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IN THE
COURT OF APPEALS OF INDIANA

MICHELLE RENEE (DAY) RANES,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 24A04-0606-CV-292
	)	
DARREN K. DAY,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-9908-DR-199

December 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Michelle Ranes ("Mother") appeals the trial court's grant of a petition for modification of child custody filed by Darren K. Day ("Father"). Mother raises one issue, which we restate as whether the trial court abused its discretion by modifying custody. We affirm.

The relevant facts follow. Mother and Father were married in 1993 and had two children, D.D, born February 26, 1994, and O.D., born December 31, 1995. Mother and Father divorced in September 2000. The trial court ordered that the parties share joint legal custody of the children and that Mother have physical custody.

After the dissolution, Mother moved several times due to financial problems. At the time of the dissolution, the parties were living in Brookville, Indiana, and D.D. was attending school in Brookville. Mother remarried in December 2000, and moved with her husband and the children to Aurora, Indiana, in May 2001. In the fall of 2001, they moved to Burlington, Kentucky, where D.D. attended school. After three months, Mother moved to Florence, Kentucky, where they lived for two and one-half years. D.D. attended school there, and O.D. started school. Mother then moved to Aurora, Indiana, where they lived for two years. Both D.D. and O.D. attended school in Aurora. In June 2005, Mother moved to Burlington, Kentucky, where they are living rent-free in a home owned by her husband's family. Both D.D. and O.D. are attending school in Burlington.

Father has lived in the same residence since the dissolution. Father has also exercised regular visitation and paid child support in a timely manner. On August 22, 2005, Father filed a petition to modify custody and support and alleged that there had

been "a continuing and substantial change in circumstances making current custody, visitation and support unreasonable." Appellant's Appendix at 40. After a hearing at which the trial court conducted an in camera interview with the children, the trial court entered an order finding:

> That there has been a material and substantial change in circumstances regarding custody of the minor children herein to such an extent that the terms of the decree are unreasonable, and it is now in the best interest of the parties[']minor children, [D.D. and O.D.], that said Petition To Modify be and hereby is GRANTED, subject to [Mother's] right of reasonable visitation.

Id. at 33.

The issue is whether the trial court abused its discretion by modifying custody. We review custody modifications for an abuse of discretion and have 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). "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. The Indiana Supreme Court explained the reason for this deference in Kirk:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). Therefore, "[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." Id. We may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

We first note that a prior version of the custody modification statute provided: "The court in determining said child custody, shall make a modification thereof only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable." See Ind. Code § 31-1-11.5-22(d) (amended by Pub. L. No. 139-1994 and later repealed by Pub. L. No. 1-1997, § 157). The current version of the child custody modification statute provides, in part, that "[t]he 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 [Ind. Code § 31-17-2-8] . . . ." Ind. Code § 31-17-2-21(a).

Although the trial court here utilized the "unreasonable" language from the prior statute, we addressed similar concerns in Nienaber v. Marriage of Nienaber, 787 N.E.2d 450, 454-456 (Ind. Ct. App. 2003). There, in a custody modification proceeding, the trial court "parrot[ed] language from the repealed standard." Nienaber, 787 N.E.2d at 455. We held that "[t]his is not to say, however, that such renders the modification clearly erroneous." Id. We were "not inclined to focus on the terminology employed by the trial

court and ignore the substance of its order." Id. We concluded that it was apparent "that the trial court did indeed consider the appropriate 'factors.'" Id. Moreover, we emphasized that we had previously "rejected the argument that the court must specifically identify which of the aforementioned factors were substantially changed." Id. at 456 (citing Kanach v. Rogers, 742 N.E.2d 987 (Ind. Ct. App. 2001)). We determined that although "[t]he court's terminology was outdated," the trial court's "decision-making process and the substance of that decision compl[ied] with current law." Id.

Similarly, here, despite the trial court's failure to use the proper terminology, we decline to elevate form over substance. Consequently, we will examine the trial court's order to determine if its decision-making process and the substance of the decision complied with the current law governing modification of child custody. See, e.g., id.

As noted above, the current version of the child custody modification statute provides, in part, that "[t]he 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 [Ind. Code § 31-17-2-8] . . ." Ind. Code § 31-17-2-21(a). Ind. Code § 31-17-2-8 lists the following factors:

> (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.

Thus, to modify custody of D.D. and O.D., the trial court must have found that modification was in their best interest and that a substantial change in one of the factors had occurred.

At the hearing, Father argued that Mother's frequent moves resulted in a substantial change due to their changes in school and lack of stability. Additionally, Father argued that the children wanted to live with him. On appeal, Mother argues that the evidence presented at the trial does not establish that the frequent moves or the children's desires have resulted in a substantial change.

During the trial, Father presented evidence that D.D. was in sixth grade and had attended five different schools because of Mother's frequent moves. O.D. was in third grade and had attended three schools. Father testified that their performance in school was "[v]arying" but seems "to be getting . . . worse and worse." Transcript at 29. Father based this observation on the children's grades and their teacher's comments on their report cards. Mother admitted during her testimony that D.D. is tired of moving and changing schools, but she contends that she and her husband have no plans to move from his family's farmhouse in Kentucky. As for the children's wishes, Father testified that

the children wanted to live with him, while Mother testified that the children wanted to live with her. The trial court conducted an in camera interview, and the results of that interview are not part of the record.

While the record does not indicate definitively whether the children wanted to live with Mother or Father, the record does indicate a substantial change in the children's adjustment to their home and school due to Mother's frequent moves. Mother's argument to the contrary is an invitation to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Fields, 749 N.E.2d at 108. The trial court saw Mother and Father as witnesses, observed their demeanor, scrutinized their testimony as it came from the witness stand, and conducted an in camera interview with the children. As in Kirk, we are "in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did." Kirk, 770 N.E.2d at 307.

Based upon all of the evidence, we cannot say that the trial court abused its discretion by finding that a substantial change occurred in one of the statutory factors or that modification was in the children's best interests. Accordingly, we conclude that the trial court did not abuse its discretion by granting Father's petition to modify custody. See, e.g., Bettencourt v. Ford, 822 N.E.2d 989, 1000 (Ind. Ct. App. 2005) (holding that the trial court did not abuse its discretion by modifying custody where the mother had

relocated to Florida and moved frequently); Wallin v. Wallin, 668 N.E.2d 259, 261 (Ind. Ct. App. 1996) (holding that "[t]he evidence demonstrated a lack of stability in the children's lives caused by Mother's frequent moves" and the repeated moves "support[ed] the conclusion that a substantial change occurred in the custodial arrangement").

For the foregoing reasons, we affirm the trial court's grant of Father's petition to modify custody.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur