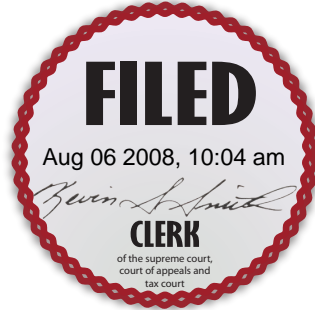


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF M.B.,)
)
Appellant,)
)
vs.) No. 37A03-0711-CV-539
)
J.E.,)
)
Appellee.)

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable James R. Ahler, Judge
The Honorable J. Philip McGraw, Presiding Judge
Cause No. 37D01-0304-DR-165

August 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

M.B. (“Mother”) appeals the trial court’s granting of the petition for modification of visitation filed by J.E. (“Father”).

We affirm in part, reverse in part, and remand with instructions.

ISSUE

Whether the trial court abused its discretion in modifying custody.

FACTS

Father and Mother were married on March 26, 1994, and resided in Wolcott during their marriage. Two children, L.E. and J.E., were born of the marriage. L.E. was born on November 25, 1995, and J.E. was born on June 7, 1999.

The parties’ marriage was dissolved on July 31, 2003, pursuant to a summary decree of dissolution, which awarded the parties joint legal custody of the children and awarded Mother physical custody. As to visitation, the parties agreed to the following:

[Father] shall have the right to reasonable visitation with the minor children every other weekend from 6:00 p.m. on Friday to Sunday at 6:00 o’clock p.m. The parties further agree that [Father] shall not keep the two minor children over night until both parties agree that the children are ready for the same to occur or the Court shall order the same upon petition of either party. [Father] shall further have weekly visitation with the two minor children on Wednesday evening from 5:00 o’clock p.m. to 8:00 o’clock p.m. in addition to minimum visitation as set forth by the Indiana Parenting Guidelines.

(App. 20).

Subsequently, on October 7, 2004, the trial court entered an order granting temporary modification of visitation, whereby it modified Father’s visitation “to include visitation with the parties’ minor children on each Tuesday and Thursday from after their

respective school until 6:30 o'clock p.m.” (App. 26). The trial court reaffirmed the temporary order on November 12, 2004.

In October of 2005, Mother and the children moved to Rensselaer, which is located approximately fifteen miles from Wolcott. Father continued to reside in Wolcott.

On December 27, 2005, Mother filed a petition to modify visitation, requesting that Father’s visitation “be modified wherein the midweek visitation is one evening per week and otherwise pursuant to the Indiana Parenting Time Guidelines.” (App. 29). On January 30, 2006, Father also filed a petition to modify visitation, requesting that “his weekend visitation be extended to include that he be allowed to pick the children up from school on Fridays and return them to school on the following Monday.” (App. 32).

On May 3, 2006, Father filed a petition to modify physical custody of the parties’ children. In his petition, Father asserted the following: 1) “there has been a substantial change in circumstances in regards to the best interest of the parties’ minor children”; 2) Mother had “relocated on two residents [sic]” since the entry of the dissolution decree; 3) Mother placed the children “in another school system”; 4) Mother “has taken action to frustrate visitation on behalf of [Father]”; 5) L.E. wished “to be with [Father]”; 6) Mother’s remarriage has caused “a state of instability”; and 7) “it is in the best interest of the parties’ minor children to be in the physical possession of [Father].” (App. 33-34). On February 20, 2007, the trial court appointed Dr. Richard Lawlor to conduct a custody evaluation.

The trial court commenced a hearing on June 28, 2007, which it continued to October 23, 2007. The trial court admitted Dr. Lawlor’s custody evaluation into

evidence. Dr. Lawlor advised that he “would leave custody as it is now, with the parenting time schedule as it is.” (Joint Ex. at 25). Thus, Dr. Lawlor recommended continuation of the “joint legal custody arrangement with [Mother] having primary physical custody,” and Father having visitation on “alternate weekends and Tuesdays and Thursdays after school until 6:30 p.m.” (Joint Ex. at 1).

Christine Ping, a licensed social worker, testified that she began seeing L.E. and J.E. in June of 2005 after “it was court ordered to do therapy with the children,” (Oct. Tr. 3),¹ in order to address “the conflicts between the children’s parents, visitation exchanges.” (Oct. Tr. 5). Ping testified that Mother and Father’s relationship was “very strained and conflicted.” (Oct. Tr. 7). Ping recommended visitation on “Tuesday and Thursday and every other weekend” (Oct. Tr. 8). Specifically, Ping recommended that children “stay overnight” with Father “so that there wasn’t a situation with the children witnessing another stressful exchange.” (Oct. Tr. 10). Ping, however, testified that she had not had contact with the children in over a year and had no “reason to challenge Dr. Lawlor’s recommendation” (Oct. Tr. 17).

