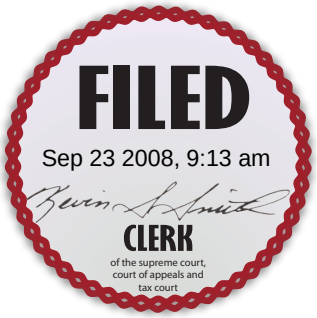

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL J. HOOD,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0711-CV-996
	)	
ROBBIN G. HOOD,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John Jay Boyce, Master Commissioner
Cause No. 49D10-0205-DR-779

September 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Michael Hood ("Father") appeals the trial court's denial of his petition for modification of child custody.

We affirm.

ISSUE

Whether the trial court properly denied Father's petition for modification of child custody.

FACTS[1]

Mother and Father were married in 1997. They are the parents of C.H., who was born on April 1, 1998. Mother and Father divorced in January 2004. Pursuant to an agreement by the parties, the dissolution decree awarded primary physical custody of C.H. to Mother. Father was granted parenting time three days per week. In October 2005, Father obtained new employment. Because of this, Father, through an informal agreement with Mother, relinquished his mid-week visits with C.H. in exchange for having parenting time three weekends per month, one half of the holidays, and one half of C.H.'s summer vacation.

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[1] As a preliminary matter, Robbin Blake ("Mother") argues that Father's Statement of Facts does not comply with Indiana Appellate Rule 46(A)(6) because it is largely argumentative. As such, Mother contends that we should disregard Father's Statement of Facts. Indiana Appellate Rule 46(A)(6) requires that the Statement of Facts should be a concise narrative of the facts relevant to the issues presented for review stated in the light most favorable to the judgment supported by citations to the record. "Any legal argument based on the facts should be reserved for either the Summary of Argument or Argument section of the briefs." *First Nat'l Bank & Trust v. Indianapolis Pub. Hous. Agency*, 864 N.E.2d 340, 351 n.1 (Ind. Ct. App. 2007). Father's Statement of Facts is largely one-sided and, at times, argumentative. Nevertheless, the statement of facts is fully supported by citations to the record and contains a number of direct quotes of findings made by the trial court. Therefore, we will not disregard Father's Statement of Facts.

In May 2005, Mother began dating Jason Barger. In July 2005, Barger moved into Mother's home. On March 21, 2006, Barger became enraged over allegations that his son had been sexually molested. He began yelling at Mother's oldest daughter, A.A.,[2] and pushed her. When Mother intervened, Barger pushed her to the floor where she hit her head and lost consciousness for a few seconds. Barger then left the residence, and A.A. called the police. C.H. witnessed these events. Mother later obtained a protective order against Barger. As a result of these events, criminal charges were filed against Barger for battery, and Mother cooperated with authorities in his prosecution.

After learning of this incident, on April 10, 2006, Father filed a petition to modify custody. In his petition, Father alleged that because of Barger's attack on Mother, she could not provide C.H. with a safe home. Father asserted that it was necessary to modify custody in order to protect C.H.'s health, safety, and welfare. Father requested that the trial court award him primary physical custody of C.H.

The trial court held an evidentiary hearing on Father's petition to modify custody on June 4, 2007. During the hearing, Mother testified about the March 2006 incident with Barger. She related that the criminal charges filed against Barger were dismissed after he agreed to participate in anger management counseling. Mother stated that Barger apologized to her, A.A., and C.H. for his behavior and admitted that he made a mistake. After Barger began anger management counseling, Mother resumed contact with him, in that they carpooled to work. Since June 2006, Barger has occasionally come to Mother's

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[2] A.A. was born on August 30, 1990.

home to allow his son to play with C.H. Mother testified that she does not leave C.H. unsupervised with Barger. Both Mother and A.A. felt that Barger's outburst in March 2006 was an isolated incident. Mother stated that she was no longer romantically involved with Barger.

