

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Anthony J. Saunders
New Castle, Indiana

IN THE COURT OF APPEALS OF INDIANA

Makayla Dalton,
Appellant-Respondent,

v.

Timothy Anderson,
Appellee-Petitioner.

January 12, 2024

Court of Appeals Case No.
23A-JP-1744

Appeal from the Henry Circuit
Court

The Honorable Bob A. Witham,
Judge

Trial Court Cause No.
33C01-1808-JP-51

Memorandum Decision by Chief Judge Altice
Judges Weissmann and Kenworthy concur.

Altice, Chief Judge.

Case Summary

[1] Makayla K. Dalton (Mother) appeals the trial court’s modification of legal and physical custody of her minor child, A.D., to Timothy O. Anderson (Father). Mother contends that the evidence failed to show that modification of custody and parenting time restrictions were in A.D.’s best interests, and that there was a substantial change in the mental and/or physical health of the individuals involved. *Appellant’s Brief* at 11.

[2] We affirm.

Facts and Procedural History

[3] A.D. was born to Mother and Father (collectively, the Parents) on November 9, 2017, in New Castle. The Parents, however, had ended their relationship shortly after Mother became pregnant. The trial court entered paternity and child support orders on May 2, 2019 that awarded physical and legal custody of A.D. to Mother. Father was granted parenting time on a schedule as the parties could agree.

[4] On November 28, 2022, Father petitioned to modify support and parenting time, as he had moved to North Carolina and was serving in the military. Thereafter, an agreed order set forth Father’s parenting time schedule, while Mother continued to have legal and primary physical custody of A.D.

[5] On March 8, 2023, Father filed a motion for “an ex parte/emergency order of custody,” seeking temporary custody of A.D. because Mother had been

involved in a serious motor vehicle accident the previous day. *Appellant's Appendix Vol. II* at 27. As a result of that incident, Mother was arrested and charged with two criminal offenses, including driving while intoxicated. Father further alleged in his motion that A.D. and another child were in the vehicle when the accident occurred, that both had been severely injured, and that one of the children had been "life lined" to the hospital. *Id.* Following the accident and Mother's arrest, the Indiana Department of Child Services (DCS) filed a Child in Need of Services (CHINS) petition, removed A.D. from Mother's care, and placed him with Father in early April.

[6] At a hearing on Father's petition on May 16, 2023, the trial court took judicial notice of Mother's pending criminal charges, as well as the CHINS case. Although Mother had not yet been sentenced on the charges, she was facing a potential six-year term of incarceration.

[7] Father testified that A.D. had sustained serious injuries in the automobile accident and was treated at a local hospital. Father further testified that when A.D. was initially placed with him, A.D. was "afraid of things," and had recurrent "nightmares." *Transcript* at 7. Father pointed out, however, that A.D. was undergoing therapy near the North Carolina military base where Father was stationed and was "doing fantastic." *Id.* at 9. The evidence further established that A.D. has made several friends in North Carolina, has adjusted well to Father's home, keeps a daily routine, and is in bed by 8:00 p.m. Father testified that he is married, and that A.D. is happy in their home. Father plans to enroll A.D. in kindergarten the next school year.

[8] Following the hearing, the trial court issued findings of fact and conclusions of law on June 27, 2023, and awarded sole legal and physical custody to Father—at least until Mother was sentenced in the criminal case.¹ The trial court also affirmed the order in the CHINS case that Mother should have only virtual parenting time with A.D.

[9] The trial court’s findings of fact and conclusions of law provided in relevant part as follows:

9. Based on the evidence and testimony presented, there is only one of the nine factors that the court has determined that a substantial change has occurred: (6) *The mental and physical health of all individuals involved.* All other factors, the court has reviewed and has determined that either a substantial change has not occurred or a substantial change occurred after the filing of Father’s petition to modify. *Therefore, the court will focus on this factor and the best interests of the child.*

10. The parties do not dispute that an incident occurred on March 8, 2023, that led to the child being removed from the care of Mother and a CHINS being opened regarding the minor child. The parties also do not dispute that the child was detained under that cause number. The Court is aware of the CHINS case and a pending criminal case regarding Mother arising from that incident.

