MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Clifford Wetter,
Appellant-Defendant,

v.

Angel Wetter, et al.,
Appellee-Plaintiff.

June 28, 2023

Court of Appeals Case No. 23A-DR-250

Appeal from the Marion Superior Court

The Honorable Danielle Gaughan, Judge

Trial Court Cause No. 49D15-1204-DR-14357

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Clifford Wetter ("Father") appeals the trial court's denial of his motion to modify physical and legal child custody. The only issue he raises on appeal is whether that ruling was an abuse of discretion. We affirm.

Facts and Procedural History

[2] Father and Angel Wetter ("Mother") were married and have two minor children: K.W., age fifteen, and T.W., age twelve (collectively, "Children"). The parties' marriage was dissolved in 2014, at which time Mother was granted sole physical and legal custody of Children. On March 10, 2015, the trial court ordered that Father would have parenting time with Children "on the third Saturday of each month from noon to 6:00 p.m. at a location of [Father's] choosing." App. v. II at 22. On September 18, 2015, the trial court issued an order that "Father's parenting time remain the same without overnights until he establishe[s] a more consistent ability to exercise parenting time and has a home that can accommodate overnight parenting time." *Id.* at 43. On January 21, 2016, the trial court approved the parties' "Agreed Entry" under which Father's parenting time was to "continue to move forward." *Id.*

[3] On April 15, 2021, Father filed a Verified Petition seeking, in relevant part, to modify the dissolution decree to grant the parties joint legal custody of Children and grant Father "minimum parenting time consistent with the Indiana Parenting Time Guidelines." *Id*. at 38. On November 28, 2021, the court approved a "Partial Agreed Provisional Order," which granted Father parenting time with Children on alternating weekends from Saturday morning to Sunday afternoon without overnight parenting time unless Father "acquire[d] a suitable residence that shall have a bedroom and proper beds for the children." *Id*. at 40.

[4] The court appointed a Guardian Ad Litem ("GAL") who subsequently submitted a report to the trial court in which she recommended, in relevant part, that the parties have joint legal custody of Children and Father have "physical custody subject to Mother's parenting time." *Id*. at 56. That recommendation was based on the GAL's conclusion that "[b]oth children seem to be currently struggling in their current environment[,] and there is considerable tension in Mother's home." *Id*. at 55.

[5] The trial court held an evidentiary hearing on Father's modification request on January 18, 2023, at which Father testified that he was requesting "primary physical custody" of Children. Tr. at 53. The following evidence most favorable to the court's judgment was presented at the hearing.

[6] K.W. had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Impulse Control Disorder, Anxiety, OSA,[1] Obesity, and Major Depression and had a history of carnitine deficiency.[2] K.W. also had poor grades in school and recent excessive tardiness. Mother believed that K.W.'s problems with school were related to his medical issues. K.W. received counseling, therapy, and medication to address his diagnoses, and Mother also provided for tutoring for K.W.

[7] T.W. had been diagnosed with ADHD, Autistic Disorder, and Developmental Delay. T.W. had a 504 Plan at school to accommodate his medical conditions, and T.W. also received counseling. T.W. had made "a good amount of progress" at school and was performing satisfactorily. App. v. II at 52. Father was not involved in Children's education or health care, and Father failed to ensure Children did their homework and took their medications as directed during parenting time. The parties did not communicate well with each other regarding Children.

[8] Mother was in a relationship with Tony Fields, who had periodically "stayed" at Mother and Children's home in the past. Tr. at 107. Children reported that Fields had physically disciplined them in the past, and they expressed fear of

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[1] The record does not disclose the meaning of this acronym.

[2] The trial court sustained a hearsay objection to Mother's testimony that K.W. has been diagnosed with sleep apnea; thus, that testimony was not admitted into evidence. Mother points to no other evidence in the record in support of the alleged fact of K.W.'s sleep apnea.

Fields. An investigation by the Indiana Department of Child Services ("DCS") determined the incidents of physical discipline did not constitute abuse or neglect. Nevertheless, Mother cancelled plans to have Fields move in with her and Children, and she and Fields agreed that Fields is not to physically discipline Children in the future. Fields did not live with Mother and Children at the time of the hearing.

[9] K.W. stated that he had "a strained relationship" with Mother and wished to live with Father. App. v. II at 54. T.W. stated that he wished to see Father more often. At the time of trial, Father's home had bedrooms and proper beds for Children. However, his home was not in Children's current school district.

[10] At the conclusion of the hearing, the trial court ruled from the bench. The judge stated that he did not "see a substantial change in circumstances" and therefore ordered that Mother retain "primary, physical, and sole legal custody." Tr. at 111. The court further ordered that Father have parenting time in excess of the Indiana Parenting Time Guidelines. Regarding the finding of no substantial change in circumstances warranting a custody modification, the court noted in reference to K.W.'s wishes that "a child's desire standing alone for me is not significant enough." *Id*. at 115. In its written order dated January 27, 2023, the trial court also ordered that "Mother's boyfriend, Tony Fields, shall not be left alone with the parties' minor children [and] ... is not permitted to discipline the parties' minor children." Appealed order at 1-2. This appeal ensued.

Discussion and Decision

[11] Father appeals the trial court's denial of his motion to modify physical and legal child custody. Neither party requested findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), and the court did not make any factual findings.[3] Therefore, we apply a general judgment standard; that is, we may affirm the general judgment "on any theory supported by the evidence adduced at trial." *Sexton v. Sedlak*, 946 N.E.2d 1177, 1183 (Ind. Ct. App. 2011) (citation omitted), *trans. denied*.

[12] Moreover, 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).

