



## **Case Summary**

Felicia J. Cook (“Cook”) argues that the trial court abused its discretion in denying her Petition to Modify Custody. We affirm.

## **Facts and Procedural History**

Cook and Demetrius J. Baker (“Baker”) married in 1993 and had three children, D.B.1 born in 1995, D.B.2 born in 1996, and D.B.3 born in 2000. Pursuant to a settlement agreement, the Final Decree of Dissolution of Marriage (“Final Decree”) was entered in 2003. The Final Decree provided for joint legal custody. Baker had primary physical custody, while Cook had secondary physical custody and parenting time for Thanksgiving, Christmas, spring break, June, and July.

In October 2007, Cook filed a Petition to Modify Custody. The trial court held an evidentiary hearing, including *in camera* interviews of the three children, and denied Cook’s Petition. She now appeals.

## **Discussion and Decision**

Cook argues that the trial court abused its discretion in denying her Petition to Modify Custody. Indiana Code Section 31-17-2-8 (“Section 8”) specifies eight factors a trial court must consider in initially determining custody: (1) age and sex of the children; (2) wishes of the parents; (3) wishes of the children, with more consideration given to their wishes if they are at least fourteen; (4) children’s relationships with people who affect their best interests; (5) children’s adjustment to home, school, and community; (6) mental and physical health of all involved; (7) evidence of a pattern of either parent’s violence; and (8) care by a “de facto

custodian.”<sup>1</sup> Ind. Code § 31-17-2-8. The trial court may not modify custody, unless modification is in the children’s best interests and there is a substantial change in one or more of the factors in Section 8.<sup>2</sup> Ind. Code § 31-17-2-21. The person seeking modification bears the burden of demonstrating that the existing custody order should be altered. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002).

We review orders regarding custody modification for an abuse of discretion, with a preference for granting latitude and deference to the trial court. Id. “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.

Much of the evidence concerned Baker’s disciplinary methods and economic circumstances. Baker, unlike Cook, disciplined the children by spanking them with a vacuum cleaner attachment that he referred to as a “Kirby tool.” Transcript at 121. Baker spanked D.B.1 on rare occasions – only three or four times ever. However, Baker spanked D.B.2 and D.B.3 from five to at least eight times per week. One of the children stated that Baker “just gets really mad at first yelling and threatening.” Id. at 132. As to discipline, the trial court found as follows:

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<sup>1</sup> There is no suggestion that the eighth criterion is relevant in this case. See Ind. Code § 31-9-2-35.5.

<sup>2</sup> The trial court found that Cook “has proved neither a substantial and continuing change in circumstances nor that the proposed modification is in the best interests of the children.” Appendix at 28 (emphasis in original). On appeal, Cook notes accurately that a “continuing” change is not an element of the statute. See IND. CODE ANN. § 31-17-2-21 (West 2008). However, her attorney elicited evidence of continuing circumstances, asking Baker, “don’t you think it’s continuous since you don’t have another job?” and asking Cook, “based on what we believe to be a substantial and continuing change of circumstances, you would make sure that they still had those bonds and you would bring the children back here to Evansville to visit?” Transcript at 88 and 110-11. “[A] party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.” Witte v. Mundy ex rel. Mundy, 820 N.E.2d 128, 133 (Ind. 2005) (citation omitted).

While the Court is always sensitive to the possible physical abuse of children, the Mother has presented no evidence that the Father has ever physically abused any of the children. The children are frequently in the care of the Mother's family, school teachers and church leaders, yet there was no testimony that anyone has ever observed any marks on the children or behavior commonly associated with abused children.

Appendix at 27-28. There was evidence to support this finding.

During an exchange of physical custody in April 2006, the children witnessed an altercation between Baker and Cook's husband. The two came together, chest to chest. Baker hit Cook's husband in the eye, which caused bleeding, swelling, bruising, and the need for medical attention. Later, Baker apologized to the children for his actions.

On February 3, 2007, Baker was arrested and charged with operating a vehicle while intoxicated and resisting law enforcement, as Class A misdemeanors. Baker introduced a letter from the Vanderburgh Superior Court Drug and Alcohol Deferral Service, which stated that Baker had enrolled on February 5, 2007, was one week from completing the program, and was complying fully with its requirements.

Baker lost his job in August 2006 and remained unemployed, providing for the family with unemployment benefits, Temporary Aid to Needy Families, food stamps, and child support. With the support of his union, Baker was in arbitration with his former employer. As of the hearing in this case, Baker had one year of unemployment benefits remaining.

Baker's mortgage company filed a foreclosure action in September 2007. However, Baker introduced a letter from a loan officer with the U.S. Department of Veterans Affairs, stating:

The VA has requested and obtain [sic] forbearance from any further foreclosure activity to allow Wells Fargo time to consider Mr. Baker for a loan modification. If this modification is approved, his loan will be reamortized and loan brought current and foreclosure cancelled. We believe he is soluble now and if he was brought current should be able to afford his property.

Exhibit 14. The monthly obligation on the mortgage was \$483. As of the hearing in this case, Cook was \$1315 in arrears in child support payments to Baker, constituting almost three months worth of mortgage payments. Furthermore, Baker testified that he took a finance class at his church and learned “how to prioritize my uh, income.” Tr. at 75.

All three children have had positive results in school. For example, each was named “Student of the Week” at school or “Citizen of the Month” by the Evansville Rotary Club. Ex. 5, 8, and 9. The children attended church and participated regularly in church activities. Although residing with Baker since the dissolution, the children spent time with Cook’s parents, brother, and sister. Baker resided in the same house for more than ten years. While some of Baker’s conduct is of great concern, the trial court was well within its discretion to deny Cook’s Petition to Modify Custody.

### **Conclusion**

The trial court did not abuse its discretion in denying Cook’s Petition to Modify Custody.

Affirmed.

RILEY, J., and BRADFORD, J., concur.