Chad Pulver, a psychologist, testified that in the summer of 2006, he began counseling L.E. “due to some issues with anxiety.” (Oct. Tr. 19). He also began counseling J.E. “due to issues with the transition as far as how she’s acting and dressing.” (Oct. Tr. 19). Pulver testified that L.E. began “having nightmares, some crying spells, [and] anxiety” after getting lost during a kayaking trip with Father. (Oct. Tr. 20).

¹ The transcript from the June 28, 2007 hearing shall be referred to as the “June Tr.,” and the transcript from the October 23, 2007 hearing shall be referred to as the “Oct. Tr.”

Pulver began counseling J.E. after “a marked change in her behavior, her attitude, her desire to cut her hair to look like a boy” and her statements that “she wanted to look like a boy.” (Oct. Tr. 21). Pulver testified that Mother raised the concern about the possibility of sexual abuse causing these changes but that she never made “a specific accusation that somebody had sexually abused [J.E.]” (Oct. Tr. 22).

Remington Police Officer Paul Westmoreland testified that he had investigated a report by Mother that Father was stalking her. According to Officer Westmoreland, law enforcement “could find no evidence whatsoever to file any charges.” (Oct. Tr. 39). Mother testified that she had contacted the police in January of 2005 after discovering “footprints outside [her] home” and “cigarette butts under [her] windows[.]” (June Tr. 60).

Mother testified that after L.E. and J.E. returned from a trip to California with Father, J.E. began complaining about pain in and around her anus; therefore, Mother sought medical attention for J.E. Mother informed an emergency room physician that J.E. had been with Mother, Father and L.E. during the days prior to J.E.’s complaint. Mother testified that the physician contacted the White County Office of Family and Children. Mother denied accusing Father of molesting J.E. Authorities found no evidence that J.E. had been molested.

Mother admitted that she contacted the Federal Aviation Administration after L.E. informed her that Father had taken L.E. and J.E. on a flight and had flown “over [their] house and flew so low they scared the cows.” (June Tr. 67). Mother testified that she was unaware that a flight instructor had accompanied Father and the children until after

she made her report. Mother also testified she was concerned about Father flying with the children because “of his suicidal threats while [they] were married and also [his] depression.” (June Tr. 69). Father admitted to having taken antidepressants but denied being suicidal.

Regarding the children and visits with Father, Mother testified that she believed “it’s important to maintain a schedule for the children, to have some consistency, get them in bed and fed on time regularly on school nights.” (June Tr. 79). Mother further testified that she “would not object if [Father] wanted to pick [L.E. and J.E.] up from school on Friday, but [she] would still like to have them home and in beds on school nights” (June Tr. 90).

Mother acknowledged filing a contempt citation against Father after he returned the children two hours late on a school night. Mother also testified that she objected to overnight visitation with Father every Tuesday and Thursday “[b]ecause they need to be in their bed[s], at home, not sleeping on a couch in [Father’s] living room on a school night.” (June Tr. 90). Mother, however, testified that she was “willing to accept Dr. Lawlor’s recommendation” regarding visitation on Tuesdays and Thursdays evenings. (Oct. Tr. 127).

Father testified that his “main goal is for [L.E. and J.E.] to get to their activities that they’re interested in . . . anyway possible.” (Oct. Tr. 94). Father testified that overnight visitation would allow the children to participate in their activities because they would not have “to be back at a certain time” and would “[c]ut down on some of the

tension” between Mother and Father. (Oct. Tr. 96). Both parties agreed that the relationship between Mother and Father had been acrimonious.

On October 26, 2007, the trial court entered its order, which provides, in pertinent part, as follows:

[Father]’s Petition for Change of Custody is overruled and denied as there has been no change in circumstances such to warrant a change of custody in this matter.

* * *

As to both Petitions to Modify Visitation, the Court finds that the recommendation of the child custody counselor was that the visitation remain unchanged, including the mid-week visitation currently granted to [Father]. However, the Court finds that because the parties seem to be unable to discuss visitation and matters dealing with the children in a reasonable fashion, the less contact they have with each other the better. Therefore, for the purpose of visitation during the school year, the non-custodial parent [Father] will pick up the minor children at the end of classes at their schools on Friday and return them to their schools before the beginning of classes on Monday morning. In the weeks that [Father] does not have weekend visitation, [Father] will retain his mid-week visitation on Tuesday and Thursday. [Father] will pick the minor children up at their schools at the end of school on Tuesday and return them to their schools on Wednesday morning before commencement of classes; pick them up at their schools on Thursday at the end of the school day and return them to their schools on Friday morning before commencement of classes.

(App. 8-9). The trial court did not issue findings of fact or conclusions of law.

Mother filed a motion for clarification on November 7, 2007. The trial court entered an order, explaining that

it only modified the [October 7, 2004 order] to the extent of granting mid-week visitations as overnight visitations and establishing delivery and pick-up points. The Court had no intention of lessening parenting time granted by the Order entered [on October 7, 2004 and reaffirmed on November 12, 2004]. It is therefore ordered and adjudged that on the mid-week visitation (Tuesday, Thursday) said visitation shall be overnight visitation and the

non-custodial parent will pick up the children at their school and return them to their school the following day.

