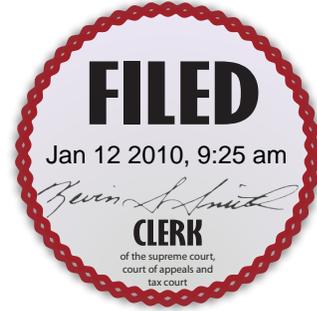


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBIN A. (CALDWELL) KROOT,)

Appellant-Petitioner,)

vs.)

No. 03A01-0906-CV-276

CHRISTOPHER A. CALDWELL,)

Appellee-Respondent.)

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0703-DR-616

January 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Robin A. (Caldwell) Kroot appeals the trial court's refusal to admit the deposition of Dr. Robert Granacher into evidence in the proceeding dissolving Robin's marriage to appellee-respondent Christopher Caldwell. Specifically, Robin contends that the exclusion of the deposition contravened Indiana Rules of Evidence 702 and 703. We find that even if an error occurred, Robin was not prejudiced thereby. Thus, we affirm.

FACTS¹

Robin and Chris were married on September 14, 2000. One child, M.C., was born of the marriage on February 16, 2006. On March 20, 2007, Robin filed a petition to dissolve the marriage.

In October 2007, Robin filed a motion seeking an order that Christopher undergo a neuropsychological evaluation. The basis for Robin's request was, among other things, a bicycle accident and resulting injuries that Christopher had sustained in 1986, when he was fifteen years old. Christopher responded by requesting, instead, a custody evaluation pursuant to Indiana Code section 31-17-2-12. In February 2008, the trial court denied Robin's motion and granted Christopher's request for a custody evaluation, noting that if Dr. Alfred Barrow, who the parties agreed would perform the evaluation, believed that a neuropsychological exam would be helpful, he could request it.

¹ Robin's statement of facts is in the form of a witness-by-witness summary of testimony rather than a narrative, in contravention of Appellate Rule 46(A)(6)(c). We encourage counsel to pay closer attention to the Appellate Rules in the future.

On July 7, 2008, Dr. Barrow filed his custody evaluation with the court. He concluded that a neuropsychological assessment was unwarranted. Dr. Barrow found nothing to suggest that Christopher had experienced any ill effects from the 1986 closed head trauma, and recommended that Christopher and M.C. participate in a transitional period from the current supervised parenting time to unsupervised parenting time of increasing lengths until the time periods set forth in the Indiana Parenting Time Guidelines were reached.

One week later, Robin filed a second motion for a mental examination, requesting that Christopher be ordered to undergo a neuropsychological assessment by Dr. Odie L. Bracy. Following a hearing, the trial court determined that Robin had shown good cause for the requested examination and ordered Christopher to undergo a “neuropsychological examination/evaluation by Odie L. Bracy, . . . the examiner chosen and designated by [Robin].” Appellant’s App. p. 86. On November 12, 2008, Dr. Bracy filed his neuropsychological examination report with the court, concluding that he did “not see any indication of neuropsychological problems in these tests that would restrict [Christopher’s] ability to function in any capacity.” Id. at 504.

In March 2009, one month after the final hearing had been set for April 1, 2009, Robin filed a third request for an evaluation of Christopher. This time, Robin told the trial court that while Dr. Bracy had performed a neuropsychological examination, what was actually needed was a neuropsychiatric evaluation. The trial court denied Robin’s request.

Robin proceeded to secure a diagnosis of Christopher by Dr. Granacher without Christopher's participation. Dr. Granacher reviewed the depositions of Christopher, Robin, Christopher's parents, and Robin's father, the 1986 neurological examination of Christopher at Hermann Hospital, the neuropsychological and psychological testing by Dr. Barrow, the neuropsychological evaluation by Dr. Bracy, and some legal articles regarding traumatic brain injury. Among other things, Dr. Granacher concluded that the 1986 injury caused significant and permanent brain damage to Christopher and stated that he did not believe Christopher should have unsupervised visitation with M.C.

Robin deposed Dr. Granacher, and asked to file the deposition as evidence. On March 31, 2009, Christopher filed a motion in limine seeking to exclude Dr. Granacher's deposition. The final hearing took place on April 1, 2009. The trial court heard argument regarding the admission of Dr. Granacher's testimony at the beginning of the final hearing, and chose to take the matter under advisement, noting that because there was no jury, he could review the deposition after the hearing and then either ignore or include everything Dr. Granacher said in his deposition. Christopher continued to object to the introduction of Dr. Granacher's deposition and references to its content throughout the proceeding.

On May 14, 2009, the trial court granted Christopher's motion to exclude Dr. Granacher's testimony:

. . . Dr. Granacher did not examine [Christopher], but relied upon depositions of persons such as Paternal Grandfather. Dr. Granacher testified that he finds that deposition to be credible because "I know

his father (Paternal Grandfather) would tell us the truth. He's an officer of the court." When asked if he believed [Christopher's] deposition testimony, Dr. Granacher states: "No, but I assumed it was filtered through a—I assumed it was truthful from his perception. But I also concluded it was filtered through a damaged brain." Dr. Granacher believed [Robin's] deposition statements as well. To arrive at his conclusions, Dr. Granacher chose to believe certain statements from some depositions and to disbelieve opposing statements from other depositions. He didn't directly speak with the deponents concerning those statements and he didn't administer tests to see whether the statements were valid.

