

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Stacey M. Hoover,
Appellant-Petitioner,

v.

Junior J. Ferrell, III,
Appellee-Respondent.

October 31, 2023

Court of Appeals Case No.
23A-DR-1116

Appeal from the White Circuit
Court

The Honorable Jason A.
Thompson, Judge

Trial Court Cause No.
91C01-1508-DR-101

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

- [1] Stacey Hoover (“Mother”) appeals the trial court’s order modifying custody of D.F. (“the Child”) in favor of Junior Ferrell, III (“Father”). Mother contends that the trial court abused its discretion by modifying custody of the Child. We find Mother’s arguments without merit, and accordingly, affirm.

Issue

- [2] Mother raises one issue on appeal, which we restate as whether the trial court abused its discretion by modifying custody of the Child.

Facts

- [3] Father and Mother (collectively, “the Parents”) married in 2010 and had two children: Junior, born in 2003, and the Child, born in 2013. The Child has been diagnosed with neurofibromatosis type 1 (“NF1”), which requires him to take daily medication to prevent seizures. Father disagrees with the Child’s diagnosis.
- [4] The Parents’ marriage was dissolved in 2016, and the trial court awarded joint legal custody to the Parents and primary physical custody over the children to Mother. Father was awarded parenting time every other weekend as well as one midweek night.
- [5] Mother and Junior’s relationship became strained due to instances of Junior physically assaulting Mother, and in 2017, the Parents entered an agreed order whereby Father would take primary physical custody over Junior and Mother would retain primary physical custody over the Child. In 2018, Father was

exercising parenting time with the Child every other weekend and twice midweek.

- [6] Over the next several years, disputes arose regarding the Child. On May 17, 2019, the trial court found Mother in contempt for denying Father visitation with the Child on seventeen occasions.¹ In 2022, each parent petitioned the trial court to hold the other parent in contempt for denying parenting time.²
- [7] In July 2022, the Child reported to Father that Mother “grabbed his arm and left a bruise, held his neck/throat area[,] repeatedly smacked his mouth, and said very hurtful things about him when she did not know he was present,” including, “Move it[,] slow a**,” and “I can’t f*****g stand this kid.” Appellant’s App. Vol. II p. 84. Father observed a bruise on the Child’s arm, which he photographed.
- [8] Based on the Child’s report, on July 26, 2022, Father filed a petition for emergency modification of custody of the Child. Father also reported the alleged abuse to the Department of Child Services (“DCS”). The trial court immediately ordered the Child temporarily placed with Father until a hearing could be held on Father’s petition. On August 2, 2022, Mother filed a response to Father’s petition and denied the allegations of abuse. On August 4, 2022, the Parents’ counsel and the trial court met in chambers, and the trial court ordered

¹ The trial court also found Father in contempt for failing to follow the trial court’s order regarding therapy between Junior and Mother.

² The record is silent regarding the trial court’s rulings on the 2022 contempt petitions.

Father to return the Child to Mother pending a hearing on a modification of the Parents' custody agreement.

[9] Meanwhile, DCS determined that the abuse allegations were unsubstantiated. In December 2022, however, the Child reported the same allegations to his therapist, who also reported them to DCS. The record is silent regarding DCS's determination on this second report of abuse.

[10] On January 6, 2023, the Guardian ad Litem ("GAL") filed her report with the trial court. The GAL described the Child as "very open and talkative" and "not shy at all." *Id.* at 85. The GAL, however, expressed concern that Father was discussing the divorce and custody arrangements with the Child.

[11] The GAL reported that the Child repeated the allegations of abuse by Mother to the GAL. The Child also reported "feeling stressed out" by his Parents' divorce and, "unprompted," "made it very clear . . . that his desire is to live with his Father." *Id.* Additionally, the Child reported experiencing bullying at his school and that he would be "glad" to change schools. *Id.* at 86. Mother denied the allegations of abuse but admitted that she did "tap [the Child] on the mouth . . . because he was backtalking." *Id.* at 84.

[12] Regarding Mother's cancellation of Father's parenting time, the GAL opined that Mother's cancellations were "slightly excessive." *Id.* The GAL listed the following as "[u]nacceptable reasons" that Mother cancelled Father's parenting time:

[T]he child refuses to go, child has a minor illness, child has to/wants to go somewhere else, Mother has a minor illness, Father is behind in child support, Mother doesn't want the child to go, the weather is bad . . . , the child has no clothes to wear, the Father did not do a certain thing Mother wanted Father to do (i.e. pick medications up at a certain time from the pharmacy).

