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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF)
KIMBERLY TICE,)
)
Appellant-Respondent,)
)
vs.)
)
DEVIN TICE,)
)
Appellee-Petitioner.)

No. 49A02-0709-CV-774

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Deborah J. Shook, Master Commissioner
The Honorable Gary Miller, Judge
Cause No. 49D05-0402-DR-344

December 31, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Kimberly Tice (“Mother”) appeals the trial court’s order granting primary physical custody of the parties’ three minor children, A.T., age 15; L.T., age 13; and M.T., age 10, to her ex-husband, Appellee-Petitioner Devin Tice (“Father”). More specifically, Mother alleges that the trial court abused its discretion in awarding Father primary physical custody of their children. We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father were divorced on November 18, 2004. Their divorce decree provided that Mother and Father would share joint legal custody of their three minor children, and that Mother would have primary physical custody. Following the parties’ divorce, the relationship between Mother and Father deteriorated, and Mother displayed escalating angry outbursts, often in the presence of, and sometimes directed toward, the minor children. On one occasion, Mother spanked L.T. with what she called her “whipping stick” during an argument. Mother’s “whipping stick” consisted of three five-gallon paint-stirring sticks taped together. On May 25, 2006, Father filed a verified petition for modification of custody. On July 11, 2007, the trial court issued an order granting Father primary physical custody. Mother now appeals.

DISCUSSION AND DECISION

A child custody determination falls within the sound discretion of the trial court. *Spencer v. Spencer*, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997). The Indiana Supreme Court has held that appellate courts “are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not

properly understand the significance of the evidence, or that [s]he should have found its preponderance or the inferences therefrom to be different from what [s]he did.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). Therefore, “[w]e review custody modifications for an abuse of discretion, with a ‘preference for granting latitude and deference to our trial judges in family law matters.’” *Id.* (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). Furthermore, upon review we neither reweigh evidence nor reassess witness credibility, and we consider only the evidence which supports the trial court’s decision. *Spencer*, 684 N.E.2d at 501.

In response to Father’s timely request, the trial court entered specific findings of facts and conclusions thereon. When a party has requested specific findings pursuant to Indiana Trial Rule 52(A), the reviewing court may affirm the judgment on any legal theory supported by the judgment. *In re Paternity of Winkler*, 725 N.E.2d 124, 126 (Ind. Ct. App. 2000). In reviewing the judgment, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Id.* The judgment will be reversed only when it is clearly erroneous. *Id.* Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997). In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. *Id.*

Mother contends that the trial court abused its discretion in modifying the custody order to award custody of the parties’ minor children to Father. A court may not modify a child custody order unless the modification is in the best interests of the child and there

is a substantial change in one or more of the factors a court is to consider in determining custody initially. *See* Ind. Code § 31-17-2-21 (2006). Those factors include:

- (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 his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (5) the child's adjustment to the child's home, school, and community;
- (6) the mental and physical health of all individuals involved; and
- (7) evidence of a pattern of domestic or family violence by either parent.

Ind. Code § 31-17-2-8 (2006). "A change in conditions must be judged in the context of the whole environment, and it is the effect upon the child ... that renders a change substantial or inconsequential." *Winkler*, 725 N.E.2d at 128 (internal quotations omitted). "Whether the effect is of such a nature as to require a change in custody is a matter within the sound discretion of the trial court." *Id.*

Specifically, Mother claims that the trial court abused its discretion in granting Father primary physical custody because: (1) evidence of an isolated incident or single incident does not demonstrate a substantial change meriting modification of custody; (2) both experts appointed by the trial court testified that mother should have primary physical custody; (3) the trial court's reasoning did not focus on a change in circumstances, but rather on a general improvement in relations between the parties; and (4) Father failed to carry his burden of proof to justify a modification of the custody order. We disagree.

