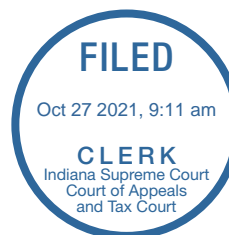


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Karen Woody,
Appellant-Petitioner,

v.

J. Amy Dillard,
Appellee-Respondent.

October 27, 2021

Court of Appeals Case No.
21A-DC-162

Appeal from the Monroe Circuit
Court

The Honorable Catherine Stafford,
Judge

Trial Court Cause No.
53C04-1906-DC-244

Pyle, Judge.

Statement of the Case

- [1] Karen Woody (“Woody”) appeals the child custody order entered following the dissolution of her marriage to Amy Dillard (“Dillard”). Woody specifically argues that the trial court abused its discretion in awarding primary physical

custody of the parties' two children to Dillard. Finding no abuse of the trial court's discretion, we affirm the trial court's judgment.

[2] We affirm.

Issue

Whether the trial court abused its discretion in awarding primary physical custody of the parties' two children to Dillard.

Facts

[3] Woody and Dillard began dating in 2004. At that time, Woody and Dillard, who are both attorneys, lived in Alexandria, Virginia. Woody worked at a large law firm, and Dillard commuted two hours each way to the University of Baltimore School of Law ("UBSL"), where she was a professor. Woody's and Dillard's son, W.D., was born in December 2009, and their daughter, V.D., was born in January 2013. Woody and Dillard married in November 2014.

[4] In 2015, Woody accepted a position teaching law at the Kelley School of Business at Indiana University in Bloomington. During the 2015-2016 academic year, Dillard and the children remained in Alexandria while Woody commuted between Alexandria and Bloomington. Woody typically left Virginia on Monday evenings and returned on Thursday afternoons. Dillard cared for the then-five-year-old W.D. and then-two-year-old V.D. while Woody was in Bloomington.

- [5] In July 2016, the entire family relocated to Bloomington. Dillard took a three-year leave of absence from UBSL and hoped to find a permanent teaching position in Bloomington. Although Dillard found some temporary teaching assignments in Bloomington and Indianapolis, she was unable to find a permanent position.
- [6] In 2018, concerned that Dillard would be required to return to UBSL in the fall of 2019 and that Dillard had become emotionally involved in another relationship, Woody began looking for jobs in Virginia. In December 2018, Woody accepted a teaching position at Washington and Lee School of Law (“WLSL”) in Lexington, Virginia. Woody assumed that the family would return to their home in Virginia and Dillard would resume her commute to UBSL. However, Dillard told Woody that she wanted to remain in Bloomington.
- [7] In June 2019, Woody filed a petition to dissolve her marriage to Dillard. The following month, July 2019, Woody took both children to Colorado for a wedding. She and W.D. argued, and Woody grabbed W.D.’s arm with enough force to leave a bruise. During another incident involving W.D. in Bloomington, Woody dislocated her shoulder. Further, a third incident led to W.D.’s bedroom door being broken.
- [8] In August 2019, the parties entered into a provisional agreement, which provided that Woody and Dillard would have temporary joint legal custody of then-nine-year-old W.D. and then-six-year-old V.D. Woody and Dillard also

agreed that Dillard would have temporary primary physical custody of the two children through June 30, 2020. The agreement further provided that if Dillard relocated to Virginia, Maryland, Washington D.C., or another mutually agreeable location, Dillard would continue to have primary physical custody of the children. In addition, the agreement provided that if Dillard did not relocate by June 30, 2020, Woody would have primary physical custody of the children. The parties also agreed that Dillard would have temporary possession of the marital residence in Bloomington until June 2020. The trial court approved the provisional agreement.

[9] In the fall of 2019, Woody rented a home in Virginia and began teaching at WLSL. Dillard remained in Bloomington with the children and commuted one day a week to UBSL. Also in the fall of 2019, W.D., who had exhibited behavioral problems at past schools, moved to The Project School (“TPS”), a charter school in Bloomington, where he was in the fourth grade. V.D. entered the first grade at TPS.