Id. at 89. The GAL, however, observed that Mother often attempted to make up visits and that Father occasionally would not respond. Additionally, the GAL reported that the Child's diagnosis was "a large point of contention" between the Parents and that Father "reluctant[ly] agreed" to continue providing the Child's medication if Father were awarded custody. *Id.* at 82, 88.

[13] The GAL recommended that Father's petition for modification of custody be denied. The GAL also recommended that Mother be "admonished for her continued disregard of Father's parenting time and cancellations for unjust reasons"; that Father be awarded additional parenting time; and that the Child's medical condition be reevaluated. *Id.* at 88.

[14] The trial court held hearings on Father's petition to modify custody on January 19 and 23, 2023. Father proffered a record documenting Mother's cancellations of Father's parenting time since January 18, 2022. Father also explained his disagreement with the Child's diagnosis but promised to provide the Child's medication if Father were awarded custody. Additionally, Father presented evidence regarding instances where the Child was disciplined at school.

[15] Mother admitted that Father asked her to contact his attorney regarding make-up parenting time and that she never did so. Mother also testified regarding

issues with Father and the Child's medication. She explained that, on one occasion, she forgot to pack the Child's medication and she instructed Father to pick up the medication from the pharmacy; however, Father did not respond. Mother received an email from the pharmacy that confirmed that the medication was picked up approximately one day later. Mother reported Father to DCS for failing to provide the Child's medication; however, DCS determined the report was unsubstantiated.

[16] On April 25, 2023, the trial court entered findings of fact and conclusions thereon. The trial court found in relevant part:

16. That the minor child has expressed to multiple people, including his Therapist, the GAL, and his Father, that he wishes to live with his Father. The Court also recognizes that the minor child is ten (10) years old, therefore minimal weight is given to his wishes in this proceeding.

17. [DCS] has investigated an incident where there was an allegation of abuse from Mother. This was when Mother swatted the minor child on the mouth. Those allegations were unsubstantiated. The minor child has expressed to his Therapist and GAL [] incidents of physical[] and/or emotional [abuse] against him from Mother.

* * * * *

20. [T]he minor child has some behavioral issues while attending his current school. These issues have required discipline actions that range from: 1) warning; 2) loss of recess; 3) lunchroom detentions; 4) In-House suspension; and 5) Out of School suspension. These incidents are related to hitting another student, disruptive behavior, defiance, and fighting. This Court

believes these actions are related to the minor child observing this action at the home (see 2019 custody order on physical violence between Mother and [Junior]) and his way of expressing his discomfort/trauma from being involved in the family drama. The minor child has adjusted well to both communities.

21. [T]here is a lot of controversy with some of the diagnos[is] of the minor child, as Father feels he is left out of the loop. Mother feels she knows what is going on with minor child as it pertains to seizures, described as “staring,” as she started having those at the age of 7. Although Father is very vocal on the minor child’s medications, there is no evidence that Father has withheld the medication from minor child. . . .

22. [T]here was also evidence/testimony of some punishment style of Mother that initiated a call to the Department of Child Services (swatting on the minor child’s mouth). The Court recognizes this was unsubstantiated. . . .

23. That this Court recognizes Mother has withheld multiple visitations of Father for a myriad of reasons. All of this after this Court admonished both parties about following the visitation schedule and the Indiana Parenting Time Guidelines. This Court specifically admonished Mother [that] her continued withholding of mid-week visits would be used in any future determinations in a change of custody along with the aforementioned factors. Mother continued to withhold visitations to the amount of 23 additional parenting time visits . . . including midweek visits and weekend periods leading up to this hearing

Id. at 104-106 (record citations omitted). The trial court granted Father’s petition to modify custody and awarded Father primary physical custody over the Child with Mother having parenting time according to the Indiana Parenting Time Guidelines. Mother now appeals.

