

Bradley Bruno (Father) appeals the trial court's order in favor of Amanda D. Skobel (Mother) finding Father in contempt of court for violating the trial court's visitation order. Father presents the following consolidated and restated issues for review:

1. Did the trial court abuse its discretion by finding Father in contempt?
2. Did the trial court err by ordering Father to pay Mother's attorney's fees, as well as the fees of her witness, Dr. John Ehrmann, for testifying at the contempt hearing?

We reverse and remand.

Father and Mother were married on January 11, 1997, and their marriage produced one child, B.B., born July 12, 1997. When their marriage was dissolved in September 1999, Mother was granted sole physical custody and the parties were to share joint legal custody of B.B. pursuant to their settlement agreement. Thereafter, in August 2002, Father filed a petition to modify custody seeking, among other things, application of the Indiana Parenting Time Guidelines (the IPT Guidelines), which had not been promulgated at the time of the parties' divorce. Following a hearing, the trial court implemented the IPT Guidelines pursuant to Father's request.

Father filed a petition to modify custody and parenting time in December 2003. In his petition, Father sought joint physical custody of B.B. and equal time with her. On October 6, 2004, the parties entered into an agreed entry (the Agreed Entry), which was approved by the trial court and provided for a shared parenting schedule. Relevant to the instant appeal, the Agreed Entry provides as follows:

2. The parties agree to split [B.B.'s] summer vacation. During odd years, Father shall have the second half of [B.B.'s] summer vacation. If Mother's

summer parenting time includes the Father's day [sic] weekend, Father shall also have [B.B.] from 6:00 p.m. the Friday before Father's day [sic] until 10:00 p.m. on Father's Day.... Mother shall not be entitled to make up time if Father's day [sic] falls during her half of the summer break. Likewise, Mother shall always receive Mother's Day weekend even if it falls on Father's parenting time. Father shall not be entitled to make up time.

3. The party not having [B.B.] on her birthday shall be entitled to summer parenting time on the closest Saturday to July 12th in order to have a birthday celebration for [B.B.] Neither party shall be entitled to make up time for having to give up the Saturday closest to [B.B.'s] birthday.

* * * *

7. The parties agree to continue to use Dr. John Ehrmann as a parenting coordinator. The parties acknowledge that Dr. Ehrmann can no longer perform future custodial evaluations in this case; however, the parties agree that Dr. Ehrmann may report his recommendations to the Court. Father shall pay 70% and Mother shall pay 30% of Dr. Ehrmann's fees to serve as parenting coordinator. Dr. Ehrmann reserves the right to advise the court if he believes one party is acting inappropriately. Based on Dr. Ehrmann's recommendations, the Court may order one party to reimburse the other party for Dr. Ehrmann's fees.

* * * *

10. The parties shall confer with one another prior to enrolling [B.B.] in extra-curricular activities or providing non-routine or non-emergency medical (including counseling) care for [B.B.] In the event the parties cannot agree, the parties shall confer with Dr. Ehrmann prior to scheduling any appointments or activities. In the event the parties cannot agree, Dr. Ehrmann shall offer a recommendation which the parties shall follow.

* * * *

12. All other Court Orders not in conflict with this Order shall remain in full force and effect.

Appellant's Appendix at 19-21 (emphases in original).

Father filed his second petition to modify custody on May 9, 2006, which was eventually dismissed by the trial court, but not until after the court had transferred physical custody of B.B. from Mother to Father (pursuant to a temporary injunction) and then back to Mother within a period of two months. In March 2007, Father's petition was dismissed as moot because the changed circumstances alleged in the petition (Mother's move out of state)

no longer existed. In an unpublished decision of this court, 49A02-0705-CV-428 (January 15, 2008), we affirmed the trial court's dismissal of Father's second petition to modify custody. Though there may have been discord between the parties before the events surrounding this petition, it unfortunately rose to new levels during this time.

