

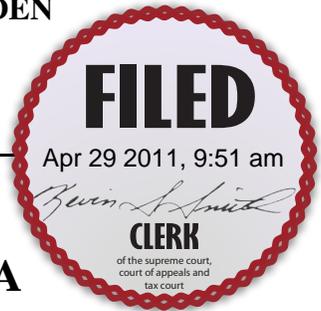
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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE)
PATERNITY OF E.W.,)
)
L.W.,)
)
Appellant,)
)
vs.)
)
C.M.,)
)
Appellee.)

No. 65A01-1010-JP-588

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable S. Brent Almon, Special Judge
Cause No. 65C01-0509-JP-134

April 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

L.W. (“Father”) appeals from the trial court’s order denying his petition to modify the physical custody of his daughter, E.W., and modifying parenting time. We affirm.

Issues

Father presents two issues for review:

- I. Whether the trial court abused its discretion by refusing to modify custody; and
- II. Whether the trial court abused its discretion with regard to parenting time.

Facts and Procedural History

In December of 2005, E.W. was born to C.M. (“Mother”). E.W.’s paternity was established in May of 2006. At that time, Father and Mother agreed to joint legal custody of E.W., with Mother having primary physical custody. Mother was working a second-shift job and was living with her parents (“Grandparents”) and E.W.’s older sibling. Later, Mother purchased a home where she and the children resided. On work nights, Mother would transport E.W. to Grandparents’ home, where she would spend the night.

On November 16, 2009, Mother filed a petition requesting that she be allocated a tax exemption for E.W. each year as opposed to alternate years. On January 19, 2010, Father petitioned to modify physical custody. Father’s petition alleged that Mother worked second shift while E.W. stayed with Grandparents, that Father had a first shift job, and that it would be in E.W.’s best interests to change her primary physical custodian from Mother to Father.

The trial court conducted a hearing on June 11, 2010. The trial court declined to

change E.W.'s primary physical custody from Mother to Father, but ordered that Father have additional parenting time. In addition to alternate weekends and each Wednesday evening, Father was to have parenting time with E.W. on Friday evenings preceding Mother's weekend. Father now appeals.

Discussion and Decision

I. Custody

In declining to modify custody, the trial court observed, "[E.W.] is well adjusted, settled and secure in her current situation and it is not yet certain that any advantage to the child would be ongoing if custody were changed." (App. 9.) Father claims that the trial court abused its discretion by engaging in speculation that led to the denial of custody modification. More specifically, Father asserts that the trial court speculated that Father's temporary work assignment would change and that his two-bedroom trailer home would become inadequate for himself, his wife and infant son, and E.W.

Indiana Code Section 31-17-2-8 sets forth factors to be considered by the trial court when making a custody determination, providing in relevant part:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The 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.
- (8) Evidence that the child has been cared for by a de facto custodian[.]

Judgments in custody matters will typically turn on essentially factual determinations.

Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008). We do not reweigh evidence or consider witness credibility, and will set aside a judgment only when it is clearly erroneous. Id. “We will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment.” Id. at 1257-58. This doctrine is reinforced by the concern for finality in custody matters. Id. at 1258.

Four-year-old E.W. has been in Mother’s physical custody since birth. She lives with her older sibling and Mother in a three-bedroom home in Elberfeld, which Mother had purchased in 2006. There was evidence that E.W. has several friends in Elberfeld and is strongly bonded with her older sibling.

Mother works second shift and has been employed full-time at her current employment for over three and one-half years. Grandparents have actively assisted in providing care for E.W. since her birth. They do so by providing several evening meals, some morning transportation to pre-school,¹ and overnight accommodations during Mother’s work shifts.

¹ On Monday mornings, Mother transports E.W. to pre-school. Mother also picks up E.W. each afternoon around 3:00 to 3:30 p.m.

Father married in 2009. The couple lives in Wadesville, and Father proposed that E.W.'s preschool be changed to a facility there. Father, his wife, and their infant son share a bedroom so that the second bedroom is available for E.W. Father regularly exercises his parenting time with E.W., and there is evidence that E.W. enjoys spending time with her paternal grandparents.

Father is employed through a temporary employment agency. As of the hearing date, he had been assigned to a particular job site on first shift for approximately three and one-half months. He had specified a preference for first-shift work and hoped to obtain permanent employment through his temporary placement, but had not been offered such.

In sum, the evidence strongly suggests that E.W. has loving and capable parents, multiple sets of caring and involved grandparents, and an age-appropriate relationship with a sibling in each home. By all indications, E.W. is well-adjusted and benefits from stability in her residence, social interactions, daily routines, and preschool classes. The trial court's decision to deny custody modification is not clearly erroneous.

II. Parenting Time

Father alternatively argues that the trial court abused its discretion when it failed to afford him a right to exercise parenting time each evening that Mother works, consistent with the parental preference language of Section I(C)(3) of the Indiana Parenting Time Guidelines:

When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time. The other parent

is under no obligation to provide the child care. If the other parent elects to provide this care, it shall be done at no cost.

A “family member” is “a person within the same household as the parent with physical custody.” Shelton v. Shelton, 840 N.E.2d 835, 835 (Ind. 2006). The Guideline imposition of a preference for parental childcare is founded upon the premise that it is usually in a child’s best interest to have frequent, meaningful, and continued contact with each parent. Id. It is presumed that the Guidelines apply in all cases which they cover; however, a trial court may, within its discretion, determine that a deviation is necessary or appropriate. Id. Any such deviation must be accompanied by a written explanation. Id.

Here, the trial court observed that E.W. had enjoyed the same routine since infancy and that, in the same time frame, Father had “worked all three shifts at different times.” (App. 9.) The trial court adequately explained the reasons justifying a deviation from the right of first refusal to provide child care. Also, Father was afforded additional parenting time on Friday evenings, when preschool transportation for the next day was unnecessary. Father has not demonstrated that the trial court abused its discretion in the parenting time order.

Conclusion

The trial court did not abuse its discretion when it refused to modify the physical custody of E.W., nor did the trial court abuse its discretion in issuing the modified parenting time order.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.