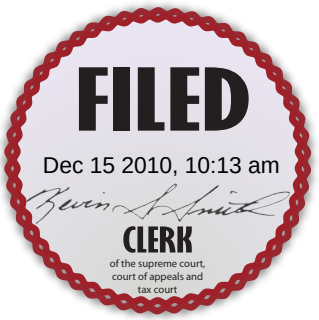

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IN THE
COURT OF APPEALS OF INDIANA

J.S.M.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 73A01-1003-DR-199
	)	
B.C.M.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Russell J. Sanders, Judge
Cause No. 73D02-9910-DR-50

December 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

J.S.M. ("Mother") appeals the trial court's denial of her motion to modify custody. The sole issue she raises for our review is whether the trial court erred by not modifying custody. Concluding the trial court has not abused its discretion in denying modification of custody, we affirm.

Facts and Procedural History

Mother and B.C.M. ("Father") dissolved their marriage in 1999, and the decree, per their agreement, provided for joint legal and physical custody of their son, B.A.M. B.A.M., born in 1999, has been diagnosed with cystic fibrosis and requires daily treatment and medications at home, and frequent medical monitoring and treatments. The decree also provided specific times for physical custody by each parent, that neither parent was to pay child support, and that "the parties were to divide the expenses associated with non-reimbursed healthcare expenses/costs and childcare expenses/costs for [B.A.M.], with [F]ather paying 60% and [M]other paying 40%." Appellant's Brief at 14.[1]

In February 2009, Mother moved for custody modification, alleging the following:

> an inability to communicate with each other effectively regarding [B.A.M.]'s best interests, specifically his health care issues and parenting time; Father's inability to meet his financial obligations regarding his son's health care; and Father's frequent, habitual, and dangerous drug and/or alcohol use based upon his behavior since 2006, which included three (3) separate drug and alcohol related incidents with the Shelbyville Police Department and the Shelby County Sheriff's Department.

Id. at 2.

[1] Because of our partial lack of a record, the Appellant's Brief includes our only text of the trial court's order.

After a hearing on the matter, the trial court entered findings of fact and conclusions of law, including the following:

> FINDINGS OF FACT
>
> ***
>
> 15. There is no evidence that [B.A.M.]'s medical condition has changed substantially during the period at issue and the treating physicians have reported to the parents that they are happy with [B.A.M.]'s current condition.
> 16. Mother has paid a majority of [B.A.M.] [sic] non-reimbursed healthcare expenses/costs and childcare expenses/costs with token contributions from [Father] since December, 2007.
> 17. Father's failure to pay medical expenses is due in part to his financial difficulties. Father lost a well paying job and is now working for wages of less than $10.00 per hour.
> 18. The parents have had difficulty in cooperating regarding health care bills and minor heath [sic] care issues.
> 19. Father has had the following contacts with the criminal justice system:
>
> a. In 2006 he was arrested for OVWI and later pled guilty to a lesser charge;
>
> b. In 2008 he was arrested for leaving the scene of an accident and pled guilty in May, 2009 pursuant to a plea agreement;
>
> c. In November, 2008 he was arrested at his residence along with his roommate and charged with Maintaining a Common Nuisance due to his alleged possession of marijuana in his home. Those charges are pending.
>
> d. Father's roommate continued to live at father's residence for several months following the arrests.
>
> . . .
>
> 22. . . . The Court received school records through the cooperation of each party. Those reports evidence the following pertinent information:
>
> a. In the 2008-2009 school year [B.A.M.] scored A's, B's and satisfactories;
>
> b. [B.A.M.]'s ISTEP scores for a test given in March, 2009 are similar to previous test scores, though in his initial science test he did not pass;
>
> c. Grades for the second nine weeks of 2009 while lower than the last semester . . . are not significantly worse than previous years;
>
> d. [B.A.M.] was declared athletically ineligible for basketball because he failed mathematics but was later reinstated after improving his grades.
>
> e. There is no evidence directly linking the worsening grades to the status of [B.A.M.]'s custody arrangement with his parents.
>
> . . .

CONCLUSIONS OF LAW

***

9. The mother has failed to satisfy the standards required to justify a change of custody. There has been no showing that a change of custody would be in the best interests of the child. There has been no showing that father's criminal misconduct has harmed the child, though it does provide some concern for the Court. The lack of cooperation between the parties is mutual, and disturbing, but does not provide sufficient reason to alter the current arrangement.

10. Given the childs [sic] medical condition specifically and the difficulty of growing up in general, the Court finds that it would not be in [B.A.M.]'s best interests to change his school. He has been there for several years and has performed both well and not so well. But there is no evidence that a change, with its attendant disruption, would be better for him than his current educational circumstances.

