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IN THE
COURT OF APPEALS OF INDIANA

DIANA E. LOWHORN,

Appellant-Petitioner,

vs.

BRIAN E. LOWHORN,

Appellee-Respondent.

No. 49A04-0712-CV-678

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
The Honorable Mary Oldham, Master Commissioner
Cause No. 49D02-0112-DR-1936

July 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Diana E. Lowhorn ("Mother") appeals the trial court's modification of custody of her children to her former husband, Brian E. Lowhorn ("Father"). Mother raises one issue, which we restate as whether the trial court abused its discretion by modifying custody.[1] We reverse and remand.

The relevant facts follow. Mother and Father married in July 1992 and had two children, D.L., a boy born on December 20, 1993, and B.L., a girl born on December 16, 1997. Mother and Father divorced in July 2002 and agreed to joint legal custody of the children with Mother having primary physical custody. Father was granted parenting time in accordance with the Indiana Parenting Time Guidelines. In 2003, Father married Gina Lowhorn, and the children have a good relationship with Gina and her daughter.

After the divorce, Father exercised his midweek parenting time on Wednesday evenings. However, in October 2003, Mother's church, Chapel Rock Christian Church, started a Wednesday evening children's program. The children wanted to attend the program, but Father was unwilling to switch nights. Mother offered Father an extra night of midweek visitation, and Father began exercising visitation on Tuesday and Thursday evenings. In September 2004, the trial court modified the original custody order to reflect the change. In October 2005, Father's work hours changed to the evening shift, 3:00 p.m. to 11:00 p.m. For a few months, Father exercised parenting time only on

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[1] A custody evaluation was performed by Dr. Richard Lawlor and was admitted as an exhibit at the modification hearing. However, the exhibit was not included with the transcript of the hearing. On May 12, 2008, this court entered an order requesting that the Marion County Circuit and Superior Courts Clerk transmit the exhibit. The Clerk complied with this order on June 13, 2008.

Tuesday evenings, but he later returned to exercising parenting time on Tuesday and Thursday evenings.

Mother has had a platonic friendship with Galen for several years. Father described Galen as "a super nice guy." Transcript at 34. In August 2005, Father learned that Galen had transgendered from male to female. Father also learned that Mother had taken the children to the Jesus Metropolitan Community Church ("JMCC"), a church open to gay, lesbian, bisexual, and transgender people.

On January 6, 2006, Father filed a petition to modify custody, in which he requested sole legal and primary physical custody of the children. The trial court held a hearing on the petition on November 9, 2006, and conducted an in camera hearing with the children. On October 31, 2007, the trial court issued its findings of fact and conclusions of law.[2] The trial court found that "[s]ince the entry of the Decree, there has been a substantial and continuing change of circumstances such that the Court's prior Order pertaining to custody of said children and the parenting time arrangements is not in the children's best interests." Appellant's Appendix at 11. Specifically, the trial court found that: (1) Mother had failed to provide Father with information regarding parent-teacher conferences, extracurricular activities, religious training, and medical issues; (2) Mother had forced the children to be seen publicly with her transgendered friend; (3) Mother had forced the children to attend church at JMCC with her; (4) Mother had failed

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[2] The reason for the delay between the hearing and issuance of the trial court's order is not explained by the record.

to provide Father with the right of first refusal for additional parenting time; (5) both children had expressed a strong desire to live with Father; and (6) Mother was unwilling or unable to address the psychological and physical needs of the children. The trial court found that joint legal custody was "unworkable" and that Father should have sole legal and physical custody of the children with Mother having parenting time. Id. at 15.

The issue on appeal is whether the trial court abused its discretion by modifying custody. 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.

Mother argues that certain findings by the trial court are not supported by the evidence presented at the hearing. The trial court entered findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A). We may not set aside the findings unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). We give due regard to the trial court's ability to assess the credibility of witnesses. Menard, 726 N.E.2d at 1210. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

The child custody modification statute provides, in part, that "[t]he court may not modify a child custody order unless: (1) the 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 § 31-17-2-8] . . . ." Ind. Code § 31-17-2-21(a). Ind. Code § 31-17-2-8 lists the following factors:

> (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, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Thus, to modify custody of the children, the trial court must have found that modification was in their best interest and that a substantial change in one of the factors had occurred.

