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IN THE
COURT OF APPEALS OF INDIANA

S.W.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-0908-CV-723
	)	
S.K., III,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
Cause No. 45D05-0110-DR-43214

May 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

S.W. (formerly S.K.; "Mother") appeals the trial court's order that the parties continue to have joint legal custody of the children but that S.K., III. ("Father") have physical custody. Father seeks appellate sanctions.

We affirm.

ISSUES

1. Mother: Whether the trial court abused its discretion when it modified custody.

2. Father: Whether Mother's appeal is frivolous and in bad faith, warranting sanctions.

FACTS

The parties' daughter T. was born on October 18, 1994. The parties married on November 18, 1995, and two additional daughters followed: S., born September 24, 1996; and N., born December 10, 2000. The marriage was dissolved on June 26, 2002; and Mother, who worked as a flight attendant, was awarded custody of the children.

In March of 2003, the children were removed from Mother's custody and placed in an emergency shelter after an incident of child abuse by Mother's parents in which Mother participated – a matter giving rise to CHINS proceedings. Father filed a *pro se* petition seeking "full custody" of the children. (Mother's App. 67). On January 27, 2004, after the trial court heard evidence at two hearings, it found that it was "in the children's best interests that the parties share joint legal and physical custody." *Id.* at 94. Specifically, the children were to "be in Mother's care when she [was] in Indianapolis

and . . . in Father's care when Mother [was] not in Indianapolis." The order expressly directed that the children "shall not be left in the care of Mother's family members overnight." *Id.*

On May 29, 2007, the parties executed a *pro se* agreed entry stating that the children would attend school from Father's residence for the 2007/2008 school year,[1] and that when Mother was "in town," the children would be with her "but still attend school from [Father's] residence." (Mother's App. 170). The agreed entry also stated that Mother "would . . . stop[]" Father's paying of child support "by August 1st." *Id.* The entry is not file-marked or reflected in the CCS.

Nevertheless, "the day before" school was to begin in the fall of 2007, Mother told Father, "They're staying with me. They're going to school from my house." (Tr. 80). A month later, Father "found out that they actually [were] living with their" great-grandmother and "going to school from [her] house." *Id.* School records showed the great-grandmother as their guardian. T.'s behavior at the school reflected suspensions and disciplinary issues, and N. lagged significantly in all her school work.

On December 16, 2008, Father again filed a *pro se* petition, which asserted that the children had been living with him since June of 2008 and sought "physical and legal custody" of the children. (Mother's App. 165). On January 14, 2009, the trial court ordered the Domestic Relations Counseling Bureau (DCRB) to conduct a custody evaluation.

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[1] The January 27, 2004, order had provided that after the 2003/2004 school year, "the children's school settlement shall be at Father's residence." Mother's App. 96.

At the first hearing, on May 4, 2009, the trial judge noted that she had previously ordered mediation for the parties, but Mother "didn't show up"; and that the judge "certainly remember[ed] the circumstances in the CHINS" matter. (Tr. 8). Mother admitted that although the previous order "restricted[ed] [her] family's access to the children," she left them to "spend the night over at [her] parent's house." (Tr. 24).

The trial court heard evidence on June 22, July 2, and July 8, 2008. The DCRB report was admitted into evidence. It recommended that the parties' joint custody of the children continue <u>but</u> that Father be "designated as primary residential parent." (DCRB Rpt. 2, 13).

Mother confirmed to the trial court that at the hearing before the prior (January 2004) court order, she had "informed the Court that [she] [was] going to change [her] schedule and be available for [her daughters] during the week." (Tr. 273). Nevertheless, Mother admitted that she did not change her work schedule but permitted her grandmother to care for the children when she worked. Mother testified that if scheduled to "leave" on Monday, she "would . . . drop the kids off [at Mother's] grandmother's house Monday morning" and "[w]hen she came home, . . . Tuesday, Wednesday or Thursday," she would "pick the children up and then take them home with [her]." (Tr. 351). At times, Mother would "work five days straight." (Tr. 219).

