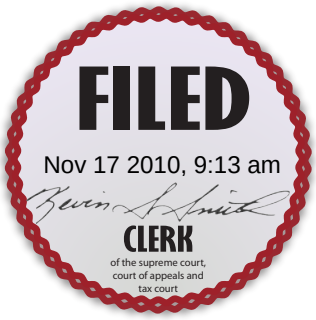

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IN THE COURT OF APPEALS OF INDIANA

K.W..	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 54A05-1003-DR-181
	)	
L.W.,	)	
	)	
Appellee.	)	

APPEAL FROM THE MONTGOMERY SUPERIOR COURT
The Honorable David A. Ault, Judge
Cause No. 54D01-0808-DR-269

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

K.W. ("Father") appeals the trial court's order awarding to L.W. ("Mother") primary physical custody of the parties' minor child K.

We affirm.

ISSUE

Whether the trial court abused its discretion in awarding primary physical custody of K. to Mother.

FACTS

In 1999, Mother bought a home in New Market. The parties began dating in July of 2002. Mother had joint custody of her daughter and son from a previous marriage,[1] who spent approximately half of their time in Mother's care and custody. In October of 2002, Father moved into Mother's home.

K. was born on August 20, 2003, and Father established paternity. In 2003, Mother was diagnosed as suffering from epilepsy, which required her to quit her employment; and she began receiving disability benefits. In December of 2003, Father began employment in Indianapolis. The parties married on November 24, 2004. They separated on or about August 5, 2008. Mother filed a petition for dissolution on August 6, 2008, and after Father filed his cross-petition on August 8, 2008, the matters were consolidated.

Mother remained in the marital home and cared for K. By agreement of the parties, the provisional order of September 15, 2008, provided that the parties would have

[1] In February of 2009, the daughter was 16 years of age, and the son was 13 years of age. Thus, at the time Father moved into Mother's home, they were approximately seven years younger.

joint legal custody and Mother would have primary physical custody. In November of 2008, Father moved to his girlfriend's home in Greenwood. On December 5, 2008, Father filed a petition for a custody and psychological examination. The trial court granted the petition and ordered an evaluation by Dr. Richard Lawlor.

On February 10, 2009, Dr. Lawlor interviewed each of the parties, K., Father's girlfriend, Mother's older children, and Father's eighteen-year old daughter from an earlier marriage. He also observed each party's interaction with K. On April 3, 2009, Dr. Lawlor filed his custody and psychological evaluation.

On February 10, 2010, the trial court held a final hearing "on the issues of custody, parenting time, child support and attorney fees." (App. 9). Both parties sought primary physical custody of K.

The trial court received evidence indicating that since October of 2003, Mother had been treated by Dr. Salanova, the director of the I.U. Comprehensive Epilepsy Program, for a complex seizure disorder. According to Dr. Salanova, Mother was participating in a research study for the most current treatment therapy available, was evaluated monthly, and was compliant with all treatment. Mother testified that she had had only had one seizure since filing for dissolution in August of 2008, and it was in April of 2009. Mother also testified to her involvement in K.'s daily life and school activities, and to the "very close" relationship that K. had developed with her half-siblings while growing up in the home with them. (Tr. 99).

In addition to Dr. Lawlor's eighteen-page report, which expressly found that Mother "ha[d] done a good job of parenting," and that K. had "learned a great deal in her

mother's care," (app. 81), he testified at the hearing. He recommended that Mother be K.'s "primary caretaker," with Father to have liberal visitation. (Tr. 19). He found that "during the course of the marriage," Mother had "been, historically, the primary physical custodian." *Id.* at 20. Based on information he had received from Dr. Salanova, Dr. Lawlor found Mother's epilepsy disorder "controlled" and "not a major issue," noting that despite her pre-separation epilepsy, Father had left K. with mother when traveling for his employment. *Id.* at 22. Moreover, he noted that K. "from [his] talking with her, had been taught if her mother had a seizure, what to do, in other words, call 911." *Id.* He found that for her age, K. "had a really good understanding of safety issues like that"; and that she "was well adjusted" and "very well functioning." *Id.* at 23. Dr. Lawlor's report noted that both of K.'s older half-siblings reported having a good relationship with her.

Mother had cared for K. in the home, not sending her to day care, and had introduced K. to books and taught her to write her name and to count. Mother had also enrolled K. in ballet and soccer. Mother usually walked K. to school, which is only four houses away from home. K. played nearly every day with the girl next door, and she had made friends at school. Growing up with her older half-sister and half-brother, K. had a close relationship with both, and they both loved her.

Mother's grandmother lived nearby, saw K. regularly, and opined that Mother "does a wonderful job taking care of K[.]" (Tr. 82). Mother's next-door neighbor testified that Mother was "a very good mother," and that Mother and K. were "very close." (Tr. 74, 75). Another witness, who was in Mother's home more than once a month, testified to the loving mother-daughter relationship between K. and Mother, and

K.'s strong bond to Mother. K.'s kindergarten teacher, with a quarter century of experience, found K. to be "a very well adjusted student" who applied herself to learning the material covered in class. (Tr. 8).

