

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lisa DeCastro,
Appellant-Respondent,

v.

John DeCastro,
Appellee-Petitioner

July 7, 2023

Court of Appeals Case No.
22A-DR-1941

Appeal from the Johnson Superior
Court

The Honorable Peter D. Nugent,
Judge

Trial Court Cause No.
41D02-1506-DR-314

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Lisa DeCastro (“Mother”) appeals the Johnson Superior Court’s order granting John DeCastro’s (“Father’s”) petition for modification of custody of the parties’ children, Ca.D. and Co.D. (collectively, “the Children”). Mother presents three issues for our review:

1. Whether the trial court abused its discretion when it considered the report of the Guardian ad Litem (“GAL”) after the trial court had removed the GAL on Mother’s motion.

2. Whether the trial court abused its discretion when it found that there was a substantial change in circumstances to justify a modification of custody.

3. Whether the trial court abused its discretion when it awarded Father sole legal custody of the Children.

[2] We affirm.

Facts and Procedural History

[3] Mother and Father were married and have two children together, Ca.D., born October 1, 2011, and Co.D., born July 31, 2013. The parties divorced in January 2016, and Mother was awarded primary physical custody of the Children, with the parties sharing legal custody.

[4] Beginning when he was a toddler, Ca.D. has displayed concerning behaviors. By 2018, Ca.D. was showing “signs of anxiety and depression” and “an increase in anger” and suicidal ideation. Ex. p. 12. Ca.D. is physically aggressive with peers and, on occasion, with his sister. Accordingly, Mother initiated therapy for Ca.D., but he only attended for a few months.

- [5] When Ca.D.’s behaviors were not improving and seemed to get worse, in July 2021, Father found a new therapist for Ca.D., Jennifer Campbell. Campbell diagnosed Ca.D. with Disruptive Mood Dysregulation Disorder (“DMDD”), finding that Ca.D. exhibited “extreme irritability, anger, and frequent temper outbursts.” *Id.* at 15. Campbell believed that Ca.D. was at risk of self-harm, and she recommended to Ca.D.’s nurse practitioner that he be prescribed a mood-regulating medication and undergo a psychological evaluation.
- [6] In September, Father filed a verified petition for modification of custody of the Children. Father alleged that Ca.D.’s anger issues had resulted in his suspension from school three times during the school year; that Ca.D.’s pediatrician had recommended that he take medication, but that Mother “refused to consent” to the medication; and that Ca.D.’s therapist had “expressed concerns to Father that [Ca.D.] sharing a bed . . . with Mother, and other activities that occur at Mother’s home, have created enmeshment, anxiety, and independence issues that have exacerbated [Ca.D.]’s anger management and control issues.” Appellant’s App. Vol. 2, p. 51.
- [7] In November, the trial court appointed a GAL, Kimberly Mattingly. And in November and December, Ca.D. underwent a psychological evaluation. In January 2022, with Mother’s agreement, Ca.D. began taking Abilify. The psychological evaluation indicated that Ca.D. has DMDD and autism spectrum disorder (“ASD”). In addition, “[p]ersonality testing suggested symptoms of anxiety, depression, mood lability, self-esteem issues, and interpersonal relationship difficulties.” Ex. p. 29. The psychological evaluator noted the

differences between Father's and Mother's houses, including different rules and consequences for bad behavior, as well as the fact that Ca.D. sleeps with Mother when he is overnight at her house. The evaluator recommended continued therapy for Ca.D., as well as family therapy to help "with adjustment and changes in each home, i.e., learning to sleep alone, rules, and reactions to consequences for misbehavior, etc." *Id.*

[8] On February 11, the GAL filed her report with the trial court, including her recommendation that the court award Father sole legal and primary physical custody of the Children. On February 22, the trial court held an evidentiary hearing on all pending motions, including Father's petition to modify custody. Before the trial court issued its order, on April 11, Mother filed a motion for the removal of the GAL alleging bias and a conflict of interest. The trial court granted that motion.

[9] On April 29, the trial court issued its order granting Father's petition to modify custody of the Children. In its findings and conclusions, the trial court stated that it had considered the GAL's report, the psychological evaluation of Ca.D., and the parties' testimony. The trial court found that "a substantial and continuing change in circumstances exists" to support the modification, namely, Ca.D.'s mental health issues. Appellant's App. Vol. 2, p. 79. The court concluded that Father would have sole legal and primary custody of the

children. Mother filed a motion to correct error, which the trial court denied.¹ This appeal ensued.

Discussion and Decision

Standard of Review

[10] Mother appeals the trial court’s grant of Father’s petition to modify custody. In granting the petition, the court entered findings of fact and conclusions thereon following an evidentiary hearing. In such appeals, we review the court’s judgment under our clearly erroneous standard. *Jones v. Gruca*, 150 N.E.3d 632, 640 (Ind. Ct. App. 2020), *trans. denied*. “We ‘neither reweigh evidence nor judge witness credibility.’” *Id.* (quoting *R.L. v. Ind. Dep’t of Child Servs. & Child Advocates, Inc.*, 144 N.E.3d 686, 689 (Ind. 2020)). Rather, a judgment is clearly erroneous only when there are no record facts that support the judgment or if the court applied an incorrect legal standard to the facts. *Id.*

Issue One: GAL’s Report

[11] Mother first contends that the trial court abused its discretion when it relied on the GAL’s report in support of the custody modification.² Mother maintains that the report was the product of the GAL’s “clear bias” against Mother and her “undisclosed conflict of interest.” Appellant’s Br. at 9. We disagree.