11. *Evidence was presented that both children involved in the March 8, 2023, incident were severely injured during the incident while in Mother’s care and control.* Evidence was also presented that one of

¹ Mother’s sentencing hearing was scheduled for August 1, 2023.

the minor children was required to stay in the hospital for an extended period of time due to injuries received during the incident. Both Father and [the] father of the other child involved in the incident, testified to how the injuries [affected] their child and the continuing difficulties each child is having during their recovery. Those injuries directly affected the parties' minor child's mental and physical health and in turn affected both parties' mental health.

12. Father . . . testified that he had completed his training and for the foreseeable future, he would be working a 9 to 5 type of work schedule with very little chance of deployment.

13. The Court is also aware of the fact that the criminal case resulting from the incident on March 8, 2023, is pending in this Court . . . [and] is currently set for sentencing on August 1, 2023. In that case, Mother is [facing a potential] sentence of up to six (6) years on two (2) charges.

14. *Based on the evidence presented and the legal authority for change of custody, the Court finds Father has met his burden to warrant a change of custody. Modification of the current custody order is in the best interests of the child and there has been a substantial change in the mental and/or physical health of the individuals involved. With Mother's upcoming sentencing and the potential incarceration, the Court does not believe it would be in the best interests of the child to be moved from Father's custody . . . at least until after Mother's sentence is determined in the criminal case. It is ordered that Father shall have sole legal and physical custody of the parties' minor child and Mother shall have virtual visits with the child as ordered in [the CHINS case] until further order of this court.*

Appellant's Appendix Vol. II at 19-21 (emphases added).

[10] Mother now appeals.

Discussion and Decision

[11] At the outset, we note that Father has failed to file an appellee's brief. Thus, we will not undertake the burden of developing arguments for him. *See Jenkins v. Jenkins*, 17 N.E.3d 350, 351 (Ind. Ct. App. 2014). Rather, we apply a less stringent standard of review and will reverse upon a showing of prima facie error, which is error "at first sight, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006). To determine whether reversal is required, we are still obligated to correctly apply the law to the facts in the record. *Jenkins*, 17 N.E.3d at 352.

[12] In addressing Mother's contentions that the trial court erred in granting the custody modification, our standard of review is for an abuse of discretion. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010). However, when the trial court enters findings and conclusions pursuant to Indiana Trial Rule 52, as it did here, our standard of review is as follows:

First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law.

Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.

Estate of Kappel v. Kappel, 979 N.E.2d 642, 651-52 (Ind. Ct. App. 2012).

[13] In accordance with Ind. Code § 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 at least one of the following 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.

(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 8.5(b) of this chapter.

(9) A designation in a power of attorney of:

(A) the child's parent; or

(B) a person found to be a de facto custodian of the child.

I.C. § 31-17-2-8; *see also In re Marriage of B.K. and B.P.*, 873 N.E.2d 729, 737 (Ind. Ct. App. 2007), *trans. denied*.

[14] Here, Mother argues that the evidence failed to show a substantial change in circumstances that would warrant a modification of custody and parenting time restrictions. Notwithstanding her contention, the evidence at the modification hearing established that Mother was in a serious automobile accident that resulted in her arrest and the filing of criminal charges against her that included driving while intoxicated. A.D. and Mother's other child were in the vehicle when the accident occurred, and both children were injured in the collision. In fact, A.D.'s half sibling had to be airlifted to the hospital. Although Mother

had not been sentenced at the time of the modification hearing, the trial court observed that she was facing a potential sentence of up to six years of incarceration on those charges.

[15] Father testified that when DCS initially placed A.D. with him following the accident and Mother's arrest, A.D. had frequent nightmares and would wake up screaming in the middle of the night. The automobile accident also caused A.D. to become "very much afraid of things." *Transcript* at 9. Father further testified, however, that A.D. was undergoing counseling and is doing "really good with that." *Id.* at 7. While living with Father, A.D. is on a structured schedule, has made several friends, and is close to his stepmother.

[16] Based on the facts and circumstances before us, we cannot say that the trial court erred when it concluded that there has been a substantial change in circumstances that have adversely affected Mother's ability to be A.D.'s primary custodian and that modification of physical custody is in A.D.'s best interests. Also, when considering the Parents' geographic distance from each other and the potential six-year term of incarceration that Mother may face, we further conclude that the trial court properly restricted Mother's parenting time with A.D. to virtual visits consistent with the CHINS order.

[17] Judgment affirmed.

Weissmann, J. and Kenworthy, J., concur.