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IN THE  
COURT OF APPEALS OF INDIANA

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David Ross Sanford,  
*Appellant-Respondent,*

v.

Elise Danielle Wilburn,  
*Appellee-Petitioner.*

March 31, 2022

Court of Appeals Case No.  
21A-DR-1023

Appeal from the  
Putnam Circuit Court

The Honorable  
Joseph D. Trout, Special Judge

Trial Court Cause No.  
67C01-1005-DR-118

**Molter, Judge.**

- [1] In this custody dispute, the trial court changed primary physical custody of thirteen-year-old M.S. (“Child”) from David Ross Sanford (“Father”) to Elise Danielle Wilburn (“Mother”) shortly after a previous judge had changed custody from Mother to Father. The court also denied Father’s request for an order requiring Mother to reimburse him for probation fees he paid on behalf of

Child stemming from an incident where Mother and Child keyed a car in a Wal-Mart parking lot.

- [2] On appeal, Father contends there was no substantial change in circumstances justifying the second change of custody so soon after the first, and the trial court erred in declining to require Mother to reimburse him for Child’s probation fees. We agree with Father that the trial court erred in modifying custody when there was no substantial change with respect to the statutory considerations for the Child’s best interests, and we therefore reverse that portion of the court’s order. However, we do not find any error in the court’s decision denying Father’s request for reimbursement of probation fees based on a lack of evidence, so we affirm that portion of the order.

### **Facts and Procedural History**

- [3] Child was born to Mother and Father in October 2007, and in January 2011, Mother and Father’s marriage was dissolved. They shared joint legal custody of Child with Mother having primary physical custody. Mother, Child, and Child’s half-sibling live in Greencastle, Putnam County, in Mother’s parents’ home. Father and his wife (“Stepmother”) live in Brownsburg, Hendricks County.
- [4] In February 2020, Father filed a motion to change custody for primary physical custody of Child. On July 27, 2020, the trial court granted Father’s motion, concluding there was a substantial change in circumstances while Child was in Mother’s custody, including (a) Child struggled in school and often missed

school because Mother failed to take her there; (b) Mother moved Child from one school to another school without telling Father and without considering how the move would impact Child; and (c) Mother sent Child to a therapist but would not tell Father who the therapist was. Appellant’s App. Vol. II at 51–52, 58. The trial court also found that (a) Mother denied parenting time to Father, allegedly because of the Covid-19 pandemic, until “lawyers got involved”; (b) Father would provide a more stable environment; and (c) Father had a more “structured plan” for Child. *Id.* at 52, 59–61. The trial court acknowledged that changing primary physical custody “w[ould] not be easy, but for the long-term health of [Child], this is the court’s conclusion.” *Id.* at 61. Mother did not appeal this ruling.

[5] On August 11, 2020—just fifteen days after the trial court granted Father’s motion to change custody—Mother filed two reports with the Department of Child Services alleging that Father and Stepmother were neglecting Child. Specifically, Mother alleged Stepmother had driven a vehicle while intoxicated with Child as a passenger, beat up Father in front of Child, and called Child vulgar names. Mother alleged Father criticized Child for not understanding her homework and criticized her appearance. The Department investigated these allegations and found them to be unsubstantiated.

[6] One week later, on August 18, 2020, Mother petitioned for a protective order on Child’s behalf against Stepmother. Roughly a week after that, Mother and Child were in a Wal-Mart parking lot and each one of them keyed the same car. A bystander caught them on video, and that video was widely circulated on

social media. As a result, Father asked the trial court that same day to require supervision of Mother's parenting time. Both Mother and Child were charged for the keying incident. Mother's case was resolved through pretrial diversion, and Child was adjudicated as a delinquent child and was placed on probation. Father paid Child's probation fees and asked the court to order Mother to reimburse him.