[10] In December 2019, W.D. wrote a note about “setting traps to kill [a] classmate.” (Ex. Vol. 2 at 84). TPS put “some extra supports in place between [W.D.] and his classmate through the school social worker, d[id] some directed conflict resolution work between them, and use[d] the upcoming winter break as a time to let the conflict cool.” (Ex. Vol. 2 at 84). TPS also planned to include W.D. in social skills sessions and to assist and support him in learning to self-manage and resolve conflicts.

[11] Following this incident, in January 2020, Dillard scheduled an evaluation for W.D. at the Children’s Resource Group in Indianapolis. One month later, in February 2020, Psychologist Anna Merrill (“Dr. Merrill”) diagnosed W.D. with Autism Spectrum Disorder (“ASD”) and Attention-Deficit/Hyperactivity Disorder (“ADHD”). Following W.D.’s diagnosis, W.D. began therapy with Dr. Merrill. In addition, although TPS does not offer a specialized program for ASD students, TPS put in place for W.D. additional individualized supports that incorporated Dr. Merrill’s recommendations. For example, TPS offered W.D. speech therapy and a social development group. W.D.’s teacher also created a special workspace in the classroom for W.D. W.D. will be able to attend TPS through the eighth grade.

[12] In February 2020, Dillard filed a motion to modify the provisional agreement. In her motion, Dillard explained that she did not intend to relocate her residence from Bloomington. She further stated that it was no longer in the children’s best interests to relocate to Virginia with Woody. Rather, according to Dillard, it was in the children’s best interests to remain in her primary physical custody in Bloomington. Woody and Dillard also participated in mediation in February 2020 but were unable to reach an agreement on any issues.

[13] In March 2020, Woody filed a motion for a custody evaluation “to assist the court in . . . determining the best interests of the children[.]” (App. Vol. 2 at 54). Dillard filed a response to Woody’s motion wherein she disagreed that a custody evaluation was necessary. In her response, Dillard pointed out that Dr.

Janice Miller (“Dr. Miller”) of Meridian Psychological Services had quoted an estimated fee of more than \$11,000 to complete the evaluation. Dillard explained that she could not afford to pay any part of this fee. When Woody agreed to pay Dr. Miller’s evaluation fee, Dillard agreed to the evaluation. Woody and Dillard further agreed that Dr. Miller should make her best effort to complete the evaluation and submit it to the trial court no later than May 31, 2020.

[14] Also in March 2020, both Woody and Dillard began teaching remotely due to the COVID-19 pandemic. Woody returned to Indiana and rented a studio apartment to be near the children. Dillard remained in the marital residence with the children.

[15] In addition, in March 2020, W.D. and V.D. began attending school remotely due to the COVID-19 pandemic. While at home, W.D. and V.D. developed significant relationships with siblings M.K. and V.K., who lived across the street from W.D. and V.D. W.D. and M.K., who are the same age, “both seem[ed] to think of the other as one of their primary relationships.” (Tr. Vol. 2 at 11). M.K. understood W.D.’s “big personality and big feelings.” (Tr. Vol. 2 at 15). In addition, W.D.’s ability to regulate his emotions improved when he was with M.K. V.D. and V.K., who are also the same age and who are both very artistic, created an art show to raise money for a nonprofit group. In addition, all four children spent time outside together roller skating, drawing with sidewalk chalk, jumping on a trampoline and taking evening walks with their pets. Further, a retired neighbor built the children an outdoor rock wall.

