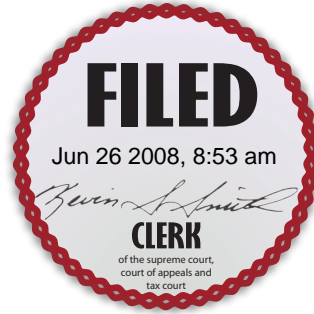


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DUSTIN SOUTHARD,
Appellant-Respondent,

vs.

MICHELLE SOUTHARD,
Appellee-Petitioner.

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) No. 48A02-0710-CV-860
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APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0512-DR-1306

June 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Dustin Southard (Father) appeals the trial court's order dissolving his marriage to Michelle Southard (Mother). As the sole issue on appeal, Father contends that the trial court abused its discretion in awarding physical custody of the parties' minor child, C.S., to Mother.

We affirm.

Mother and Father were married on September 14, 2002, and they separated in October 2005. One child was born to the marriage, C.S., who was born on January 30, 2003. Upon separation, Mother and C.S. moved in with her parents, and Father stayed in the marital home. Father initially exercised overnight parenting time with C.S. every Sunday night. This eventually increased to two nights per week. On January 31, 2006, following a provisional hearing, the trial court ordered the parties to share joint physical custody of C.S., which was contrary to Mother's request for primary physical custody.

The final hearing was conducted over the course of several days, beginning on November 17, 2006 and concluding on February 23, 2007. Thereafter, on June 6, 2007, the trial court issued its decree of dissolution, wherein it ruled in relevant part that the parties would have joint legal custody and Mother would have primary physical custody of C.S. Father subsequently filed a motion to correct error regarding the custody determination, which the trial court denied after a hearing.

The facts favorable to the trial court's final custody determination follow. Despite the fact C.S. appeared to be doing well with the provisional custody arrangement, Mother testified that joint physical custody was not working. Mother explained that Father had been vindictive, inflexible, and uncooperative with her, that they had different parenting

philosophies, and that they did not communicate well.¹ Mother further testified that she planned to move out of her parents' home and to the southern part of the county to be closer to work and in a better school system. Therefore, she and Father would no longer have the convenience of living a short distance from each other. Mother also noted that C.S. would be starting school in two years and she did not want to go through another custody battle then, when joint custody would certainly not be workable.

While Mother acknowledged Father has a good relationship with C.S., she expressed concern with respect to his instability, irresponsibility, and spotty work history. The undisputed evidence established that throughout their marriage, Mother had a stable job and was the primary breadwinner.² Despite working fulltime, Mother was also the primary caretaker of C.S. Mother opined that their daughter needed stability and a home base, which she was better able to provide. Mother further indicated that she intended to continue to foster the relationship between Father and C.S., as well as C.S.'s relationship with Father's family.

Dr. Thomas E. Murray was appointed by the trial court to perform a custody evaluation in this case. Both in the evaluation filed with the court and during his testimony at the final hearing, Dr. Murray was of the opinion that the parties could continue to maintain a joint custodial relationship with each party having custody of C.S.

¹ For example, Mother testified that during the provisional period Father had (1) denied her requests to see C.S. during his scheduled parenting time on thirteen occasions; (2) failed to return her telephone calls on eleven occasions; and (3) declined her offer for him to see C.S. during her scheduled parenting time. Mother also recounted several specific instances when Father had insulted her in front of their child.

² The evidence reveals that during the marriage Mother worked long hours and sometimes traveled for work. At the time of the final hearing, however, Mother had been promoted and was in a position that required no travel and virtually no overtime and provided her with a flexible schedule.

approximately fifty percent of the time, especially if Mother continued to live close to Father. He explained that C.S., who was almost four years old, had a very positive relationship with both parents and was doing well with the joint custody arrangement. Dr. Murray, however, acknowledged that there had been “some bumpy roads” with regard to communication and cooperation between Mother and Father during the provisional period. *Transcript* at 70. Like Mother, Dr. Murray expressed concern over Father’s history of employment and income instability.³

The results of Father’s MMPI-2 psychological profile (MMPI results) also raised concerns. While Mother’s MMPI results established she is generally “well adjusted”, several negative personality traits were indicated with respect to Father’s MMPI results. *Id.* at 85. These included difficulty trusting others, extreme suspiciousness, rigidity, tendency to hold grudges, sensitivity to criticism, and difficulty taking responsibility for his own issues. The test results also suggested that Father is likely to become angry if he feels others are taking advantage of him and is likely to view the world as a threatening place and one in which he is unjustly blamed for others’ problems. With respect to the MMPI results, Dr. Murray acknowledged that Father’s personality profile suggests Father may have difficulty communicating and cooperating with Mother. Dr. Murray further indicated that as C.S. matures she would begin to pick up on any vindictiveness, disrespect, or lack of cooperation by either parent, which may lead to C.S. being resentful and distrusting.

³ During 2005, Father worked outside the home only about four months out of the year. On most days, however, he continued to have C.S. taken to others for childcare during the day. While he claimed to be working on the horse fences and stuccoing the outside of the family’s home, these projects were not completed in 2005. In fact, at the time of the final hearing, the exterior of the house was still substantially unfinished.

On appeal, Father contends the trial court abused its discretion in awarding physical custody of C.S. to Mother. He contends the evidence presented at the final hearing established that it was in C.S.'s best interests for the parties to continue exercising joint physical custody. To the extent he possesses negative personality traits, has been irresponsible with respect to work, and has been uncooperative, disrespectful, and vindictive with Mother, Father simply asserts that the evidence fails to demonstrate C.S. has been negatively impacted and directs us to Dr. Murray's recommendation that the joint custody arrangement should continue.

In custody disputes, "the trial court is often called upon to make Solomon-like decisions in complex and sensitive matters."⁴ *Speaker v. Speaker*, 759 N.E.2d 1174, 1179 (Ind. Ct. App. 2001). "The trial court is in a position to see the parties, observe their conduct and demeanor, and hear their testimony; therefore, its decision receives

⁴ In making its custody determination, Ind. Code Ann. § 31-17-2-8 (West, PREMISE through 2007 1st Regular Sess.) guides a trial court:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (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....

considerable deference in an appellate court.” *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 509 (Ind. Ct. App. 2002), *trans. denied*. Thus, on review, we will not reweigh the evidence, judge the credibility of the witnesses, or substitute our judgment for that of the trial court. *Trost-Steffen v. Steffen*, 772 N.E.2d 500. We will reverse the trial court’s custody determination only if it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. *Id.*

In the instant case, the evidence undoubtedly reveals C.S. is a happy, well-adjusted child, who loves and has a good relationship with both of her parents. The trial court’s award of primary physical custody to Mother is not an indication that Father is a bad father. Rather, it simply reflects a determination that joint physical custody is not in C.S.’s best interests. Mother’s testimony reveals that joint custody had not been working well, due to lack of communication and cooperation between the parties. For this reason, as well as her belief that C.S. needed constancy and “a home base”, Mother requested primary physical custody. *Transcript* at 289. She expressed, however, her desire to foster C.S.’s relationship with Father, as well as with Father’s family.

Although Dr. Murray advocated split custody, his testimony also raised concerns in this regard. Specifically, Dr. Murray testified regarding the negative aspects of Father’s personality profile, including trust issues, suspiciousness, rigidity, tendency to hold grudges, sensitivity to criticism, and difficulty taking responsibility. While these personality traits have yet to directly impact C.S. (who was only four years old at the time

of dissolution),⁵ they help explain much of the difficulties Mother has faced in dealing with Father with respect to joint physical custody during the provisional period. Moreover, as Dr. Murray indicated, cooperation and communication will become even more imperative when Mother moves further away, as she testified she planned to do following the dissolution.

In sum, there was ample evidence presented from which the trial court could reasonably conclude joint physical custody was not working and, therefore, was not in C.S.'s best interests. The trial court was not required to accept Dr. Murray's contrary opinion. *See Clark v. Madden*, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000) ("the fact-finder is not required to accept the opinions of experts regarding custody").

In light of its determination that joint custody was unworkable, the trial court was left to decide which parent should have primary physical custody. The evidence establishes that Mother was the best choice given her employment and income stability, responsibility, and well-adjusted personality. Further, the facts favorable to the judgment establish that she had been C.S.'s primary caretaker since birth. We conclude that the trial court did not abuse its discretion in granting physical custody of C.S. to Mother.

Judgment affirmed.

KIRSCH, J. and BAILEY, J., concur

⁵ As C.S. becomes older, Dr. Murray explained that she will eventually pick up on and be negatively impacted by the types of vindictiveness and lack of cooperation that have occurred during the provisional period.