The trial court found that a substantial change had occurred but did not specify the substantial change. In its findings of fact, the trial court stated that Mother had failed to provide information regarding the children's activities to Father, Mother subjected the children to public scrutiny and embarrassment by spending time with a transgendered friend, Mother had made the children attend JMCC, Mother had failed to provide Father with the right of first refusal for additional parenting time, the children expressed a strong desire to live with Father, and Mother was unwilling or unable to address the psychological and physical needs of the children. These findings concern the interaction and interrelationship of the children with Mother and "any other person who may significantly affect the child's best interests," the children's adjustment to their home, the children's wishes, and the mental and physical health of Mother and the children. I.C. §

31-17-2-8. Thus, we must determine whether these circumstances have resulted in a substantial change in one of these factors warranting a change in custody.

1. *Findings Regarding Children's Wishes*.

It is undisputed that the children, both of whom were less than fourteen years old at the time of the hearing and trial court's order, wished to live primarily with Father. Although the wishes of the children are a factor to consider, "a change in the child's wishes, standing alone, cannot support a change in custody." Williamson v. Williamson, 825 N.E.2d 33, 42 (Ind. Ct. App. 2005). Thus, this factor, standing alone, cannot support a change in custody from Mother to Father.

2. *Findings regarding Father's parenting time*.

The trial court found that Mother had failed to provide Father with "the right of first refusal for additional parenting time." Appellant's Appendix at 13. The Indiana Parenting Time Guidelines and Commentary provide:

> When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time. The other parent is under no obligation to provide the child care. If the other parent elects to provide this care, it shall be done at no cost.
>
> Commentary
>
> The rule providing for opportunities for additional parenting time promotes the concept that a child receives greater benefit from being with a parent rather than a child care provider. It is also intended to be practical. When a parent's work schedule or other regular recurring activities require hiring a child care provider, the other parent should be given the opportunity to provide the care. Distance, transportation or time may make the rule impractical. Parents should agree on the amount of child care time and the circumstances that require the offer be made.

Ind. Parenting Time Guidelines I(C)(3). The Indiana Supreme Court has interpreted the term "family member" to mean "a person within the same household as the parent with physical custody." Shelton v. Shelton, 840 N.E.2d 835, 835 (Ind. 2006).

The trial court first found that "[o]n numerous occasions, [Mother] admits that she has refused to provide [Father] with the right of first refusal for additional parenting time." Appellant's Appendix at 13. However, the finding that Mother failed to provide Father with additional parenting time on "numerous occasions" is not supported by the evidence. Rather, the trial court identified only two occasions – Spring Break in 2006 and August 2006 – that Mother failed to provide Father with the opportunity for additional parenting time.

Per the Parenting Time Guidelines, Mother had the children for Spring Break of 2006. However, Mother had to work for three days and took two days off of work. Mother permitted Father to have the children on one of the three days that she had to work. At his request, D.L. spent the other two days visiting a friend, while B.L. spent those two days visiting her maternal grandparents.

In August 2006, Mother took a nine-day vacation. D.L. spent the entire nine days with Father. B.L. spent seven days with Father and two days visiting Mother's sister. Additionally, during the seven days that B.L. spent with Father, Mother's sister picked B.L. up from school and took B.L. to Gina's workplace at 5:00 p.m. when Gina got off work. B.L. would then spend the remainder of the evening with Father and Gina.

While Mother's actions were technically a violation of the Parenting Time Guidelines under the Shelton interpretation, we cannot say that these minor violations

amounted to a substantial change warranting modification of custody. Generally, "isolated acts of misconduct by a custodial parent cannot serve as a basis for the modification of child custody." Hanson v. Spolnik, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997), trans. denied. "However, this court has held that a parent's egregious violation of a custody order or behavior towards another parent, which places a child's welfare at stake, can support a trial court's modification of its custody order." Id. Mother's actions can hardly be considered an "egregious violation," and we note that Mother, on other occasions, voluntarily gave Father extra parenting time.