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[3] While a trial court is required to consider specific statutory factors in making a custody modification determination, it is not required to enter a finding as to each factor unless requested in writing by a party pursuant to Trial Rule 52(A). *See, e.g.*, *M.G. v. S.K.*, 162 N.E.3d 544, 548-49 (Ind. Ct. App. 2020).

Id.

[13] 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).

[14] 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 . . . .

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.

[15] Here, Father contends that a substantial change has occurred, making modification of physical custody to him and joint legal custody in the children's best interests. Specifically, he alleges the following "substantial changes" have

occurred since the last custody order: (1) Father has made "efforts to be available for the children;" (2) Father has obtained suitable housing for Children; (3) Father has "tak[en] measures to ensure that [Children] consume" their medications; (4) K.W. wishes to live with Father;[4] (5) Fields physically disciplined Children; (6) Mother's relationship with K.W. is "strained;" (7) Children have struggled in school; (8) Mother refused to allow K.W. to walk the dogs by himself as a coping mechanism for stress; (9) Children's "mental health decline;" and (10) the GAL recommended joint legal custody and physical custody with Father. Appellant's Br. at 20-24.

[16] Allegations (1) through (3), above, support the trial court's determination that Father should have parenting time in excess of the guidelines, but they do not show any substantial change justifying removing sole legal and physical custody from Mother. Factor (4) weighs in favor of Father's custody of K.W., but the trial court did not abuse its discretion when it found that factor, alone, was not sufficient to support a custody modification.

[17] While Fields' physical discipline of Children—factor (5)—was certainly not ideal, it did not qualify as domestic violence or abuse, as shown by the determinations of DCS. Moreover, Mother took action to protect Children by voluntarily cancelling plans for Fields to live with her and obtaining an agreement from Fields that he would no longer discipline Children. The trial

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[4] Although Father alleges T.W. also wishes to live with Father, the evidence does not support that allegation, as T.W. only expressed a desire to see more of Father.

court further addressed that factor by ordering that Fields not be left alone with Children and continue to refrain from disciplining Children. Weighing all of that evidence, the trial court determined that factor (5) was not a substantial change in circumstances supporting a change in custody, and we will not reweigh the evidence.

[18] Regarding factors (6) through (9), the evidence established that Children both have multiple disabilities—including learning disabilities, such as ADHD—which affect their lives to varying degrees. However, there was no evidence that their mental health was "declining," as Father alleges; there was no evidence that Children's mental health issues were less severe at the time of the previous custody order.[5]

[19] K.W. has more medical and mental health challenges than T.W. and struggles more with school and his relationship with Mother. However, the evidence establishes that Mother addresses all of Children's medical and educational issues by obtaining regular therapy, counseling, and medication for Children. Mother also has obtained tutoring for K.W. and a special education 504 Plan for T.W. Father, on the other hand, was not involved in Children's health care or educations and did not seek to be involved through any formal channels until five years after the previous custody order, at which time he filed the motion to modify custody. In addition, during his parenting time, Father admittedly

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[5] While there was evidence that some of Children's conditions had been recently diagnosed, that does not show that the conditions did not exist before being diagnosed.

failed to ensure Children did their school work and took their medications as directed. The trial court did not abuse its discretion in weighing this evidence and determining that it did not show a substantial change in circumstances warranting a custody modification or that modification is in Children's best interests. And we may not reweigh the evidence or judge witness credibility.

[20] Father relies on the GAL's recommendation to support his allegation of a substantial change in circumstances. However, that recommendation was based upon the above factors which the trial court clearly found weighed against a custody modification. Again, we will not reweigh the evidence. The trial court did not abuse its discretion when it denied Father's request to modify physical custody of Children.

[21] Regarding legal custody,[6] "[a]s with modifications of physical custody, a trial court may not modify legal custody unless (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 31-17-2-8 when it originally determines custody." *Julie C.*, 924 N.E.2d at 1259; *see also* I.C. § 31-17-2-13. In addition, the trial court must also consider the factors listed in Indiana Code Section 31-17-2-15. *Id*. That statute provides:

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[6] We note that Father addresses the issue of legal custody in only one paragraph of his brief and asserts only that the trial court abused its discretion by failing to make "findings" on the issue of legal custody. Appellant's Br. at 25. However, as previously noted, the court was not required to issue findings because neither party requested them. T.R. 52(A); *M.G.*, 162 N.E.3d at 548-49.

> In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:
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> (1) the fitness and suitability of each of the persons awarded joint custody;
>
> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
>
> (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
>
> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
>
> (B) plan to continue to do so; and
>
> (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

[22] "Particularly germane to whether joint legal custody should be modified is 'whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare.'" *Julie C.*, 924

N.E.2d at 1259 (quoting I.C. § 31-17-2-15(2)). That issue requires "a very fact-sensitive determination, necessarily requiring the weighing of evidence and judging the credibility of witnesses, functions that rested exclusively with the trial court." *Carmichael v. Siegel*, 754 N.E.2d 619, 635-36 (Ind. Ct. App. 2001). Here, the trial court noted that parents have poor communication with each other. The court noted that parents were "picking each other apart on just about everything," Tr. at 114, and the court could not "see these parents working it out to have joint legal [custody]," *id*. at 111. Given that finding and the other custody modification factors discussed above, the trial court did not abuse its discretion when it denied the request to modify sole legal custody with Mother to joint legal custody.

Conclusion

[23] The trial court did not abuse its discretion when it found the evidence did not establish a substantial change in circumstances that would support a modification of physical or legal custody or that modification was in Children's best interests. Father's assertions to the contrary are requests that we reweigh the evidence and judge witness credibility, which we may not do.

[24] Affirmed.

Tavitas, J., and Kenworthy, J., concur.