, and neither had observed any unusual behavior on her part.

When Mother took the stand, Father's counsel asked a series of questions based on "medical and mental health records" received "in the last two weeks." (Tr. 39). The records, admitted into evidence, were in two exhibits. First, the records from Mother's primary care physician, dating from August of 2002 to December of 2006, reflect a notation of her generalized anxiety, obsessive-compulsive, and depressive disorders. At times, these are shown as improved. However, in March of 2006, the conditions were noted as "deteriorated," and notes reflect Mother's suspicion of bipolar disorder, with cycles of being "up" and then "depressed." (Ex. 2). The physician's office gave her a "handout" about bipolar disorder and referred her to Hamilton Center "psych" to "maybe . . . get evened out." *Id.* Second, there are records from Hamilton Center, Inc., reflecting Mother's sessions there from April 21, 2006, through May 30, 2006, after which Mother did not return.[2] Father's counsel elicited Mother's admission that she had stated things reflected in the notes from Hamilton Center. However, Mother qualified and put in context nearly all of these admissions. She explained that her mood swings were occasional, and not extreme. She essentially testified that she had sought help when she felt overwhelmed -- but that her feelings were ones of temporary inadequacy as a single parent with four young children.

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[2] B.'s injuries took place on June 5, 2006.

Mother testified that B. did exercises for his right hand regularly, and that his last medical appointment in that regard had indicated that no further treatment was necessary. She testified that her three boys frequently argued and engaged in physical squabbles, a matter of sibling rivalry, but never bruised or bloodied one another. Mother testified that her children are happy, and that the brothers have chosen to share a room.

Mother testified that B.'s visitation was normally for two days every week. However, in early February of 2006, she had asked Father to take B. into his home for two weeks because the brothers "had been squabbling quite a bit" and she "thought it would be a good idea to separate them . . . for a couple of weeks." (Tr. 139). When B. came home after two weeks, she saw bruises on his buttocks. When asked, B. "said that his dad had spanked him with a belt." (Tr. 140). After B. was back with Mother, there was no contact from Father for over a month. At the end of March 2006, Mother asked Father why there was no contact with B., and "he said, well he told me he doesn't want to see me so I'm not going to make him do something he doesn't want to do." (Tr. 140-141). Father did not visit with B. from the time he returned to Mother's in February until after his injury on June 5, 2006.

Mother described B. as "very happy" and "very well adjusted." (Tr. 146). Upon questioning by the trial court, Mother confirmed that as a parent, she had also "dealt with the health concerns" of her sons C. and E., both of whom had (in their early school years) undergone multiple surgeries for birth defects. (Tr. 80). The procedures for each included a colostomy, spinal surgery, and a colostomy reversal.

Father testified that in the exercise of his visitation, he had had contact with Mother on a regular basis, but Father admitted that he had never observed any behavior that suggested she had mental health issues. Father also testified that during the time B. stayed with him, the local daycare reported that B. was "awesome," with "no problems out of him," and "very loving and caring." (Tr. 99). Father admitted that while B. was with him, he "whipped his butt" with a belt. (Tr. 100). Father also admitted that he had not had visitation with B. after returning him to Mother in February.[3]

Brian Hudson, Mother's former husband and the father of E., testified that he was in Mother's home on a regular basis to see E. Hudson testified that he had never observed any behavior by Mother indicating mental health problems. He further testified that B. was "a great kid," and that the three brothers "argued," like "all brothers argue," but that he had never seen any violence, and that E. had never reported any physical violence in the home. (Tr. 158, 159).

The trial court also received into evidence the September 7, 2006, report of the Parke County Department of Child Services after a complaint of "neglect" – specifically, Mother's lack of supervision pertaining to the lawn mower incident. (Ex. A). The report reflected that the investigation included interviews with Mother, Father, the fathers of C., E., and A., "neighbors, friends/acquaintances, relatives, school officials, the other children, and the victim." *Id.* It noted that there had been no previous Child Protective

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[3] Father did resume visitation with B. after his release from the hospital.

Service/Child Welfare "history on the mother and/or the children." *Id.* The investigation reached the conclusion that "the incident was . . . an accident." *Id.*

The trial court took the matter under advisement. On March 26, 2006, the trial court issued its order concluding that Father had "failed to show that there is a substantial change in one or more of the factors described in I.C. 3[1]-14-13-2." (App. 6). The trial court explained its "reasons" therefor as follows:

> The court feels it cannot challenge the finding of the Parke County Department of Child Services when it did not substantiate an allegation of abuse concerning the lawn mower accident suffered by the minor child. Further the court finds no corroborating evidence as to mother's mental health presented by way of records from Hamilton Center. The court believes mother may have been attempting to assemble a history in order to qualify for assistance from the Social Security Administration. In any event, there is no other evidence which would raise concerns about mother's mental health.

(App. 6).