[7] On September 4, 2020, eleven days after Mother keyed the car, she filed a motion for change of judge without stating any basis. The motion was granted without explanation on September 8, 2020, and the same day, Mother dismissed her petition for a protective order. Two days later, and only forty-four days after the trial court changed primary physical custody of Child to Father, Mother filed a motion to change primary physical custody of Child.

[8] On February 15, 2021, the trial court conducted a hearing on Mother's motion. Mother testified that Child was "spiraling downhill a little bit since she has had to transition to [Father's] house." Tr. at 185. Mother claimed Child was despondent, and to support her testimony, she introduced into evidence a photo of Child that Child had posted on Snapchat that showed Child crying, holding a tissue, and captioned: "This photo is from today as I cried and vomited in the bathroom at work." *Id.* at 171–74; Ex. Vol. IV at 59. Mother testified it was in Child's best interest to return to Mother's home: "Do I think it would be in the best interest if she came back with me, yes. Just because a 13-year-old, hormonal teenager needs her mom as much as her mom needs her." Tr. at 185.

[9] Father testified that Child was upset when she first moved in with him and Stepmother but her mood had improved and she had transitioned well into Brownsburg East Middle School, where her grades were better than when she attended Putnam County Schools. *Id.* at 83, 110–11. The hearing ended, and the trial court later interviewed Child *in camera*. Tr. at 216–17.

[10] On May 27, 2021, the trial court issued its Findings of Fact and Conclusions of Law on Mother’s motion to change physical custody of Child and Father’s motion to find Mother in contempt. In part, the trial court found and concluded:

FINDINGS OF FACT

. . . .

13. Normally, this Judge would never divulge the contents of an in-camera interview[] but finds it necessary in this case. Quite frankly, this Judge has never seen a [thirteen-year-old] more homesick than [Child] is. Child misses South Putnam school. She misses her mother. She misses her sister. She likes South Putnam in that there were fewer children and more one-on-one contact and she enjoys meeting with [her therapist]. She is depressed living with her dad and participates in no sporting events, when she did so before in Putnam County. She misses living in her old house and in her new house, she feels depressed and stays in her room a lot of the time. She feels like she has depression and anxiety. She misses her family and her friends in Putnam County, and she is overall unhappy.

14. These opinions of [Child] were supported by the evidence of Mother basically raising her; her close relationship with maternal

grandmother and maternal grandfather; her close relationship and bond with Mother; her close relationship and bond with her younger half-sibling; her experience in the South Putnam school system and her description of her friends; and her overall desire to “go home.” Further evidence in support is the fact that both Father and [Stepmother] indicated that it was a struggle for [Child] making the adjustment in the beginning. The Court finds that that struggle has continued.

....

### CONCLUSIONS OF LAW

....

19. The Court finds that there are substantial and ongoing changes in circumstances. [Child] is now 13 and 1/2 years old. The wishes of [Child] are outlined in the Findings of Fact, and [Child] is almost 14 years of age. [Child’s] interaction and inter-relationships with parents and siblings is a factor, and also with friends, and maternal grandmother and maternal grandfather.

20. Child’s adjustment to the [Father’s Brownsburg] home, school and community has become a factor in favor of Mother.

21. . . . Child wishes to “go home.” These wishes of Child are reinforced by additional factors found by the trial court, which are supported by the evidence.

22. Any request to recalculate child support is denied due to lack of evidence presented on that issue.

Appellant’s App. Vol. II at 25–26, 28. In a separate order issued the same day, the trial court granted Father’s motion to find Mother in contempt based on her failure to follow the prior custody order and ordered her to pay his attorney fees. Father now appeals.

