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IN THE
COURT OF APPEALS OF INDIANA

Samantha D. Ellenburg,
Appellant-Respondent,

v.

Calvin J. Kropp,
Appellee-Petitioner.

September 17, 2021

Court of Appeals Case No.
21A-JP-574

Appeal from the Decatur Circuit
Court

The Honorable Matthew Bailey,
Special Judge

Trial Court Cause No.
16C01-1103-JP-49

Bradford, Chief Judge.

Case Summary

[1] Samantha D. Ellenburg (“Mother”) and Calvin J. Kropp (“Father”) (collectively “Parents”) have two children together, R.K. and C.K., (collectively “Children”) who were, respectively, fourteen and eleven years old at the time of the custody hearing. Previously, Parents shared legal custody and Mother had physical custody while Father exercised parenting time according to the Indiana Parenting Time Guidelines, with additional Sunday overnights and alternating Monday and Wednesday nights. In 2020, Mother was convicted twice and arrested once for conduct involving alcohol and the operation of a motor vehicle; in response, on July 1, 2020, Father filed a petition for modification of custody, parenting time, and child support. On August 6, 2020, Mother filed a petition to modify, alleging that there had been a substantial change in circumstances due to issues between Father’s wife, Heather Kropp, and the Children. On March 26, 2021, the juvenile court held a hearing on the petitions. On April 1, 2021, the juvenile court issued an order modifying physical custody of the Children from Mother to Father and granted Father sole legal custody of the Children. Mother argues that the juvenile court erred in determining that there had been a substantial change in circumstances and improperly granted full legal custody to Father *sua sponte*, as neither Parent requested as much during the hearing or in their briefs. Concluding that the trial court acted within its discretion by granting Father physical and sole legal custody to Father, we affirm.

Facts and Procedural History

- [2] Mother and Father have two children together, R.K. and C.K. who were fourteen and eleven years old at the time of the custody hearing. Previously, Parents shared legal custody and Mother had physical custody while Father exercised parenting time according to the Indiana Parenting Time Guidelines, with additional Sunday overnights and alternating Monday and Wednesday nights.
- [3] In 2020, Mother had an alcohol problem which manifested in a number of criminal incidents. Mother was convicted twice, under two separate cause numbers, for Class B misdemeanor public intoxication on May 21, 2020. Mother was also arrested on June 28, 2020, at 3:26 a.m. and subsequently charged with Class C misdemeanor operating a motor vehicle while intoxicated endangering a person and violating the terms of her probation.
- [4] In response to these incidents, on July 1, 2020, Father filed a petition for modification of custody, parenting time, and child support. Father alleged that, because of Mother's alcohol related issues, there had been a substantial change in circumstances. On August 6, 2020, Mother filed a petition to modify, alleging that there had been a substantial change in circumstances due to conflict between Heather and the Children. While Mother's petition made no request to change legal custody, only physical custody, Father's petition asked generally that the court "make a modification of current custody" and "make

appropriate orders with respect to custody and parenting time [...] and for all other appropriate relief.” Appellant’s App. Vol. II, pp. 17–18.

- [5] On March 26, 2021, the juvenile court held a hearing on the petitions. On April 1, 2021, the juvenile court issued an order modifying physical custody of the Children from Mother to Father and granted Father sole legal custody of the Children. In support of its decision, the trial court expressed concern that Mother had four separate criminal cases, Mother had a plan to potentially cohabitate with a convicted felon upon his release from incarceration, and Mother decided to leave the Children in the care of a repeat criminal offender, among other findings.

Discussion and Decision

- [6] “The [juvenile] court is vested with the sound discretion to make custody determinations, and we will uphold the [juvenile] court’s judgment absent an abuse of discretion.” *Gonzalez v. Gonzalez*, 893 N.E.2d 333, 335 (Ind. Ct. App. 2008) (citing *Liddy v. Liddy*, 881 N.E.2d 62, 69 (Ind. Ct. App. 2008) *trans. denied*). “A [juvenile] court’s custody determination is afforded considerable deference as it is the [juvenile] court that sees the parties, observes their conduct and demeanor and hears their testimony.” *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 945–46 (Ind. Ct. App. 2006) (citing *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 509 (Ind. Ct. App. 2002), *trans. denied*). We will not reweigh evidence or reassess witness credibility. *M.S. v. C.S.*, 938 N.E.2d 278, 281–82 (Ind. Ct. App. 2010). “We will not substitute our own judgment if any

evidence or legitimate inferences support the [juvenile] court’s judgment. The concern for finality in custody matters reinforces this doctrine.” *Baxendale v. Raich*, 878 N.E.2d 1252, 1257–58 (Ind. 2008) (citing *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)).

I. Physical Custody

[7] Mother contends that the juvenile court abused its discretion in modifying physical custody of the Children when it determined that there had been a substantial change in circumstances, as she argues that this is against the logic and effects of the facts and circumstances of this case. Specifically, Mother argues that the juvenile court’s findings do not support the inference that there has been a substantial change in circumstances, because none of them have had an effect on the Children, and that it is not in their best interest to have physical custody awarded to Father because the Children would prefer to stay with her due to their strained relationship with Father and his wife. We are unpersuaded.