Mother testified that Father was her third husband. Mother's first husband was Patrick Woods. They were married between 1984 and 1987. Woods assaulted Mother, broke her arm, and choked her. Mother stated that after Woods assaulted her, she divorced him.

Mother's second husband was Ronald Anderson. Anderson is A.A.'s father. Mother stated that during their marriage, Anderson verbally abused her. She denied that Anderson had ever physically abused her, but in a 2002 deposition, Mother stated that Anderson had hit her. Mother obtained a protective order against Anderson during their marriage. She divorced Anderson in February 1993. Mother testified that she still has contact with Anderson, mostly to discuss A.A. She stated that, over the years, Anderson has proven to her that he has changed since they were married and that "he can be the father that [A.A.] needs right now." (Tr. 42). She is no longer afraid of him and views him as a friend. Anderson has helped Mother with home and car repairs. Mother stated that Anderson drives A.A. to school everyday and, in the process, drops C.H. off at a neighbor's house where she gets on the bus. At the time of the hearing, Mother testified that the last incident of abuse she experienced with Anderson was over ten years ago.

Sometime in 2006, Mother had a disagreement with her sister. Her sister pushed Mother to go out a door, and Mother fell, aggravating a preexisting wrist injury. C.H.

was inside the house but unaware of the situation. In discussing the argument, Mother explained, "we argue back and forth once in awhile like all sisters do but we . . . have a very good relationship." (Tr. 43). Mother testified that C.H. is not afraid of her aunt and has a good relationship with her.

As a result of the March 2006 incident with Barger, C.H. began treatment with therapist Patrick McWeeny in June 2006. Father selected McWeeny as C.H.'s therapist. McWeeny believed that modification of the current custody arrangement was not in C.H.'s best interest. He noted that many of C.H.'s issues stem from the conflict between her parents over custody. He estimated that C.H.'s treatment could be concluded within six months of Mother and Father resolving their disputes. McWeeny felt that C.H. was safe in Mother's custody. He added that if he felt C.H. was in danger, he would have contacted both parents and child protective services. He said that he was "not even close" to having to do that "at this point." (Tr. 97). He further stated that he did not have any concerns about C.H. having contact with Barger.

At McWeeny's request, Mother and C.H.'s teacher Debra Farino completed a Connor's Teacher Rating Scale that would be used to determine whether C.H. had attention deficit disorder. Mother identified as "very much true" that C.H. was "hard to control in malls or while grocery shopping", that C.H. had "difficulty doing or completing homework", "disturbs other children", and "deliberately does things that annoy people". Respondent's Exhibits, Exhibit D. In her rating scale, Farino identified as "very much true" that C.H. "does not know how to make friends", "disturbs other children", and "is one of the last to be picked for teams or games". Respondent's

Exhibits, Exhibit E. However, Farino testified that by the end of the school year, C.H. had gotten better about not disturbing other students. In contrast to Mother and Farino, Father testified that C.H. had no problem making friends and socializing with the children in his neighborhood. He also stated that C.H. was helpful with grocery shopping.

Evidence was introduced that during the past school year, C.H.'s grades had dropped. In the last school year, C.H. received four C grades, whereas in the year prior to that, she only received two C grades. Mother testified that she was aware of this problem and had spoken with C.H.'s teacher. She stated that she worked with C.H. every night on her homework and helped her with her flash cards and spelling words.

Concerns were also raised about C.H.'s hygiene. Mother testified that C.H. had lice due to contact with children at school or her cousins. Additionally, on one occasion, Farino told Mother that she saw C.H. scratching her private area. In response to this, Mother stated, "We got her bigger size underwear and it was not an issue anymore . . . ." (Tr. 39).