Discussion and Decision

- [17] Mother argues that the trial court erred by modifying the custody order to award primary custody to Father. We are not persuaded.
- [18] The person seeking to modify custody “bears the burden of demonstrating the existing custody should be altered.” *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016). We review custody modifications only for an abuse of discretion. *McDaniel v. McDaniel*, 150 N.E.3d 282, 288 (Ind. Ct. App. 2020) (citing *Werner v. Werner*, 946 N.E.2d 1233, 1244 (Ind. Ct. App. 2011), *trans. denied*), *trans. denied*. Our review is deferential because “[t]here is a well-established preference in Indiana for granting significant latitude and deference to our trial judges in family law matters.” *Id.* (citing *Steele-Giri*, 51 N.E.3d at 124). “Appellate courts ‘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.’” *Id.* (quoting *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)).
- [19] Under our standard of review, we will not “reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.” *Steele-Giri*, 51 N.E.3d at 124. “We will reverse the trial court’s custody determination only if the decision is ‘clearly against the logic and effect of the facts and circumstances or the reasonable inferences drawn therefrom.’” *McDaniel*, 150 N.E.3d at 288 (quoting *In re Paternity of C.S.*, 964 N.E.2d 879, 883 (Ind. Ct. App. 2012), *trans. denied*). “[I]t 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.” *Steele-Giri*, 51 N.E.3d at 124.

[20] Additionally, pursuant to Trial Rule 52(A), “[w]hen a trial court has made special findings of fact, as it did in this case, its judgment is clearly erroneous only if (i) its findings of fact do not support its conclusions of law or (ii) its conclusions of law do not support its judgment.” *Randolph v. Randolph*, 210 N.E.3d 890, 896 (Ind. Ct. App. 2023) (citing *Smith v. State*, 194 N.E.3d 63, 72 (Ind. Ct. App. 2022)); accord *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Id.* (quoting *Smith*, 194 N.E.3d at 72).

A. Findings of Fact

[21] We first address Mother’s challenges to several of the trial court’s findings of fact. Mother challenges Finding No. 20, which states that the trial court believed that the Child’s behavioral issues at school were “related to the minor child observing this action at the home (see 2019 custody order on physical violence between Mother and [Junior])” and were the Child’s “way of expressing his discomfort/trauma from being involved in the family drama.” Appellant’s App. Vol. II p. 105.

[22] Mother argues that “[n]o evidence was presented at the evidentiary hearing linking the child’s acts of fighting or disruptive behavior at school to Mother.” Appellant’s Br. p. 19. Trial courts, however, may take judicial notice of their

“own orders in the same case.” *Reising v. Guardianship of Reising*, 852 N.E.2d 644, 648 (Ind. Ct. App. 2006) (citing *Richard v. Richard*, 812 N.E.2d 222, 225 (Ind. Ct. App. 2004)). Here, the trial court expressly referenced its 2019 order awarding physical custody of Junior to Father based on violence between Junior and Mother. We cannot say that the trial court clearly erred by inferring that the violence between Junior and Mother influenced the Child’s behavior at school.

[23] Mother also challenges Finding No. 21, which states that “there is no evidence that Father has withheld the medication” from the Child. Appellant’s App. Vol. II p. 105. Mother correctly points out that, during the hearing, the trial court admitted the Child’s medical records as an exhibit and these records contained the Child’s statements to his doctor that he takes his medication “most of the time except at [Father’s] house” and that “he only misses 1-2 doses per week.” Ex. Vol. III p. 112. We find, however, that the trial court was referring to the weight of the evidence not individual items thereof. In other words, the trial court found the evidence that Father failed to provide the Child’s medication unpersuasive. Indeed, DCS determined that Mother’s report that Father failed to provide the Child’s medication was unsubstantiated. Additionally, Mother had the Child’s blood tested to determine if the medication was in his system after staying with Father, and the blood tests indicated that the Child had received his medication. Based on this evidence,

we cannot say that the trial court’s finding that Father did not fail to provide the Child’s medication was clearly erroneous.³

B. Conclusions

[24] Mother next argues that the trial court abused its discretion by modifying custody in favor of Father. We are not persuaded.

[25] Indiana Code Section 31-17-2-21 provides, in relevant part:

(a) The 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 section 8. . . .

(b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.

* * * * *

³ Mother also challenges Finding No. 21’s statement that “[t]here is a lot of controversy with some of the diagnos[e]s of the minor child, as Father feels he is left out of the loop.” Appellant’s App. Vol. II p. 105. We read this statement as a report on Father’s feelings, not an adoption of them as a factual finding. Accordingly, we cannot say that the trial court clearly erred.