- [16] In May 2020, Woody bought a home in Charlottesville, Virginia. Woody also found schools for the children. Specifically, Woody planned for W.D. to attend Walker Upper Elementary School (“Walker”) in Charlottesville because it has a Strategies for Teaching based on Autism Research (“STAR”) program for students with ASD. However, Walker has only fifth and sixth grade students, and the middle schools and high schools in Charlotte do not have a STAR program at this time. Thus, W.D. would only benefit from the STAR program through the end of the 2021-2022 academic year. Further, Walker was in the bottom 7% of schools in Virginia and had only been conditionally accredited.
- [17] Also in May 2020, the trial court held a hearing on Dillard’s motion to modify the provisional agreement. Following the hearing, the trial court noted that the global pandemic had caused a serious delay in the completion of Dr. Miller’s child custody evaluation, which the trial court wanted to review before making a final custody determination. In the absence of a final determination, the trial court “prioritize[d] stability for the children and grant[ed] provisional physical custody to Dillard, keeping the children in their current home and starting their school year at the Project School.” (App. Vol. 2 at 85).
- [18] In June 2020, Woody and Dillard participated in mediation and signed a partial mediated settlement agreement resolving all property issues. During the summer of 2020, the children spent time with both Dillard in Bloomington and Woody in Virginia. During one of his visits to Virginia, W.D. became upset with Woody for singing while he was playing a game on her cell phone and told her to “shut up.” (Tr. Vol. 1 at 195). When Woody told W.D. that he was

going to lose the privilege of playing the game, W.D. became angry and threw Woody's cell phone. W.D. later talked to Dillard on the telephone, and she was able to calm him down.

[19] In August 2020, W.D. and V.D. returned to TPS virtually due to the COVID-19 pandemic. W.D. was in the fifth grade, and V.D. was in the second grade. Dillard and Woody also both taught their law school classes remotely.

[20] Dr. Miller submitted her ninety-one-page single-spaced custody evaluation to the trial court in November 2020. During the course of preparing the evaluation, Dr. Miller had interviewed Woody, Dillard, and both children. Dr. Miller had also observed each parent with one and then both children and had reviewed text and email messages between the parties. Dr. Miller had further reviewed audio tapes that Woody had recorded of Dillard in May 2020 without Dillard's knowledge. Dr. Miller had further completed psychological testing on both parents and had interviewed fifteen or sixteen collateral contacts, which included the parties' family and friends.

[21] In the summary and recommendations section of the evaluation, Dr. Miller stated, in relevant part, as follows:

In this psychologist[']s 20+ year history of evaluating families for custody/relocation, this case has possibly been the most difficult. In essence, the difficulty lies in the appreciation that there are two loving, nurturing, bright, educated parents that can care for, love, and nurture their children. The bottom line in this case is that the children will likely succeed in either parent's home and community and, if the parents were to live in the same

community, it is likely that an equal parenting time arrangement would be advised and they likely would have agreed to it on their own. There is no clear-cut answer in this case[.]

The role of the evaluation is focused on assisting the Court by predicting the risk and degree of potential harm the move may cause a child and discussing the protective factors that can mediate any stress associated with a possible move[.]

In weighing risk and protective factors, and taking into consideration all data from the evaluation, the evaluator views that the proposed relocation for [W.D.] and [V.D.] would likely be successful, (with caution noted in regard to [W.D.]’s ability to adjust as quickly.) In essence, for [V.D.], there is a high probability of a low level of harm and for [W.D.], the relocation is a moderate risk, and it is likely that he might have short-term negative adjustment but with supports, encouragement, and consistent contact with both parents, data indicate he will likely adapt and have a successful response to relocation within a reasonable timeframe.

(App. Vol. 2 at 169, 170, 175-76).

[22] The trial court held a two-day custody hearing in December 2020 and January 2021. At the hearing, the trial court heard testimony about the evidence as set forth above. In addition, Dr. Miller testified that W.D. “react[ed] better to [Dillard][.]” (Tr. Vol. 1 at 82). Dr. Miller further testified that neither child wanted to move to Virginia and that it could be stressful for the children to move away from their friends. According to Dr. Miller, TPS was a “good fit” for W.D., but the STAR program at the Charlottesville school had been specifically researched and established for ASD students. (Tr. Vol. 1 at 94).