On October 29, 2007, the trial court issued an order denying Father's petition to modify custody. The court specifically concluded that Father "has shown that [Mother] has an extensive history and pattern of victimization by family violence. He has not shown that a substantial change has occurred in this or other factors." (App. 24). The court, though, found that it was in C.H.'s "best interest that [Father] exercise an increased amount of custodial parenting time with [C.H.]." *Id.* The court specified that Father should exercise parenting time four weekends per month, rather than just three, and

should have parenting time every Wednesday evening from 6:00 p.m. to 8:30 p.m. This appeal ensued.

DECISION

1. Custody Modification

Father argues that the trial court abused its discretion when it denied his petition to modify custody. We review custody modifications for an abuse of discretion. *Webb v. Webb*, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. *Id.* In reviewing a trial court's determination, we do not reweigh the evidence or judge the credibility of the witnesses. *Tompa v. Tompa*, 867 N.E.2d 158, 163 (Ind. Ct. App. 2007). We will only consider the evidence most favorable to the judgment and any reasonable inferences from that evidence. *Id.*

Father is appealing from a decision in which the trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. In this situation, we first determine whether the evidence supports the findings and then assess whether the findings support the judgment. *Truelove v. Truelove*, 855 N.E.2d 311, 314 (Ind. Ct. App. 2006). We will set aside the findings or the judgment only if they are clearly erroneous. *Id.* Findings of fact are clearly erroneous if the record lacks any evidence or reasonable inferences to support them. *Id.* The trial court's judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.*

As the petitioner seeking subsequent modification of custody, Father bears the burden of demonstrating that the existing custody arrangement should be altered. *Tompa*,

867 N.E.2d at 163. A 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 or more of the factors set forth in Indiana Code section 31-17-2-8. *Id.* The factors listed in Indiana Code section 31-17-2-8 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.

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)).

Father contends that there was a substantial change in several of the factors listed in Indiana Code section 31-17-2-8, and because of this, the trial court should have granted his petition to modify custody. He first argues that there is a pattern of

domestic/family violence in Mother's home. The trial court found that there was a pattern of family violence. It specifically found that Mother was abused by her first husband, Woods, and her second husband, Anderson. It also found that Barger physically assaulted Mother and A.A. in March 2006 and that Mother had an argument with her sister that resulted in an injury to Mother's wrist. The trial court, however, concluded that these events did not constitute a substantial change in circumstances warranting a modification of custody. We agree.

Initially, we note that "when determining whether a change in circumstances has occurred . . . the trial court may consider changes that have occurred since the last custody determination." *Rea v. Shroyer*, 797 N.E.2d 1178, 1182 (Ind. Ct. App. 2003). Here, the last custody determination was made in 2004 when Mother and Father divorced. Mother's past incidents of violence with Woods and Anderson do not constitute a substantial change in circumstances because these incidents occurred long before the last custody determination was made in 2004.

We note that there have been long periods in Mother's life where there was no violence. Prior to the incident with Barger in March 2006, Mother indicated that the last experience she had with domestic violence was over ten years ago with Anderson. Throughout her marriage with Father, there was no evidence that Father physically abused Mother. Following the incident with Barger, Mother has not been involved in any domestic violence other than an argument she had with her sister, on which the trial court placed little emphasis.

We also find it significant that Mother has not stayed in abusive relationships. After Woods assaulted her, she promptly divorced him. When Anderson became physically abusive, Mother obtained a protective order and divorced him. She also successfully petitioned the court to reduce Anderson's parenting time with their daughter A.A. After Barger physically assaulted her, Mother cooperated in his prosecution. She then ended her relationship with Barger and obtained a protective order against him.

Mother has allowed Anderson and Barger back into her life, but not without certain precautions and conditions. In Anderson's case, Mother has recognized that he has a right to contact with his daughter A.A. and that he can be the father figure A.A. needs at this time. Additionally, it has been over ten years since Anderson's last act of violence against Mother. Since that time, Anderson has proven to Mother that he has changed, such that she is no longer afraid of him.

