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IN THE COURT OF APPEALS OF INDIANA

DAVID J. JOHNSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 54A04-1102-DR-108
	)	
KIRA JOHNSON BOWER,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Justin Hunter, Special Judge
Cause No. 54C01-0601-DR-23

November 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Johnson ("Father") appeals the denial of his motion to modify custody. We reverse.

Issue

Father raises three issues. We address the dispostive issue, which we restate as whether the evidence establishes that the trial court's ruling was clearly erroneous.

Facts

Father and Kira Bower ("Mother") are the parents of C.J., who was born on January 5, 2004, while the couple was married. Father and Mother divorced in 2006. Pursuant to the dissolution decree, the parties were awarded joint legal custody, and Mother was awarded primary physical custody of C.J. In 2008, Father filed a motion to modify custody. The matter was settled, and C.J. remained in Mother's custody. Although the precise resolution of this matter is not clear, the chronological case summary indicates that, on August 14, 2008, an agreed entry was approved by the trial court. In July 2010, Father moved to modify custody again. On December 16, 2010, and December 28, 2010, the trial court held hearings on Father's motion.

Mother was a salaried employee at a gas station. During the summer of 2009, while employed at the gas station, Mother left C.J. and another child in her car while she worked. In April 2010, Mother quit her job at the gas station and was laid off from a subsequent job a month later. At the time of the modification hearing, Mother was receiving unemployment. She indicated that, although she did the required three job searches a week, she did not want a job and would rather stay home with her children.

In May 2010, Mother moved out of an apartment, where she had lived with her boyfriend and three children, and into her parents' house. At the time of the hearing, Mother lived at her parents' house with her three children, her parents, and two of her siblings. Additionally, Mother's parents were involved in an "open relationship" with Kim Bower, who also lived at the house with her two children with Mother's father. Tr. p. 98. According to Mother, her parents have "sexual" convictions but are not registered sex offenders. Id. at 102. Mother admitted that she had not investigated her parents' criminal histories.

From 2005, until the time of the hearing on the motion to modify, the Department of Child Services ("DCS")[1] investigated twelve complaints involving Mother. At least five of the complaints were made by Father. One complaint was substantiated and resulted in an informal adjustment in July 2008. The remaining complaints were unsubstantiated by the DCS.

Of the complaints to DCS after the parties' agreed entry in 2008, the DCS investigated two allegations of abuse in 2009, and those allegations were unsubstantiated. In 2010, the DCS investigated an allegation of neglect, which was unsubstantiated but a safety plan for the supervision of the children was established with Mother. In October 2010, the DCS investigated an allegation that Mother allowed a registered sex offender, whose husband was also a registered sex offender, to babysit the children. Mother, however, indicated that she was not aware of the couple's criminal history until authorities were involved. Accordingly, the complaint was unsubstantiated, and Mother

[1] The trial court referred to the DCS as "CPS."

agreed to a safety plan requiring her to ensure that any caregiver will be appropriate and safe. Finally, at the time of the December 2010 hearings, the DCS was investigating a complaint regarding a lack of heat at Mother's parents' house. Although the home was cooler than normal, the DCS investigator indicated that complaint would also be unsubstantiated.

Also, at times, C.J. appeared to be dirty and unkempt, and C.J.'s kindergarten and first grade teachers noted incidents in which she came to school smelling of urine. C.J. was also struggling academically, but with her teacher's help had been making progress.

At the time of the hearing, Father lived at his parents' house,[2] and C.J. had her own bedroom there. Father had worked at a farm for over a year. He made $12 per hour and worked forty hours per week. He was current in his child support and exercised regular parenting time. Father acknowledged that, although he was receiving a credit for C.J.'s health insurance, he was not carrying her health insurance. At the termination hearing, Mother stipulated that Father was a "good dad." Tr. p. 181. Mother testified that C.J. loves Father and that they are very close. Mother also testified that she had never had any concerns about Father's parenting.