The Court having considered the arguments and the law now finds that Dr. Granacher's opinions fail[] to meet the requirements of Evidence Rule 702 and the Daubert[v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993),] requirements for reliability.

Appellant's App. p. 12-13. Also on May 14, the trial court entered a decree of dissolution of the marriage of Robin and Christopher. Among other things, it found and concluded as follows:

11. Throughout the relationship between Mother and Father, Father never obtained "meaningful" full-time employment. He did race BMX bicycles on a full-time basis for a number of years, but this was not an income generating venture of any significance. Father did obtain a master's degree in psychology; however, he has not utilized this degree as a means of obtaining any income-producing employment in the field of psychology or for any employment, post-degree. . . . At the time of trial, Father was still unemployed.
12. Father often engages in Internet pornography, and this activity increased substantially in 2006 after the birth of [M.C.]
13. Father stays up late into the night and sleeps during late into the day and this affects his ability to properly care for [M.C.]
14. Father was with [M.C.] during the first seven (7) months of her life. Thereafter, Father has been with [M.C.] infrequently and for short durations of time.

Conclusions of Law

3. The facts do not support Father's request for joint legal custody. It is in [M.C.'s] best interests for Mother to have custody, subject to Father's parenting time. [FN]

FN. In reviewing Mother and Father's proposed findings of facts and proposed dissolution decrees, it is interesting to note that once one cuts through the verbiage, Mother and Father have strikingly similar proposals regarding Father's parenting time with [M.C.] They both recognize that Father should have frequent times of short duration with [M.C.] They both agree that his parenting time should be supervised at this point.

4. Father shall have supervised parenting time . . . for a period of time of not less than three hours per week. . . . Father shall have additional parenting time with [M.C.] on the first, third and fifth Saturdays of each month at Mother's home under Mother's supervision from 9:00 a.m. to 5:00 p.m. The parties may mutually agree to another location. In the event that Mother is not available to supervise during this period of time, Maternal Grandmother may supervise. Father shall also have parenting time on Father's Day from noon until 6:00 p.m. which shall be supervised by Mother or Maternal Grandmother.
5. The parties shall immediately employ a Parenting Coordinator to assist them in working toward expanded parenting time for Father, if and when such time becomes appropriate. . . .
6. The Family Access Center shall file with this Court and with the Parenting Coordinator a report detailing its observations concerning supervised parenting time between Father and [M.C.]
. . . .

Id. at 14-21. Robin now appeals the exclusion of Dr. Granacher's testimony from evidence.

DISCUSSION AND DECISION

We review a trial court's ruling to admit or exclude evidence for an abuse of discretion. Hopper v. Carey, 716 N.E.2d 566, 570 (Ind. Ct. App. 1999). The appellant must establish that the trial court's ruling was both erroneous and prejudicial. Rohrkaste v. City of Terre Haute, 470 N.E.2d 738, 741-42 (Ind. Ct. App. 1984). In other words, even if an abuse of discretion is found, we will not reverse absent a showing of actual harm. Id.

Here, Robin is not appealing the decree of dissolution. She is not appealing the trial court's custody and visitation order. Indeed, the trial court denied Christopher's request for joint legal custody and awarded limited, supervised parenting time in a manner consistent with the wishes of both parties. Although the order does not explicitly refer to Christopher's brain injury, it includes findings of fact relating to his problematic behaviors that Robin insists result from the injury. Specifically, the order highlights Christopher's chronic unemployment, frequent consumption of Internet pornography, repeated failures to spend time with his daughter, and unconventional sleep patterns that affect his ability to parent his child.

Robin argues that she has been harmed by the exclusion of Dr. Granacher's deposition because, had that evidence been in the record, the trial court would have explicitly noted a connection between Christopher's brain injuries and the behaviors just

described.² In the absence of such a finding, Robin contends that it will be easier for the custody and visitation arrangement to be changed in the future. We cannot agree. If Christopher's behaviors change to such a degree that a substantial change in circumstances has occurred, a change in custody and/or visitation would be warranted regardless of the label placed on his mental health. See Ind. Code § 31-17-2-21(a) (providing that a custody modification may be made only upon a substantial change in a number of factors, including a parent's mental health, and only if modification is in the child's best interests).

Whether or not the trial court included a finding regarding the 1986 injury, it is evident that the trial court heard—and shared—Robin's concerns about Christopher's ability to parent M.C. The order took these concerns into account and arrived at a conclusion requested by Robin. Therefore, even if we assume for argument's sake that the trial court erred by excluding Dr. Granacher's deposition from evidence, Robin has failed to establish any prejudice as a result of that ruling.³

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.

² Additionally, we note that it seems likely, based on the language used by the trial court in its order granting Christopher's motion in limine, that even if it had admitted Dr. Granacher's deposition into evidence, the trial court would have given little or no weight to the doctor's conclusions. As the factfinder, it would have been within the trial court's purview to conduct its analysis in such a fashion.

³ If, in the future, Christopher seeks and is granted a modification of the custody and/or visitation arrangement, Robin would, of course, be free to appeal that determination at that time. Currently, however, any argument about what might or might not happen in the future is simply premature.