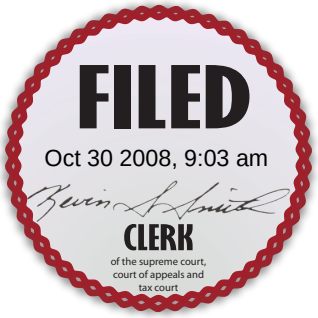

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF:	)	
THE SUPPORT OF T.M., BY NEXT	)	
FRIEND SHANA DANIEL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 46A03-0807-CV-346
	)	
NATHAN MCALISTER,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LaPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Jr., Judge
The Honorable Richard R. Stalbrink, Jr., Magistrate
Cause No. 46C01-0707-DR-175

October 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Shana Daniel ("Mother") appeals the trial court's order awarding Nathan McAlister ("Father") physical custody of their daughter, T.M. Specifically, Mother claims that the evidence was insufficient to establish that (1) there has been a substantial change in the circumstances to warrant modification of custody, and (2) the custody modification was in T.M.'s best interests. We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father are the parents of a daughter, T.M., who was born on June 15, 1998. At some point in 1999, Mother and Father's relationship ended. On September 20, 1999, Mother was granted sole physical custody of T.M., and Father was granted parenting time. On April 28, 2003, the parties stipulated that Father would have visitation with T.M. every Tuesday and Thursday as well as every other weekend. On September 24, 2005, Father married Verna McAlister ("Step-Mother").

At the beginning of the 2005-2006 school year, T.M. was enrolled in the first grade at Westville Elementary School. Throughout the first few years of elementary school, T.M. struggled with reading, spelling, organization, concentration, and the ability to complete assigned tasks. In light of T.M.'s struggles, school officials recommended that T.M. be tested for a number of learning disabilities. T.M. was diagnosed with Attention-Deficit Hyperactivity Disorder ("ADHD")[1] and dyslexia. Although the doctor who diagnosed T.M. recommended medication to treat T.M.'s condition, Mother refused to place T.M. on the

[1] The record is inconsistent with regard to whether T.M. suffers from ADHD or Attention-Deficit Disorder ("ADD"). However, we note that it appears that the terms ADHD and ADD are commonly used interchangeably. *See* http://add.about.com/od/adhdthebasics/a/ADDvsADHD.htm (last visited October 7, 2008).

medication. Mother also refused Father's offers to pay for alternative treatment or a second opinion. Mother never obtained treatment for T.M.'s condition. Additionally, Mother was inconsistent in providing T.M. with needed corrective eyewear and had refused to allow Father to participate in decisions concerning T.M.'s medical needs.

T.M.'s struggles at school eventually became so great that in the spring of 2006, school officials recommended to Mother that T.M. repeat the second grade. Mother disagreed and requested that school officials allow T.M. to move on to the third grade. Mother did not consult with Father regarding the decision of whether to hold T.M. back. T.M. continued to struggle in third grade and eventually Mother agreed in the spring of 2007, to hold T.M. back for a second year in the third grade. Again, Father was not consulted in making this decision.

At some point during January of 2006, Mother unilaterally decided to end Father's Tuesday and Thursday visitation with T.M. Mother's claimed reasons for denying Father's weekday visitation were that Father was not helping T.M. get her school work done and Mother's erroneous belief that the court had never granted weekday visitation. Court documents established, however, that the trial court had granted Father Tuesday and Thursday visitation. Mother had also denied some of Father's scheduled weekend visitation time with T.M. On April 24, 2007, Father filed a petition to modify custody, seeking sole physical custody of T.M.

Prior to the February 15, 2008 modification hearing, the trial court arranged for "Choices!" Counseling Services ("Choices") to conduct a comprehensive child custody

evaluation. In its report, the Choices custody evaluator determined that "it would be beneficial for Father to have the ability to overrule Mother on issues involving educational and medical issues." Appellee's App. p. 52.

On February 15, 2008, T.M.'s teacher, Autumn Scheidt, testified that T.M. continued to struggle, and that even though her grades had improved somewhat, T.M. was still at least one semester behind in desired reading and spelling levels. The evidence showed that up to this point, Father had shown a continued interest in T.M.'s education, and had offered to pay for private tutoring or any additional resources that the school deemed necessary despite Mother's continuous refusal to allow Father to participate in decisions concerning T.M.'s education.

The trial court determined, based on the evidence presented at the modification hearing and in the Choices custody evaluation, that Father had met his burden of showing that a substantial change had occurred, and that T.M.'s physical and mental health and education had been compromised. The trial court awarded Father sole physical custody of T.M., and awarded Mother parenting time pursuant to the Indiana Parenting Time Guidelines. Mother now appeals.

