

Case Summary

After Michael E. Stagg and Michelle M. Lovelady-Smith (formerly Stagg)¹ both filed petitions to modify custody of one of their children, the trial court granted Lovelady-Smith's petition. Finding that there has been a substantial change in circumstances regarding the child, the trial court granted primary physical custody over the child to Lovelady-Smith during the child's school year. Concluding that the trial court clearly erred in granting the petition for modification because its order does not reflect that it found that the modification is in the child's best interests, we reverse and remand. On remand, we direct the trial court to determine whether modification of custody is in the child's best interests and, if so, to articulate an appropriate parenting time schedule for the parties.

Facts and Procedural History

Stagg and Lovelady-Smith married on September 8, 1990, and later moved to Evansville. During their marriage, they had four children together and adopted one child. On November 2, 2006, Stagg returned home from an overseas business trip, and a fight erupted between him and Lovelady-Smith. Their children were at home during this time. The fight escalated into a physical altercation, and Lovelady-Smith called the police. Stagg was arrested and charged with domestic battery. Stagg ultimately resolved the matter through a pretrial diversion program.

¹ Lovelady-Smith's maiden name of Lovelady was restored upon the parties' divorce, and she has since remarried.

Lovelady-Smith filed a petition for dissolution of the parties' marriage, and the trial court granted the dissolution in March 2007. The parties' agreed summary final dissolution decree included the following relevant provision:

The parties shall share physical custody of the parties' Minor Children, [A.M.S.] . . . , [M.S.] . . . , [A.J.S.] . . . , [K.S.] . . . , and [J.S.] . . . ("Minor Children"). The parties agree to develop and implement a parenting time schedule that will afford each of them equal time with the Minor Children. In developing and implementing said plan, the parties shall remain flexible and take into account each other's schedule, the schedules of the Minor Children and the wishes of the Minor Children.

Appellant's App. p. 15. The dissolution decree also provided that the parties would have joint legal custody of the children. *Id.*

Approximately five months after the parties' divorce, Lovelady-Smith filed a petition to modify physical custody of the parties' children. *Id.* at 28-29. In support of her petition, she alleged that a substantial change in circumstances had occurred, namely, that three of the children "no longer desire[d] shared physical custody." *Id.* at 28. In January 2008, while Lovelady-Smith's petition was still pending, Stagg also filed a petition to modify custody, asking that he be named the children's primary physical custodian because "the older children desire[d] to live with" him and Lovelady-Smith "failed to adequately supervise and care for the children." *Id.* at 36.

The trial court held a hearing on the parties' petitions. The only disputed issue by the time of the hearing was whether physical custody of K.S. should be modified. Lovelady-Smith contended that the circumstances warranting a custody modification were that K.S. wanted to spend more time with her but was prevented from doing so by Stagg and that Stagg behaved abusively in front of K.S. Tr. p. 14. Stagg refuted these

claims.² By agreement of the parties, the trial court interviewed the parties' children individually *in camera*. The trial court then issued a written order granting Lovelady-Smith's petition to modify custody of K.S. Appellant's App. p. 40-41. The order provides in part:

Comes now the Court, having had the Mother's Petition to Modify under advisement, and now finds that there has been a substantial and continuing change in circumstances regarding the parties' minor child, [K.S.], and that the Mother shall have primary custody of [K.S.] during the school year only. During the summer months (away from school), the parties shall share equal time with the minor children.

Id. at 40. Stagg now appeals.

Discussion and Decision

Stagg contends that the trial court erred by granting Lovelady-Smith's petition to modify custody of K.S. 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.'" *Green v. Green*, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006) (quoting *Apter v. Ross*, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003), *trans. denied*). When reviewing a trial court's decision modifying custody, we may not reweigh the evidence or judge the credibility of the witnesses. *Browell v. Bagby*, 875 N.E.2d 410, 412 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. Instead, we consider only the evidence most favorable to the judgment and any reasonable inferences therefrom. *Id.* When ordering a modification of child custody, a trial court is not, absent a request by a party, required to make special findings. *Kanach v. Rogers*, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001). Where, as here,

² Although not explicit, Stagg appeared to abandon his request for primary physical custody of K.S. at the hearing, telling the court, "I've got concerns that I want to be sure that while [K.S.] has her fifty per cent [sic] with her mother, it . . . it is with her mother." Tr. p. 83-84.

the trial court does not make special findings, the decision of a trial court is reviewed under a general judgment standard and will be affirmed if it can be sustained upon any legal theory consistent with the evidence introduced at trial. *In re Paternity of M.J.M.*, 766 N.E.2d 1203, 1208 (Ind. Ct. App. 2002).

As a preliminary matter, Stagg characterizes the trial court's order as an order modifying legal, rather than physical, custody of K.S. Appellant's Br. p. 6-7. In her appellate brief, Lovelady-Smith points out that the trial court's modification order dealt only with physical custody of K.S., as sought by her petition to modify. Appellee's Br. p. 6. There are two types of custody: legal and physical. *See* Ind. Code § 31-17-2-14 (providing that joint legal custody does not require that parents have an equal division of physical custody); *Wolljung v. Sidell*, 891 N.E.2d 1109, 1110 (Ind. Ct. App. 2008) (recognizing that parents had joint legal custody but mother had primary physical custody). At the time of the dissolution of their marriage, the parties agreed to joint physical and legal custody of their children. Appellant's App. p. 15. That is, they agreed to share physical custody of their children equally and to "communicate and cooperate and attempt to collectively decide all matters concerning the advancement of the Minor Children's welfare, including, but not limited to, education, medical treatment, religious upbringing and extracurricular activities." *Id.* Upon reviewing Lovelady-Smith's petition to modify, it is apparent she asked the trial court only to modify physical custody of K.S. *Id.* at 28 ("Three (3) of the parties' five (5) minor children no longer desire shared physical custody."). Thus, although the trial court's modification order does not

specify which type of custody it modifies, it is clear that it only modifies physical custody of K.S. and does not affect the parties' joint legal custody arrangement.

On appeal, Stagg argues that the trial court clearly erred by failing to articulate that custody modification is in K.S.'s best interests. The statute governing custody modifications in Indiana provides in part:

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 [Indiana Code § 31-17-2-8] and, if applicable, [Indiana Code § 31-17-2-8.5].

Ind. Code § 31-17-2-21(a). Stagg correctly points out that the trial court's order modifying the parties' physical custody of K.S. fails to articulate that the modification is in K.S.'s best interests. Appellant's App. p. 40. Before modifying custody of K.S., the trial court was required to find that modification was in the child's best interests. *See Hill v. Ramey*, 744 N.E.2d 509, 513 (Ind. Ct. App. 2001) (finding modification of parenting time improper where the trial court's order did not find that modification was in the child's best interests). Thus, we agree with Stagg that the trial court erred in this regard.

We reverse and remand to the trial court for a determination of whether modification of custody of K.S. is in the child's best interests. Additionally, if the trial court finds that it is, because the trial court's order is silent regarding parenting time under the modified physical custody arrangement, we direct the court to articulate an appropriate parenting time schedule for the parties.

Reversed and remanded.

KIRSCH, J., and CRONE, J., concur.