Additionally, Mother challenges “any aspect of the trial court’s [o]rder that could be interpreted as implying she has engaged in any act of physical or emotional abuse of [the Child].” Appellant’s Br. p. 21. The trial court’s only finding with regard to the allegations of abuse by Mother was that DCS determined the allegations were “unsubstantiated.” Appellant’s App. Vol. II p. 106. Accordingly, the trial court did not find that Mother abused the Child.

Indiana Code Section 31-17-2-8 lists as relevant 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.

* * * * *

[26] “When evaluating whether a change of circumstances has occurred that is substantial enough to warrant a modification of custody, the context of the whole environment must be judged, ‘and the effect on the child is what renders a change substantial or inconsequential.’” *Montgomery v. Montgomery*, 59 N.E.3d 343, 350 (Ind. Ct. App. 2016) (quoting *In re Marriage of Sutton*, 16 N.E.3d 481, 485 (Ind. Ct. App. 2014)), *trans. denied*. “[I]n some cases, a custodial parent’s interference with a noncustodial parent’s visitation rights may be of such a degree that it represents a substantial change in the parties’ relationship and the parties’ relationship with their children under subsection (4) of Indiana Code Section 31-17-2-8.” *Id.* (citations omitted). To qualify, the interference must be “continuing and substantial.” *Id.* (citations omitted).

[27] Here, the trial court determined that a significant change occurred and that modifying custody in favor of Father was in the Child’s best interests. The trial court was chiefly concerned with Mother’s pattern of denying Father parenting time. Mother was previously found in contempt for denying Father parenting time on seventeen occasions, yet Mother continued to deny Father parenting time on twenty-three additional occasions in the span of one year. *Cf. In re Paternity of J.T.*, 988 N.E.2d 398, 401 (Ind. Ct. App. 2013) (affirming custody modification when parent “routinely” denied non-custodial parent parenting time despite contempt finding). The trial court observed that the Child felt “discomfort/trauma from being involved in the family drama,” Appellant’s App. Vol. II p. 105, to which parenting time disputes no doubt contributed. We also note that the commentary to Section 1(C) of the Indiana Parenting Time Guidelines provides:

Parents should understand it is important for a child to experience consistent and ongoing parenting time. A child is entitled to rely on spending time with each parent in a predictable way and adjusts better after a routine has been established and followed. **A parent who consistently cancels scheduled parenting time sends a very harmful message to the child that the child is not a priority in that parent's life. . . .**

(Emphasis added). The same can be said of a parent who prevents the non-custodial parent from exercising parenting time.

[28] The trial court considered two additional factors in reaching its decision. First, the trial court was concerned with the Child's escalating disciplinary record due to behavioral problems at his school. Additionally, the trial court determined that the Child wished to live with Father and assigned the Child's preference "minimal weight." Appellant's App. Vol. II p. 104.

[29] Mother argues that no significant change occurred and that modifying custody is not in the Child's best interests. She contends that Child has a good relationship with Mother and that modifying custody will require the Child to move to a new community. As we have explained, however, the Child, has received increasingly severe disciplinary action at school, largely due to his experience of being bullied, and the Child indicated to the GAL that he would be "glad" to change schools. Appellant's App. Vol. II p. 86. "[T]he paramount concern is the best interests of the child." *See Moell v. Moell*, 84 N.E.3d 741, 744 (Ind. Ct. App. 2017) (quoting *Joe v. Lebow*, 670 N.E.2d 9, 22 (Ind. Ct. App. 1996)).

[30] Mother also argues that Father engaged in “inappropriate conduct throughout the proceedings” by discussing custody issues with the Child and alleged that Father “coached the child to a fabricated abuse allegation” Appellant’s Br. p. 24. The trial court was well-aware of Mother’s allegations against Father and admonished the parties not to “discuss adult matters, such as these proceedings, with the minor child or in the presence of the child.” Appellant’s App. Vol. II p. 107. Father’s credibility was for the trial court to decide, and we cannot second-guess that determination here. Accordingly, we cannot say that the trial court abused its discretion by determining that a significant change occurred and that modifying custody in favor of Father was in the Child’s best interests.

Conclusion

[31] The trial court did not abuse its discretion by determining that a significant change occurred and that modifying custody in favor of Father was in the Child’s best interests. Accordingly, we affirm.

[32] Affirmed.

Pyle, J., and Foley, J., concur.