On January 28, 2011, the trial court denied Father's motion to modify custody. The trial court's order provided in part:

> Under the facts and circumstances presented, the Court does not find a substantial change in factors listed at Ind. Code § 31-17-2-8 and the Court finds it in the best interest of [C.J.] that she remain in the custody of Mother. The Court

[2] At the hearing, Johnson testified that a family friend with a criminal history had been staying at his parents' house and was expected to leave the house soon.

finds that some of Father's assertions were indeed proven, but the inference to be drawn from many of the facts was overstated by Father and does not amount to a sufficient change of facts and circumstances to warrant a change of custody.

The Court finds that both parents would be barely able to independently support themselves let alone their own child, [C.J.], were it not for help from a support network of their own respective families. Father's network of family is not supportive of Mother's lifestyle, her choices and conduct over the last several years. Both before and after the 2008 custody dispute, CPS has been called on numerous occasions to conduct an investigation of [C.J.'s] safety. The CPS investigations have revealed some validation of Father's concerns (CPS found in 2010 that Mother and [C.J.] were living in a home without hot water);[3] however, there is ample evidence that most of the CPS reports both before and after 2008 were initiated on overstated concerns and conjecture. After thorough investigation by CPS, nearly all complaints were unsubstantiated.

In regard to Father's contentions, the Court finds that Mother took her children to her place of employment in the summer of 2009 and left them in her vehicle for an extended period during the day while she worked. The children periodically left the car and entered Mother's place of employment. The children were loud and disruptive, probably due to boredom, however at no time was law enforcement or CPS involved to suggest that neglect had occurred. At the time Mother had been attempting to maintain employment and had difficulty finding or affording child care. Rather than seek the help of family, she brought the children to work. Mother's choice was poor and created less than ideal circumstances. There is no evidence that [C.J.] was placed in immediate harm when that occurred, however, Mother should refrain from that choice in the future.

There is evidence that Father's family network places a great deal of importance on keeping a child clean and groomed. The evidence supports the Court's conclusion that [C.J.] is active (rides horses and likes to play outside), and

[3] It is not clear whether the trial court was referring to the investigation of the lack of heat in December 2010 or the substantiated allegations of poor hygiene, medical neglect, and environment life/health endangering, which included the lack of hot water, in July 2008.

children like [C.J.] will naturally get dirty in those circumstances. On a few occasions at school the teachers have noticed that [C.J.] has smelled of urine indicating that she may have wet herself overnight. Both parents should continue to monitor that situation to see whether medical or behavioral intervention is needed should [C.J.] continue to wet herself. The issue of cleanliness, under present isolated circumstances, is not one that rises to a level to warrant a change in custody, alone or in combination with other factors.

The Court, like CPS, finds no credible facts to substantiate the contention that Mother has been neglectful through inappropriate discipline of [C.J.] and that Mother knew of the convictions of the Kalinowski's before she has left [C.J.] to be watched by Tamara Kalinowski.

The Court gives no weight to Father's claim that [C.J.] is suffering by living in a home where some of the occupants engage in a polyamorous lifestyle. There is no evidence whether [C.J.] will suffer emotional or psychological harm once she eventually discovers what it entails. Absent such evidence, this Court is not about to impose such a moral code where none exists in the Indiana statutes regarding custody.

Finally, it is clear to the Court that Mother suffers, above all, from poor economic circumstances and from lack of cooperation of Father and Father's family. Mother has tried to live on her own, to maintain employment, to foster relationships with others, and to care for children—a tall order for most young people to do with limited help and limited income. It's also clear that Mother is intelligent, having quite effectively represented herself on the first day of the hearing on Father's motion. The court also concludes that Mother is independent and does not like the help of others, most notably that of Father and his family. Under the current economic circumstances, Mother has made a conscious choice to seek unemployment only to the minimum extent necessary to keep her qualified for unemployment compensation. This situation is clearly not desirable for [C.J.] in the long term, but in the short term may seem to Mother to be a rational choice. This Court is unable to find that Mother's short term solution amounts to a substantial change.

