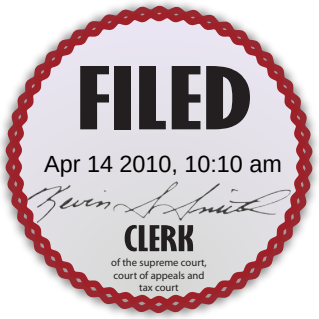

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IN THE COURT OF APPEALS OF INDIANA

IN RE THE PATERNITY OF:	)	
D.M.	)	
	)	
K.M.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 55A05-0906-JV-346
	)	
B.M.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Brian H. Williams, Magistrate
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-0602-JP-24

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

K.M. ("Mother") appeals the trial court's grant of a petition for modification of child custody filed by B.M. ("Father") regarding their son, D.M. Mother raises one issue, which we revise and restate as whether the trial court abused its discretion by granting Father's petition to modify custody of D.M. We affirm.

The relevant facts follow. Father and Mother lived together for almost two years during 2004 and 2005 until their romantic relationship ended in December 2005. On April 16, 2005, during their period of cohabitation, D.M. was born to Mother and Father. Father established legal paternity on May 16, 2006. The 2006 Decree of Paternity ordered that Mother have primary physical custody, that the parties share joint legal custody, and that Father pay Mother $100 per week in child support. Father's parenting time consisted of weekly Wednesday overnights, every other weekend from 6:00 p.m. Friday until 6:00 p.m. Sunday, Tuesday overnights following Mother's weekends, and one week of extended visitation "every six months pending further agreement . . . of the court." Appellee's Appendix at 8.

Father has owned a home in Mooresville, Indiana for the past five years dating back to before D.M. was born and when Mother and Father lived together. D.M. has his own room in Father's house. Mother, on the other hand, has had three different residences since moving out of Father's home. Initially, Mother rented a private home and an apartment for about one year each, and while residing at each residence she was sued for non-payment of rent. While living at the apartment, Mother was sued six times for nonpayment of rent. At one point during this time Mother telephoned Father and

asked whether he "wanted custody of [D.M.] because [Mother] wasn't sure where she was going to be living." Id. at 15. Also, Mother at one point asked Father to pay an electricity bill and a sewer bill for her when she could not afford to pay them.

Since January 2008, Mother has lived in Avon, Indiana with her ex-husband, M.M., with whom Mother has another child, H.M. The relationship between Mother and M.M. since Mother moved into M.M.'s house is platonic. Mother does not pay M.M. for rent or for utilities. D.M. and H.M. each have their own bedrooms in M.M.'s house. Mother informed Father of the living arrangement, and she told Father that "they would not be there long, that they had to live there for three weeks because the apartment complex she was trying to move into . . . was not ready yet . . . ." Transcript at 18. However, around the time Father filed the custody modification petition on February 21, 2008, Mother told Father that she was going to make M.M.'s house her permanent residence because Father was "going to fight for custody of [D.M.]." Id. at 133-134.

For about six months after the initial decree of paternity had been issued, Father was able to have D.M. for four days in a row coinciding with his off days from his job. About six months into this arrangement, however, after Mother found out that Father had been dating Ky.M.,[1] Mother decided to instead give Father access to D.M. in accordance with the decree. Also, Mother at times indicated to Father that she did not "want [her] son around [Ky.M.]." Id. at 30. Mother and Father also agreed that Ky.M. would not come to Mother's residence under any circumstances.

[1] Father and Ky.M. were married on September 20, 2008.

Instances in which Mother has encountered Ky.M. have led to altercations between Mother and Father. When Father and Ky.M. first started dating, Mother "didn't like [Ky.M.] and she made frequent phone calls to [Ky.M.], leaving [Ky.M.] voicemails telling [Ky.M.] that [she] had to stay away from [D.M.] . . . ." Id. at 167. Mother would also send text messages to Ky.M. to the same effect. Mother once confronted Ky.M. while at "the softball diamonds." Id. at 167. Mother made an unannounced visit to Father's house on December 31, 2006 in which Mother repeatedly banged on the door and "actually woke [D.M.] up" after noticing Ky.M.'s car in the driveway. Id. at 34. There have also been problems with exchanges of D.M. due to Ky.M.'s presence, including in March 2008 when Father attempted to take D.M. to a birthday party and in the fall of 2008 when Mother stopped by D.M.'s babysitter's house to pick up D.M. while Ky.M. was also present.

