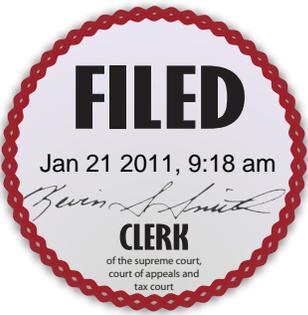


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

S. R.,)
)
Appellant,)
)
vs.) No. 79A02-1005-DR-617
)
T.R.,)
)
Appellee.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0810-DR-406

January 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

S.R.'s ("Mother") and T.R.'s ("Father") marriage was dissolved in Tippecanoe Superior Court. Mother appeals the trial court's decision to allow Father to have unsupervised parenting time with the parties' minor children. Mother also argues that the trial court's admonishment concerning any future contempt findings violates her due process rights. We affirm.

Facts and Procedural History

Mother and Father have two minor children: R.R., born September 15, 2004, and K.R., born August 26, 2008. On October 7, 2008, Father filed a petition for dissolution of marriage. Shortly thereafter, the trial court held a provisional hearing at which the only contested issue was visitation. Mother requested that Father's visitation be supervised. The trial court determined that Father was entitled to visitation pursuant to the Indiana Parenting Time Guidelines.

On April 15, 2009, the trial court found Mother in contempt for failing to comply with the court's provisional order concerning visitation. However, because Mother presented evidence that R.R. had "exhibited problematic behavior suggesting that the child may not be safe in some of the environments to which the child is exposed," the trial court requested reports from Child Protective Services ("CPS"), R.R.'s pediatrician, and R.R.'s therapist. Those individuals were asked to consider and recommend to the court "whether there should be any limitation placed upon any contact the child has with any individual." Appellant's App. p. 7.

Those reports were submitted to the court prior to the December 29, 2009 final hearing on Father's petition for dissolution. R.R.'s therapist recommended that any

contact between R.R. and Father should be “fully supervised.” Confidential App. p. 1. However, R.R.’s prior therapist¹ reported that R.R. “seems to be very fond of her father and very bonded and interested in seeing him on a regular basis.” Id. at 13. While she acknowledged R.R.’s issues with anxiety, the prior therapist was not convinced that Father was sexually molesting R.R. Id. at 7.

R.R.’s pediatrician reported that R.R. has always been a healthy child until “rapid weight gain started over the past 1-1.5 years and recurrent hives that occur intermittently also starting over the past few years that sometimes are preceded by a viral illness and sometimes not.” Id. at 15. The pediatrician also noted behavioral changes including aggressiveness towards other children. Ultimately, R.R.’s pediatrician reported that R.R.’s “rapid weight gain, behavioral changes, and possibly her recurrent hives could be physical manifestations of the stress and effect that family disruption and divorce can have on a child.” Id. CPS reported that the alleged “abuse is unsubstantiated based on the investigation.” Id. at 23.

During the final hearing, Mother requested that Father receive no visitation with the children. The court heard testimony that R.R. acts out sexually, that she would intentionally hurt herself, and has stated that she is stupid and ugly. Tr. pp. 53-59. R.R.’s therapist reported that R.R. stated she “didn’t like it when her daddy tickled her” in “her bad places,” which R.R. indicated were her vaginal area and down the front of her shirt. Tr. p. 8. Also on one occasion in May 2008, while in the presence of Mother and Father,

¹ Mother testified that she sought a new therapist for R.R. because the prior therapist was not helping R.R. with her aggressive behavior. See Tr. p. 92 (“We were getting nowhere, because she was so aggressive and angry and attacking her therapist. I thought we needed to move on to someone that she could open up to and feel comfortable with.”)

R.R. stated “tickle my tutu daddy.” Tr. p. 76. R.R. referred to her vaginal area as her “tutu.”

When asked if she believed R.R. was molested by Father, Mother replied, “I believe something has happened. I don’t know to what extent.” Tr. p. 62. Mother also stated that R.R. had not seen Father for the six months prior to the final hearing, and in those six months, R.R.’s behavior improved, she lost weight, she was sleeping well, and had opened up in counseling. Tr. pp. 64-65. Father agreed that R.R. exhibits “unusual behaviors.” Tr. p. 79. But when asked whether he believed R.R. had been sexually molested, Father replied, “I don’t know if someone has. But she’s obviously getting it from somewhere. I don’t know.” Id.

Father testified that Mother discouraged visits between him and the children. In August 2009, Father attempted to exercise visitation with the children and Mother would not allow it. Tr. p. 34. Mother told Father he could not have any visitation with the children unless it was supervised. Because Mother has continually refused visitation in contravention of the court’s order, at the final hearing, Father requested that Mother be held in contempt and be incarcerated one day for every day she denies Father visitation with the children. Tr. p. 35.