Dr. Miller concluded that “the best option was to allow the children to relocate” to Virginia with Woody. (Tr. Vol. 1 at 78).

[23] W.D.’s therapist, Dr. Merrill, who specializes in children with ASD, testified that she had been seeing W.D. once a week or once every two weeks for the past year. According to Dr. Merrill, W.D. struggled with emotional regulation, and his emotional regulation was negatively impacted by stress and change. Dr. Merrill further testified that W.D., who wanted to stay in Bloomington, suffered from stress and anxiety about the possible move to Virginia. Dr. Merrill also testified that any close social relationship, such as W.D.’s relationship with M.K., was very valuable to W.D. because it gave him an opportunity to grow in his emotional regulation and social skills. Dr. Merrill further testified that TPS had met W.D.’s needs and had incorporated her recommendations into the accommodations that it provided to W.D. Lastly, Dr. Merrill testified that W.D. had begun to make progress but that the progress had been slow.

[24] Dr. Sarah Hurwitz (“Dr. Hurwitz”), who is a family friend and a professor of special education at Indiana University specializing in autism, testified that she had seen improvement in W.D.’s ability to regulate his conduct in the past two years. According to Dr. Hurwitz, Dillard was “very important to [W.D.’s] wellbeing, she underst[ood] him very well.” (Tr. Vol. 2 at 48).

[25] Woody testified that she agreed that the children were happy in Bloomington. However, she further testified that she believed that there were more autism

resources available for W.D. in Virginia. Woody also agreed that, when W.D. became upset during visits with her, it helped him to talk to Dillard. Woody further testified that her “goal for this whole process ha[d] been to figure out how [she and Dillard] c[ould] both be in [their] children’s lives . . . as much as possible.” (Tr. Vol. 1 at 199). She also testified that she and Dillard would be able to co-parent “on the other side of this[.]” (Tr. Vol. 1 at 208).

[26] Lastly, Dillard testified that she would be able to live in Bloomington and keep her teaching position at UBSL. According to Dillard, UBSL was moving towards a remote model for its evening program, which would allow her to permanently teach all of her classes virtually.

[27] At the end of the hearing, the trial court stated as follows:

Alright, um this is to first to both attorneys, thank you for a class act. Um I wish that I had a zoom recording of this that I could share with my law students in my family law class because this is exactly how it’s supposed to go. Respect, professionalism, courtesy, a very high standard of lawyering has been done the last two days and I commend you both and I appreciate it very much, you have well served your clients. Um to[] both moms . . . I take this job very seriously and I will review carefully every exhibit, I will review my notes, I will talk with my court reporters, I will re-listen to portions of the hearing, and I will very carefully review the proposed orders from both of your attorneys before I make my final decision. I have yet, as of yet after two days of very compelling testimony not a clue what I’m going to decide. This is a very, very difficult case. It does not surprise me that it’s one that you have not been able to resolve in mediation or with negotiation because you’re both such excellent people and such excellent parents. And that makes this decision all the

more painful. Um I want you both to know that I leave these two days of hearing with the utmost respect and affection for you both. I, it's very clear to me that you are all doing you utmost for these children and that they're incredibly fortunate to have two such fantastic parents. And that is something that I don't often get to say.

(Tr. Vol. 2 at 132-33).

[28] In December 2020, the trial court issued a detailed seventeen-page order, which included sixty-six findings of fact and thirty-two conclusions of law. In its order, the trial court awarded physical custody of the parties' two children to Dillard.

[29] Woody now appeals.

Decision

[30] Woody argues that the trial court abused its discretion when it awarded primary physical custody of the parties' two children to Dillard. We disagree.