[C.J.] would more effectively benefit in a situation where the parents communicate better to achieve a positive outcome for [C.J.] rather than as a method to posture for a

> future custody battle. Given the extensive reporting to CPS, Mother is likely cautious in seeking Father's help to raise [C.J.]. Yet, clearly [C.J.] needs the immediate cooperation of both parents to ensure [C.J.'s] academic improvement, which has suffered in the recent past. [C.J.'s] current teacher has been able to greatly help [C.J.], but she will need additional help from her parents to ensure that [C.J.] does not fall back a grade. If the parents are unsure how to help [C.J.] with her academic progress, they should not be afraid to seek guidance from [C.J.'s] teacher for suggestions. Seeking such guidance is not a sign of weak parenting skills but rather a sign of commitment to achieving a positive outcome for [C.J.]
>
> IT IS THEREFORE ORDERED that Father's Motion to Modify Custody is denied because Father has not demonstrated a substantial change in factors listed at Ind. Code § 31-17-2-8 and because it is in the best interest of [C.J.] that she remain in the custody of Mother.

App. pp. 20-22. Father now appeals.

Analysis

Father claims that the trial court improperly denied his motion to modify custody. Under Indiana Code Section 31-17-2-21, a court may not modify a child custody order unless modification is in the child's best interests and there is a substantial change in one of several factors that a court may consider in initially determining custody. Kirk v. Kirk, 770 N.E.2d 304, 306-07 (Ind. 2002). Those factors are:

> (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. "The court shall not hear evidence on a matter occurring before the last custody proceeding between the parties unless the matter relates to a change in the factors relating to the best interests of the child as described by section 8 . . . of this chapter." I.C. § 31-17-2-21(c). A petitioner seeking to modify an existing custody order bears the burden of demonstrating the existing custody should be altered. Kirk, 770 N.E.2d at 307.

We review decisions on custody modifications for an abuse of discretion. Id. "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." Best v. Best, 941 N.E.2d

499, 502 (Ind. 2011) "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." Id. On appeal, it is not enough that the evidence might support some other conclusion; instead, the evidence must positively require the conclusion contended for by appellant before there is a basis for reversal. Kirk, 770 N.E.2d at 307.

Here, it does not appear that either party filed a written request for findings and conclusions. Rather, the trial court entered its special findings and conclusions sua sponte. See Tew v. Tew, 924 N.E.2d 1262, 1264 (Ind. Ct. App. 2010), trans. denied. When a trial court enters special findings and conclusions sua sponte, the findings and conclusions control only as to the issues they cover and a general judgment standard applies to any issue upon which the court has not found. Id.

"On appeal, we review the trial court's specific findings and conclusions under a two-tiered standard of review." Id. We first consider whether the evidence supports the findings and then whether the findings support the judgment. Id. at 1265. A trial court's findings and conclusions will be set aside only if they are clearly erroneous, which is when the record contains no facts or inferences supporting them. Id. In making this determination, we neither reweigh the evidence nor assess the credibility of witnesses and consider only the evidence most favorable to the judgment. Id. Conclusions of law are reviewed de novo, and we may affirm a general judgment on any theory supported by the evidence adduced at trial. Id.

In its order, the trial court acknowledged the correct legal standard but appears to have actually applied a stricter standard for modification of custody than the statute requires. For example, regarding Mother leaving C.J. in the car while she worked, the trial court observed, "at no time was law enforcement or CPS involved to suggest that neglect occurred." App. p. 21. Further, the court concluded that it, "like CPS, finds no credible facts to substantiate the contention" that Mother had inappropriately disciplined C.J. or knew of the babysitter's criminal history before leaving C.J. there. Id. Although the results of a DCS investigation certainly could be relevant in a custody modification proceeding, there is no statutory requirement that the DCS substantiate, or even investigate, an allegation of neglect or abuse before a trial court may modify custody. See I.C. §§ 31-17-2-21, 31-17-2-8. In analyzing a prior version of the modification statute, we have observed that a trial court is not required to find that the present custodial parent is unfit prior to modifying custody. See Spoor v. Spoor, 641 N.E.2d 1282, 1285 (Ind. Ct. App. 1994). We see no reason why this observation would not be equally applicable under the current modification statute. See, e.g., Wolljung v. Sidell, 891 N.E.2d 1109, 1111 (Ind. Ct. App. 2008) (citing Spoor in modification of custody dispute).

