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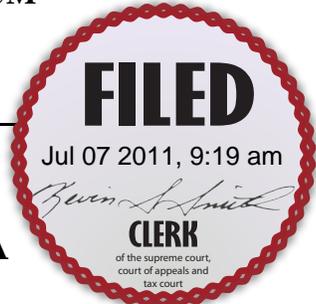
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF)
RICK W. BAGBY, II,)
)
Appellant-Respondent,)
)
vs.)
)
CARLA M. (BAGBY) BROWELL,)
)
Appellee-Petitioner.)

No. 82A01-1011-DR-609

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D04-0305-DR-544

July 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Rick W. Bagby (“Father”) appeals the trial court’s order granting Carla M. (Bagby) Browell’s (“Mother”) petition to modify custody of the parties’ two minor children. The sole issue presented for our review is whether the trial court abused its discretion when it granted Mother’s petition to modify. Finding no abuse of discretion, we affirm.

Facts and Procedural History

Mother and Father married in September 1998. Two children, Gr.B., now age 11, and Ga.B., now age 7, were born of the marriage. Mother and Father divorced in 2004. Pursuant to the dissolution decree, the parties maintained joint legal custody of the children with Mother receiving primary physical custody and Father retaining liberal visitation. Mother later remarried and, on October 7, 2005, she filed both a notice of intent to relocate to Tennessee and a petition to modify Father’s visitation. Father responded with a petition to modify custody. On January 16, 2007, the trial court granted Father’s petition to modify thereby granting Father physical custody of the children. This Court affirmed the trial court’s custody modification in *Browell v. Bagby*, 875 N.E.2d 410 (Ind. Ct. App. 2007), *trans. denied*.

On November 24, 2008, Mother filed a petition to modify custody alleging that a substantial change in circumstances had occurred since Father was granted physical custody of the children and that modification of the custody order was in the best interests of the children. Mother filed her petition after becoming concerned about alleged verbal, mental, and emotional abuse of the children by Father. Mother also learned that Father had been

physically abusive with his then-live-in girlfriend, Shawna Sisk, which abuse occurred in the presence of the children. In the petition to modify, Mother further noted that Father's work schedule required the children to spend at least four nights per week in the home of their paternal grandparents.

The trial court held a hearing on Mother's petition to modify on August 30-31, 2010. Thereafter, on October 29, 2010, the trial court entered its findings of fact and order granting Mother's petition to modify and ordering that Mother have primary physical custody of the children. The trial court ordered that the joint legal custody order remain in effect. Father now appeals.

Discussion and Decision

The trial court here entered findings of fact sua sponte, without any purported conclusions thereon, except for the ultimate conclusion to change physical custody of the children to Mother. Sua sponte findings control only the issues they cover, and a general judgment standard of review controls as to the issues upon which there are no findings. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). We will set aside the trial court's specific findings only if they are clearly erroneous, that is to say, when there are no facts or inferences drawn therefrom to support them. *Id.* at 1255-56. We will affirm a general judgment if it can be sustained on any legal theory supported by the evidence. *Id.* at 1255. When reviewing the trial court's judgment following a requested custody modification, we may neither reweigh the evidence nor assess witness credibility, and we will

consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. *In re Paternity of P.R.*, 940 N.E.2d 346, 351 (Ind. Ct. App. 2010).

As we explained in our prior decision in this case, we have a particular preference for granting latitude and deference to trial judges in family law matters, and we review custody modifications for an abuse of discretion. *Browell*, 875 N.E.2d at 412. “[I]t 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.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 210 N.E.2d 850 (1965)). “The burden of demonstrating that an existing child custody arrangement should be modified rests with the party seeking the modification.” *Browell*, 875 N.E.2d at 412.

Modification of child custody is governed by Indiana Code Section 31-17-2-21(a), which provides:

The 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 section 8 and, if applicable, section 8.5 of this chapter.

The factors listed in Indiana Code Section 31-17-2-8 are:

- (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.

Accordingly, before granting a petition to modify custody, a trial court must find both that the modification is in the best interests of the children and that there has been a substantial change in one or more designated statutory factors. Ind. Code § 31-17-2-21. Father does not challenge the trial court's conclusion that modification of custody is in the best interests of the children. Instead, Father contends that the evidence does not support the trial court's findings that there has been a substantial change in any of the statutory factors since its 2007 custody order.

