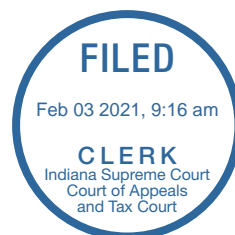


## MEMORANDUM DECISION

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

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Bryanna Duran,  
*Appellant-Respondent,*

v.

Richard Kyle Gipson,  
*Appellee-Petitioner.*

February 3, 2021

Court of Appeals Case No.  
20A-JP-1517

Appeal from the Gibson Circuit  
Court

The Honorable Jeffrey F. Meade,  
Judge

Trial Court Cause No.  
26C01-1111-JP-58

**Riley, Judge.**

## STATEMENT OF THE CASE

- [1] Appellant-Respondent, Bryanna Duran (Mother), appeals the trial court's findings of fact and conclusions thereon, modifying the physical custody of the minor child, C.G. (Child), from Mother to Appellee-Petitioner, Richard Kyle Gipson (Father).
- [2] We affirm.

## ISSUE

- [3] Mother presents this court with one issue on appeal, which we restate as: Whether the trial court abused its discretion by modifying physical custody of the Child from Mother to Father.

## FACTS AND PROCEDURAL HISTORY

- [4] Mother and Father have one child in common, Child, born out of wedlock on September 2, 2011. When Child was born, Father was fifteen years old and Mother was seventeen years old. Paternity was established by agreement in February 2012, with child support set at a minimum as Father was still a minor. On June 4, 2015, Mother and Father filed an agreed entry of modification in which the parties consented to give Father parenting time pursuant to the Indiana Parenting Time Guidelines, excluding the midweek overnight parenting time, with the parties exchanging the Child in Illinois, where Father was living for employment purposes. At the time of the trial court's proceedings, Mother had two other children in addition to Child: K.V., who was five-years old and from a different relationship, and I.R., who was two

weeks old, born from Mother's relationship with Jeffrey Robbins (Robbins). Mother has custody of both children. In 2018, Mother and Father agreed for Father to have parenting time with the Child on Wednesdays, in addition to every other weekend. However, after Father filed his current petition to modify custody, Mother no longer allowed Father parenting time on Wednesdays.

[5] In July 2019, Mother lived with Robbins in a trailer in Princeton, Indiana. The couple got into an argument about Robbins' suspected methamphetamine use. The argument became violent when Robbins attempted to strangle Mother, leaving marks on her neck. During the incident, Mother, who had been smoking marijuana laced with methamphetamine, struck Robbins with a DVD player while he was holding his infant child from another relationship. Mother broke a picture frame and a window during the altercation, leaving glass on the floor. She also bit Robbins on the shoulder. The incident was witnessed by children present in the trailer, but not Child, who had gone on a fishing trip with his grandparents. As a result of the incident, Robbins pled guilty to domestic battery committed in the presence of a child less than 16 years of age, as a Level 6 felony. He was sentenced to 720 days executed, with the sentence suspended to probation. Prior to this incident, Robbins had a juvenile criminal history with one delinquency adjudication that resulted in him being sent to the Department of Correction, as well as an adult record which included convictions for possession of methamphetamine, a Level 6 felony, possession of a synthetic or lookalike drug, a Level 6 felony, and operating a motor vehicle without ever receiving a license, a Class C misdemeanor. Robbins had been

released from probation on March 28, 2019, four months prior to the domestic violence incident.

[6] As a consequence of the July 2019 altercation, the Gibson County Department of Child Services (DCS) opened a Child in Need of Services investigation in October 2019. DCS reached an agreement with Mother and Robbins about a safety plan for the care of the children and they completed every task, including passing every drug test. In addition, Mother and Robbins were referred to counseling where they completed all interventional goals and participated in the scheduled sessions.