3. *Findings regarding Mother's failure to keep Father informed.*

The trial court found that Mother failed to keep Father informed regarding parent-teacher conferences, extracurricular activities, some medical matters, and the children's religious training. Specifically, the trial court found:

> 13. Diana is an involved parent who participates regularly in school functions and activities, parent-teacher conferences, church functions, medical care and the like.
>
> 14. Brian and/or Gina attend most of the children's extra-curricular school functions and activities, parent-teacher conferences, medical care and the like when they are made aware of these events.
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> * * * * *
>
> 16. Diana's admitted refusal to provide information regarding the children's educational development, more specifically the scheduling of parent-teacher conferences and extra curricular activities has substantially interfered with Brian's ability to attend these events.
>
> 17. However, he has been able to attend the parent-teacher conferences on the occasion one of the children would advise him of the scheduled time.
>
> * * * * *

> 31. Brian never had a chance to discuss the children's religious training at [] Chapel Rock in comparison with JMCC, as Diana failed and refused to discuss the matter with [sic].
>
> * * * * *
>
> 44. Diana admits that she has not been proactive in keeping Brian informed of school activities and some medical matters.
> 45. Diana only provides Brian with information when he requests it, and due to this lack of information, he cannot seek information from her of which he had no knowledge.

Appellant's Appendix at 10-11, 13-14.

Mother argues that she did not "refuse" to provide Father with information or "admit" that she did not provide the information. However, she concedes that communication between them was problematic, which, she alleges, supports a change from joint legal custody but not a change in primary physical custody.

Mother and Father had joint legal custody of the children, which means that they shared "authority and responsibility for the major decisions concerning the child[ren]'s upbringing, including the child[ren]'s education, health care, and religious training." Ind. Code § 31-9-2-67. The Indiana Parenting Time Guidelines require prompt communication between the parents regarding school activities, other organized events, and medical information. Ind. Parenting Time Guidelines I(D).

Our review of the record reveals some support for the trial court's findings that Mother was not proactive in informing Father of some information, specifically, the dates of parent-teacher conferences, some of the children's religious training, and some medical information. However, there was no evidence presented that Mother failed to

keep Father informed regarding extracurricular events. In fact, Father testified that he and his wife attended "[e]very one" of the children's sporting events. Transcript at 47.

Despite the admittedly poor communication between Mother and Father and the trial court's findings on this issue, we again note that "[g]enerally, a lack of cooperation or isolated acts of misconduct by a custodial parent cannot serve as a basis for the modification of child custody." Williamson, 825 N.E.2d at 42. "[T]his court has held that a parent's egregious violation of a custody order or behavior towards another parent, which places a child's welfare at stake, can support a trial court's modification of its custody order." Id. The trial court made no findings that Mother's failure to keep Father informed was egregious or placed the children's welfare at stake. Thus, this finding does not support a change of custody.

4. *Mother's ability to address the children's psychological and physical needs.*

The trial court found that Mother was unwilling or unable to address the psychological and physical needs of the children. Specifically, the trial court found:

> 49. Diana is focused more on herself and spending time with her friends than she is on the children and spending time with them.
> 50. The children need and want to spend time with a parent alone or as a family, without other friends present all the time.
> 51. The children's confusion and embarrassment over Diana's transgendered friend and her church is not primarily caused or created by Brian. These circumstances have had a negative psychological impact on the children.
> 52. Further, Diana's transgendered friend and church are not the only issues causing difficulties for the children.
> 53. Diana is unwilling or unable to address the psychological and physical needs of the children.

Appellant's Appendix at 14.

There was no evidence presented during the hearing that the children's physical needs were not being met or that Mother was unwilling or unable to address the children's psychological needs. Further, there was no evidence presented that Mother had "other friends present all the time" or was more focused upon her friends than the children. Id. Rather, the evidence demonstrated that Mother worked full-time, attended the children's extracurricular events, helped them with homework, volunteered at their schools when possible, took care of the children's medical needs, and participated in church activities. We conclude that the trial court's findings on this issue are clearly erroneous.

5. *Findings regarding the children's attendance at JMCC.*

Mother also challenges the trial court's findings regarding the children's attendance at JMCC. The trial court found:

> 26. Without consulting Brian and without providing him with any information, Diana admits that she unilaterally decided to continuously take the children to attend her transgendered friend's church, Jesus Metropolitan Community Church (JMCC), twice a week, despite the children's pleading with her not to do so.
>
> 27. The children and Father (upon learning of the children's discomfort with the church) have told Mother how uncomfortable the children are with the behaviors and circumstances at the church, but Mother continues to insist that the parties' daughter attend (she has agreed to allow the older son to stay home alone during these times, claiming that she believes he is old enough to stay home alone instead of allowing him to visit with Brian during this time.).
>
> * * * * *
>
> 51. The children's confusion and embarrassment over Diana's transgendered friend and her church is not primarily caused or created by Brian. These circumstances have had a negative psychological impact on the children.