Here, the trial court specifically found a substantial change in the following four circumstances:

1. The Father's tumultuous relationship with another female;
2. The fact that de facto custodians are being used by the Father to assist in raising and caring for the parties' minor children (approximately 104 overnights per year); and,
3. That the Mother can provide a stable environment where the children return to one home every day after school, one home to sleep every night, and can enjoy a family setting consisting of a step sibling, step father, and a Mother who is home 24 hours of each day to care for the children.
4. That some, if not much of the conflict between the parties directly relates to the actions of the Father.

Appellant's App. at 51-52.

Regarding the first finding, Father argues that the evidence is clear that he and Sisk, his former live-in girlfriend, ended their relationship in 2008 and thus, his tumultuous relationship with her was no longer a problem at the time of the 2010 custody modification. Father further argues that although his parents do care for the children a great deal, such care cannot serve as a substantial change in circumstances because his parents do not satisfy the statutory definition of "de facto custodians."¹ Regarding the third substantial change listed by the trial court, Father asserts that Mother has always been a stay-at-home mother and that her ability to provide a stable environment for the children has not changed since the 2007 custody determination.

¹ Indiana Code Section 31-9-2-35.5(2) defines a "[d]e facto custodian" as "a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least one year if the child is at least three years of age."

We remind Father that the trial court need only find a substantial change in one of several enumerated statutory factors affecting the best interests of the children. We agree with Father that the trial court's first three findings, standing alone, do not necessarily support a conclusion that there has been a substantial change in circumstances warranting a change in custody. As to the trial court's fourth finding, although we recognize that the wording of the finding is less than ideal, the evidence in the record would support a much stronger evidentiary finding. Significantly, the evidence most favorable to the trial court's judgment supports the trial court's ultimate conclusion that there has been a substantial change in circumstances. The record indicates that there has been a substantial change in the level of conflict, not only between Mother and Father, but also between Father and the children, that Father is mostly to blame for that conflict, and that the conflict has substantially changed the interaction and interrelationship of the children with their parents. *See* Ind. Code § 31-17-2-8(4)(A).

Father has engaged in behavior which has escalated the conflict between the parties to such a degree that he has severely jeopardized the children's well-being and the relationship between the children and both parents. Despite a continuing joint legal custody order and Mother's attempts at communication, Father refuses to communicate with Mother in any manner other than email. Father is adamant that he will not assist with transportation for parenting time to or from Mother's residence in Tennessee. Mother is forced to pick up her children at their school or the Vanderburgh County Sheriff's Command Post rather than the Father's residence. Father testified that he enlists third parties to be present when Mother is

picking up the children because he refuses all contact with Mother. During Father's parenting time, Father thwarts Mother's attempts to communicate with the children by refusing to answer calls and refusing to allow the children to return calls. The trial court specifically took judicial notice of a child counseling report which followed multiple counseling sessions with Gr.B. and Ga.B. The counselor found that the contentious atmosphere between the parties adversely affects the children and has contributed to behavioral and emotional outbursts by one of the boys. This evidence supports the trial court's finding that Father has caused an increase in the conflict between Father and Mother and that conflict has substantially changed the interaction and relationships of the children with their parents. *Id.*

We further note that, as to any issue not covered by the trial court's findings, we will affirm on any theory supported by the evidence. This record is replete with evidence that, since Father was granted physical custody of the children, he has verbally and emotionally abused them. Sisk testified that although she had witnessed some verbal abuse prior to the 2007 custody modification, the verbal abuse intensified significantly after the children began living with Father. Father would yell and call both children names, sometimes hundreds of times in one week. As Gr.B. grew older, Father would tell Gr.B. that he could not stand to look at him because he looked like Mother. Father often called Gr.B. "wimp," "faggot," and "sissy." Tr. at 67. Father told Gr.B. that he would disown him if he "grows up to be gay[.]" *Id.* This evidence supports a finding that there has been a substantial change in the children's

interaction with Father, Ind. Code § 31-17-2-8(4)(A), and a substantial change in the mental health of the children, Ind. Code § 31-17-2-8(6).

We find that the evidence and the reasonable inferences drawn from that evidence support the trial court's conclusion that there was a substantial change in one or more of the statutory factors between the time of the 2007 custody determination and the time of the current custody modification hearing in 2010. Father has not shown that the trial court abused its discretion when it granted Mother's petition to modify. Accordingly, we affirm the judgment of the trial court.

Affirmed.

NAJAM, J., and ROBB, C.J., concur