

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Stephon Macon,
Appellant-Respondent,

v.

Tiffany Davis,
Appellee-Petitioner

July 6, 2023

Court of Appeals Case No.
23A-JP-313

Appeal from the Marion Circuit
Court

The Honorable Melissa Hayden
Kramer, Magistrate

Trial Court Cause No.
49C01-1802-JP-8245

Memorandum Decision by Judge Crone
Judge Brown and Senior Judge Robb concur.

Crone, Judge.

Case Summary

- [1] Stephon Macon (Father) appeals the trial court’s order on modification of custody and parenting time. He asserts that the trial court abused its discretion by denying his requests for modification of custody and parenting time. We affirm.

Facts and Procedural History

- [2] Father and Tiffany Davis (Mother) were romantically involved, and they had a child (Child) on November 14, 2013. On June 22, 2018, paternity was established based on an agreed decree of paternity, whereby the parties agreed to joint legal and physical custody of Child, with each parent to have alternating weeks of parenting time. Although the record is scant regarding the parties’ co-parenting prior to this time, it apparently was successful.
- [3] On March 18, 2019, Father filed a petition for modification of custody and child support. He alleged that there had been a substantial and continuing change of circumstances rendering the original custody order contrary to Child’s best interests, in that Mother “frequently argue[d] and [was] physically aggressive toward Father in front of [Child].” Appellant’s App. Vol. 2 at 49. He further alleged that Child had exhibited violent behavior with other family members and at daycare and was in therapy for his behavioral issues, and that Mother refused to participate in family therapy. He requested that the court modify custody and grant him sole legal and physical custody of Child, with

Mother having parenting time pursuant to the Indiana Parenting Time Guidelines (IPTG).

- [4] Following a hearing, on May 10, 2019, the trial court issued a preliminary order denying Father's request for modification of custody. The trial court found that Child, who was then five years old, has had behavioral issues, began therapy services in September 2018, and was successfully discharged in March 2019. The trial court found that Child had shown improvement in his behavior while he was in therapy and that additional therapy services were not necessary. The court ordered the parties to follow their 2018 agreement and to participate in a Domestic Relations Counseling Bureau (DRCB) evaluation.
- [5] On December 30, 2019, DRCB completed a seventeen-page evaluation (the 2019 DRCB evaluation), which in summary reached the following conclusions: Mother resided with her mother, sister, cousin, Child, and Child's twelve-year old brother; Father resided in his own home with Child; the parties had both made unilateral decisions concerning Child; they were referred for co-parenting classes; Father completed the co-parenting classes; Mother's class attendance had been inconsistent, and she had not yet completed the classes; the parties had different views regarding Child's behavior and disciplinary methods; Child was exposed to his parents' arguments on a few occasions, which was likely one factor contributing to Child's behavior; Child made progress in therapy and did not appear to need additional therapy; and Child had good school attendance and appeared to be performing on average, with lower marks for personal and social development. The evaluation concluded that there did not appear to have

been a substantial change in circumstances to justify a modification of physical custody, and recommended that the parties continue joint legal custody of Child and maintain the existing physical custody arrangement.

[6] On May 31, 2021, the parties met for a parenting time exchange to transfer Child, who was then seven years old, from Father's care to Mother's. Father did not see a booster seat for Child in Mother's car. When Father moved to a position where he could use his phone to record that Mother did not have a booster seat, a confrontation between the parties occurred in front of Child. The parties disputed the details of the incident, which we discuss further below. Father recorded part of the episode on his phone. After the incident, Father called the police and filed a police report. Law enforcement contacted the Indiana Department of Child Services (DCS).