Dr. Ehrmann met with the parties in May 2007. At the meeting, Father expressed displeasure with the fact Mother had taken certain overnights (those not ordered by the court) away from him after she regained custody of B.B. in October 2006. Dr. Ehrmann recommended, as he had since 2004, that Mother grant Father this additional time with B.B., but Mother refused. With respect to the upcoming summer (2007), the parties agreed that during each party's half of the summer, except when out of town on vacation, B.B. was to be with the other parent on Wednesday evenings from 5:00 p.m. through the following morning at 10:00.

During the first half of the summer, while B.B. was with Mother, B.B. spent three Wednesday overnights with Father.¹ During the second half of B.B.'s summer vacation, however, Father did not allow B.B. to spend any Wednesday overnights with Mother. On three separate Wednesday evenings, Mother went to Father's home to pick up B.B. Although B.B. was inside the home, Father refused to allow Mother to take her. The only parenting time Mother received during the second half of the summer was twelve hours for B.B.'s birthday on July 12, as expressly required by the Agreed Entry. Moreover, Mother was only able to speak with B.B. on the telephone twice during Father's half of the summer.

¹ The other two weeks Mother and B.B. were on vacation.

The parties met with Dr. Ehrmann after B.B.'s summer vacation on August 21, 2007. They discussed, among other things, Father's refusal to allow Mother to exercise Wednesday overnights with B.B. during Father's half of the summer. They also discussed a disagreement regarding B.B. being on a particular soccer team. Father acknowledged that Mother had provided him with cost information and that he had approved the purchase of uniforms and equipment for that team. After Mother had expended significant sums, however, Father withdrew his support. At the August parenting meeting, Dr. Ehrmann recommended that Father support B.B.'s participation on this particular soccer team for the upcoming season. There is no evidence in the record concerning what actions Father took regarding soccer and Dr. Ehrmann's recommendation after this meeting.

On October 9, 2007, Mother filed a petition for contempt against Father based upon his refusal to allow Wednesday overnights during his half of the summer with B.B. In response, on November 1, Father filed several petitions with the trial court, including his third petition to modify custody, a petition seeking a finding of contempt against Mother, and a petition for appointment of a level III parenting coordinator. In summary, Father claimed that Mother failed to follow Dr. Ehrmann's recommendation that Father receive additional overnights and that Mother refused to advise Father regarding who was caring for B.B. before school.

The trial court held a hearing on the cross petitions for contempt on December 7, 2007. The trial court issued an order appointing Dr. Ehrmann as a level II parenting

coordinator on December 20 and a subsequent order addressing the contempt issues on May 13, 2008. In its order regarding the contempt petitions, the court denied Father's petition² and granted Mother's petition. Specifically, the court found Father in contempt for failing to abide by the recommendations of Dr. Ehrmann regarding the division of summer parenting time and B.B.'s soccer expenses. Based upon the finding of contempt, the court ordered Father to pay Mother's attorney's fees related to the contempt petitions and Dr. Ehrmann's fees for testifying at the hearing. After an unsuccessful motion to correct error, Father now appeals.

1.

Father argues the trial court abused its discretion by finding him in contempt. Our standard of review in this regard is well settled:

“Whether a person is in contempt of a court order is a matter left to the trial court's discretion.” We will reverse the trial court's finding of contempt only where an abuse of discretion has been shown, which occurs only when the trial court's decision is against the logic and effect of the facts and circumstances before it. When we review a contempt order, we neither reweigh the evidence nor judge the credibility of the witnesses.

Mitchell v. Mitchell, 785 N.E.2d 1194, 1198 (Ind. Ct. App. 2003) (citations omitted).

In order to be punished for contempt of a court's order, there must be an order commanding the accused to do or refrain from doing something, and the accused must have acted with “willful disobedience” in violating the order. *Williamson v. Creamer*, 722 N.E.2d

² The court found that there was no court order or agreement allowing Father the additional overnights he was seeking. The court further determined that Mother had provided Father with all necessary information regarding B.B.'s childcare and extracurricular activities.

