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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE PATERNITY OF M.M.:)
)
A.D.,)
)
Appellant-Respondent,)
)
vs.) No. 32A01-1402-JP-97
)
J.M.,)
)
Appellee-Petitioner.)

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Mark A. Smith, Judge
The Honorable Michael J. Manning, Magistrate
Cause No. 32D04-1104-JP-38

October 23, 2014

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

A.D. appeals the trial court's denial of her emergency motion to modify custody. She argues that the trial court erred by ignoring evidence that showed a substantial change in circumstances. Finding that A.D.'s arguments constitute an improper invitation to reweigh the evidence and judge the credibility of the witnesses, we affirm the decision of the trial court.

FACTS

A.D. and J.M. have one child together, M.M, aged seven. In August 2011, the trial court gave J.M. primary custody of M.M., and A.D. had parenting time according to the Indiana Parenting Time Guidelines.

In September 2013, the Indiana Department of Child Services (DCS) received a report that J.M. was neglecting M.M. DCS was told that the home was dirty and flea infested and that J.M. used many space heaters to heat the home and covered up the sensors so that the heaters would not turn off. DCS was also told that there was a large hole in J.M.'s bathroom floor wide enough for a child to fall through. DCS was also investigating allegations that J.M. drank alcohol to excess and used illegal drugs.

DCS interviewed J.M., A.D., and A.W., the mother of J.M.'s youngest son A.M. DCS also went to J.M.'s home and spoke to M.M. and A.M. While the family case manager (FCM) did find the home to be cluttered, the FCM found that it was not a safety hazard. The FCM further noted that no fleas were observed and that the hole in the bathroom had been repaired. Further, the FCM stated that J.M. denied excessive alcohol use and the use of illegal drugs. Finding that the home met the minimal standards of

sufficiency and that J.M. provided food, clothing, and shelter for his children, the FCM recommended that the assessment be closed. The allegations were not substantiated by DCS.

On September 14, 2013, A.D. filed an emergency motion to modify custody. The motion cited J.M.'s drinking, the space heaters, flea infestation, and J.M. locking M.M. in the house while he was away as substantial changes in circumstances warranting a modification of custody.

The trial court held a hearing on the motion on October 31, 2013, and December 12, 2013. On October 31, 2013, A.D. testified that M.M. often came home with fleas on his clothes and testified that she had learned from A.W. that there was a large hole in the bathroom at J.M.'s home and that J.M. left the children at home alone. A.W. testified that J.M. drank to excess and that he used illegal drugs. She testified that she had obtained an ex parte order of protection in Boone County, which J.M. violated when he picked A.M. up from daycare.

J.M. testified that he did not drink to excess or use illegal drugs and asserted that he cared for the children. He relied on the DCS report that stated that the allegations of negligence were unsubstantiated to support his assertion that the testimony put forth by A.D. and A.W. was false.

On December 12, 2013, M.M.'s Guardian Ad Litum (GAL) testified regarding her investigation. The GAL testified that, after speaking to J.M. and A.D., interviewing M.M.'s school principal, conducting a drug screen for J.M., and speaking to M.M, she

recommended that J.M. retain custody of M.M. The GAL testified that M.M. had said that he liked living with J.M., and that, while J.M. consumed alcohol, he had never seen his father drunk.

On December 12, 2013, the trial court determined that no substantial change in circumstances had occurred that might warrant a change in the custody order. On January 13, 2013, A.D. filed her motion to correct error, which the trial court denied on January 31, 2014. A.D. now appeals.

DISCUSSION AND DECISION

Before addressing A.D.'s argument, we note that J.M. has not filed a brief. When the appellee has failed to submit an appellate brief, we need not undertake the burden of developing an argument on the appellee's behalf. 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. If an appellant is unable to meet this burden, we will affirm the trial court's judgment. Id.

Turning to the merits, A.D. raises one issue on appeal, arguing that the trial court ignored substantial changes in circumstances that indicated that a change in custody was in M.M.'s best interest.

We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). When reviewing a trial court's determination to

modify custody, we may not reweigh the evidence or judge the credibility of the witnesses. Leisure v. Wheeler, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005). We consider only the evidence most favorable to the judgment and any reasonable inferences from that evidence. Id.

In the initial custody determination, both parents are presumed entitled to custody, but a petition seeking subsequent modification bears the burden of demonstrating that the existing custody arrangement should be altered. Green v. Green, 843 N.E.2d 23, 26-27 (Ind. Ct. App. 2006). A court may only modify an existing custody order if it finds that (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 a court may consider under Indiana Code section 31-17-2-8 when it originally determines custody. Id. Section 8 provides:

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:

- (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

....

Ind. Code § 31-17-2-8.

Here, the trial court did not indicate in its order which of the above factors it considered when it determined that a change in custody would not be in M.M.'s interest. Appellant's App. p. 10. Rather, it determined that "there is not a substantial change in one or more of the factors which the Court may consider under I.C. 31-17-2-8." Id. A.D. argues that this determination was an abuse of discretion because the trial court ignored evidence of a substantial change in circumstances.

The evidence most favorable to the trial court's determination demonstrates that circumstances had not substantially changed to an extent justifying modification of custody. The GAL who investigated A.D.'s concerns determined that it was in M.M.'s best interest to stay with J.M. Tr. p. 80. Further, the large majority of A.D.'s concerns—

flea infestation, excessive drinking, a cluttered home, and a hole in the bathroom floor—were found to be unsubstantiated by DCS. Appellant’s App. p. 16-18. At the hearing on her motion, A.D. and A.W. testified that J.M. neglected his children, while J.M. testified that he did not. Tr. p. 20-27, 51-56, 62, 69-71. This is an issue of witness credibility, and it is not within our purview to reweigh the evidence or judge the credibility of witnesses. Therefore, we find that the trial court did not err by denying A.D.’s emergency motion for change of custody.

The judgment of the trial court is affirmed.

KIRSCH, J., and ROBB, J., concur.