1. Isolated Incident

Mother first argues that an isolated incident, *i.e.*, spanking L.T. with what she called her “whipping stick,” cannot support a finding of a substantial change meriting the modification of a custody order. In support, Mother points to our decision in *Leisure v. Wheeler*, 828 N.E.2d 409, 416 (Ind. Ct. App. 2005), where we concluded that, under the circumstances of that case, we could not say that the trial court erred by determining that the evidence of an isolated complaint of symptoms and a single instance of missing a doctor’s appointment did not demonstrate a substantial change in N.W.’s health so as to merit a modification of custody. However, Mother’s reliance upon *Leisure* is misplaced, because *Leisure* does not stand for the general proposition that a single incident can never amount to a substantial change in the circumstances, but, rather, establishes that the trial court did not abuse its discretion in that case in concluding that the circumstances did not amount to such a substantial change. *See id.* In any event, regardless of whether a single incident can justify a change in custody, Mother’s claim must fail because the record indicates that the trial court did not rely only on a single incident in determining that a change of custody to Father was necessary, but also considered additional evidence of Mother’s increasing displays of angry outbursts in front of the children, some of which were directed toward the children.

2. Expert Testimony

Mother next claims that the trial court abused its discretion by allegedly wrongfully disregarding relevant non-conflicting expert testimony in support of Mother. We have held that in custody cases, “a finder of fact is not required to accept the opinions

of an expert simply because [s]he is an expert.” *Periquet-Febres v. Febres*, 659 N.E.2d 602, 607 (Ind. Ct. App. 1995), *trans. denied*. “Instead, the finder of fact must weigh the expert’s opinion against the other evidence and make its own determination as to the evidence.” *Id.*; *see also Hunsberger v. Hunsberger*, 653 N.E.2d 118 (Ind. Ct. App. 1995) (concluding that the trial court did not abuse its discretion in rejecting the expert’s opinion in awarding custody when other evidence supported the court’s determination), *trans. denied*.

Following the entry of the trial court’s July 2006 order granting Father temporary physical custody of the minor children, the court retained social worker Diane Elliot of the Marion County Courts’ Domestic Relations Counseling Bureau to make a custody recommendation. The trial court also appointed Joyce Lowry, a counselor with the Providence Guidance Center, to provide counseling for the family. Both Elliot and Lowry recommended that Mother should be granted primary physical custody, but as the trial court noted, Lowry was appointed solely for the purposes of providing counseling for the family and “was not ordered to make a custody evaluation.” Appellant’s App. p. 15. As such, it was within the trial court’s discretion to disregard Lowry’s custody recommendation.

Furthermore, even though Elliot recommended that Mother be granted primary physical custody, there was ample evidence before the trial court to support its determination awarding Father primary physical custody of the minor children. In addition to Elliot’s testimony, the trial court considered the testimony of both parents, as well as an *in camera* interview with all three minor children, which the court found

favored the change of custody to father. The trial court was free to reject the expert's testimony as to what custody arrangement she believed was in the Tice children's best interest and to make its own determination base upon all the evidence before it. *See Febres*, 659 N.E.2d at 607. Because the trial court had evidence from which it could logically conclude that it was in the Tice children's best interest that Father have primary physical custody, we conclude that the trial court did not abuse its discretion in allegedly disregarding the experts' recommendations.

3. Change in Circumstances

Mother next claims that the trial court abused its discretion because its order modifying the custody arrangement did not focus on a substantial change in the circumstances as required by the relevant statutory provisions. We find this claim unpersuasive because the record contained ample evidence from which the trial court could have found a substantial change in the circumstances due to Mother's increasing angry displays. Furthermore, to the extent that Mother argues that the trial court did not base its decision upon the evidence of a substantial change in the circumstances, we note that the trial court issued various orders pertaining to this matter, including a July 17, 2006 order, which found a change of circumstances so as to warrant a change in custody, and a July 11, 2007 order, which focused on the positive improvements and the reduction of conflict between the parties that had occurred since the July 17, 2006 order modifying custody. We have recognized that a child's interest in a stable home environment, free from unnecessary conflict, is an appropriate basis for a custody modification order, and, as such, we cannot conclude that the trial court abused its discretion by finding that the

circumstances had changed so as to support a finding that it was within the best interest of the Tice children that Father be granted primary physical custody. *See Spencer*, 684 N.E.2d at 503 (citing *Wallin v. Wallin*, 668 N.E.2d 259, 261 (Ind. Ct. App. 1996)).

4. Burden of Proof

Mother last claims that the trial court abused its discretion in awarding Father primary physical custody of the parties' minor children because Father has failed to meet his burden of proof that there has been a substantial change in the circumstances and that a change in custody would be in the best interest of the children. In making this claim, Mother effectively invites us to reweigh the evidence, which we decline to do. Moreover, because we concluded above that the record contained ample evidence to support the trial court's custody determination, we find this claim unpersuasive and therefore will not consider it further.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.