As to Barger, Mother only resumed contact with him after he began anger management counseling, and the criminal charges against him were dismissed. Mother and A.A. both felt that Barger's violence in March 2006 was an isolated incident. Mother was impressed that Barger admitted he made a mistake and apologized to Mother, A.A., and C.H. Despite the apology and anger management counseling, Mother stated that C.H. only has occasional contact with Barger when he brings his son to Mother's home to play with C.H. Mother testified that she does not leave C.H. unsupervised with Barger.

Mother also continues to have a relationship with her sister, with whom she had an argument. The trial court placed little emphasis on this episode, perhaps because C.H. was unaware it occurred. In discussing the argument, Mother explained, "we argue back

and forth once in awhile like all sisters do but we . . . have a very good relationship." (Tr. 43). We cannot fault Mother for not excluding her own sister and C.H.'s aunt from her life over what appears to be a fairly minor sibling dispute.

We also note that McWeeny, C.H.'s therapist who was chosen by Father, testified that C.H. was safe in Mother's custody. He specifically stated that he did not have any concerns about C.H. having contact with Barger.

While we believe Father had legitimate cause for concern over the violence in Mother's home, we cannot say that the trial court abused its discretion by concluding that this did not constitute a substantial change in circumstances that warranted modification of custody.

Father next argues that there has been a substantial change in C.H.'s adjustment to her home, school, and community. Father first contends that there has been a change in C.H.'s social skills/relationships. He points out that Farino, C.H.'s teacher, stated C.H. had trouble making friends. Father, though, testified that C.H. had no trouble making friends in his neighborhood. Mother and Farino both stated that C.H. disturbs other children, yet Farino noted that by the end of the school year, C.H. had improved in this area. Mother stated that she had trouble controlling C.H. at malls and while grocery shopping. Father, however, indicated that C.H. was helpful when he took her grocery shopping. Given the contradictory evidence introduced, we cannot say the trial court abused its discretion in concluding that this was not a substantial change in circumstances justifying modification of custody.

Next, Father notes that C.H.'s grades at school are down. In her last year of school prior to the hearing, C.H. received four C grades, but in the prior school year she only received two C grades. Mother testified that she was aware of this problem, had spoken with C.H.'s teacher, and was working with C.H. to correct the problem by helping her with her homework every night. We cannot say that the trial court erred in not finding this to be a substantial change warranting modification of custody, especially in light of McWeeny's testimony that changing C.H.'s school, which would be necessary if primary custody was awarded to Father, would be detrimental to C.H.

Father last notes that there has been a change in C.H.'s hygiene. He specifically notes that C.H. had lice and was seen by her teacher scratching her private area. Both of these events seem to be isolated incidents that were promptly addressed by Mother. As such, we cannot say that the trial court abused its discretion in not finding this to be a substantial change justifying modification of custody.

Therefore, we conclude that the trial court did not abuse its discretion in finding that Father did not prove a substantial change in circumstances that would have warranted modification of custody.

2. Appellate Attorney Fees

Mother argues that because she prevailed at the trial court and on appeal, she should be awarded her appellate attorney fees. "Indiana follows the 'American Rule' that each party involved in litigation must pay its own attorney's fees." *Hill v. Davis*, 850 N.E.2d 993, 995 (Ind. Ct. App. 2006). Nevertheless, Indiana Appellate Rule 66(E) states: "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous

or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." "Our discretion to award attorney fees under Appellate Rule 66(E) is limited, however, to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Helmuth v. Distance Learning Sys. Indiana, Inc.*, 837 N.E.2d 1085, 1094 (Ind. Ct. App. 2005). "[W]hile Appellate Rule 66(E) provides this court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal." *Id.* "A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious." *Id.*

Mother does not argue that Father's "appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Id*. Nor do we find that Father's appeal falls into any of these categories. As previously stated, Father had a legitimate right to be concerned about the violence in Mother's home and this provided him with a valid, good faith basis for seeking modification of custody. Therefore, we conclude that an award of appellate attorney's fees to Mother is not warranted.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.