On February 3, 2010, the trial court entered its decree of dissolution. Concerning the visitation issue, the trial court found and ordered as follows:

25. The [Mother] shall continue to have custody of the parties’ minor children.

26. The Court has reviewed the assessment and Progress Notes of Patricia Thorn, [R.R.’s] counselor. The Assessment finds that [R.R.] “appears to be very fond of her father and very bonded and interested in

seeing him on a regular basis.” Her notes state that [R.R.] has been inconsistent with her stories about the boy at church touching her and her touching herself, but “has always said consistently that her Father has never and would never touch her tutu.”

27. The Court reviewed the report by Doctor Ho, [R.R.’s] pediatrician. Dr. Ho’s report indicates that [R.R.] has experienced a urinary tract infection, recurrent hives, rapid weight gain, and behavior problems. The doctor reported that these “could be physical manifestations of the stress and effect that family disruption and divorce can have on a child.”

28. The Court reviewed the two CPS investigations of allegations that the Father had molested [R.R.]. Both allegations were unsubstantiated.

29. [R.R.’s] current counselor, Laura Kirchhofer, testified that she began seeing [R.R.] on July 20, 2009. She stated that the Mother reported aggressive behavior, and sexual acting out, which had reduced over the past months. Laura Kirchhofer reported that [R.R.] has stated that she doesn’t like to be tickled in her bad places, and that she didn’t like it when he[r] dad tickled her. Laura Kirchhofer stated that she had never spoken to the [Father], and had never seen him interact with [R.R.]. Laura Kirchhofer recommended that the Father’s visitation “remain on hold” pending a psychological evaluation.

30. The Court is concerned that the [Mother] has taken [R.R.] to three different counselors . . . in the past year, apparently searching for one that will affirm her convictions that the [Father] has molested [R.R.].

31. The [Mother] had testified at the Provisional hearing that she did not want the [Father] to have regular visitation with [R.R.] because of the trauma inflicted when the [Father] left the marital residence on [R.R.’s] birthday. The [Mother] later admitted that the [Father] had been out of town when she locked the front door, disabled the garage door, and placed his clothing and personal effects on the front porch.

32. The [Mother] had been found in contempt twice for not allowing Parenting Time according to the Court’s Order. The first contempt petition was heard by the Court on April 14, 2009. The [Mother] alleged that the [Father] had molested [R.R.] The [Mother] was found in contempt.

33. The second contempt petition was heard by the Court on August 10, 2009. The [Mother] stated that she had not allowed visitation because [R.R.] had a cough and a runny nose. The Court found the [Mother] again in contempt, and ordered her to pay \$200.00 of [Father’s] attorney fees, which she has not yet paid. The Court admonished the [Mother] not to violate the Court’s Order on parenting time.

34. On August 11, 2009, the [Mother] refused the [Father’s] mid-week visit with the minor children, and indicated an intention to continue to do so for the foreseeable future. The [Father] filed a third Petition for Contempt, which is pending before the Court.

35. The [Mother] testified that she did not want the [Father] to have any contact with either child until he could prove that he had not molested [R.R.], though could not articulate how she wished him to do so.

36. In considering the reports of Patricia Thorn, Laura Kirchhofer, Child Protective Services and Dr. Ho, and the testimony of the parties, the Court does not find that Father's right of Parenting Time should be supervised. The Court reaffirms that the [Father] should have Parenting Time according to the Indiana Parenting Time Guidelines, and orders the [Mother] to comply with that Order.

37. The Court finds that the [Mother] is in contempt a third time for refusing to allow Parenting Time according to the Court's order as a penalty. The [Mother] is ordered to pay all her attorney fees herein. The [Mother] is admonished that if she continues to refuse visits in the future, she WILL be incarcerated one day jail for each day of missed visits.

38. The [Mother] has requested that the Court order the child to undergo a psychological evaluation and/or a forensic examination. The Court finds that, as the custodial parent, the [Mother] is free to offer any medical or psychological examination of the minor child that she deems necessary . . .

39. That Father is ordered to participate in family therapy with the minor child [R.R.]. The [Mother] is ordered to cooperate with the family therapy. . . .

40. A psychological evaluation shall be completed on both parties by Dr. Vanderwater-Piercy. Each party shall pay one-half of the cost of said evaluation.

Appellant's App. pp. 15-19.

On March 5, 2010, Mother filed a Motion to Correct Error. After a hearing was held on Mother's motion, the trial court entered a corrected Decree of Dissolution on April 13, 2010. The court's findings and ruling with regard to Father's visitation were not altered in the corrected decree. Mother now appeals.

Standard of Review

Initially, we observe that Father failed to file an appellee's brief. We will not undertake the burden of developing arguments for the appellee. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Applying a less stringent standard of review, we

may reverse the trial court if the appellant establishes prima facie error. Id. Prima facie error is defined as at first sight, on first appearance, or on the face of it. Id.