DISCUSSION AND DECISION

Mother contends that the trial court abused its discretion in modifying the custody arrangement to award Father sole physical custody of T.M. Specifically, Mother asserts that evidence presented at trial was insufficient to prove that (1) a substantial change in the

circumstances warranting the custody modification had occurred, and (2) the proposed custody modification was in T.M.'s best interest.

It is well-established that 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 (1) or more of the factors that the court may consider under [Indiana Code section 31-17-2-8 (2007)]." Ind. Code § 31-17-2-21 (2007). Indiana Code section 31-17-2-8 provides the following:

> 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:
> …
> (6) The mental and physical health of all individuals involved.

In a custody modification matter, the standard used by a trial court and that used on appellate review are not the same. *In re Marriage of Richardson*, 622 N.E.2d 178, 179 (Ind. 1993). The trial judge is entrusted with the responsibility of determining whether there has been a change in circumstances so substantial and continuing as to make the existing order unreasonable. *Id*. On appellate review, we review custody modifications for an abuse of discretion, with a preference for granting latitude and deference to our trial courts in family law matters. *Webb v. Webb*, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007). As the Indiana Supreme Court has previously explained, the reason for this deference is that,

> this Court as a court of review … [is] 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.

Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965).

Here, Mother is appealing from a decision in which the trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52. Therefore, we must first determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Webb*, 868 N.E.2d at 592. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*.

> We do not weigh the evidence nor judge the credibility of witnesses, but rather consider only the evidence most favorable to the judgment, together with reasonable inferences which can be drawn therefrom. If, from that viewpoint, there is substantial evidence to support the finding of the trial court, it will not be disturbed, even though we might have reached a different conclusion if we had been the triers of fact. If there is any evidence or legitimate inferences to support the finding and judgment of the trial court, this Court will not intercede and use its judgment as a substitute for that of the trial court.

Richardson, 622 N.E.2d at 179 (citations and quotations omitted).

I. Challenges to the Modification Order

The trial court determined that a substantial change in T.M.'s physical and mental health and education had occurred, and that, in light of this change, it would be in T.M.'s best interests to award sole physical custody to Father. Mother asserts, however, that the evidence fails to establish that there has been a substantial change in the circumstances. Specifically,

Mother claims that paragraphs seven, eight, nine, fourteen, fifteen, twenty-three, twenty-four, and twenty-six of the trial court's modification order are clearly erroneous.

A. Paragraph Seven

Paragraph seven of the modification order states the following:

> [T.M.]'s third grade teacher, Autumn Scheidt testified that [T.M.] was a well-adjusted child and is a pleasure to have in class. Ms. Scheidt also testified that [T.M.] was held back in school and had experienced difficulty with homework, with reading and with inattentive behavior. Ms. Scheidt testified that originally it had been recommended that [T.M.] be held back in the second grade, however, [Mother] had refused. She also testified that [T.M.] did not wear or have her glasses at school with her as needed and further that her performance was better when she had her glasses.

Appellant's App. p. 6.

Mother challenges the portion of paragraph seven pertaining to T.M.'s need to wear glasses. Mother claims that T.M. does not need to wear glasses, but also that T.M. does wear her glasses at school. Notwithstanding Mother's conflicting claims, the evidence presented at the custody modification hearing established that Mother was inconsistent in providing T.M. with corrective eyewear as needed. The Choices custody evaluation states that:

> Mother is not consistent in providing glasses. Mother did provide more information about this and this backs her actions. However, she is not communicating this clearly to others. The teacher is as confused about this as Father is. Mother did not allow parenting time when Father had made an [appointment] at an eye doctor and thus he was unable to meet with the doctor, and learn first hand about [T.M.'s] visual needs.

Appellee's App. pp. 49-50. Additionally, Scheidt testified that there was an issue with glasses when T.M. was in the second grade and that at times, T.M. wore glasses at school. Moreover, Step-Mother also testified that she had been told by T.M.'s teachers that T.M. had

problems seeing, but that she did not have eyeglasses on a regular basis. Moreover, Mother told the custody evaluator that T.M. did not need glasses, but when T.M. was struggling to read a card while playing a game with Mother, Mother made T.M. put on her glasses which alleviated T.M.'s struggle. In light of the evidence establishing that Mother was inconsistent in providing T.M. with needed corrective eyewear, we conclude that this finding is not clearly erroneous.