[7] On June 2, 2021, Father filed an emergency petition for modification of child custody, request for psychological evaluation, and request for supervised parenting time based on the May 2021 incident. Following a hearing, on June 25, the court issued a second preliminary order, in which it granted Father sole legal and primary physical custody pending a final hearing. The court ordered the existing parenting time schedule to remain in effect with the requirements that the parties not exit their vehicles during parenting time exchanges and that each have a weight appropriate booster seat for Child. At the time of the hearing, the police investigation of the May 2021 incident was still pending. DCS had created a safety plan for the parties, which required them to refrain from arguing or committing physical violence in front of Child. DCS was still

assessing the situation to determine whether further investigation was warranted. The court found that Mother failed to comply with prior referrals to DRCB and ordered her to cooperate with DRCB to participate in anger management services and a psychological evaluation. Also in June, Father was granted an ex parte protective order against Mother, which was in effect through June 2022.

[8] On September 20, 2021, DRCB filed a notice with the trial court indicating that Mother had failed to follow through with recommended services. On October 5, 2021, the court issued a referral to DRCB with specific instructions for Mother to have a mental health evaluation and anger management services. On November 18, 2021, Mother filed her certificate of completion of co-parenting services with the trial court. In February 2022, Mother filed a motion requesting the court to reissue its order of referral to DRCB for services, which the court did.

[9] On April 5, 2022, the DRCB completed a fourteen-page evaluation (the 2022 DRCB evaluation), which provided the following information regarding the May 2021 incident. Father claimed that he went to the driver's side door of Mother's car to take a picture to show that there was no booster seat. He claimed that Mother choked him and grabbed his phone and that Child told his mother to stop. Mother, who was pregnant at the time of the incident, told DCS that Father "leaned into her car and was on top of her stomach and she tried to push him off while he held her wrist." Ex. Vol. 1 at 90. DCS's report found that Mother's version of events appeared to be accurate, and its investigation

yielded unsubstantiated results. The evaluation stated that there have been no further conflicts related to parenting time exchanges and that parenting time appeared to have generally occurred as ordered.

[10] In addition, the 2022 DRCB evaluation indicated as follows: Mother has resided in her home for the past three years and resided with her mother, sister, Child, and Child's two brothers; Father had his own home where he lived with Child; "[b]oth parents appear to have the same goals and generally agree about things related to [Child] but do not communicate effectively and engage in some passive/aggressive decision making"; "[l]imiting inperson contact with each other appears best"; Mother had not completed anger management counseling or a mental health evaluation; Child appeared to be academically behind in his reading and language arts but was "making progress," and the school met his academic needs; Child liked his school, had made friends, and was adjusted to it; and Child "appear[ed] to be making progress in decreased negative behaviors with both parents' agreement and [Child was] showing pride in his 'new self.'" *Id.* at 99-100. The evaluation recommended that Father have sole legal custody and that the parents should continue to alternate weeks for parenting time with Child, exchanging him on Mondays after school.

[11] On October 18, 2022, DRCB filed a notice with the trial court indicating that Mother had completed anger management services. Mother's anger assessment indicated that she did "not appear to be in need of or appropriate for anger management classes." Appellant's App. Vol. 2 at 92. Also that day, Mother filed her mental health evaluation. As part of the evaluation, Mother completed

an MMPI, which is “ an objective test of personality that is designed to evaluate a number of areas of mental health functioning including personality and mood concerns.” Ex. Vol. 1 at 116. The evaluation stated that, “[b]ased on [Mother’s] response style, there are significant concerns with how she went about taking the test as two of the validity indices that deal with underreporting were very elevated.” *Id.* The evaluation concluded that “based on this test alone, no conclusions can be drawn regarding any underlying mental health concerns.” *Id.* at 117. The evaluation recommended that Mother participate in weekly individual psychotherapy.

[12] On October 19, 2022, the court held a final hearing at which both Mother and Father testified. At the close of the hearing, the court took the matter under advisement. Following Father’s motion for ruling, on January 17, 2023, the trial court issued its final order on modification of custody and parenting time, which found as follows:

10. The Court finds the Child is bonded with both parents and his maternal siblings. It was reported that the Child would hit his older brother when he was younger, but that behavior has since improved.