The trial court also heard other testimony regarding Mother's failure to comply with the trial court's order that the children be in Father's care when she was "not in Indianapolis." (Mother's App. 94). It also heard testimony about Mother's failure to be

specific about the times for her to exercise her visitation rights and her frequent failure to comply with her stated visitation intentions.

In August of 2007, Mother applied for SSI benefits for S.; she did not inform Father. In October of 2007, she applied for Medicaid benefits for S. Both applications were approved. S. was hospitalized for psychiatric treatment in December 2007; January 2008; March 2008; April 2008, and May 2008. Records reflect that S. had assaulted family members, had fought at school, and was subject to outbursts of rage.

In June of 2008, the children began living with Father and his wife. After S. attacked her sisters and toddler half-siblings, she was briefly placed in the Guardian Home and then in a psychiatric facility. Upon being released, S. went to live with Mother, but a month later Father learned that Mother had left S. to live with S.' maternal grandmother. In December of 2008, S. attacked her maternal grandmother and was arrested. S. was placed as an inpatient at the Youth Opportunity Center ("YOC"). By the time of the hearings, there had been a true finding in juvenile court involving S., and her YOC inpatient treatment was a condition of probation. S. reported to a counselor that her removal during the CHINS proceeding was "the most peaceful time of [her] life" because Mother "couldn't hurt [her] anymore." (Ex. Q.).

In the meantime, from June of 2008 until the summer 2009 hearings, T. and N. had lived with Father. Father testified that before the children began living with him full-time, they had experienced "lack of discipline" and "behavior problems" resulting from the inconsistency in their lives and frequently changing residences, but they now had

"routines," with chores and responsibilities and were involved in various school and church activities. (Tr. 135). Father testified that he petitioned for custody because he believes children "need[] routine, security, [and] parental guidance." (Tr. 62). He described T. as "a totally different kid" from the previous year, and testified that after he "got tutors" to help N., she was reading at a level ahead of her peers. (Tr. 68, 71). Both were now "secure emotionally," "excelling in school," and with "little to no disciplinary problems at school." (Tr. 72). Father's wife testified that she and Father had rules and set boundaries for the children. She also testified to her love for the children and their happiness in their home and comfortable involvement with their extended family.

Despite the fact that both T. and N. were living with Father from June of 2008 until the hearings, he continued to pay child support to Mother for all three daughters. Mother provided no financial assistance to him for the support of T. and N, and she also claimed the earned income tax credit for all three daughters in 2008. From November 1, 2007, until the last hearing, Mother received more than $9,000.00 in SSI for S.

Father visited S. regularly at YOC, and participated in counseling with her there. He found she had improved "vastly" by the time of the hearings, and testified that he "look[ed] forward to having her progress emotionally . . . so that she can leave and come live with [him] and her sisters in a stable . . . secure" environment. (Tr. 45, 61).

At the conclusion of the July 8, 2009, hearing, the trial court stated from the bench that the current custody "situation [was] not working out," and that Mother's "schedule [was] simply too erratic." (Tr. 452). It noted her testimony that she had "virtually full

control over [her] schedule" based on her seniority, but that she had failed and/or refused to arrange it to be with the children during the week. *Id.* It found that it was not in the children's best interest to experience the "change and inconsistency in their life" that had been shown. (Tr. 453). The trial court declined to order "sole custody with dad," but found "a change in circumstances." *Id.* Specifically, it found the joint parenting arrangement had "certainly deteriorated," S.'s mental health had "devolved," and the current parenting time arrangement was "truly unworkable." (Tr. 454). Accordingly, after expressly "considering the statutory factors," the trial court "determine[d] that it [was] in the children's best interest that the parties continue to have joint legal custody with [F]ather having physical custody of the children and [Mother] having parenting time" pursuant to the Indiana Parenting Time Guidelines. *Id.* A minute entry reflected the foregoing in the CCS; and a written order of August 4, 2009, so provided.

DECISION

1. Custody Modification

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 several factors that a court may consider in initially determining custody. *Kirk v. Kirk*, 770 N.E.2d 304, 306 (Ind. 2002) (citing Ind. Code § 31-17-2-21).[2] Although both parents

[2] 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.

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.* (internal citation omitted). 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, 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." *Id.* (internal citation omitted).

