

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua Stephens,
Appellant-Defendant,

v.

Camberly Stephens,
Appellee-Plaintiff.

November 15, 2023

Court of Appeals Case No.
23A-DC-968

Appeal from the Jennings Superior
Court

The Honorable Christopher L.
Doran, Magistrate

Trial Court Cause No.
40D01-2106-DC-92

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

- [1] Joshua Stephens (“Father”) appeals the trial court order modifying physical child custody of the parties’ daughter, N.S. (“Child”), from him to Camberley Stephens (“Mother”). The only issue he raises on appeal is whether the trial court abused its discretion when it found a substantial change in circumstances warranting the custody modification. We affirm.

Facts and Procedural History

- [2] The parties’ marriage was dissolved on October 29, 2021, and the trial court awarded physical custody of Child, born August 24, 2020, to Mother. Mother also had custody of a young child, V., from another relationship. On August 26, 2022, the court modified physical custody of Child from Mother to Father, due to Mother’s drug use. The court granted Mother supervised parenting time and ordered her to “pass a number of drug tests, get counseling, maintain her sobriety[,] and remain employed going forward.” Appealed Order at 3. Mother subsequently filed a motion for contempt for denial of parenting time, and a motion to modify custody.
- [3] Because Mother had completed a drug program, taken and passed all drug tests, and maintained her sobriety, on February 10, 2023, the court ordered unsupervised parenting time for Mother and did not require additional drug screening. The court ordered Father to provide Mother with his work schedule so that Mother could also have additional parenting time when Father was

working. The court took the motion for custody modification under advisement, pending a review hearing.

- [4] In an order dated March 27, 2023, the trial court found Father in contempt of the February parenting time order for “failing to provide his work schedule to [Mother] and for not giving [Mother] the previously ordered parenting time.” *Id.* at 5. The court further found that Father was “willingly foregoing work to attempt to thwart the Court’s [parenting time] order of February 10, 2023.” *Id.* The court ordered “make-up parenting time” for Mother. *Id.* at 6.
- [5] On April 5, 2023, the court held a review hearing and a hearing on Mother’s petition to modify physical child custody. In an order dated April 17, 2023, the trial court entered Findings of Fact and Conclusions of Law in support of its order modifying physical custody of Child from Father to Mother. The court found, in pertinent part, that:
- Father had failed to provide Mother with parenting time as ordered;
 - Mother was no longer using drugs or in a relationship with her prior boyfriend with whom she used drugs;
 - Mother had maintained a full-time job “for months.”
Appealed Order at 9;
 - The credibility of Father and his fiancée, Randi Phillips, “was very dubious,” and Father and Phillips “were using inappropriate language with [sic] the Mother in the presence of [Child].” *Id.* at 7;

- “The credibility of [Father] and his fiancée is highly questionable on almost any issue.” *Id.* at 8-9;

- When Mother returns Child to Father, “[Child] cries, grabs ahold of [Mother] in a desperate way[,] and attempts to avoid going to the Father.” *Id.* at 8;

- “[Mother] testified that this happens almost every time she returns the child, [Child] will never let Mother hand her to the fiancée, [Phillips], and although the Father denied this occurred except on one (1) occasion, the Court believes it happens routinely.” *Id.*;

- The relationship between Mother’s other daughter, V., age four, and Child “is very close and [Child] not being in [Mother’s] care when she has [V.] has been a real problem.” *Id.* at 6;

- “The relationship between [V.] and [Child] is important for [Child] and should be reinstated.” *Id.* at 7;

- “The evidence has consistently proven each time the parties have been in court that [Mother] has complied with th[e] court[’s] orders regarding her conduct and is fully capable of having custody of [Child] transferred back to her at this time.” *Id.* at 10.

[6] The trial court concluded that Mother had “improved her own situation” but noted that “improvements in the non-custodial parent’s circumstances alone are not an appropriate basis to modify custody.” *Id.* at 11. Nevertheless, after noting the relevant statutory factors to be considered in an action for

modification of child custody, the court ordered physical custody modified to Mother because:

65. Although the child is too young to express her wishes, the Court believes she did express her wishes by how she reacted when[ever] Mother attempt[ed] to return the child to Father.

* * *

69. The Father has ignored or attempted to avoid various court orders of the Court, attempted to eliminate or minimize Mother's contact with the child and the Court believes that both he and his fiancée have not been truthful about a number of facts in the various hearings.

70. The Court finds it very important that [Child] be in the same household with her half-sister [V.] which has been essentially eliminated by the transfer of custody to the Father.

71. Rather than co-parenting here, the Father has made an effort to undermine the relationship of the Mother with [Child] and used very unacceptable language when dealing with the Mother in the presence of her daughter.

Id. at 11-12.

[7] The trial court modified the child custody order to provide physical custody of Child to Mother, with parenting time for Father. Father now appeals the custody order.

Discussion and Decision

Standard of Review

- [8] Father appeals the trial court order modifying child custody. We review decisions on custody modifications for an abuse of discretion. *E.g.*, *Kietzman v. Kietzman*, 992 N.E.2d 946, 948 (Ind. Ct. App. 2013).