***

Id. at 16-20. The trial court therefore denied modification of custody. Mother now appeals.

Discussion and Decision

I. Standard of Review and Preliminary Issues

We generally review a child custody modification order for an abuse of discretion, in which "the decision is clearly against the logic and effect of the circumstances before the court." Joe v. Lebow, 670 N.E.2d 9, 23 (Ind. Ct. App. 1996) (citation omitted). We do not reweigh evidence or assess the credibility of witnesses, and consider only the evidence which supports the trial court's decision. Id.

Father did not file an appellee's brief. When an appellee fails to file a brief, we need not undertake the burden of developing an argument for the appellee. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant presents a case of prima facie error. Id. "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." Id. (quotation omitted).

Where an appellant does not meet this burden, we will affirm. Id. In sum, we review the trial court's decision for prima facie evidence of an abuse of discretion.

Finally, we note that Mother failed to properly refile an appellate appendix.[2] Indiana Appellate Rule 49(A) states that an appellant "shall" file an appendix. An appellate appendix is an opportunity for an appellant to provide additional documentation that may assist us in reviewing the case and for the appellant to reach its appellate burden to show a trial court's reversible error. See App. R. 50(A)(1) ("The purpose of an Appendix in civil appeals . . . is to present the Court with copies of only those parts of the record on appeal that are necessary for the Court to decide the issues presented."); see also Carter v. Whitney, 136 Ind. App. 427, 433, 202 N.E.2d 167, 169 (1964) ("The burden is on appellant on appeal to establish error by the record . . . ."). Indeed, in Yoquelet v. Marshall County, 811 N.E.2d 826 (Ind. Ct. App. 2004), we affirmed a trial court's order granting summary judgment because the appellant failed to file an appendix, which was necessary for a decision on the merits. The dissent in Yoquelet disagreed, believing the court should have ordered the appellant to file an appendix to correct the error, which we did in this case. Therefore it is well within our purview to dismiss this appeal.

However, "we prefer to decide the issues on their merits when possible." Kelly v. Levandoski, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), trans. denied; see also App. R. 49(B)

[2] Mother initially timely filed the wrong appendix, which was captioned with another case name and contained documents that do not pertain to this case. We informed Mother of this error and ordered her to refile the correct appendix within fifteen days, but she failed to do so. Therefore we do not consider or presume what may or may not have been included.

("Any party's failure to include any item in an Appendix shall not waive any issue or argument."). Consequently, we address this appeal on its merits.

II. Modification of Child Custody

Indiana Code section 31-17-2-21 provides that a trial court may not modify a child custody order unless the modification is in the best interests of the child and a "substantial change" has occurred in one or more of the following factors which a court is to consider in initially determining custody:

> (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 trial court entered findings of fact and concluded as a matter of law that Mother failed to show modification would be in B.A.M.'s best interests or that there had been a substantial change in one or more of the above factors.

Mother argues on appeal that several of the trial court's findings are unsupported by the record. First, Mother alleges the trial court's finding that Father's failure to pay "is due in part to his financial difficulties" is a "gross understatement" of Father's financial condition and is incomplete without stating "what the other part could possibly be." Appellant's Br. at 6-7 (quotations omitted). Deferring to the trial court, we refuse to reweigh the evidence and consider only evidence that supports the trial court's decision. See Joe, 670 N.E.2d at 23. Upon review of the hearing transcript, we conclude that to the extent this finding is vague or an understatement of the evidence, it is only negligibly so and is an insufficient basis for reversal.

Second, Mother argues the trial court's finding that the parties "have difficulty in cooperating regarding health care bills and minor heath [sic] care issues" understates the lack of cooperation and severity of the healthcare issues. Appellant's Br. at 7. We disagree and conclude the trial court's characterization of the lack of cooperation and severity of the healthcare issues are accurate.

Third, Mother contends the trial court erred in its characterization of Father's arguments against modification of custody. We conclude that any mistake here is irrelevant because the trial court did not base any of its conclusions on these allegedly misstated arguments. The trial court did, similar to the alleged misstatement of Father's arguments, conclude there is insufficient evidence of substantial change to warrant modification of custody, but evaluating whether a substantial change has occurred is required by statute. See Ind. Code §§ 31-17-2-8 & 31-17-2-21.

Fourth, Mother takes issue with the trial court's finding that "[t]he lack of cooperation between parties is mutual, and disturbing, but does not provide sufficient reason to alter the current arrangement." Appellant's Br. at 9 (quotation omitted). As to whether the lack of cooperation is mutual, this is squarely a question of evaluating the parties' credibility and weighing evidence. Accordingly, we defer to the trial court's findings. See Joe, 670 N.E.2d at 23.