Mother presents a series of "eight systemic errors in the trial record that . . . render the trial court's" modification error "both an abuse of the court's discretion and clearly erroneous." Mother's Br. at 16. She then presents a "combined" argument, *id.*, as to the first six asserted errors – that the trial court erroneously focused on the unreasonableness

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(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 de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in [I.C. § 31-17-2-8.5(b) regarding the de facto custodian].

of the prior order instead of whether there had been a substantial change in factors and the best interests of the children; that the children's best interests is not expressly stated in the modification order; that the finding that the existing arrangement ordered is "unworkable" cannot sustain a modification[3]; that the findings and record fail to support the judgment; that the order is against the logic and effect of the circumstances presented; and that the order fails to identify any statutory factor as having undergone a substantial change and warrant a custody modification. We decline her invitation to disentangle the "combined" argument. *Id.* Accordingly, our review will consider whether "any evidence or legitimate inferences support the trial court's judgment" that Father met his burden of demonstrating that the existing custody order should be altered because there had been a substantial change in at least one of the statutory factors, and it was in the best interest of the children for him to have their physical custody. *Kirk*, 770 N.E.2d at 307.

The January 2004 order found that it was "in the children's best interests that the parties share joint legal and physical custody." (Mother's App. 94). It then expressly directed that Mother have physical custody of the children when she was "in Indianapolis," and that they would be "in Father's care when [she was] not in Indianapolis." *Id.* During its consideration of Father's petition for modification, the trial court expressly noted that Mother's commitment to arrange her future work schedule in order to be in Indianapolis during the week was critical to its January 2004 order. The record clearly establishes that Father was not allowed to care for the children when

[3] Such appears to posit that a trial court should leave unchanged an "unworkable" custody arrangement.

Mother was "not in Indianapolis," *id.*, and Mother failed and/or refused to arrange her schedule so as to be in Indianapolis during the children's school-week. We believe that Mother's failure to honor her commitment to the trial court to modify her work schedule to be with her children can be considered a change of circumstances that supports a modification of child support.

In addition, during the trial court's consideration of Father's petition, the trial judge expressly "remember[ed] the circumstances in the CHINS," (Tr. 8), "vividly recalling what really sparked the CHINS petition" and "hearing sworn testimony in that regard." (Tr. 25). The CHINS incident involved physical abuse of S. by her maternal grandmother. Thus, the January 2004 custody order had specified that the children "shall not be left in the care of Mother's family members overnight." (Mother's App. 94). Yet the record clearly establishes that from 2004 until June of 2008, the children regularly stayed overnight with their great-grandmother for three to four days at a time – in violation of the court order. The trial court's record, and its previous prohibition against the children staying overnight with Mother's family members, support the inference that the trial court believed the children could be endangered by such overnight stays. Based on the facts presented, we believe that disobeying the prohibition could be considered another change of circumstances that supports a modification of custody.

Moreover, the record is replete with evidence that when with Mother, the only consistency that the children experienced was inconsistency. Apart from Mother's continually changing work schedule, there were different residences and different

boyfriends. Sometimes Mother left the children with their maternal grandmother, and sometimes with their maternal great-grandmother. The children apparently attended several different schools. Since living with Father, however, the lives of T. and N. had taken on a consistent routine, and they had both stability and dependability in his home. They became involved in extra-curricular school activities and church activities,; had improved their behavior and grades at school; and had developed neighborhood friendships. Clearly, the record established that for the children, living with Father was a significant change of circumstances, and one which reflects the statutory factors of their "interaction and interrelationship" with Father and their step-mother, step-sister, and half-siblings ("other person[s] who may significantly affect the child's best interest"); their adjustment to the home, school, and community; and their mental health. I.C. § 31-17-2-8(4), (5), and (6). Although such evidence does not directly address the custody of S., the fact that her two sisters have been living with Father for more than a year constitutes a substantial change of circumstances affecting S. as well – her "interaction and interrelationship" with T. and N. in his home, and her mental health, as evidenced by Father's testimony of his commitment to her progress in therapy and to her joining her sisters in his home.