But we also observe that the trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). When we review findings of fact and conclusions of law, our court will first determine whether the evidence supports the findings and then whether the findings support the judgment. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, (Ind. 2009). On appeal, we “shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Id. (quoting T.R. 52(A)). A judgment is clearly erroneous when the evidence does not support the findings, when the findings fail to support the judgment, or when the trial court applies the wrong legal standard to properly found facts. Id.

I. Father’s Visitation

Mother argues that the trial court abused its discretion when it determined that Father should have unsupervised visitation pursuant to the Indiana Parenting Time Guidelines. Specifically, Mother claims that she “more than met her evidentiary requirement of beyond a preponderance of evidence that . . . visitation with the [Father] would endanger [R.R.’s] physical health or well being or significantly impair her emotional development.” Appellant’s Br. at 15.

Indiana recognizes that the right of a noncustodial parent to visit his or her children is a “precious privilege.” D.B. v. M.B.V., 913 N.E.2d 1271, 1274 (Ind. Ct. App. 2009) (quoting Duncan v. Duncan, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), trans.

denied)). Although a court may modify a parenting time order when the modification would serve the best interests of the child or children, a parent's visitation rights shall not be restricted unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.² Id. (citing Ind. Code § 31-17-4-2). A party who seeks to restrict a parent's visitation rights bears the burden of presenting evidence justifying such a restriction. Id. at 1275. A parent's right to visit with her child is subordinate to the best interests of the child. See Pence v. Pence, 667 N.E.2d 798, 800 (Ind. Ct. App. 1996).

Here, we are again confronted with a case that illustrates the tension between protecting children from heinous sexual abuse and protecting parents from the interruption and loss of parental rights, which almost inevitably accompanies a charge of sexual abuse. See, e.g., Farrell v. Littell, 790 N.E.2d 612 (Ind. Ct. App. 2003). Given her sexualized behavior, there is certainly evidence in this case that would lead a reasonable person to conclude that R.R. has likely suffered sexual abuse at some point in her young life. But we cannot agree that Mother proved, by a preponderance of the evidence, that Father has molested R.R.

CPS concluded that the allegations of molestation by Father were unsubstantiated. R.R.'s former therapist and pediatrician did not recommend that Father's parenting time be suspended or supervised. In fact, the therapist concluded that R.R. seemed very fond of Father. R.R.'s pediatrician concluded that R.R.'s behavioral problems and anxiety

² Although Indiana Code section 31-17-4-2 uses the word "might," our court has previously interpreted the language to mean that a court may not restrict parenting time unless that parenting time "would" endanger the child's physical health or emotional development. See Stewart v. Stewart, 521 N.E.2d 956, 960 n.3 (Ind. Ct. App. 1988), trans. denied.

“could be physical manifestations of the stress and effect that family disruption and divorce can have on a child.” Appellant’s App. p. 15.

On the other hand, R.R.’s therapist on the date of the hearing reported that R.R. has stated that she does not like to be tickled in her bad places, and that she did not like it when her dad tickled her. The therapist recommended that Father’s visitation “remain on hold” pending a psychological evaluation, but also admitted that she had never spoken to Father, and had never seen him interact with R.R.

The trial court judge appropriately considered and weighed the conflicting evidence that was presented to him before concluding that Father should have unsupervised parenting time in accordance with the Indiana Parenting Time Guidelines. Mother’s argument that the court abused its discretion by allowing Father unsupervised parenting time is simply a request to reweigh the evidence and the credibility of the witnesses, which our court will not do.

II. Contempt

Mother also argues that the trial court violated her due process rights by holding Mother in contempt “prospectively.” Appellant’s Br. at. 15. Mother claims, “[f]or the Trial Court to find that the [Mother] will be in contempt in the future without holding further hearings is an impermissible Order.” *Id.* at 17. In its decree, the trial court stated:

The Court finds that the [Mother] is in contempt a third time for refusing to allow Parenting Time according to the Court’s order as a penalty. The [Mother] is ordered to pay all her attorney fees herein. The [Mother] is admonished that if she continues to refuse visits in the future, she WILL be incarcerated one day jail for each day of missed visits.

Appellant’s App. pp. 18, 28.

We cannot conclude that the trial court's admonishment in the dissolution decree is a prospective finding of contempt. The trial court was understandably frustrated by Mother's continued refusal to comply with its orders concerning Father's visitation. If Mother refuses to allow visitation in the future, the court's order does not lead us to conclude that the proper procedures, including notice and a hearing, will not be followed before Mother might be found in contempt. The court's order is simply a warning that the penalty for future, substantiated contempt will be incarceration.

Conclusion

The evidence supports the trial court's determination that Father should have unsupervised parenting time in accordance with the Indiana Parenting Time Guidelines. And Mother has not demonstrated that the trial court's warning concerning any future contempt finding for failure to comply with its visitation order violates her due process rights.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.