[31] At the outset, we note that where, as here, a trial court enters findings on its own motion, the appellate court reviews issues covered by the findings with a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment. *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016). A finding is clearly erroneous when there are no facts or inferences drawn therefrom which support it. *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). We neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* We consider only the evidence and reasonable

inferences drawn therefrom that support the findings. *Id.* We review a trial court's legal conclusions de novo. *Id.*

[32] We further note that there is a well-established preference in Indiana “for granting latitude and deference to our trial judges in family law matters.” *Steele-Giri*, 51 N.E.3d at 124 (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). In this regard, the Indiana Supreme Court has explained as follows:

Appellate deference to the determinations of our trial court judges, especially in domestic relations matters, is warranted because of their unique, direct interactions with the parties face-to-face, often over an extended period of time. Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, our trial judges are in a superior position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children.

Best v. Best, 941 N.E.2d 499, 502 (Ind. 2011). It is not enough on appeal that the evidence might support some other conclusion; rather, the evidence must positively require the result sought by the appellant. *D.C. v. J.A.C.*, 977 N.E.2d 951, 957 (Ind. 2012). Accordingly, we will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. *Id.*

[33] In an initial custody determination, both parents are presumed equally entitled to custody, and “[t]he court shall determine custody and enter a custody order in accordance with the best interests of the child.” I.C. § 31-17-2-8. There is no presumption favoring either parent. I.C. § 31-17-2-8. *See also Kondamuri v.*

Kondamuri, 852 N.E.2d 939, 945 (Ind. Ct. App. 2006). In determining the child's best interests, the trial court must consider all relevant factors, including specifically 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....

I.C. § 31-17-2-8. The trial court's decisions on child custody are reviewed only for an abuse of discretion. *Sabo v. Sabo*, 858 N.E.2d 1064, 1068 (Ind. Ct. App. 2006).

[34] Here, our review of the evidence reveals that, at the time of the hearing, W.D. had just turned eleven years old, and V.D. was about to turn eight years old. Both Woody and Dillard wanted primary physical custody of the two children. Specifically, Woody wanted to take the children to Virginia, and Dillard wanted to remain with the children in Bloomington. Both children wanted to remain in Bloomington, where they had lived with Dillard for the past four years. W.D., who has been diagnosed with ASD and who was more closely bonded with Dillard, preferred to live with her. The evidence also suggests that Dillard is better able to calm down W.D. when he gets upset. In addition, the trial court heard evidence of a more turbulent relationship between Woody and W.D. For example, on one occasion when W.D. and Woody argued, Woody grabbed W.D.'s arm with enough force to leave a bruise. During another incident, Woody dislocated her shoulder, and a third incident led to W.D.'s bedroom door being broken.

[35] The evidence further reveals that W.D. has a particularly close friendship with M.K., who lives across the street from W.D. This friendship is beneficial to W.D. because it allows him an opportunity to improve his social skills and emotional regulation. Further, W.D., who is negatively impacted by stress and change has suffered stress and anxiety about the possible move to Virginia. V.D. also has a close friendship with M.K.'s sibling, V.K. All four children

spend time together roller skating, drawing with sidewalk chalk, jumping on a trampoline, and taking evening walks with their pets.

[36] The evidence also reveals that both children attend TPS. Although TPS does not offer a specific program for ASD students, TPS has successfully met W.D.'s needs and has incorporated W.D.'s therapist's recommendations into the accommodations that it provides to W.D. W.D. will be able to attend TSP through the eighth grade. In addition, the therapist who W.D. has been seeing for more than a year is located in Indiana.

[37] This evidence supports the trial court's award of primary physical custody of the parties' two children to Dillard. The trial court did not abuse its discretion.¹

[38] Affirmed.

Bailey, J., and Crone, J., concur.

¹ Woody also contends that seven of the trial court's sixty-six detailed findings are clearly erroneous because they are not supported by the evidence. However, because the fifty-nine unchallenged detailed findings "provide ample support for the trial court's ultimate conclusion[.]" any error in the seven challenged findings is "merely harmless surplusage[.]" See *In re B.J.*, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008), *trans. denied*.