[7] On September 16, 2019, Father filed his petition to modify custody. On October 4, 2019, the trial court appointed David Heal (GAL Heal) as Guardian Ad Litem for the Child, and GAL Heal filed his report with the court on November 19, 2019. In his report, GAL Heal expressed several concerns about Mother and Robbins. First, GAL Heal observed that the Child was living with the maternal grandparents. The maternal grandfather informed GAL Heal that Mother would visit with the Child in the evening but then return to the apartment where she resided with Robbins. GAL Heal also noted that Robbins did not have a driver's license and that Mother was unemployed with no intention of obtaining future employment "because of DCS and court proceedings." (Appellant's App. Vol. II, p. 30). GAL Heal was very concerned about the domestic violence incident and noted that, at the time of the altercation, it was suspected that Robbins was under the influence of illegal substances. Ultimately, GAL Heal recommended that Father have physical

custody of the Child, with Mother having supervised parenting time as long as she was in a relationship with Robbins.

- [8] Since January 2020, Mother, the three children, and Robbins have lived with Mother's parents at her parents' residence. Mother and Robbins intend to get married and have been given permission to put a double wide trailer on the parents' property after they receive their tax refunds in 2021. Mother's parents intend to deed Mother one acre of their property.
- [9] On June 8, 2020, during the hearing on Father's petition to modify custody, testimony was presented that Mother was twenty-seven years old, and was living with her three children and Robbins at her parents' residence. She was unemployed and relied on Robbins to support her and the children. Mother never graduated from high school, obtained her GED, or held any consistent employment. Mother had made four separate attempts to get her own residence, but she has been unable to maintain a residence and has returned to her parents' home each time. Mother was most recently evicted on January 28, 2020. Mother failed to inform Father of her eviction or her change of address. Evidence was presented that Mother did not keep Father informed of the Child's activities and doctor's visits.
- [10] Robbins has three children, two children of a previous relationship who reside with third parties, and one child with Mother of whom Mother has custody. Robbins had only recently been allowed supervised visits with one of his children and exercised no parenting time with his other child. At the hearing,

Robbins admitted to prior use of illicit substances, including methamphetamine, marijuana, and K2. He has worked sporadic jobs and, at the time of the hearing, was employed through a temporary agency.

[11] At the time of trial court’s proceedings, Father had been married for five years. Father and his wife have two young children and they own a home in Owensville, Indiana. Father has lived in only one other residence since graduating from high school and has been consistently employed. Father provided Child’s health insurance. Neither Father nor his wife have ever been arrested or convicted of any criminal offenses.

[12] On July 22, 2020, the trial court issued its findings of fact and conclusions thereon, concluding that it was in the Child’s best interests for Father to have primary physical custody as “Mother is not able to provide a healthy, stable home environment for the minor child.” (Appellant’s App. Vol. II, p. 48).

[13] Mother now appeals. Additional facts will be provided if necessary.

## **DISCUSSION AND DECISION<sup>1</sup>**

[14] When reviewing a custody determination, we afford the trial court considerable deference as it is the trial court that observes the parties’ conduct and demeanor

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<sup>1</sup> At the outset, we remind the trial court and Mother that the legislature has treated the issues of child custody, support and visitation somewhat differently depending upon whether the issues arise in the context of a dissolution proceeding or a paternity action. While the statutes relating to paternity and dissolution are substantially similar, there are wording variations between them that may be significant, resulting in differing outcomes depending upon

and hears their testimonies. *In Re Paternity of C.S.*, 964 N.E2d 879, 883 (Ind. Ct. App. 2012), *trans. denied*. We review custody modifications for an abuse of discretion “with a preference for granting latitude and deference to our trial judges in family law matters. *Id.* We will not reweigh the evidence or judge the credibility of witnesses. *Id.* Rather, we will reverse the trial court’s custody determination based only upon a trial court’s abuse of discretion that is “clearly against the logic and effect of the facts and circumstances or the reasonable inferences drawn therefrom.” *Id.* It is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal. *Id.*