Appellant's Appendix at 12, 14.

Mother first argues that no evidence was presented that she continuously took the children to JMCC. Mother testified that she had been a member of Chapel Rock since 1991. Additionally, she had started attending church at JMCC. D.L. went to JMCC with her earlier in 2006 on three occasions, one of which was an Easter egg hunt. B.L. went to JMCC a few more times than D.L. However, since earlier in 2006, Mother had attended JMCC only on weekends when the children were with Father. This testimony was confirmed by the minister of worship for JMCC, who testified that Mother now attended church there every other weekend when she did not have the children. She testified that she had previously met D.L. a couple of times and that she had met B.L. "a little more often" and that B.L. "enjoys church very much." Transcript at 58. An employee of Chapel Rock also testified that Mother attended church there a couple times a month with the children.

Mother is correct that the trial court's findings that she "continuously" took the children to JMCC and that she continued to take B.L. to JMCC are not supported by the evidence presented at the hearing. Rather, the evidence presented at the hearing demonstrated that Mother had stopped taking the children to JMCC and was attending JMCC only on weekends that the children were with Father. The trial court's findings on this issue are clearly erroneous.

6. *Findings regarding Mother's relationship with Galen.*

Mother also challenges the trial court's findings regarding her relationship with Galen, Mother's friend who transgendered from male to female. The trial court found:

> 19. Mother has consistently subjected the children to be publicly scrutinized and embarrassed by forcing them to regularly spend time with Mother's friend, a middle-aged male to female transgendered person.
> 20. Despite the children pleading with Mother that she not force them to be around this person, Mother continues to subject the children to being seen with the person in restaurants, in front of their friends, and at the children's extracurricular activities.
> 21. [When] Father learned of Mother's behavior from the children and saw the harmful effects the same had on the children, he confronted Mother about the same.
> 22. During the confrontation, Mother admitted to the foregoing and promised she would never allow the children to be around her transgendered friend again.
> 23. Subsequently, Diana, also concerned about the children's discomfort and confusion with her transgendered friend, admits to taking the children to a therapist, Erin Hamilton, without consulting Brian or providing him with any information regarding the children's confusion prior to the children's disclosure to him.
> 24. Dr. Richard Lawlor stated in his custody evaluation that he did not think Diana's unilateral choice of therapist was appropriate due to concerns that "the particular therapist involved may have an agenda that would not seriously consider realistic concerns of the children".
> 25. However, Mother has continued to subject her children to these circumstances repeatedly, despite the children's and Father's pleading.

Appellant's Appendix at 11-12.

Mother argues that these findings are not supported by the evidence. The evidence demonstrated that Mother has had a platonic friendship with Galen for several years. Father described Galen as "a super nice guy." Transcript at 34. In August 2005, Father learned that Galen had transgendered from male to female. There was no evidence presented that Mother subjected the children to being seen with Galen while he was

dressed as a female in restaurants or at the children's extracurricular activities. Moreover, the evidence demonstrated that the children's friends saw Galen while he was dressed as a female only one time when Mother and Galen picked the children up from Father's house.

Father testified that the children were "embarrassed." Transcript at 31. After Father confronted Mother about Galen, Mother agreed that she would not "have the kids around . . . Galen." Id. at 112. For a few months, the children had no contact with Galen. Now, the only interaction between the children and Galen is when Galen comes to Mother's house for dinner two or three times a month.

The trial court's finding that "Mother continues to subject the children to being seen with the person in restaurants, in front of their friends, and at the children's extracurricular activities" is clearly erroneous. Rather, the evidence demonstrates that, after the children's concerns were brought to Mother's attention, the children had interaction with Galen only a few times a month for a private dinner in their residence. There is no evidence that the children's occasional interaction with Galen during private dinners is harmful, and the evidence is simply insufficient to demonstrate a substantial change to modify custody. See, e.g., Downey v. Muffley, 767 N.E.2d 1014, 1020 (Ind. Ct. App. 2002) (holding that no rational basis existed for custody order preventing the mother from living with her same-sex domestic partner where there was no evidence of an adverse effect upon the children based upon the mother's sexual preference and relationship with same-sex partner); Johnson v. Nation, 615 N.E.2d 141, 146 (Ind. Ct. App. 1993) (holding that the trial court erred by modifying custody solely based upon

changes in the father's attitude toward and involvement in religious activities without evidence that the children's physical health was being endangered or their emotional development was being significantly impaired); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) (holding that homosexuality of a parent, standing alone, without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child).