Similarly, in reference to Mother's parents' polyamorous lifestyle, the trial court found no evidence that C.J. "will suffer emotional or psychological harm once she eventually discovers what that entails." App. p. 21. Also, in discussing Mother leaving the children in the car, the trial court stated that C.J. had not been placed in "immediate harm[.]" Id. The modification statute, however, does not require a parent to establish

that a child has suffered or will suffer actual harm before custody may be modified. See I.C.§§ 31-17-2-21, 31-17-2-8. Instead, a parent need only establish that there has been a substantial change in one or more designated statutory factors.

Thus, notwithstanding the trial court's recitation of the proper standard for modification, the trial court's findings taken as a whole suggest that the trial court held Father to a standard of proof higher than that actually required by the modification statute. With this in mind, we consider whether the findings and the undisputed evidence not reduced to findings support the trial court's conclusion that there was not a substantial change in circumstances.

From the time of the 2008 settlement agreement, Mother had gone from living independently with C.J., her two other children, and her boyfriend to living in a house with her parents, who have sex-related convictions, her three children, two of her siblings, her two half siblings, and another adult. In the summer of 2009, Mother left her children in her vehicle for extended periods while she worked. In April 2010, she quit her salaried job, worked as a temporary employee for a month, and was laid off in May 2010. At the time of the hearing, Mother had made a conscious choice to seek employment only to the minimum extent necessary to qualify for unemployment benefits so she could stay home with her children. In 2009, C.J. started school, where her teachers occasionally noticed she smelled of urine. Further, C.J.'s academic achievement had suffered, and she needed additional help to ensure she did not fall back a year.

We appreciate the trial court's role in judging witness credibility. Nevertheless, the findings and undisputed evidence do not support its conclusion that there was not a

substantial change in circumstances. The evidence presented at the hearing not only supports the conclusion that there has been a substantial change in the interrelationship of C.J. with Mother, but it positively requires such a conclusion. See Kirk, 770 N.E.2d at 307.

Although the trial court concluded that it was in C.J.'s best interests to remain in Mother's custody, it made no specific findings on that point. Our review of the evidence shows that Father had been employed at the same job for over year, that C.J. had her own room at Father's parents' house, where Father lived, that he was current in his child support, and that he participated in regular parenting time and attended school-related activities. Mother stipulated that Father was "good dad" and that the pictures offered by him "show that his daughter's happy when she's around him." Tr. p. 181. This stipulation was confirmed by Mother's own testimony that C.J. loves Father, that Father and C.J. are "very close," and that she has never had any concerns about Father's parenting or rearing of C.J. Id. at 247. Taking this evidence with the evidence of the changed circumstances, we must conclude that the evidence does not support the trial court's conclusion that it was in C.J.'s best interest to remain Mother's custody. Because Father established that there had been a substantial change in circumstances and that modification was in C.J.'s best interests, it was clearly erroneous for the trial court to deny Father's motion to modify custody.[4]

[4] Because of our conclusion, we need not address Johnson's argument regarding the admissibility of the DCS reports that predate the 2008 agreed entry.

Conclusion

When applying the proper standard for the modification of custody, the evidence positively shows that there was a substantial change in circumstances and that the modification of custody was in C.J.'s best interests. We reverse.

Reversed.

ROBB, C.J., and BRADFORD, J., concur.