## **Discussion and Decision**

### **I. Change of Custody**

- [11] Father contends the trial court erred in granting Mother’s motion to change primary physical custody. We agree.
- [12] The polestar for child custody determinations is what is in the best interests of the child, but the best interests are determined differently for initial custody decisions than for modifying custody. For the initial custody determination, “there is no presumption favoring either parent.” Ind. Code § 31-17-2-8. Instead, the court assesses the child’s best interests by weighing “all relevant factors,” including the age and sex of the child; the parents’ and child’s wishes; the child’s interactions with family members and others; the child’s adjustment to their home, school, and community; the mental and physical health of those involved; family violence; care by a de facto custodian; and a designation in a power of attorney of the child’s parent or custodian. *Id.*
- [13] After the initial custody determination, there is a presumption in favor of maintaining the status quo because generally “permanence and stability are considered best for the welfare and happiness of the child.” *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992). The General Assembly has directed that a trial

court may not modify child custody unless “there is a substantial change” in the statutory best interests considerations. Ind. Code § 31-17-2-21(a)(2). A substantial change requires more than isolated misconduct. *Collyear-Bell v. Bell*, 105 N.E.3d 176, 184 (Ind. Ct. App. 2018).

[14] The alleged change in circumstances is evaluated in the context of the child’s environment, and the effect of the change on the child is what makes it either substantial or inconsequential. *In re Marriage of Sutton*, 16 N.E.3d 481, 485 (Ind. Ct. App. 2014). As a result, “a change that might be regarded as slight or inconsequential in one case might be catastrophic in another.” *Poret v. Martin*, 434 N.E.2d 885, 888 (Ind. 1982). Even if there is a substantial change, the trial court still can only modify custody if it is in the child’s best interests. Ind. Code § 31-17-2-21(a)(1).

[15] “We review custody modifications for abuse of discretion with a preference for granting latitude and deference to our trial judges in family law matters.” *Wilson v. Myers*, 997 N.E.2d 338, 340 (Ind. 2013). “Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.” *Matter of Paternity of B.Y.*, 159 N.E.3d 575, 578 (Ind. 2020). This is because the trial judge “is in the best position to judge the facts, to get a feel for the family dynamics,” and “to get a sense of the parents and their relationship with their children,” all of which are “qualities that appellate courts would be in a difficult position to assess.” *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940–41 (Ind. 2005).



[16] Even with this substantial deference—and especially mindful that we not only defer to the second judge’s exercise of discretion but the first judge’s as well—we must reverse the trial court’s most recent custody modification order because there is no evidence that there was a substantial change in circumstances justifying a change of custody. *See* Ind. Code § 31-17-2-21(a)(2). Given the presumption that primary physical custody should remain with Father, we begin our analysis with the order granting Father custody in the first place.

[17] When the previous judge found there was a substantial change warranting a change of physical custody from Mother to Father, it was because Child was struggling at home and at school. She was stressed and anxious, she was missing school, and her grades were suffering. Mother enrolled Child in mental health therapy, “but for some inexplicable rational reason, [M]other refused to tell [Father] with whom.” Appellant’s App. Vol. II at 59. Both Child and her guardian ad litem noted Child had anxiety, which was exacerbated by the fact that her parents had “drawn their swords” and that they “talked badly about each other in front of her.” *Id.* at 52–53. Child had wished to stay with her mother, but her “big wish [was] that her parents would not speak so negatively of one another.” *Id.* at 56–57.

[18] Notwithstanding Child’s wish for physical custody to remain with Mother, the trial court concluded that the substantial changes in circumstances warranted changing custody to Father. It concluded this was in Child’s best interests in part because Father would provide more structure and the best environment for

Child to thrive. *Id.* at 61. The court acknowledged “this change will not be easy,” but it was best “for the long-term health of the child.” *Id.*

[19] Mother did not appeal this order, and she did not sheath her sword. She almost immediately made unsubstantiated allegations of neglect against Father and Stepmother and sought a protective order against Stepmother on behalf of Child, which request was then dismissed. Just forty-four days after the custody modification—two weeks after the appeal deadline had run—she filed her petition for modification in front of a new judge.