The Indiana Supreme Court “has expressed a preference for granting latitude and deference to our trial judges in family law matters ... because of trial judges’ unique, direct interactions with the parties face-to-face.” *T.L. v. J.L.*, 950 N.E.2d 779, 784 (Ind. Ct. App. 2011) (citations and quotations omitted). Therefore, we do not substitute our judgment for that of the trial court if evidence and legitimate inferences therefrom support the trial court’s judgment; this serves the interests of finality in custody matters. *Baxendale v. Raich*, 878 N.E.2d 1252, 1257-58 (Ind. 2008).

Id.

- [9] Thus, we will reverse the trial court only upon a showing that the decision “is clearly against the logic and effect of the facts and circumstances before the court.” *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010).

On 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. Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.

Steele-Giri v. Steele, 51 N.E.3d 119, 124 (Ind. 2016) (quotations and citations omitted).

[10] The trial court also made findings and conclusions; therefore, we employ a two-tiered standard of review under which we first determine whether the record supports the findings and then whether the findings support the judgment. *E.g.*, *Nelson v. Nelson*, 10 N.E.3d 1283, 1285 (Ind. Ct. App. 2014) (quotation and citation omitted). Father does not challenge any specific finding; therefore, we only address whether the findings support the judgment.

[11] Finally, we note that Mother has not filed an appellee's brief. Under such circumstances, "we do not undertake the burden of developing appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error." *Id.* Prima facie error means error "at first sight, on first appearance, or on the face of it." *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006).

Modification of Child Custody

[12] 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 the several factors. Indiana Code Section 31-17-2-8 provides that the factors relevant to a custody order are as follows:

(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

[13] The party seeking modification of a custody order bears the burden of demonstrating that the existing custody should be altered. *Steele-Giri*, 51 N.E.3d at 124. Whether custody modification is warranted must be determined

from all relevant facts, including a change of circumstances of both custodial and noncustodial parents and the effect of those changes on the child. *Watters v. Dinn*, 633 N.E.2d 280, 288 (Ind. Ct. App. 1994), *trans. denied*; *see also In re Marriage of Sutton*, 16 N.E.3d 481, 485 (Ind. Ct. App. 2014) (holding a change in circumstances to warrant modification of custody must be judged in the context of the whole environment, and the effect on the child is what renders a change substantial or inconsequential).

[14] Here, in support of its modification of custody, the trial court made the following findings regarding the period of time since Child had been placed in Father’s sole physical custody: Mother had stopped using drugs, terminated a relationship with the man with whom she used to use drugs, and maintained steady employment;¹ Child is a young girl who is bonded with her half-sister, V., Child is being harmed by a loss of contact with V., and it is important for Child to reestablish her relationship with V. by living in the same household; Child expressed her wishes to be in her mother’s care through her negative reaction each time² Mother returned Child to Father and his fiancée; and Father

¹ While it is true, as the trial court noted, that evidence of a child’s improving condition with the noncustodial parent will not *by itself* support a custody modification, improvements in the noncustodial home are nevertheless a proper consideration in the modification determination. *See Collyear-Bell v. Bell*, 105 N.E.3d 176, 185 (Ind. Ct. App. 2018) (“[W]ithout independent evidence of a substantial change in one of the statutory factors, evidence of a child’s improving condition with the noncustodial parent will not by itself support a custody modification.”); *Bryant v. Bryant*, 693 N.E.2d 976, 979 (Ind. Ct. App. 1998) (“[I]mprovements in the non-custodial home are [a] proper consideration[] under the [statutory] modification standard.”), *trans. denied*.

² Child’s negative reaction was not an isolated incident; rather, the court found that “it happens routinely.” Appealed Order at 8.

and his fiancé repeatedly have tried to undermine Mother’s relationship with Child.³ Those findings support the trial court’s modification order granting Mother sole physical custody of Child. Father’s contentions to the contrary are simply impermissible requests that we reweigh the evidence, which we will not do. *See Steele-Giri*, 51 N.E.3d at 124. Moreover, the trial court found Father’s and Phillips’ testimony in opposition to the modification of custody to lack credibility “on almost any issue,” Appealed Order at 8-9, and we are not at liberty to second-guess the court’s judgment of the credibility of the witnesses. *Id.*

[15] Given the court’s uncontested factual findings, we cannot say the evidence “positively require[s] the conclusion” that there was no substantial change in circumstances since the last custody order or that modification is not in Child’s best interests. *Id.* Father has failed to show an abuse of discretion/prima facie error. We therefore affirm the trial court’s custody determination.

[16] Affirmed.

May, J., and Felix, J., concur.

³ While lack of cooperation or isolated acts of misconduct by a custodial parent generally cannot serve as a basis for the modification of child custody, a parent’s “behavior towards another parent, which places a child’s welfare at stake, can support” such a modification. *McDaniel v. McDaniel*, 150 N.E.3d 282, 290 (Ind. App. Ct. 2020) (quoting *Hanson v. Spolnik*, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997), *trans. denied*), *trans denied*.