In Mother's seventh assertion of error, she argues that the trial court's order rewarded Father "for his misdeeds." Mother's Br. at 25. As "misdeeds," she first cites his "wait[ing] four years . . . to act on split custody responsibility." *Id.* We find no authority for such being a "misdeed." She next cites her own testimony that he

demanded she agree to termination of his child support and relinquish all tax deduction credits. Inasmuch as such never materialized, we are not persuaded. Thirdly, she argues that Father committed a "misdeed" by not recording the 2007 agreed entry. Both signed the *pro se* entry; neither affected its recording; and inasmuch as its terms were never honored, we fail to see this as a "misdeed" for which Father was "reward[ed]" by the modification order. Finally, she argues that Father "rejected [S.] and forced [Mother] to cope with all the developing problems associated with this particularly troubled child." Mother's Br. at 26. Indeed, Mother testified to that effect. However, Father testified that S. was removed from his home by police after attacking other family members; that after her removal, he was not kept informed of her whereabouts; that before her first hospitalization, he had tried to convince Mother that S. needed counseling and therapy but Mother refused; and that he had consistently participated in all of S.'s treatment when informed thereof. Hence, the testimony on this matter was disputed. On appellate review of a custody modification, we do not "reweigh the evidence or judge the credibility of witnesses." *In re Paternity of J.J.*, 911 N.E.2d 725, 727 (Ind. Ct. App. 2009). We do not find that the trial court's order must be reversed because it rewards Father for misdeeds.

Mother's last argument is that the trial court's order must be reversed because the trial court's statement "strongly inferred [sic] that the step-mother [K. K.] was a better parent than [Mother]." Mother's Br. at 27. She contends that because "no evidence in the record remotely supports" a finding of superior parenting by the step-mother," and "little else in the record . . . justif[ies] this modification order," the order must be

reversed. *Id.* at 27, 28. We find her final argument unpersuasive, as we have already concluded that the record contains ample evidence that there had been a significant change in circumstances since the January 2004 custody order, and that it was in the best interest of the children for Father to have their physical custody.

2. Frivolous, Bad Faith Appeal

Father argues that Mother's appeal is "frivolous and in bad faith," and "warrants sanctions." Father's Br. at 22. He alleges that her brief contains "multiple misstatements" and inapposite caselaw to sustain her arguments, and asserts that her appeal is "without merit, baseless, worthless, and wasteful of the court's resources and time." *Id.* at 22, 24.

We may assess damages if an appeal is frivolous or in bad faith. Ind. Appellate Rule 66(E). We have held that an award in this regard may be made "when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Bergerson v. Bergerson*, 895 N.E.2d 705, 715 (Ind. Ct. App. 2008) (quoting *Tioga Pines Living Center, Inc. v. Ind. Family & Social Servs. Admin.*, 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), *aff'd on reh'g* 763 N.E.2d 1032 (Ind. Ct. App. 2002), *trans. denied*). However, we use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. *Id.* at 716 (citing *Tioga Pines*, 760 N.E.2d at 1087). "A strong showing is required to justify an award of appellate damages." *Id.*

We acknowledge that perhaps some rhetorical license was taken by Mother in her rendition of the facts, but Father's own brief is written in a particularly heated rhetorical tone as well. Neither party provided a summary of the facts favorable to the judgment. *See* Ind App. R. 46(6)(b). Even if the authorities cited by Mother were not directly on point with the issues and arguments heard by the trial court, Father's brief failed to expand upon or apply any of the authority he cited.[4] The history preceding Father's instant petition for modification of custody, as well as the parties' filings, arguments, and evidence presented to the trial court, reflect the contentious relationship of the parties. Thus, it is not surprising that such is reflected in the style of Mother's brief. However, given her right to appeal, we do not find her continued effort to present her point of view regarding the best interests of her children to rise to the level of "meritlessness, bad faith, frivolity, harassment, [or] vexatiousness" that warrants an award of appellate damages. *Tioga Pines*, 760 N.E.2d at 1087. Therefore, we find that Father has failed to make the "strong showing required." *Id.*

Affirmed.

BAKER, C.J., and CRONE, J., concur.

[4] We also remind Father's counsel that the brief's table of authorities "shall" include "references to each page on which [the authority] is cited." Ind. App. R. 46(A)(2), and (B).