On February 21, 2008, about a month before the birthday party incident, Father filed a Verified Petition for Contempt Citation and for Modification of Prior Order for Custody and Support requesting that the trial court modify the terms of D.M.'s custody and give Father "the care and custody of [D.M.], with appropriate parenting time to [Mother] as the Court deems proper." Appellant's Appendix at Petition for Modification, Paragraph 7.[2] A hearing on Father's motion was held on March 19 and March 26, 2009. At the end of the first day of the hearing, the trial court orally ordered the parties to comply with Section I of the Indiana Parenting Time Guidelines "with regards to how

[2] We note that the Appellant's Appendix is not paginated. We remind Mother that Ind. Appellate Rule 51(C) requires: "All pages of the Appendix shall be numbered at the bottom consecutively . . . ."

[the parties] ought to be getting along and dealing with one another . . . ." Transcript at 152.

At the hearing, Father testified that Mother had denied him parenting time "four or five times," and that these denials occurred "usually whenever [Mother is] upset with [Father]." Id. at 9. Father testified that at times Mother had allowed "greater access to [D.M.] than what was allowed in the paternity order," but that "it's always been directly related to how [Father] and [Mother's] relationship is." Id. at 29. Father testified that he and Mother had an arrangement that Father could pick D.M. up at 5:30 p.m. instead of 6:00 p.m. per the paternity decree because that was a more convenient time for Father, but "if [they] were arguing for any reason . . . [Father] had to hang out in Avon until six o'clock to pick [D.M.] up or drive all the way to Mooresville and then turn around and drive all the way back." Id. at 40. Father also testified that around the time he filed his original paternity petition Mother "said she was going to take [D.M.] to Michigan . . . ." Id. at 20. Also, around the time Father filed the modification petition Mother told Father that "she had met a boyfriend in Duluth, Minnesota . . . and that she was going to try to move up there with [D.M.]." Id.

Father also presented evidence of taped phone conversations between Father and Mother and voicemail messages from Mother in which Mother "uses profanity quite a bit . . . ." Id. at 38. Father testified that during these conversations, "there's a lot of screaming and yelling, profanity and sometimes to the extreme that you can't even understand what's being said." Id. at 40. Some of these phone conversations took place

with D.M. and H.M. within earshot while in Mother's care including in the car with Mother. Mother testified that when she yells at Father over the phone and D.M. hears the conversation, she will explain to D.M. that Mother "was wrong when she screamed at [Father]." Id. at 141.

On May 20, 2009, the trial court entered the following order:

> This matter having come before the Court for hearing upon [Father's] Request for Modification of Custody, and the court having held hearing a [sic] and having taken testimony and exhibits, and the Court being duly advised;
>
> The Court finds and rules as follows:
>
> * * * * *
>
> (5) The child's adjustment to the child's:
>
> home;
>
> One of Father's significant complaints about mother is her lack of stability, and the number of household moves she has made since their relationship ended and [sic]. Since the last order the mother has moved multiple times, and is currently living with her ex-husband, [M.M.]. This appears to be the most stable living situation the mother has had; but as the father correctly points out, it is quite tenuous. While the mother and [M.M.] characterize things as great and stable, the fact remains that the mother's most stable living situation to date is largely the result of the good graces of her ex husband. Both she and he describe the living situation as platonic and being largely for the benefit of the children and the positives it creates for everyone to have [H.M.] and [D.M.] in a two parent household. (More importantly [M.M.] has time with [H.M.] that would otherwise be unavailable.) The court cannot conclude this is a long term stable solution for [D.M.] and the mother's living situation. Mother and [M.M.'s] relationship has previously failed. The living situation is inconsistent with either mother or her ex-husband having an outside romantic relationship, which seems inevitable if their "platonic relationship" is to be taken as presented. Finally, mother has described in the telephone conversations

exhibit submitted by father that the original plan was the living situation with [M.M.] was temporary and became "permanent" as a result of [Father's] custody petition. The court finds that the mother's inability to provide a stable consistent home environment weighs in favor of the father, who demonstrates considerably . . . more stability in comparison.

School; and community.

The child is not of school age and it appears that this factor is neutral as the child has yet to develop significant ties to a community of people outside family and sitters.

(6) The mental and physical health of all individuals involved.

Neither the parents, the child or any third person of importance appears to have any significant physical health issues. While not amounting to a diagnosable mental health issue, the Court has significant concerns over the mother's emotional stability and ability to handle conflict with the father. The evidence (particularly the taped conversations submitted by father), shows that both parties having had a long term relationship, and are now without question adept at creating emotional outbursts in the other. As described and shown by the evidence, the mother appears very quick to anger, and has fallen into a pattern being quick to use the child (and access to the child) as a reward and punishment system directed toward the father. This is without question a damaging and unhealthy tactic, and past episodes have directly involved and distressed the child.

Mother has also exhibited a strong and lasting resentment toward [Ky.M.,] the father's fiancé/wife that has consistently interfered with constructive co-parenting, created conflict and directly and adversely affected the child. None of these concerns appear to exist within the father's household. This factor strongly favors the father.