DECISION

Here, neither party requested findings and conclusions, as permitted by Trial Rule 52. Father reads the trial court's order as containing "sua sponte findings of fact" about Mother's mental health and the DSC investigation. Father's Br. at 1. Where a trial court enters some findings when not requested by the parties to do so, those findings control only the issues they cover, and we apply a general judgment standard to any issue about which the court makes no finding. *Rea v. Shroyer*, 797 N.E.2d 1178, 1181 (Ind. Ct. App. 2003). Here, the order itself first states the trial court's conclusion that Father had "failed to show that there is a substantial change" in a statutory factor, and then gives the trial court's "reasons" for reaching that conclusion. (App. 6). Hence, issues not mentioned in

those "reasons" would warrant application of the general judgment standard. Moreover, we find the trial court's order to be in the nature of a general judgment. A general judgment may be affirmed on any legal theory supported by the evidence. *Rea*, 797 N.E.2d at 1181. Further, our review "presume[s] the trial court followed the law." *Id.*

The law provides that subsequent to the initial custody decision in a paternity determination, the trial court "may not" modify that 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 Title 31, Article 14. IND. CODE § 31-14-13-6 (emphasis added). That section provides that in determining the best interests of the child, the trial 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;
>   (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 . . . .

I.C. § 31-14-13-2.

The trial court has discretion to determine whether custody should be modified. *Rea*, 797 N.E.2d at 1181. When we review the trial court's decision as to whether to modify custody, we may not reweigh the evidence or judge the credibility of witnesses.

Id. A custody modification decision is accorded latitude and deference. *Higginbotham v. Higginbotham*, 822 N.E.2d 609, 611 (Ind. Ct. App. 2004). Our Supreme Court has explained the reason for granting latitude and deference to the trial courts in family law matters by noting that appellate courts

> 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 than what he did.

Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). Therefore, we "will not substitute our judgment for the trial court "unless no evidence or legitimate inferences support its judgment." *Higginbotham*, 822 N.E.2d at 611. Put another way, "on appeal 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." *Kirk*, 770 N.E.2d at 307 (internal citations omitted).

Father first argues that "all of the evidence presented showed Mother was suffering in 2006 from very serious and deteriorating mental health problems." Father's Br. at 8. He cites to the April 2006 record from Mother's primary care physician's office that referred her to Hamilton Center and the notes from Mother's sessions at Hamilton Center. However, as indicated above in FACTS, Mother's testimony on the stand qualified her statements and explained the context in which the statements in the records were made. Also, the records are not without internal contractions. For example, Father's refers to "Mother['s] attempted suicide," Father's Br. at 17, but one Hamilton

Center note states Mother had attempted suicide ("Initial Assessment p. 2), and another states that Mother "denied history of any suicide attempts" (Psychiatric Evaluation p. 2). Further, Mother testified that she had not attempted suicide. Moreover, it was the trial court that heard Mother's testimony and had the opportunity to observe her demeanor on the stand. *See Kirk*, 770 N.E.2d. at 307. We also note that the time period involved, from April until the end of May 2006, was the period when Father failed to exercise his customary two-days-a-week visitation with B., thus leaving Mother without any respite from the fulltime responsibility for B.'s care. Further, the trial court heard testimony from Father himself and from Hudson that they had observed no behavior by Mother during the months of April and May, 2006, that suggested she was experiencing mental health problems. There was also no testimony from either Father, Hudson, or the staff at B.'s kindergarten that Mother's behavior after the June 2006 lawn mower accident reflected mental health problems. Therefore, we find the evidence supports the trial court's conclusion that there had been no substantial change in Mother's mental health so as to warrant a modification of custody.

Father next suggests that the trial court "ignore[d] relevant [statutory] factors" that he claims are supported by the evidence presented. Father's Br. at 14. However, the ensuing arguments all seek to have us reweigh the evidence presented to the trial court and/or to assess the credibility of the witnesses heard by the trial court. This we will not do. *See Rea*, 797 N.E.2d at 1181.

Father cites our statement in *Bettencourt v. Ford*, 822 N.E.2d 989, 998 (Ind. Ct. App. 2005), "[A]ll that is required to support modification of custody is a finding that a

change would be in the child's best interests, a consideration of the [statutory] factors . . . and a finding that there has been a substantial change in one of those factors." He then faults the trial court for failing to "engage in 'a consideration of the factors.'" Father's Br. at 17. However, the statute requires that to modify custody, the trial court must find not only there has been a substantial change in one or more of the statutory factors but *also* that modification is in the best interests of the child. I.C. § 31-14-13-6. The evidence appeared to unequivocally establish that B. is a happy, well adjusted child; has a healthy relationship with his sibling; and is thriving under the existing custody order. As a general judgment, the trial court's order reflects its conclusion that it is in the best interests of B. to "remain with [M]other," as the trial court ordered. (App. 6). We do not find the evidence to "positively require" a conclusion to the contrary. *Kirk*. 770 N.E.2d at 307.

Finally, Father directs our attention to the trial court's statement that it could not "challenge the finding" of the DCS "when it did not substantiate an allegation of abuse concerning the lawn mower accident suffered by the minor child." (App. 6). Father asserts that because the DCS "has no judicial authority," its decision should have "no preclusive effect on the trial court." Father's Br. at 20, 20-21. However, he does not explain how this fact renders erroneous the trial court's determination that custody should not be modified. We have already stated that we consider the trial court's order to be a general judgment. Further, we have found the evidence to support the trial court's conclusions that a modification would not be in the best interest of B., and that there had been no substantial change in a relevant statutory factor. Therefore, we find the trial

court’s statement as to the conclusion of the DCS to be of no moment in its disposition of Father’s petition for a change of custody.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.