As to whether their cooperation difficulties warrant modification of custody, we address this together with Mother's final assertion that she and Father are "incapable of making a joint custody arrangement work." Appellant's Br. at 10. Mother directs us to Arms v. Arms, 803 N.E.2d 1201, 1210 (Ind. Ct. App. 2004), which states that when determining whether joint custody is appropriate, trial "courts examine whether the parents have the ability to work together for the best interests of their children." In Arms, there were numerous allegations of abuse, parental coaching of the child to make negative comments about and use derogatory names for the other parent, several examples of an unwillingness to abide by the terms of custody and visitation orders, a physical altercation, and more. Under those facts, and acknowledging that "[p]ast behavior is a valid predictor for future conduct," we concluded evidence was sufficient to demonstrate an inability to work together to make joint custody "plausible." Id. at 1210-11.

As in Arms, we may review Mother and Father's history of cooperation throughout B.A.M.'s lifetime. B.A.M. was born in 1999, the year their marriage dissolved. The record before us provides no evidence as to any difficulties in cooperating or breakdowns in

communication until B.A.M. was at least six years old. In late 2005, Father sought modification of custody, but the record does not detail why, or more importantly, if it was due to an inability to communicate or cooperate.[3] Mother filed her present petition for custody modification in February 2009, when B.A.M. was about ten years old. Although accompanied by other motions, the petition for modification centers on Father's failure to pay B.A.M.'s medical expenses. As the trial court recognized, the record supports an inference that this failure to pay is strongly linked to Father's employment or lack thereof for an extended period. Although Father's failure to pay is not excusable as it relates to failure to comply with a court order, it does not demonstrate an inability to communicate or unwillingness to cooperate for the best interests of the child.

Mother raises, as an example of their "inability" to communicate, an incident that took place immediately before the trial court hearing. While B.A.M. was in Father's care one evening, Father noticed B.A.M.'s forehead was hot to the touch, and after taking his temperature – which was 102 – he took B.A.M. to the emergency room. After B.A.M. was treated, Father and B.A.M. returned home about ten o' clock that evening. Father did not inform Mother of the incident until the next morning, when B.A.M. was scheduled to return to Mother's custody. Mother and Father disagree as to the nature and tone of their discussion that morning, but Father essentially refused Mother's request to take B.A.M. and wanted B.A.M. to stay to further recuperate. Mother came over to see B.A.M., she stayed with him "for a little while," went to pick up and returned to drop off a prescription for B.A.M., and

[3] As noted above, Indiana Code sections 31-17-2-8 and 31-17-2-21 provide a variety of reasons to modify custody.

then left. That evening, about twenty-four hours after the high fever, Father took B.A.M. out to see a movie.

Given these relatively undisputed facts, Mother points to this incident as an example of an inability to cooperate or communicate. We disagree, and view it as a relatively minor disagreement, especially because it appears to be an isolated incident when viewing the record as a whole. In over eleven years of B.A.M.'s life, Mother does not show an inability to communicate or cooperate regarding B.A.M.'s best interests.

This contrasts sharply with Arms, which contained at least allegations of physical altercations or abuse and derogatory name-calling – all of which would contribute to an immediate and potentially irretrievable breakdown of communication and cooperation. Here, Mother's allegations as to a failure to cooperate center around Father's failure to pay medical expenses and to carry health insurance for B.A.M., and one incident of short-lived protective hovering over a child resting after a fever. To the extent Mother and Father disagree as to what neighborhood or school would be best for B.A.M., we consider this a reasonable and common dispute and not an example of an inability to cooperate to make decisions in their child's best interests.

Although we agree that Mother and Father have not fully worked out minor communications issues, they are not incapable of communicating and cooperating for B.A.M.'s best interests. The record supports the trial court's cautious optimism that Mother and Father can and will put aside minor differences of opinion or frustrations to cooperate for the best interests of B.A.M. During the hearing, the trial court spoke candidly to Mother and

Father: "[Y]ou're not disagreeing with each other, I'm seeing a real love for that child . . . that both of you have that understands that he's a special needs child and is willing to deal with that and do whatever it takes to take care of that child." Transcript at 82. The trial court found Mother and Father are both actively involved in ensuring B.A.M. receives medical care and are familiar with his physicians, medicines, treatments, and prognosis. This is cooperation. Mother and Father also telephone and text-message each other regarding B.A.M.'s health. This is communication. Consequently, we agree with the trial court's conclusion that Mother has failed to produce sufficient evidence that either a substantial change has occurred or it would be in B.A.M.'s best interests to modify custody.

Conclusion

Mother has failed to show prima facie evidence of an abuse of discretion in the trial court's findings of fact and conclusions of law. Therefore, the trial court's order denying modification of custody is affirmed.

Affirmed.

MAY, J., and VAIDIK, J., concur.