* * * * *

In light of this, the court now finds and rules as follows:

A. The court finds that there has been a substantial change in the factors for consideration per Ind. Code § 31-17-2-8, after consideration of all those factors per Ind. Code § 31-17-2-21(b).

> Specifically the court finds changes in considerations 5 and 6 as per above.
>
> B. The court finds that a change of custody would be in the child's best interests. . . .

Appellee's Appendix at 1-4. The trial court awarded legal and physical custody of D.M. to Father "subject to [Mother's] right of visitation/parenting time, which shall be conducted pursuant to the Indiana Parenting time Guidelines . . . ." Id. at 4.

The sole issue is whether the trial court abused its discretion by granting Father's petition to modify custody of D.M. We review custody modifications for an abuse of discretion and have 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). "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. 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. (quoting 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. 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.

The child custody modification statute provides 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 [Ind. Code § 31-14-13-2] . . . ." Ind. Code § 31-14-13-6.[3] Ind. Code § 31-14-13-2 lists the following factors:

(1) The age and sex of the child.

(2) The wishes of the child's parents.

[3] The trial court cited to Ind. Code §§ 31-17-2-8 and 31-17-2-21(b), which are applicable to determining custody in dissolution proceedings, while Ind. Code §§ 31-14-13-6 and 31-14-13-2 are applicable to determining custody in paternity proceedings. The paternity and dissolution statutes, however, contain virtually identical language.

(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 trial court abused its discretion in finding: (A) "that Mother is incapable of providing a[] stable, consistent home environment;" and (B) "that Mother's mental health weighed in favor of modifying custody." Appellant's Brief at 12, 17 (internal quotations omitted). As to each challenge, 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.

A. Stable Home Environment

Mother argues that while the record indicates accurately that Mother has moved three times in the past three years, "a review of the facts does not support the conclusion that these moves constitute a substantial change in circumstances." Appellant's Brief at 12. Mother argues that although she has experienced financial difficulty, "the existence of financial difficulty, standing alone without evidence of further effects on the child, is insufficient to support a finding that a substantial change in circumstances exists . . . ." Id. at 13. Mother argues that the trial court's characterization of her current living situation as "tenuous" is not supported by the evidence, and that "Father's concern strains the bounds of a reasonable hypothesis and ignores certain testimony." Id.

The record reveals that Mother has had three different residences in the past three years. Currently, Mother lives in the home of her ex-husband, M.M. Although Mother's and M.M.'s relationship is currently platonic, their relationship has failed previously. Mother does not have a contract or other legal right to remain in M.M.'s house. Mother does not pay M.M. for rent or for utilities. The landlords for each of her previous two residences sued Mother for nonpayment of rent, and one of the landlords sued Mother six times in one year for nonpayment of rent. At one point, Mother telephoned Father and asked whether he "wanted custody of [D.M.] because [Mother] wasn't sure where she

was going to be living." Transcript at 15. Conversely, at the time of trial Father had lived in the same house which he has owned for almost five years.

B. Mother's Mental Health

Mother argues that the trial court abused its discretion in considering that "[w]hile not amounting to a diagnosable mental health issue, the Court has significant concerns over [Mother's] emotional stability and ability to handle conflict with [Father]" as reason to modify D.M.'s custody to Father. Appellee's Appendix at 3. As articulated by Mother in her brief, the trial court relied on three factors discussed in its order in making this determination: (1) the "series of selected recorded phone calls submitted by Father;" (2) the trial court's finding that "Mother had utilized D.M. as part of a 'reward and punishment system' to respond to Father's actions;" and (3) the trial court's finding that the relationship between Mother and Ky.M. "had interfered with co-parenting." Appellant's Brief at 17. We consider each factor as described by Mother separately.

1. Phone Conversations Recorded by Father

Mother argues that "[t]he recorded phone calls were one year-old and did not accurately reflect the entirety of Father's and Mother's relationship." Id. The record reveals that Father presented evidence of taped phone conversations between Father and Mother and voicemail messages from Mother in which Mother "uses profanity quite a bit . . . . [T]here's a lot of screaming and yelling, profanity and sometimes to the extreme that you can't even understand what's being said." Transcript at 38, 40. Some of these phone

conversations took place with D.M. and H.M. within earshot. Mother testified that she explains to D.M. that Mother "was wrong when she screamed at [Father]." Id. at 141.

2. Mother's Use of D.M. as a "Reward and Punishment System"

Mother argues that "the trial court erred by finding that Mother had a 'system' for dictating Father's parenting time." Appellant's Brief at 20. The record reveals that Mother had denied Father parenting time "four or five times . . . . usually whenever [Mother was] upset with [Father]," Transcript at 9, and that at times Mother had allowed "greater access to [D.M.] . . . . directly related to how [Father] and [Mother's] relationship is." Id. at 29. Around the time Father filed his original paternity petition Mother "said she was going to take [D.M.] to Michigan . . . ," Id. at 20, and around the time Father filed the modification petition Mother told Father that "she had met a boyfriend in Duluth, Minnesota . . . and that she was going to try to move up there with [D.M.]." Id.