We also note that an extensive custody evaluation was performed by Dr. Richard Lawlor and submitted to the trial court. Dr. Lawlor noted that "[t]here is no psychological research to support the finding that involvement with transgendered individuals is of any risk to children. The only harm that would likely come to children would be from the children's reaction to that situation." Exhibit 1 at 18. Dr. Lawlor's impression was "that the children's current negative reactions are actually a combination of their own confusion and spontaneous reactions; as well as their father's somewhat shocked approach to the whole situation. Their reaction also flows from their mother's overly aggressive approach to trying to make sure both children grow up unprejudiced." Id. Dr. Lawlor believed that a change in custody was not an appropriate remedy to the situation. Rather, Dr. Lawlor recommended counseling "to try to sort out whether or not this situation can be resolved without a change of custody and with maintaining the current custody arrangement." Id. Specifically, Dr. Lawlor recommended the following:

> Should the children's current discomfort flow primarily from within themselves and not from Brian, and I do think that their discomfort is a combination of Brian's conservatism and their mother's extreme liberalism, it may be that a custody change is warranted. However, my impression is that at this point, the discomfort of the children is actually a mixture

> flowing from the reactions of both parents, as well as some of the spontaneous actions on the part of both of the children. For that reason, I think that rather than a change of custody at this point, the issues should be dealt with in a therapeutic way. . . . For the moment, I would suggest that a change of custody is not the best way to go, and I would strongly recommend going with some type of therapeutic involvement at this time.

Id. at 18-19.

The trial court included findings regarding Dr. Lawlor's evaluation as follows:

> 32. Dr. Richard Lawlor completed a custody evaluation in this matter and indicates that the children are experiencing some concern and confusion regarding Diana's transgendered friend and JMCC.
> 33. Dr. Lawlor's assessment is that the children's confusion may be a result of how the parents, Brian and Diana, are handling the situation.
> 34. However, Dr. Lawlor concluded that "should the children's current discomfort flow primarily from within themselves . . . it may be that a custody change is warranted."

While these findings do enjoy support in the record, they do not support the conclusions in that the trial court did not further find that the children's discomfort "flowed primarily from within themselves" and not from Father. Had the trial court made this determination and a determination that the children were adversely affected or their emotional development was significantly impaired, its legitimate findings, including the strong desires of the children, may have supported its conclusions thereon and the conclusions may have supported the Judgment.

In summary, we conclude that many of the trial court's findings are clearly erroneous, and the remaining findings, taken together, fail to demonstrate a substantial change necessary to modify custody. We therefore reverse the trial court's grant of Father's petition to modify custody and remand for proceedings consistent with this

opinion. See, e.g., Van Schoyck v. Van Schoyck, 661 N.E.2d 1, 6 (Ind. Ct. App. 1996) (holding that the trial court's findings did not support a modification of custody), trans. denied.

The difficulty this case presents is that the trial court granted Father's request for modification of custody on October 31, 2007. Resolution of this appeal was delayed due to Mother's failure to include the Custody Evaluation performed by Dr. Lawlor in the record, the Marion Superior Court Clerk's failure to include the Custody Evaluation as an exhibit with the transcript, and the Marion Superior Court Clerk's unexplained delay in producing it within fifteen days as directed by our order. Reality is such that the children have been in the Father's custody for eight to nine months and the younger child may have changed schools while in Father's custody. Therefore, on remand, the trial court is ordered to hold an expedited hearing to determine the primary origin of the children's confusion and discomfort and whether their health, welfare, or emotional development is adversely affected thereby, which in conjunction with the remaining legitimate findings may support a modification of custody.

For the foregoing reasons, we reverse the trial court's grant of Father's petition to modify custody and remand for proceedings consistent with this opinion.

Reversed and remanded.

DARDEN, J. and BARNES, J. concur