11. The Court finds the Child is adjusted to Father’s residence. Father lives with just the Child and the Child has his own room. The Court finds the Child is adjusted to Mother’s residence, but Mother’s household is more crowded. Mother lives with Maternal Grandma, Maternal Aunt, her two brothers, her 1 prior born child and 1 subsequent born child. The Child shares a room and a bed. The Court strongly encourages Mother to seek a place of her own.

12. Evidence supports the Child had behavioral issues while in daycare and was asked not to return to one daycare. The Child had some behavioral issues when he started school. The parties were not consistently engaged in the Child's counseling or family counseling in 2018/2019. The Child continued to display aggression, hostility, impulsivity, and lack of focus at school. The Child was behind in reading and writing. The Child was diagnosed with Disruptive Mood Dysregulation, anxiety and AD/HD. Father has been actively involved in the Child's counseling and the Child's behaviors have improved. Mother has not been active in the counseling. Mother believes the Child's behavior is normal for his age and that he does not need counseling. The Child takes medication for his behaviors. Mother does not consistently give the Child his medication. He does not receive it on the weekends he is with Mother. The Child attends [an elementary school] and he is adjusted to this school and likes this school. The Child has made friends. The Child is still behind in reading and language, but this school is meeting his academic needs. Both parents are involved in the Child's schooling, but Father has been more actively involved. Father raised a concern that the Child has been tardy or missed school when with Mother.

13. The Court does not have any concerns with Father's mental or physical health. The Court has no concerns with Mother's physical health but is concerned that it took Mother three years to complete her mental health evaluation. The evaluation found that Mother was underreporting to the extreme, so much so, that it made the results of the MMPI not valid, so it is unknown the extent of any underlying mental health concerns. It is recommended, however, that Mother attend weekly individual psychotherapy. Additionally, it took Mother 3 years to complete her anger management assessment. The assessment determined no additional classes would be needed.

14. Some evidence of domestic or family violence was presented by both parents. One incident occurred prior to the 2018 agreement on paternity and the Court is not considering that incident. The second incident occurred in 2019 where each party claims the other was yelling/threatening but the incident occurred when Father came to Mother's home to pick up the Child and the Child was present to observe. The third incident occurred in [May] 2021 also at a child exchange. The police report supports Father's side and the DCS report supported Mother's side. Both parties claim the other was the aggressor and they were just defending themselves. This incident was a physical incident that also occurred in front of the Child. These incidents no doubt have an effect on the Child. No further conflict has occurred related to a parenting time exchange.

....

16. The 2019 DRCB [evaluation] found no substantial change in circumstances to justify a modification of physical custody and the parents should continue to alternate weeks for parenting time. The 2022 DRCB [evaluation] did not recommend a change in physical custody and that the parents should continue to alternate weeks for parenting time.

17. After a careful consideration of all the evidence, testimony, demeanor of the parties and statutory factors, the Court finds that there has not been a substantial change in circumstances warranting a modification of custody.

Appealed Order at 3-5. The trial court found that it is in the Child's best interests for Father to maintain sole legal custody. It found that modification of parenting time is not in the Child's best interests and that the parties should continue to alternate weeks exchanging the Child on Monday at school. The

court ordered that the Child take all medication as prescribed by his doctor and that Mother “engage in individual psychotherapy within 60 days from the date of this Order as recommended by her mental health evaluation.” *Id.* at 9.¹ This appeal ensued.

Discussion and Decision

[13] Father asserts that the trial court abused its discretion in denying his request to modify the existing joint physical custody arrangement and grant him primary physical custody, with Mother to have visitation according to the IPTG. In ruling on his motion, the trial court entered findings and conclusions *sua sponte*. In such a case, the specific findings control only with respect to issues they cover, and a general judgment standard applies to issues outside the findings. *In re Marriage of Sutton*, 16 N.E.3d 481, 484-85 (Ind. Ct. App. 2014). “The trial court’s findings or judgment will be set aside only if they are clearly erroneous.” *Id.* at 485. A finding is clearly erroneous only if there are no facts or inferences drawn therefrom to support it. *Id.*

[14] We recognize the well-established preference in Indiana courts “for granting latitude and deference to our trial judges in family law matters.” *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016) (quoting *In re Marriage of Richardson*, 622

¹ Father mistakenly argues that the trial court abused its discretion by failing “to require Mother to engage in recommend psychotherapy.” Appellant’s Br. at 22. Father also argues that Mother should be ordered to “report the frequency, status, and termination date of any court ordered therapy or counseling for her.” Appellant’s Br. at 23. We decline to instruct the trial court on how to manage its docket.

