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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
	)	
DANIEL MADDEN,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 46A05-1102-DR-115
	)	
TRACY MADDEN n/k/a	)	
TRACY CHAVEZ,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Steven E. King, Special Judge
Cause No. 46C01-0503-DR-76

August 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Daniel Madden ("Father") appeals the trial court's denial of his petition to modify custody of his minor child, N.M. The trial court determined that, despite its finding that a substantial change in circumstances had occurred since its original custody order, it was in the best interests of N.M. for custody to remain with Tracy Madden n/k/a Tracy Chavez ("Mother"). On appeal, Father contends that the trial court abused its discretion when it denied his petition to modify. Finding no abuse of discretion, we affirm the judgment of the trial court. Mother requests that we remand to the trial court for an assessment of appellate attorney's fees against Father. However, we deny her request and conclude that a fee assessment against Father is unwarranted.

Facts and Procedural History

Mother and Father were married in 1998 and separated in 2004, when Mother was three months pregnant. The parties' minor child, N.M., was born on February 28, 2005. On December 28, 2006, the trial court entered its decree dissolving the marriage between Mother and Father and determining that it was in the best interests of N.M. for Mother to have sole legal and physical custody. Father was granted parenting time pursuant to the Indiana Parenting Time Guidelines. From April 2007 to September 2009, Father petitioned the court on numerous occasions to modify his parenting time and/or custody due to the contentious relationship between Father and Mother and the contentious relationship between Father and Mother's boyfriend, Joseph Chavez. In all relevant aspects, those petitions were denied by the trial court.

In October of 2009, Mother married Chavez ("Stepfather"). Stepfather is the biological father of Mother's oldest child, daughter H.C. On September 12, 2010, H.C. had friends at the home for a sleepover. During the night, two of the friends, ages twelve and thirteen, reported to Mother that Stepfather had touched them in an inappropriate manner. Mother immediately ordered Stepfather out of the home and has not permitted him to return to the home since that time. Two class C felony child molesting charges are currently pending against Stepfather. Stepfather also has a prior conviction for domestic violence.

On September 21, 2010, Father filed a petition for both temporary and permanent modification of custody, along with a request for a restraining order to protect five-year-old N.M. from Stepfather. On December 3, 2010, the trial court denied Father's request for temporary modification and set additional hearing dates to consider permanent modification. Following four days of evidentiary hearings, the trial court sua sponte issued its findings of fact and conclusions of law denying Father's petition for modification on January 12, 2011. The trial court found and concluded in relevant part as follows:

> 4. [Father] has proved that there has been a substantial change in circumstances since the entry of the last child custody order, to wit: in October of 2009 [Mother] married [Stepfather], the father of her older daughter [H.C.] in October of 2009. On September 12, 2010, [H.C.] had friends over for a sleepover. During the night two of those friends, ages 12 and 13, reported to [Mother] that [Stepfather] had touched them in an inappropriate manner. [Mother] banished [Stepfather] from her home that same night. Criminal charges [two C felony Child Molesting] are presently pending against him.
>
> Although [Stepfather] is presently free on bond, [Mother] has not permitted him to return to her home at any time since September 12, 2010 and he has had only limited contact via telephone with [N.M.]. Meanwhile, [Father] has sought and obtained a Permanent Protective Order in this court prohibiting contact between [N.M.] and [Stepfather].

5. While the alleged molestations said to have occurred on September 12, 2010, were the sudden catalyst for [Father's] petitions for emergency and permanent custody of [N.M.], the allegations in his petition filed September 21, 2010 also are predicated upon his concern that [Stepfather] had a prior conviction for domestic violence in California in 2004. Concomitantly, [Father] maintains that her decision to interject [Stepfather] into [N.M.'s] daily life and sometimes entrust [Stepfather] with the physical care of [N.M.] are part of an ongoing pattern of flawed decision-making and poor judgment by [Mother].

It should be noted that in paragraph 4 of his petition [Father] also made the following allegation:

> "That Father has over the course of the last few years repeatedly advised [Mother], and the welfare department, and the court, and the relevant counselors, and the GAL, that the child had complained of being hurt by [Stepfather];
>
> Basically, Mother, the court, the welfare department, and the counselors, told Father to calm down and not to worry;"

[Father] failed to prove by a preponderance of the evidence that [N.M.] made such complaints or that he had in fact been "hurt" by [Stepfather], or that the named individuals or entities "basically" told him to "calm down and not to worry."

Evidence did establish the existence of the 2004 conviction for domestic violence entered pursuant to a plea of *nolo contender*[sic] by [Stepfather]. On the other hand, there was no evidence whatsoever to suggest that [Mother] should have been concerned that [Stepfather] might be capable of or inclined towards the conduct he is alleged to have committed on September 12, 2011.

6. Having recognized that [Mother's] decision to marry [Stepfather] and to bring him into the daily life of [N.M.] constitutes a substantial change in circumstances that bear on the child custody question at issue, it remains that [Father] has failed to establish by a preponderance of the evidence that a [modification] of custody would be in the best interests of [N.M.,] as is also required by statute.