[15] When the trial court enters findings of fact and conclusions thereon, we apply a two-tiered standard of review: whether the evidence supports the findings and whether the findings support the order. *Tompa v. Tompa*, 867 N.E.2d 158, 163 (Ind. Ct. App. 2007). To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.*

[16] Mother contends that the trial court only issued a generalized opinion of Mother not being able to provide a healthy and stable home environment without failing to identify any “specific decisive circumstances” requiring a

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the type of proceeding involved. In a dissolution context, custody issues are determined under Ind. Code §§ 31-17-2-8; -21; while in a paternity context, custody issues are determined pursuant to Ind. Code §§ 31-14-13-2; -6.

modification of custody. (Appellant's Br. p. 16). Pursuant to Indiana Code section 31-14-13-6, a trial court may modify a child custody order if (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 that the court may consider under Indiana Code section 31-14-13-2. These factors include:

- (1) The age and sex of the child.
- (2) The wishes of the child's 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 parents;
  - (B) the child's siblings; and
  - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and 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 2.5(b) of this chapter.

I.C. § 31-14-13-2. "A change in conditions must be judged in the context of the whole environment, and it is the effect upon the child . . . that renders a change substantial or inconsequential." *In re Winkler*, 725 N.E.2d 124, 128 (Ind. Ct. App. 2000). "Whether the effect is of such a nature as to require a change in custody is a matter within the sound discretion of the trial court." *Id.*

[17] The record supports that since the last custody order was entered, Mother had a history of several short-term living situations, ultimately always moving back to her parents' residence. At the time of GAL Heal's report, Child was living with



his maternal grandparents. Mother did not inform Father of these frequent relocations. Mother is unemployed, with no intention of seeking gainful employment, instead relying on Robbins to provide for her and the children. *See In re Paternity of J.G.*, 19 N.E.3d 278, 283 (Ind. Ct. App. 2014) (A history of frequent moving and economic instability may support a modification of custody).

[18] Significant evidence was presented of substance abuse and domestic violence in Mother's home. In July 2019, Robbins attempted to strangle Mother during an altercation in the residence at which children were present. Mother was violent with Robbins, biting him and throwing a DVD player at him while he was holding his infant child from a different relationship. At trial, both Mother and Robbins admitted to prior substance abuse, with Robbins conceding to the use of methamphetamine, marijuana, and K2. After the domestic violence incident, Robbins was convicted and sentenced to probation. As a result, DCS became involved with the family. Evidence of substance abuse can be relevant to that parent's health and to the child's best interests when determining child custody. *See Baxendale v. Raich*, 878 N.E.2d 1252, 1258 (Ind. 2008). On the other hand, the trial court noted Father's stable employment, home ownership, and lack of a criminal record.

[19] Mother now contends that the trial court was presented with evidence that the Child insisted on remaining with Mother and his siblings. However, the wish of the child is only one of many statutory factors that the trial court may take into consideration. As such, Mother's argument that we need to give

primordial importance to the eight-year-old Child's wish over other factors is an invitation to reweigh the evidence, which we decline to do.

[20] While we are not able to say that the trial court could not have found otherwise than it did upon the evidence introduced, 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. *See Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). Based on the evidence before us, we cannot say that any one single factor warrants a change of custody in the present case. However, the consideration of all the factors is sufficient to establish that modification is in the best interests of the Child and a substantial change has taken place in the interaction and interrelationship of the Child with his parents and other persons who may significantly affect the Child's best interests, and the mental and physical health of all the individuals involved. Therefore, although the evidence might support some other conclusion, it does not positively require the conclusion contended for by Mother. *See In Re Paternity of C.S.*, 964 N.E. 2d at 883. Accordingly, we affirm the trial court's modification of physical custody to Father.

## CONCLUSION

[21] Based on the foregoing, we conclude that the trial court did not abuse its discretion by granting Father's petition to modify custody.

[22] Affirmed.

[23] Najam, J. and Crone, J. concur