[20] The change that the second judge found warranting custody modification was that Child was homesick following the previous modification. As he explained:

Quite frankly, this Judge has never seen a [thirteen-year-old] more homesick than [Child] is. Child misses South Putnam school. She misses her mother. She misses her sister. She likes South Putnam in that there were fewer children and more one-on-one contact and she enjoys meeting with [her therapist]. She is depressed living with her dad and participates in no sporting events, when she did so before in Putnam County. She misses living in her old house and in her new house, she feels depressed and stays in her room a lot of the time. She feels like she has depression and anxiety. She misses her family and her friends in Putnam County, and she is overall unhappy.

[21] While the court took judicial notice of the prior judge’s custody modification order, the court did not explain how these circumstances reflected a substantial change from the circumstances reflected in the recently issued prior order.

[22] Again, the previous judge anticipated that “this change will not be easy,” but he also concluded the change of custody to Father was best “for the long-term health of the child.” *Id.* at 61. Child’s depression and anxiety are part of what led to custody being modified to Father, and missing her old school and house is an inevitable consequence of a change in custody that she had said she did not want in the first place. The previous judge took all that into account and determined that other factors weighed more heavily in favor of Father having custody, and we must defer to that determination.

[23] To be sure, a change in custody may go poorly, and the unexpected challenges might be significant enough to justify changing custody again. We defer to trial courts to make determinations like that. But that is not what the court’s findings reflect here, and the trial court foreshadowed this analysis. It noted that it is “alarming” that Mother did not appeal the order modifying custody to Father and that, at least initially, this seemed “to be judge shopping for a different opinion.” *Id.* at 25. It also noted that “[t]he difficulty in this decision is because of the fact that Father presented a near-flawless case in regard to Mother’s non-compliance and non-compliance with the meaning of joint legal custody, and he [and] his wife’s ability to provide stability, food, clothing, shelter, medical care, education, and supervision.” *Id.* at 26. And on the same day that the Court modified custody back to Mother, it also held her in contempt and ordered her to pay Father’s attorney fees for interfering with Father’s attempt to pick up his daughter after school for his parenting time. *Tr.* Vol. III at 16.

[24] Rather than making this a difficult case, these considerations are what make it rather straightforward. A parent cannot undo a custody modification order by simply waiting a few weeks<sup>1</sup> and filing a new modification petition in front of a new judge. There must be substantially changed circumstances related to the statutory considerations for child custody when compared to those reflected in the previous modification order, and the second judge's findings here do not support such a conclusion. We therefore reverse the portion of the trial court's order modifying primary physical custody to Mother.

## II. Reimbursement of Probation Fees

[25] Father also argues that the trial court erred by failing to rule on his request that Mother reimburse him for Child's probation fees. Father frames this as a child support issue because the probation fees were an "extraordinary expense" as described in Indiana Child Support Guideline 8. Father argues:

Given that this expense was not factored into the child support calculation; the expense was incurred as a result of Mother's behavior, under her supervision; the expense was not a regular incurred expense; and was without controvert not something Father consented to, Mother should bear the entire cost of the same or at a minimum at least a portion of the same.

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<sup>1</sup> We recognize that the hearing on the petition for custody modification was held more than five months after the petition was filed and that much of the evidence at the hearing pertained to events which occurred after the petition was filed. None of that evidence of post-petition events supported a finding or conclusion that there was a substantial change in circumstances at the time the petition was filed warranting a change in custody, and Mother does not contend that the custody modification here could be properly based on changes subsequent to the petition to modify custody.

Appellant's Br. at 23.

[26] But the trial court did rule on Father's child support request, stating: "Any request to recalculate child support is denied due to lack of evidence presented on that issue." Appellant's App. Vol. II at 28.

[27] Father does not explain how the trial court's order was mistaken in this regard, including that his brief does not point to evidence regarding fees that he presented at the final hearing. He does point to his "Notice to the Court," which submitted proof of his payment of the fees, but he did not tender the Notice as evidence at the final hearing and instead filed it with the trial court almost one month after the final hearing. Appellant's Conf. App. Vol. II at 32–35. Finding no error here, we affirm this part of the trial court's order.

[28] Reversed in part and affirmed in part.

Riley, J., and Robb, J., concur.