[8] In its order, the juvenile court listed seven findings in support of its decision:

a) Mother has had four separate criminal cases including violation of her probation.

b) The Court adopts the CASA’S testimony that Mother was “spiraling out of control”. To her credit, Mother has completed an Intensive Outpatient Program through Centerstone.

c) While Mother testified she vows not to consume alcohol or to have future criminal issues, her testimony that she plans to

cohabitate with a convicted felon upon his release from the Department of Correction is troubling with respect to influence on the children.

d) Mother left the children in the care of her cousin Daniel Keihn, a repeat criminal offender who was living with Mother and the children for a six-month period.

e) Mother allowed the children to make decisions regarding visitation and counseling that are adult decisions.

f.) Mother defied the visitation order in the summer of 2020 and was convicted of the crime of Interference With Custody.

g) Father has a stable home life and stable relationship with his wife Heather.

Appellant's App. Vol. II, pp. 11–12. Mother, rather than taking issue with any of these individual findings, merely insists that these findings, while true, do not establish a nexus of harm to the Children, and so there can be no substantial change in circumstances. We disagree. Mother committed three criminal acts involving alcohol and/or driving in just a few months, and also violated the terms of her probation. While she has taken steps to remedy those mistakes, there are other troubling signs which gave the juvenile court reason to modify custody. Further, the juvenile court was also concerned for Children that Mother would let a repeat-criminal offender stay with her and the Children and planned to cohabitate with a convicted felon. Given the seriousness of those findings, we see no reason to forgo our usual deference for the juvenile court in this case. "A [juvenile] court's custody determination is afforded

considerable deference as it is the [juvenile] court that sees the parties, observes their conduct and demeanor and hears their testimony. *Kondamuri*, 852 N.E.2d at 945–46 (citing *Trost-Steffen*, 772 N.E.2d at 509).

II. Legal Custody

[9] In his petition, Father asked the juvenile court to “make a modification of current custody” and “make appropriate orders with respect to custody and parenting time [...] and for all other appropriate relief[,]” Appellant’s App. Vol. II, pp. 17–18. Mother contends that the juvenile court erred in awarding Father sole legal custody based on such a vague statement, as she argues that the issue was not before the juvenile court and that the ruling was a prohibited *sua sponte* order to change custody. “It has been long established that [juvenile] courts may not *sua sponte* order a change of custody.” *Madden v. Phelps*, 152 N.E.3d 602, 610 (Ind. Ct. App. 2020) (citing *State ex rel. Davis v. Achor*, 225 Ind. 319,327, 75 N.E.2d 154, 157 (1947)). In *Madden v. Phelps*, on which Mother relies, another panel of this court concluded that the pleadings and argument before the court were too vague to have granted the juvenile court the authority to grant the father in that case sole legal custody. In *Madden*, neither the mother or the father made pleading indicating that they sought legal custody, and father confirmed that he and mother had joint legal custody and would continue to do so even if his pleadings were successful: “When asked by Mother’s counsel, ‘but my client, even if you get what you want, would still have joint legal custody rights, correct?’ Father responded, ‘I believe so, yes, ...

As I understand it.’” *Madden*, 152 N.E.3d at 609. The *Madden* court reasoned that

Although Father asserted during the hearing that he wanted to legally change who made most of the decisions about B.P., when Mother’s counsel observed that Mother would still have joint legal custody of B.P. even if Father received primary physical custody, Father affirmed that was his understanding. Thus, Mother did not believe that legal custody was in play, and Father did not indicate that he sought sole legal custody. Neither party submitted proposed findings of fact and conclusions requesting sole legal custody.

Id. at 612. Therefore, the *Madden* court concluded, the parents in that case had not “consented to try the issue of joint legal custody during the hearing.” *Id.* We find *Madden* and this case to be distinguishable. Additionally, we note that, while the parties did argue for physical custody before the trial court and elsewhere in their pleadings, Mother’s argument would suggest that the petition in question would also have been too vague on its own to put the issue of physical custody before the trial court as well.

[10] Indiana Code section 31-17-2-15 states that “In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody.” Further, Indiana Code section 31-17-2-15 enumerates “one of the factors for courts to consider “whether the persons awarded joint custody are willing and able to communicate and cooperate in

advancing the child’s welfare.” Despite the fact that the parties might have previously agreed on joint legal custody, we believe that Father’s pleadings, asking that the court “make a modification of current custody” and “make appropriate orders with respect to custody and parenting time [...] and for all other appropriate relief[,]” Appellant’s App. Vol. II, pp. 17–18, sufficiently place the issue of legal custody before the court. Further, Mother asked for a change in physical custody in her pleadings, bringing the issue of custody before the court. In addition, the parties presented arguments and evidence which put into question the issue of legal custody. So, as with all custody considerations, the juvenile court was tasked with, above all, determining the “best interest of the child,” Ind. Code § 31-17-2-15, despite any evidence of an agreement by the parties as to legal custody. Therefore, we cannot say that the trial court erred by awarding sole legal custody to Father.

[11] The judgment of the juvenile court is affirmed.

Robb, J., and Altice, J.,