B. Paragraph Eight

Paragraph eight of the modification order states the following:

> Ms. Scheidt also testified that [Father] had little contact with the school and that she had been given the impression by mother that father was not to have information from the school. This problem was recently remedied and father now has regular contact with school regarding [T.M.]'s education.

Appellant's App. p. 6.

Mother challenges paragraph eight by claiming that the evidence showed that Father had never contacted Scheidt and that any evidence proving that Mother had instructed the school not to provide Father with any information concerning T.M.'s education was too remote to justify modification. The record, however, established that prior to Father's contact with Scheidt, Father and Step-Mother had been in contact with school officials, and additionally that Father had initiated the contact with Scheidt. Scheidt testified that she had been told by T.M.'s second grade teacher that Mother had specifically directed her not to share any information regarding T.M.'s education with Father. Nothing in the record suggests that Mother's directions were remote, and Scheidt understood Mother's directions to be ongoing, at least until Father contacted her. Further, the Choices custody evaluation noted

that "Father has made extra efforts to get in touch with [T.M.]'s school and teacher in order to find out how she is doing and what help is available, despite Mother's resistance to giving Father this information." Appellee's App. p. 43. Because the evidence established that prior to Father's initiating contact, Scheidt had little contact with Father because she believed Mother had requested that she not provide Father with information pertaining to T.M.'s education, we conclude that this finding is not clearly erroneous.

C. Paragraph Nine

Paragraph nine of the modification order states the following:

> Ms. Scheidt testified that [T.M.] is making more progress this time in third grade but that she is still behind and is only reading on a first grade level.

Appellant's App. p. 6.

Mother challenges paragraph nine by claiming that Scheidt testified that T.M. was only one semester behind in third grade and that T.M. had passed the Indiana Statewide Testing for Educational Purposes ("ISTEP") test. Scheidt testified at the modification hearing that T.M. had begun to make progress, but that she was still behind. Scheidt also testified that the most recent testing suggested that T.M.'s instructional reading level was roughly that of a second grader. Additionally, the Choices custody evaluation noted that T.M. had made "some major gains," but that T.M. "ha[d] a long way to go." Appellee's App. p. 42. The evaluation also noted that presently, T.M. "is at a first grade level in her spelling words" and that she continues to struggle. Appellee's App. p. 42.

We acknowledge that paragraph nine states that at the time of the modification hearing, T.M. was reading at a first-grade level, but that the evidence shows she was actually

reading approximately at a second-grade level. While the finding that as of the date of the modification hearing, T.M., who was mid-way through her second year in the third grade, was reading at a first-grade level may be technically erroneous because it is off by approximately one grade level, the thrust of the finding, namely that T.M. is behind in school, is supported by the evidence. Therefore, to the extent that the trial court's finding that T.M. is currently reading at a first-grade level is erroneous, the trial court's finding that despite T.M.'s recent progress, she is still behind the normal levels for a third-grade student is sufficiently supported by the evidence.

D. Paragraph Fourteen

Paragraph fourteen of the modification order states the following:

> Mother entered documents and testified about her efforts to help [T.M.] with her schoolwork and her learning disability in the last few months. However, the testimony and custody evaluation equally show that mother has not provided enough help with [T.M.]'s learning disability and for her medical needs. Notwithstanding the recommendations from medical personnel, mother has decided not to place [T.M.] on medications to help her learning disability, nor to have a second opinion or evaluation completed to seek an appropriate alternative or acceptable medication.

Appellant's App. p. 7.

Mother challenges paragraph fourteen by claiming that both Mother and Father decided not to place T.M. on the recommended medication and that Mother had in fact obtained a second opinion. Mother's claims, however, are not supported by the evidence. The Choices custody evaluation noted that Mother was not providing enough professional help for T.M.'s learning disability and that Mother was inconsistent in providing T.M.'s visual needs. The evidence established that Mother refused Father's offer to pay for a second

opinion regarding T.M.'s medical needs or for alternative treatments. The evidence also established that Mother refused Father's offer to pay for private tutoring. Mother testified that unlike Father, she was unwilling to place T.M. on medication for her ADHD and dyslexia under any circumstances.

Furthermore, to the extent that Mother claimed to have obtained a second opinion regarding the need to medicate T.M., she provided no evidence of this alleged second opinion at the custody modification hearing, and the trial court apparently dismissed Mother's claim. Mother's challenge to this finding is merely an invitation for us to reweigh the evidence, which we will not do. In light of our position that the trial court is in the best position to judge the witnesses and their testimony and our preference for granting deference to the trial court, we cannot conclude that this finding is clearly erroneous. *See Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002); *Webb*, 868 N.E.2d at 592.