N.E.2d 178, 178 (Ind. 1993)). “It is not impossible to reverse a trial court’s decision regarding child custody on appeal, but given our deferential standard of review, it is relatively rare.” *Hecht v. Hecht*, 142 N.E.3d 1022, 1029 (Ind. Ct. App. 2020).

[15] As our supreme court has explained,

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. 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.

The party seeking to modify custody bears the burden of demonstrating the existing custody should be altered. Indeed, this more stringent standard is required to support a change in custody, as opposed to an initial custody determination[] where there is no presumption for either parent because permanence and stability are considered best for the welfare and happiness of the child.

Steele-Giri, 51 N.E.3d at 124 (citations and quotation marks omitted).

[16] Our review in this case is also affected by the fact that Mother has not filed an appellee’s brief.

When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the

appellee's behalf. Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it. Where an appellant is unable to meet this burden, we will affirm.

Fifth Third Bank v. PNC Bank, 885 N.E.2d 52, 54 (Ind. Ct. App. 2008) (citations and quotation marks omitted).

[17] Modification of child custody is governed by Indiana Code Section 31-17-2-21(a), which provides that a trial 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 [Indiana Code Section 31-17-2-8].” In making its determination, the trial court is required to “consider the factors” listed under Section 31-17-2-8. Ind. Code § 31-17-2-21(b). Section 31-17-2-8 provides that in determining the best interests of the child, the trial court “shall consider all relevant factors,” including the following:

- (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.^[2]

[18] Father challenges the trial court's finding that there has not been a substantial change in circumstances warranting a modification of custody. Specifically, he argues that paragraph 12 of the order shows substantial changes in factor (5), in that the trial court found that Mother does not consistently give Child his medication and that Father is more actively involved in Child's schooling. Father also directs us to Mother's testimony that she did not check to see if Child had homework or whether it was completed. Father ignores the findings

² Factors (8) and (9) involve de facto custodians and designations in a power of attorney, which are irrelevant here.

that Mother believes that Child's behavior is normal for his age, Child likes his school, the school is meeting his academic needs, and *both* parents are involved in Child's schooling. As for Mother's inconsistency in providing Child with his medication, the trial court addressed this by ordering that Child take all medication as prescribed by his doctor. We conclude that Father failed to carry his burden to show that there has been a substantial change in Child's adjustment to school, home, and the community.

[19] Regarding factor (7), Father challenges the court's finding in paragraph 14 of its order that, as to the May 2021 incident, "[b]oth parties claim the other was the aggressor and they were just defending themselves." Appealed Order at 5. Father asserts that there was no testimony at the final hearing that Mother was defending herself and that she testified that she wanted Father to get out of her car. We note that the DCS report also found Mother's version of the events to be more accurate. Father does not dispute, that "[n]o further conflict has occurred related to a parenting time exchange." *Id.* at 5. Also, Mother's anger management assessment indicated that she did not need anger management services. Thus, we conclude that Father failed to carry his burden to show that there has been a substantial change regarding a pattern of domestic or family violence.

[20] Based on the foregoing, we conclude that Father has failed to show prima facie error regarding the trial court's finding that there has not been a substantial

change in circumstances warranting a modification of custody.³ Therefore, we affirm.

[21] Affirmed.

Brown, J., and Robb, Sr.J., concur.

³ Because we uphold the trial court's decision to maintain the parties' joint physical custody of Child, which provides each party with an equal share of parenting time, we need not address Father's argument that the trial court abused its discretion by denying his request to reduce Mother's parenting time.