¹ The court later issued an amended order to correct a scrivener’s error.

² Notably, Mother does not challenge the trial court’s reliance on the GAL’s testimony, which Mother alleges was inconsistent with her report.

[12] In support of her motion to remove the GAL, Mother stated that on February 21, 2022, the GAL had filed a lawsuit against several Marion County Judges, including Marc Rothenberg, who is married to Stephanie Rothenberg, who is an attorney practicing in the same firm as Mother’s attorney in this custody proceeding. Mother argued that the GAL did not disclose the lawsuit, and she alleges that disclosure of the lawsuit “would have been vital in order for the parties to consider how to proceed in order to avoid any actual conflict or appearance of such.” Appellant’s App. Vol. 2, p. 75. In response to Mother’s motion, the trial court removed the GAL. Still, the trial court later considered the GAL’s report and testimony, along with the psychological evaluation and the parties’ testimony, when it granted the petition to modify custody.

[13] On appeal, Mother asserts that the GAL was biased against Mother, as evidenced by the GAL’s failure to disclose the lawsuit. But we agree with Father that there is no indication of bias. In any event, Mother did not move to strike either the GAL’s report or her testimony at the evidentiary hearing on February 22, 2022, some of which was duplicative of the findings in her report, and the issue is waived. *See Ind. Evid. Rule 103(a)* (stating that, to preserve alleged error in the admission of evidence, a party must object or move to strike the evidence).

Issue Two: Substantial Change in Circumstances

[14] Mother next contends that there is no evidence of a substantial change in circumstances to support the modification of custody. [Indiana Code section 31-17-2-21](#) 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 or more of the factors that the court may consider under [Indiana Code section 31-17-2-8](#). [Section 31-17-2-8](#) provides that the trial court is to consider all relevant factors, including:

- (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. . . .

[15] Mother maintains that the trial court's stated reason for modification of custody, namely, Ca.D.'s mental health issues, does not support modification because his mental health issues have not changed significantly since the initial custody order in 2016. In support of her argument on appeal, Mother points out that the parties both testified that Ca.D. had been exhibiting mental health issues since he was a toddler, well before the parties' divorce. Mother testified that she had sought therapy for Ca.D. and had recently agreed that Ca.D. would take medication as prescribed. And Mother states that she has complied with the recommendations set out in the psychological evaluation of Ca.D.

[16] However, Father contends that the evidence shows that Ca.D.'s mental health issues have worsened, significantly, over the last few years. Father cites the evidence that the year immediately preceding the evidentiary hearing was "particularly hard" for Ca.D.; that his outbursts were "worse"; and that he recently had bitten a friend's arm. Tr. pp. 50, 104. Father testified that Co.D. had grown afraid of Ca.D. The GAL opined that Father was better able than Mother to meet Ca.D.'s mental health needs, and the trial court obviously agreed. Mother's contention on appeal amounts to a request that we reweigh the evidence, which we will not do. The trial court did not abuse its discretion when it awarded Father primary custody of the Children.

Issue Three: Legal Custody

[17] Finally, Mother contends that the trial court abused its discretion when it awarded Father sole legal custody of the Children. As this Court has explained,

[w]hen considering a modification from joint legal custody to sole legal custody, we must determine whether there has been a substantial change in one or more of the factors listed in [Indiana Code section 31-17-2-15](#), in addition to considering any substantial change to the factors in [Indiana Code section 31-17-2-8](#),¹ as is typically necessary for physical custody modifications. *Milcherska v. Hoerstman*, 56 N.E.3d 634, 641 (Ind. Ct. App. 2016). [Indiana Code section 31-17-2-15](#) provides that[,] in evaluating a legal custody arrangement, the court shall consider the following factors:

(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.

J.W. v. M.W., 77 N.E.3d 1274, 1277-78 (Ind. Ct. App. 2017). And this Court has held that the second factor above is significant:

Our courts have reiterated that factor (2), whether the parents are willing and able to cooperate in advancing the child’s welfare, is of particular importance in making legal custody determinations. *Julie C. [v. Andrew C.]*, 924 N.E.2d [1249,] 1260 [(Ind. Ct. App. 2010)]; *see also Carmichael [v. Siegel]*, 754 N.E.2d [619,] 635 [(Ind. Ct. App. 2001)] (“One of the key factors to consider when determining whether joint legal custody is appropriate is whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare.”). Where “the parties have made child-rearing a battleground, then joint custody is not appropriate.” *Periquet-Febres v. Febres*, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995). “Indeed, to award joint legal custody to individually capable parents who cannot work together is tantamount to the proverbial folly of cutting the baby in half in order to effect a fair distribution of the child to competing parents.” *Swadner v. Swadner*, 897 N.E.2d 966, 974 (Ind. Ct. App. 2008) (quotation omitted).

Milcherska, 56 N.E.3d at 641-42.

[18] Here, Mother maintains that the trial court’s reason for awarding Father sole legal custody, that “the parties cannot seem to agree on much,” is due to Father’s “unwillingness to communicate and cooperate with Mother.” Appellant’s Br. at 20. And Mother directs us to evidence to support her

assertion. But Mother's argument is merely a request that we reweigh the evidence, which is contrary to our standard of review. The evidence shows that both parties are responsible for their contentious relationship, and we cannot say that the trial court abused its discretion when it awarded Father sole legal custody of the Children.

Conclusion

[19] For all these reasons, we affirm the trial court's grant of Father's petition for modification of custody of the Children.

[20] Affirmed.

Vaidik, J., and Pyle, J., concur.