E. Paragraph Fifteen

Paragraph fifteen of the modification order states the following:

> [T.M.] has missed sixteen (16) days of school in 2006 and six (6) days in 2007, which has negatively impacted her ability to learn and progress through school.

Appellant's App. p. 7.

Mother challenges paragraph fifteen by claiming that T.M.'s extensive absences have not negatively impacted her ability to learn and that she is progressing favorably. We however, are unconvinced that T.M.'s ability to learn was not negatively impacted by her absences from school.

Here, the evidence established that during the preceding school year, T.M. had missed

sixteen days of school and that her academic struggles were such that she was ultimately held back. The evidence also established that as of February 15, 2008, T.M. had missed six days of school during the current academic year and that T.M. continued to struggle. Additionally, both Father and the custody evaluator noted their concern about the potentially negative impact that the amount of school T.M. had missed may have had on her continued progress. Moreover, we believe that a child's ability to learn and successfully progress through school is potentially negatively impacted any time a child misses even one day of school, and that in light of T.M.'s documented struggles, regular attendance at school is paramount to T.M.'s ultimate success.

Again, the trial court's findings and conclusions will be set aside only if there are no facts or inferences from the record supporting them. *See Webb*, 868 N.E.2d at 592. Therefore, in light of the evidence documenting T.M.'s absences from school and her continued academic struggles, we conclude that the trial court's determination that T.M.'s ability to learn was negatively affected by her twenty-two absences from school in the past year and a half was a reasonable inference that could be deduced from the evidence presented at the custody modification hearing.

F. Paragraph Twenty-Three

Paragraph twenty-three of the modification order states the following:

> Mother has directly ignored the medical needs for [T.M.] by not following up with alternative treatments or second opinions for [T.M.]'s diagnosis of ADD and Dyslexia. Pursuant to the Choices evaluation father has demonstrated a willingness and ability to effectively deal with [T.M.]'s medical needs and the recommendation is that father, not mother, should have the right to make educational and medical decisions.

Appellant's App. p. 8 (emphasis in original).

Mother challenges paragraph twenty-three by claiming that she adequately provides for T.M.'s medical needs. However, as we have discussed above, the evidence establishes that Mother has failed to provide for T.M.'s medical needs on a consistent basis. The evidence establishes that Mother has consistently refused Father's attempts to obtain a second opinion regarding T.M.'s diagnosis or to explore alternative treatments for T.M.'s medical needs. Additionally, Step-Mother testified that Mother had told her that she did not intend to follow the doctor's advice. The Choices custody evaluation contained the recommendation that Father have the ability to overrule Mother on issues involving T.M.'s education and medical needs. The evaluator found that Father had shown that he was willing and able to take control of T.M.'s treatment and had demonstrated long term stability and the ability to consider what was right for T.M. This finding is not clearly erroneous.

G. Paragraph Twenty-Four

Paragraph twenty-four of the modification order states the following:

> [T.M.]'s education needs have suffered as a result of mother not being attentive by addressing medical needs and the need for [T.M.] to wear her glasses in school, causing her educational progress to wain [sic]. During the evaluation, when [T.M.] struggled with an exercise, mother did finally provide [T.M.]'s glasses which alleviated the struggle.

Appellant's App. p. 8.

Mother challenges paragraph twenty-four by claiming that she adequately provides for T.M.'s medical needs. The record, however, demonstrates that Father has consistently shown concern for T.M.'s educational and medical needs, whereas Mother's concern appeared to

have grown with the initiation of Father's action to modify custody. The evidence establishes that Mother was inconsistent in providing T.M. with glasses and that Mother failed to obtain treatment for T.M.'s ADHD and dyslexia. The evidence also establishes that Mother refused Father's offer to pay for additional opinions, alternative treatments, and additional educational resources, including private tutoring. Mother's inconsistency in providing for T.M.'s medical needs was also exhibited by her inconsistent claims that T.M. did not need glasses, but also that she consistently wore them at school. Additionally, Mother's inconsistency was noted by the Choices evaluator, who noted that during her in-home visitation with Mother and T.M., she saw that when T.M. was struggling to read a card, Mother gave T.M. her glasses, at which time T.M.'s struggle was alleviated. In light of this evidence, we conclude that Mother does not adequately provide for T.M.'s medical needs. Thus, this finding is not clearly erroneous.