On March 5, 2010, the trial court issued its order, providing for the parties' "joint legal custody" of K. (App. 9). Mother was awarded "primary physical custody," but Father was "to have liberal parenting time." *Id.* at 10. If the parties were "unable to agree on parenting time," however, such would be "pursuant to the Parenting Time Guidelines." *Id.*

DECISION

Child custody decisions "fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion." *Liddy v. Liddy*, 881 N.E.2d 62, 68 (Ind. Ct. App. 2008) (quoting *In re B.H.*, 770 N.E.2d 283, 288 (Ind. 2002)), *trans. denied*. Moreover, as we observed in *Speaker v. Speaker*, 759 N.E.2d 1174, 1179 (Ind. Ct. App. 2001), a custody dispute often calls upon the trial court to make Solomon-like decisions. Because the trial court is in a position to see the parties, observe their conduct and demeanor, and hear their testimony, its decision receives considerable deference in an appellate court. *Id.* On appellate review of a custody decision, we cannot reweigh the evidence or adjudge the credibility of the witnesses. *Id.* "We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." *Baxendale v. Raich*, 878 N.E.2d 1252, 1257-58 (Ind. 2008).

Indiana Code section 31-17-2-8 provides as follows:

> The trial 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.
> . . . .[2]

Father first argues that the trial court abused its discretion in reaching its custody decision by placing "weight, perhaps great weight," upon the fact that K. had been living with Mother from August 2008 until the final hearing in February of 2010. Father's Br. at 13. However, there was no request for the trial court to issue findings of fact and conclusions of law under Indiana Trial Rule 52(A). Hence, it is mere speculation that the trial court placed weight on such a fact, and "we cannot not reweigh the evidence," *Speaker*, 759 N.E.2d at 1179, which his argument implicitly asks that we do. In the absence of special findings, we review a trial court's custody decision "as a general judgment and, without reweighing evidence or considering witness credibility, affirm if

[2] The statute includes two additional factors which are inapplicable here.

sustainable upon any theory consistent with the evidence." *Baxendale*, 878 N.E.2d at 1257.

Father next turns to considerations of the statutory factors. He asserts that the evidence is essentially neutral with respect to the first four – K.'s age and sex; both parents' desire for primary custody; no evidence as to K.'s wishes; and the undisputed evidence that K. has a good relationship with both parents and with all three of her half-siblings, as well as Father's girlfriend. As to the fifth factor, he acknowledges that K.'s long-time residence in New Market, her attendance at school there, and the "sheer amount of time" she has spent there "could weight this" factor to Mother. Father's Br. at 18.

On the sixth factor, the mental and physical health of all individuals involved, Father claims there is "**overwhelming** evidence that [Mother]'s mental and physical health are so impaired she is unable to take care of herself." *Id.* at 19 (emphasis in original). To support this assertion, he cites to a page of the transcript which is Mother's testimony regarding K.'s weekly soccer games; her future attendance at the school which is four houses from their home; walking K. to school on most days; and her belief that based on emails she read on Father's computer, "he was seeing other women while we were married." (Tr. 102). The report and testimony of Dr. Lawlor, with his reference to a report from Mother's treating physician, do not indicate that Mother's physical health impairs her ability to take care of herself or care for K.

As to Mother's mental health, Father asserts his belief that Mother attempted to commit suicide in March of 2008, several months before the parties separated. At the

hearing, Mother acknowledged the incident, but explained that she had swallowed pills after Father

> yelled at [her] . . . you're a worthless epileptic, no one will ever want you, no Judge in his right damn mind would give you your children. This is what he always said to me over and over. He took my children, all three of them, and he had been drinking and he took them out of my house,

and drove away. (Tr. 109-110). She further testified that after taking the pills, she "realized what [she] did" and "called 911, begging them to help," (tr. 110), resulting in a trip to the hospital to have her stomach pumped. The 911 transcript, to which Father directs our attention, is consistent with Mother's testimony. Moreover, the reasonable inference from evidence before the trial court is that subsequent to the March 2008 incident, Father did not feel that Mother's mental health precluded her continued care for K. – either during his absence due to employment or immediately after separation.

Further as to Mother's mental health, Father asserts his belief that Mother attempted suicide on March 1, 2009. An officer of the Montgomery Sheriff's Department testified that he was dispatched on that date to Mother's home, where he talked with her and found "things seemed to be fine." (Tr. 63). He observed "a scratch on her arm and from talking with her she had been messing with a shelf and scratched in [sic] on their [sic], and the injury was pretty much consistent where she just scraped it." *Id.* at 64. The officer further testified that he had called Father to "let him know" that there was "no problem." *Id.* at 63. Mother's testimony was consistent with the officer's. Father's argument essentially asks that we find more credible certain statements in the transcript of the 911 call, some of which are hearsay, as to Mother's mental health.

However, we do not reweigh evidence or consider witness credibility. *Baxendale*, 878 N.E.2d at 1257.

Finally, Father argues that based on the evidence that Mother smokes and has epilepsy, her "physical and mental health" make it "certain . . . that K.[] will be harmed in some fashion with physical custody in [Mother]." Father's Br. at 24. Father strongly pressed this contention in his final argument to the trial court. The trial court, however, was not persuaded, and neither are we.

The trial court heard evidence that Father found Mother capable of caring for K. in his absence during the marriage and after he left the home. It heard Dr. Lawlor's evaluation of K. and his conclusion that Mother had done a good job of parenting her, and that her epilepsy was not a problem in that regard. Dr. Lawlor recommended that Mother have primary physical custody. It is undisputed that K. had thrived in Mother's care for the entirety of her life, and that she had significant relationships in the community of Mother's home. We find no abuse of discretion in the trial court's conclusion that it was in K.'s best interests that Mother be awarded primary physical custody of K.

Affirmed.

BRADFORD, J., and BROWN, J., concur.