

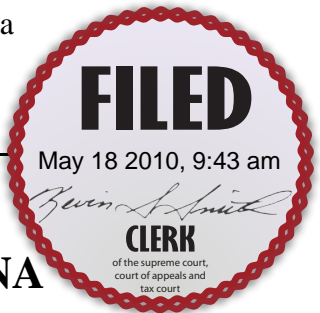
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**IN THE
COURT OF APPEALS OF INDIANA**

MARINA JIRON,

Appellant,

vs.

JOSEPH JIRON, SR.,

Appellee.

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No. 45A04-0910-CV-600

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Elizabeth Tavitas, Judge
The Honorable Nanette K. Raduenz, Magistrate
Cause No. 45D03-0301-DR-6

May 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Marina Jiron (Mother), appeals the trial court's order modifying custody of J.J., the only child born during her marriage to Joseph Jiron, Sr. (Father), awarding primary physical custody to Father. Mother presents the following restated issue for review: Did the trial court abuse its discretion by modifying custody of J.J.?

We affirm.

Mother and Father were divorced by decree of dissolution on February 9, 2004. One child was born to the marriage: J.J., born on April 21, 1999. The parties agreed that Mother would be given sole physical and legal custody of J.J. They further agreed that Father would be granted visitation consistent with the Indiana Parenting Time Guidelines, from which "some deviation may be required from time to time to accommodate both parties' schedules." *Appellant's Appendix* at 1. Father was ordered to pay \$35 per week in child support.

Although the dissolution decree provided that Mother would exercise sole physical custody, over the ensuing years J.J. stayed with Father for months at a time. During the summer months, the parties split physical custody equally. During J.J.'s kindergarten year, he lived with Father from August through December of 2004. In J.J.'s first-grade year, he lived with Father from August 2005 through September 2006. In his second- and third-grade years, J.J. stayed with Father from April through June. In July 2008, J.J. went to live with Father while Mother was receiving medical treatment. He remained with Father thereafter until, in November 2008, Father filed a petition to modify custody. Shortly thereafter, Mother picked up J.J. for what had been her regular visitation and informed Father that J.J. would not be returning.

On January 9, 2009, Charity Blackburn was appointed by stipulation of the parties as J.J.'s Guardian Ad Litem (GAL) in conjunction with Father's modification petition. Blackburn met with Father, Mother, and J.J. in preparation for filing a report with recommendations to the court. She filed her report on May 11, 2009, recommending that the parties share joint legal custody, Father be granted primary physical custody, and Mother be granted liberal parenting time. On September 10, 2009, following a hearing, the court granted Father's petition and essentially adopted the recommendations of GAL Blackburn. Mother appeals from this decision. Further facts will be provided where relevant.

Under Indiana Code Ann. § 31-17-2-21 (West, Westlaw through 2009 1st Special Sess.), a court may not modify a child custody order unless modification is in the child's best interests and there is a substantial change in at least one of several factors that a court may consider in initially determining custody. These factors include:

- (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 interrelationship 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....

I.C. § 31-17-2-8 (West, Westlaw through 2009 1st Special Sess.). In determining whether modification would be in the child’s best interests, however, the court must consider not only those factors specifically enumerated in the statute, but also any other relevant factors. *See Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008). “In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002).

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.”” *Id.* (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). Therefore, we neither reweigh the evidence nor judge the credibility of the witnesses. *Wolljung v. Sidell*, 891 N.E.2d 1109 (Ind. Ct. App. 2008). “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.” *Kirk v. Kirk*, 770 N.E.2d at 307. Our Supreme Court has explained the reason for this deference:

“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) (footnote omitted)). Therefore, on 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.” *Kirk v. Kirk*, 770 N.E.2d at 307.

As set forth above, in order to modify an existing custody order, a court must undertake a consideration of the factors listed in I.C. § 31-17-2-8, find that there has been a substantial change in at least one of those factors, and find that a change would be in the child’s best interests. *See Nienaber v. Marriage of Nienaber*, 787 N.E.2d 450 (Ind. Ct. App. 2003). Mother contends the trial court erred in finding that Father established by clear and convincing evidence that there exists a substantial and continuing change in circumstances that justifies a modification of custody, and that modification is in J.J.’s best interest.