> 7. That conclusion flows from the recognition in law that stability and continuity in children's lives is a formidable element in their well-being and development, as is inherent to the legal standard which must be met to justify modification of custody, together with the overarching problem plaguing the emotional well-being, psychological development and financial support of five-year-old [N.M.]: the extremely acrimonious relationship between his parents and the ongoing and virtual total breakdown in the parties' inability to communicate in matters related to [N.M.], as expressly acknowledged by both parties and is heretofore discussed in court orders.
>
> . . . .
>
> Any relative apportionment of responsibility for this acrimonious impasse serves little purpose. Ultimately there is no substantive evidence to compel the conclusion that a change in the physical custody of [N.M.] would alleviate the parental turmoil so deleterious to his present and long-term best interests. It remains that in the face and wake of the alleged events of September 12, 2010, [Mother] has acted affirmatively to [ensure] that the physical well-being of [N.M.] was and has been protected. It appears at present that the removal of [N.M.] from the source of continuity and stability that the surroundings and care of his familiar home environment would only add to the disruption in his life amidst circumstances which defy comprehension by his five-year-old self.
>
> 8. [Father's] petition to modify child custody should be denied.

Appellant's App. at 594-603. This appeal ensued.

Discussion and Decision

Child Custody

Father appeals the trial court's denial of his petition to modify custody of N.M. We begin by noting that the trial court entered findings of fact and conclusions thereon sua sponte. Where, as here, the trial court enters findings sua sponte, those 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, 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).

Appellate courts have a particular preference for granting latitude and deference to trial judges in family law matters, and we review decisions regarding custody modification for an abuse of discretion. *Browell v. Bagby*, 875 N.E.2d 410, 412 (Ind. Ct. App. 2007), *trans. denied*. "The burden of demonstrating that an existing child custody arrangement should be modified rests with the party seeking the modification." *Id*. 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, a trial court may not modify an existing custody order unless the modification is in the best interests of the child and there has been a substantial change in one or more designated statutory factors. Ind. Code § 31-17-2-21. The trial court here concluded that Mother's marriage to Stepfather constituted a substantial change in circumstances since the original custody order. Nevertheless, the court concluded that it was ultimately not in the best interests of N.M. to modify custody. Father contends that the trial court abused its discretion when it concluded that modification of custody was not in the best interests of N.M.

It is evident from the trial court's extensive findings of fact that the court thoroughly and thoughtfully considered the evidence submitted by both parties. As noted by the trial court, although Father relies heavily on Mother's marriage to Stepfather to support his contention that it is in N.M.'s best interests to modify custody, the record is clear that Mother has done nothing but take positive steps to protect N.M. from Stepfather since she learned of Stepfather's inappropriate and perhaps criminal behavior toward H.C.'s friends. N.M. has had absolutely no physical contact with Stepfather, and Mother, while still married to Stepfather, has not permitted Stepfather to return to her home.

Despite this uncontroverted evidence, Father directs us to several examples of what he believes to be Mother's "unreasonable and selfish behavior impacting the health and safety of [N.M.], the relationship between [Father] and [N.M.,] and the relationship between the parties." Appellant's Reply Br. at 6. Based upon these examples, Father asserts that the trial court's refusal to modify custody is clearly against the logic and effect of the circumstances before the court. However, the entirety of Father's argument in this regard is merely an invitation for this Court to reweigh the evidence and reassess witness credibility, which we may not do. The record supports the trial court's conclusion that both parents are to blame for their acrimonious relationship and their seeming inability to cooperate for the benefit of their son. The evidence further suggests that N.M. is absolutely safe with Mother and that remaining with Mother will maintain stability and continuity in his life. Permanence and stability for the child are deemed crucial for the welfare and happiness of the child. *In re*

Paternity of Winkler, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000). In sum, Father has failed to meet his burden to demonstrate that modification of custody is in N.M.'s best interests.

Appellate Attorney's Fees

Mother maintains that Father has brought this appeal in bad faith as "a continuation of a pattern of filings designed to wear down the financial resources of [Mother,] without any merit." Appellee's Br. at 12. Mother also asserts that the content of the appendix filed by Father is contrary to our appellate rules. Therefore, she urges us to award her damages in the form of appellate attorney's fees. Our appellate rules authorize this Court "to assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Ind. Appellate Rule 66(E). We will assess appellate damages only against an appellant who in bad faith maintains a wholly frivolous appeal. *Harness v. Schmitt*, 924 N.E.2d 162, 168 (Ind. Ct. App. 2010). Indeed, our discretion to award attorney's fees is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

This case involves a tumultuous relationship between former spouses, a minor child, and an emotional fight to ensure the well-being of that child. Although the lion's share of Father's brief on appeal is merely an improper invitation for us to reweigh the evidence in his favor, we do not think that his appeal rises to the level of the type of appellate abuse that warrants damages. Moreover, while we do not condone counsel's unfortunate decision to include large portions of the transcript in the appellant's appendix on appeal in violation of

Indiana Appellate Rule 50(A), we cannot say that these errors were intentional or in flagrant disregard of our appellate rules.[1] *See* Ind. Appellate Rule 50(A)(2)(h) (stating that appellant's appendix shall contain "any record material relied on in the brief *unless the material is already included in the Transcript*" (emphasis added). We decline Mother's request that we remand to the trial court for an assessment of appellate attorney's fees.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.

[1] We agree with Mother and find it curious that Father's counsel included voluminous portions of the transcript in the appendix but failed to include certain portions that are most favorable to the trial court's judgment. We advise counsel to review our appellate rules and refrain from such practice in the future.