(App. 10). Thus, the trial court awarded Father weekly visitation from Tuesday afternoon to Wednesday morning and Thursday afternoon to Friday morning in addition to biweekly visitation from Friday afternoon to Monday morning.

DECISION

Mother asserts that the trial court's "order giving [Father] two additional weekly overnight visitations and extending his regular weekend visitation to Monday morning was an abuse of discretion." Mother's Br. at 3. Specifically, Mother argues that the trial court's order in effect "created a shared custody situation" by giving Father "seven overnights in every two week period." *Id.* We agree.

Here, the parties had originally agreed that Mother would have physical custody of the children, while Father would exercise visitation biweekly from Friday evening until Sunday evening and weekly from 5:00 p.m. to 8:00 p.m. on Wednesday. Pursuant to a 2004 court order modifying visitation, Father's visitation changed from a weekly visit on Wednesday evenings to weekly visits on "each Tuesday and Thursday from after . . . school until 6:30 o'clock p.m." (App. 26).

In December of 2005 and January of 2006, respectively, Mother and Father sought to modify visitation once again. Father also sought to modify physical custody of L.E. and J.E. The trial court denied Father's petition to modify physical custody; however, it awarded Father increased visitation, including biweekly visitation from Friday afternoon to Monday morning and weekly visitation every Tuesday afternoon to Wednesday

morning and every Thursday afternoon to Friday morning. Thus, the trial court increased Father's visitation to a period of seven overnight stays during any given two-week period. We agree with Mother that the trial court's modification of visitation resulted in a de facto modification of custody to joint physical custody.

In general, we review custody modifications for an abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." When reviewing a trial court's ruling on a petition to modify custody, we may neither reweigh the evidence nor judge the credibility of the witnesses. Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn from that evidence.

Tompa v. Tompa, 867 N.E.2d 158, 163 (Ind. Ct. App. 2007) (citations omitted).

Regarding modification of a child custody order, Indiana Code section 31-17-2-21 provides as follows:

- (a) The 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 section 8 and, if applicable, section 8.5 of this chapter.
- (b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.

The factors listed in section 8 include 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, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Ind. Code § 31-17-2-8.

The change in circumstances must be “so decisive in nature as to make a change in custody necessary for the welfare of the child.” *In re Paternity of Winkler*, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000). A stricter rationale than that required for an initial custody determination is “required to support a change in custody because ‘permanence and stability are considered best for the welfare and happiness of the child.’” *Id.* (quoting *Lamb v. Wenning*, 600 N.E.2d 96, 97 (Ind. 1992)).

Here, the record reveals that Dr. Lawlor, the court-appointed custody evaluator, advised that he would modify neither custody nor visitation. Rather, Dr. Lawlor recommended continuation of the “joint legal custody arrangement with [Mother] having primary physical custody,” and Father having visitation on “alternate weekends and Tuesdays and Thursdays after school until 6:30 p.m.” (Joint Ex. at 1). According to Dr. Lawlor, “[t]he children seem to have adjusted to this situation well, and in fact, both would prefer staying on the current schedule. They have become accustomed to it” (Joint Ex. at 24). Thus, the trial court modified custody of L.E. and J.E. despite the lack of evidence to support such a change.

Furthermore, the trial court specifically found that “there has been no change in circumstances such to warrant a change of [physical] custody in this matter,” and a review of the record reveals no substantial change in the circumstances listed in Indiana Code section 31-17-2-21. (App. 8). Rather, the evidence reveals that Father and Mother have a history of failing to cooperate or communicate effectively with each other or committing isolated acts of misconduct, which cannot serve as a basis for modification of custody. *See Williamson v. Williamson*, 825 N.E.2d 33, 42 (Ind. Ct. App. 2005). We cannot say that either party committed acts so egregious as to place their children’s welfare at stake and to justify a modification of physical custody. *See id.*

Modifying custody of L.E. and J.E. despite no finding or evidence of a substantial change in circumstances sufficient to warrant a change of physical custody, as required by Indiana Code section 31-17-2-21, constitutes an abuse of discretion. However, given the evidence in the record, we find that a modification of Father’s visitation would serve the best interests of L.E. and J.E. *See* I.C. § 31-17-4-2 (“The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child.”).

As a result, we affirm in part and reverse in part the trial court’s order and remand to the trial court with instructions to enter an order, granting Father 1) weekly visitation from Tuesday afternoon to Tuesday evening at 6:30 p.m. and Thursday afternoon to Thursday evening at 6:30 p.m.; and 2) biweekly weekend visitation from Friday afternoon to Monday morning.

Affirmed in part, reversed in part, and remanded with instructions.

BRADFORD, J., and BROWN, J., concur.