There was evidence that Mother moved four times in the first five years after the divorce. Moreover, she frequently changed the school that J.J. was attending. He attended kindergarten and first grade at Franklin Elementary School in East Chicago, second grade at St. Paul Lutheran Munster, third grade at Irving Elementary, and returned to St. Paul Lutheran Munster for fourth grade. At the hearing on Father’s modification petition, Mother testified that she had enrolled J.J. in yet another school – St. Thomas Moore. We have

previously noted that “[c]ontinuity and stability in the life of a child is an important component in determining the proper custodial arrangement for a child.” *In re Paternity of M.J.M.*, 766 N.E.2d 1203, 1210 (Ind. Ct. App. 2002). Clearly, with Mother’s frequent changes of residences and moving J.J. from one school to another on an almost yearly basis, continuity and stability were lacking in his life with respect to the factors set out in I.C. § 31-17-2-8(5)(A) and (B).

At the time of the hearing, Mother and J.J. were living in the home of Mother’s mother. Although Mother denied it, there was evidence that Mother’s brother also lived in this house on at least a part-time basis. According to the GAL’s report, this brother was

the defendant in several troubling criminal matters. Most recently, he is charged with felony level Sexual Misconduct with a Minor . . . , stemming from alleged behavior with [another woman’s] daughter. Mother does not believe [her brother] to be guilty of this behavior, and therefore, sees no reason why [her brother] would be an inappropriate presence in [J.J.’s] life.

[The brother] is also a defendant in an ongoing Domestic Battery charge Further, he has relatively recent convictions for Resisting Law Enforcement . . . and Criminal Mischief[.]

Appellant’s Amended Appendix, Volume II at 2. This circumstance falls under I.C. § 31-17-2-8(4)(C), i.e., “[t]he interaction and interrelationship of the child with . . . any other person who may significantly affect the child’s best interests.” This circumstance was not present at the time of the original custody order and thus constitutes a changed circumstance within the meaning of I.C. § 31-17-2-21.

In addition to these factors, the court noted other circumstances relevant to its decision that modification was appropriate. We reproduce here the court’s oral findings with respect to three of those circumstances, the substance of which can be gleaned from context:

[Mother] failed to respond to the allegation of the attendance problem that the school has to send out notices [sic]. That this was a situation where his attendance was poor when he was with [Mother].

[Mother] never addressed the shooting that allegedly occurred in her home. Never addressed the number of males that have been living in her home throughout since the divorce.

I have to agree with [Father] that your decisions have been questionable. But most importantly, is that “MySpace” thing. That is the most dangerous thing for a child that any adult could have created. And you have to wonder who was thinking about this. But I digress.

One, you have to thirteen [sic] to be on it. [Mother], to put the child’s name on it was wrong.

Two, to list the child as nineteen. Very, very dangerous for the child because predators love these [sic] computer access to children. And to let him have access to yours. I do not get it. I do not understand it. Adults want to have conversations with adults. You do not give a child of ten years access to your “MySpace” and then talk about your ex-husband. It is not a good idea.

Transcript at 158-59. In view of the circumstances cited by the trial court concerning the stability of J.J.’s home and school environments, the persons to whom he was exposed while living with Mother in her mother’s home, and the fact that while there he was given unsupervised access to his own MySpace account, which was set up with J.J. posing as a nineteen-year-old, there was ample evidence to support the trial court’s determination that modification of the existing custody order was in J.J.’s best interest.

To summarize, “all that is required to support modification of custody under I.C. § 31-17-2-21 is a finding that a change would be in the child’s best interests, a consideration of the factors listed in I.C. § 31-17-2-8, and a finding that there has been a substantial change in one of those factors.” *Nienaber v. Marriage of Nienaber*, 787 N.E.2d at 456. The record supports the determination that there was a substantial change with respect to at least one of the factors listed in I.C. § 31-17-2-8, as set out above, and that modification was in J.J.’s best

interest. The court did not abuse its discretion in modifying custody and awarding primary physical custody to Father.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.