H. Paragraph Twenty-Six

Paragraph twenty-six of the modification order states the following:

> Based on all the above, the court now finds that father has met his burden and has shown that a substantial change has occurred, and that [T.M.]'s physical and mental health and education have been compromised.

Appellant's App. p. 8.

Mother challenges paragraph twenty-six by claiming that there is no evidence that T.M.'s physical and mental health and education have been compromised. We disagree. The Choices custody evaluation suggested that in some ways, Mother's refusal to obtain outside assistance or treatment for T.M. kept T.M. tied to Mother in a way that was not healthy.

Appellee's App. p. 49. Additionally, the evaluator found that while it was admirable that Mother wanted to spend time with T.M. and help her with her school work, it would be beneficial if Mother would allow T.M. access to resources that would help her succeed. Appellee's App. p. 49. The evaluator also noted that it was unknown how much time Mother actually spent working with T.M. on her school work on a daily basis. Appellee's App. p. 49. Additionally, the evidence established that Mother was inconsistent in providing for T.M.'s visual needs. Also, T.M. had been diagnosed with ADHD and dyslexia, but her condition continued to go untreated. We conclude that this evidence supports the finding that T.M.'s physical and mental health and education were compromised. Therefore, this finding is not clearly erroneous.

The trial court concluded that in light of the above mentioned findings, as well as those not challenged by Mother, Father had met his burden of showing that a substantial change had occurred and that T.M.'s physical and mental health and education had been compromised. Appellant's App. p. 8. We agree with the trial court's assessment and conclude that Father has shown that a substantial change has occurred warranting a custody modification. Therefore, Mother's challenge to the sufficiency of the evidence to support the trial court's modification order must fail.

II. T.M.'s Best Interests

Mother asserts that the evidence was insufficient to establish that the modification of the custody order was in T.M.'s best interest. In support, Mother relies on *VanSchoyck v. VanSchoyck*, 661 N.E.2d 1, 6 (Ind. Ct. App. 1996), in which a panel of this court concluded

that Mother's need to place the child in daycare as well as Mother's move from LaPorte to Westville did not constitute a substantial change warranting a custody modification. However, having concluded above that there has been a substantial change in T.M.'s mental and physical health and education warranting the custody modification, we are unpersuaded by Mother's reliance on *VanSchoyck*.

We have previously concluded that a child's academic failure can constitute a substantial change in circumstances so as to warrant a custody modification. *See Webb*, 868 N.E.2d at 594. In *Webb*, this court affirmed the trial court's custody modification order, finding that Father appeared to be better prepared to help the children both academically as well as with daily living skills. *Id.* The trial court in *Webb* found that Father appeared to be more proactive in his desire to assist the children in reaching their potential and also appeared to be more aware of and more willing to address C.W.'s mental health needs. *Id.*

Here, as in *Webb*, the trial court found that Father was better suited to provide for T.M.'s medical and educational needs. The evidence established that Father was more proactive than Mother in trying to provide T.M. with the resources she needed to reach her potential. Father has shown persistence in trying to obtain information concerning T.M.'s educational progress, despite Mother's continued resistance to providing him with such information. Father exhibited a willingness to pay for any tutors or educational resources that the school felt would be beneficial to T.M. Father attempted to schedule an eye exam for T.M. during his scheduled visitation, so as to better understand T.M.'s visual needs. Father was willing to consider medication and offered to pay for alternative treatments or additional

opinions regarding T.M.'s learning disabilities. Mother, alternatively, was inconsistent in providing T.M. with needed medical care and refused to allow T.M. to use any outside educational aides. The evidence supports the trial court's determination that Father was better suited to provide for T.M.'s education and medical needs and that, as a result, the modification of the custody arrangement was in T.M.'s best interests.

To the extent that Mother claims that *Webb* is inapplicable to the instant matter merely because, unlike in *Webb*, T.M. had passed the ISTEP exam and was not in danger of failing out of school, we disagree. In *Webb*, this court considered the children's academic performance as a whole and concluded that "it was in the children's best interests to modify custody to Father who [was] sensitive to their educational needs and who [would] actively aid them to reach their full academic potential." *Webb*, 868 N.E.2d at 594. Likewise, here, the trial court considered evidence relating to T.M.'s academic performance and health as a whole and determined that it was in T.M.'s best interests to modify custody to Father, who it found to be better suited to provide for T.M.'s medical and educational needs.

In sum, having concluded that the evidence to support the trial court's determination that the substantial change in the circumstances warranted modification of the prior custody arrangement, and that the custody modification was in T.M.'s best interests, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.