Father testified that "if [they] were arguing for any reason . . . [Father] had to hang out in Avon until six o'clock to pick [D.M.] up or drive all the way to Mooresville and then turn around and drive all the way back." Id. at 40. Also, for about six months following the initial decree of paternity, Mother allowed Father to have D.M. four days in a row coinciding with his off days from his job. After Mother found out that Father had been dating Ky.M., Mother decided to end this arrangement and instead gave Father access to D.M. in accordance with the decree.

3. Relationship Between Mother and Ky.M. and its Interference with Co-Parenting

Mother argues that "Mother did not have a lasting resentment towards [Ky.M.]." Appellant's Brief at 24. However, the record reveals otherwise in that Mother indicated to Father that she did not "want [her] son around [Ky.M.]." Transcript at 30, and Mother and Father agreed that Ky.M. would not come to Mother's house under any circumstances. Mother sent text messages and "made frequent phone calls to [Ky.M.], leaving [Ky.M.] voicemails telling [Ky.M.] that [she] had to stay away from [D.M.] . . . ." Id. at 167. Mother once confronted Ky.M. at "the softball diamonds" by walking up to Ky.M. while D.M. was "on [Mother's] hip" and Mother "kept coming up to [Ky.M.], yelling at [Ky.M.] . . . and [Mother's] friends actually had to pull her away from the bleachers that [Ky.M.] was sitting on and told [Mother] that she wasn't going to act that way in front of her son . . . ." Id. at 167-168. Mother was eventually removed from the vicinity.

Also, Mother's encounters with Ky.M. have led to altercations between Mother and Father. On December 31, 2006, Mother drove past Father's house and noticed Ky.M.'s car in the driveway, and Mother "parked directly behind where [Ky.M.] was parked so [Ky.M.] could not leave . . . ." Id. at 34. Mother banged repeatedly on the door and "actually woke [D.M.] up, woke [Father's cousin] up, and eventually [Father] had to call the Mooresville Police Department because [Mother] would not quit banging on [Father's] door." Id. Mother told Father that she was there "because she did not want

[Ky.M.] around her son." Id. Mother tried to remove D.M. from the house, but the police stopped Mother, telling her that "she was going to need a very, very, very good reason to take [D.M.] out of the house on New Year's Day at one or two o'clock in the morning." Id. at 34-35.

In March 2008, Father had arranged to pick up D.M. from Mother and take him to a birthday party at a water park for one of D.M.'s friends. Father and Ky.M. arrived at Mother's house to pick up D.M., but when Mother saw Ky.M., who at that point was Father's wife, in the vehicle "she actually took [D.M.] directly out of [Father's] arms." Id. at 31. Mother told Father that "it was ridiculous that [Father] would bring [Ky.M.] with [Father] to pick up [D.M.] . . . ." Id. Eventually Mother decided that she was going to let D.M. go with Father, but after some more arguing Mother again took D.M. out of Father's arms. D.M. "was very upset and crying and he was . . . screaming dad, dad, dad . . . because he wanted to go with [Father]." Id. at 31-32. After the incident, Mother explained to D.M. that "he couldn't go to the birthday party because daddy had disrespected mommy." Id. at 32.

Then, in the fall of 2008, Ky.M. dropped D.M. off at his babysitter in the morning. Later that day, on her way home from work, Ky.M. stopped by the babysitter's house to pick up D.M.'s "clothes and blankets and things like that that were to come back to [Father's] house," and while Ky.M. was there Mother arrived to pick up D.M. Id. at 35. D.M. felt the tension between Mother and Ky.M. Later Mother called Father and told

him "that it was ridiculous that [Ky.M.] was there at the same time as [Mother] and that there was no reason for [Ky.M.] to be at the babysitter at the same time as her." Id.

In summary, we conclude that Mother's arguments merely request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Fields, 749 N.E.2d at 108. Although any one factor may not necessarily warrant a change of custody in the present case, consideration of all the factors, including Mother's failure to provide a living situation for D.M. which is not tenuous, Mother's use of D.M. as a reward and punishment system directed toward Father, and Mother's relationship with Father's wife Ky.M., are sufficient to establish that modification is in the best interests of the child and a substantial change has taken place in [D.M.'s] adjustment to home, and in the emotional stability and mental health of Mother. See Walker v. Nelson, 911 N.E.2d 124, 129 (Ind. Ct. App. 2009) (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 instability of mother's life, considered with other factors, warranted modification of custody).

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

Affirmed.

MATHIAS, J., and BARNES, J., concur.