863, 865 (Ind. Ct. App. 2000). Thus, “the court’s order must be clear and certain such that there is no question regarding what a person may or may not do and no question regarding when the order is being violated.” *Mitchell v. Mitchell*, 785 N.E.2d at 1198.

In the instant case, Father was found in contempt for failing to follow Dr. Ehrmann’s recommendations regarding the summer parenting schedule and B.B.’s participation in soccer. We will address each in turn.

With respect to the summer parenting schedule, Father does not dispute that he failed to abide by Dr. Ehrmann’s recommendation and the parties’ apparent agreement during the May parenting meeting that each party would exercise Wednesday overnights during the other’s extended summer parenting time. He claims, however, that he cannot be held in contempt because there was no order requiring him to provide such overnights. Specifically, he attacks the trial court’s finding that the Agreed Entry required the parties to abide by Dr. Ehrmann’s recommendations in this regard.

A plain reading of the Agreed Entry reveals that the parties were to be bound by Dr. Ehrmann’s recommendations only with respect to disagreements regarding extracurricular activities and non-routine or non-emergency medical care. On appeal, Mother appears to concede that the Agreed Entry did not provide Dr. Ehrmann with the power to issue binding recommendations regarding parenting time. Although this erroneous premise was the basis of the trial court’s finding of contempt in this regard, Mother asserts an alternative basis for upholding the contempt finding. She argues Father violated the IPT Guidelines, which were implemented in this case in 2002 before the Agreed Entry in 2004. Mother notes that the

Agreed Entry indicated that all previous orders not in conflict with the Agreed Entry remained in full force and effect.

As set out above, the Agreed Entry provided the following with respect to summer parenting time:

2. The parties agree to split [B.B.'s] summer vacation. During odd years, Father shall have the second half of [B.B.'s] summer vacation. If Mother's summer parenting time includes the Father's day [sic] weekend, Father shall also have [B.B.] from 6:00 p.m. the Friday before Father's day [sic] until 10:00 p.m. on Father's Day.... Mother shall not be entitled to make up time if Father's day [sic] falls during her half of the summer break. Likewise, Mother shall always receive Mother's Day weekend even if it falls on Father's parenting time. Father shall not be entitled to make up time.

3. The party not having [B.B.] on her birthday shall be entitled to summer parenting time on the closest Saturday to July 12th in order to have a birthday celebration for [B.B.] Neither party shall be entitled to make up time for having to give up the Saturday closest to [B.B.'s] birthday.

Appellant's Appendix at 19. These specific provisions do not track the IPT Guidelines nor do the terms of the summer parenting schedule that was recommended by Dr. Ehrmann and informally agreed to by the parties at the May 2007 parenting meeting. *See generally Ind. Parenting Time Guidelines* § II(B)(1), (B)(3) and (D). Contrary to Mother's assertions on appeal, it is far from clear that the Agreed Entry required the parties to follow the IPT Guidelines with respect regular parenting time during the other parent's extended summer parenting time.³ Therefore, the contempt order cannot be upheld on this alternative basis

³ The IPT Guidelines contemplate alternating weekends and one evening per week of up to four hours during extended summer parenting time of more than two consecutive weeks. *See Ind. Parenting Time Guidelines* § II(B). The record reveals that Mother and Father did not intend, nor did Dr. Ehrmann recommend, to fashion the 2007 summer parenting schedule in this manner.

asserted by Mother for the first time on appeal.⁴

We now turn to the contempt issue regarding Father's contribution toward soccer expenses. The only evidence presented at the hearing regarding soccer expenses came from Dr. Ehrmann during the doctor's testimony summarizing the August 21, 2007 parenting meeting. At that meeting, the parties discussed Father's belated refusal to pay soccer expenses because he wanted B.B. to play on a different team. Since the parties could not agree, Dr. Ehrmann made a binding recommendation, pursuant to the Agreed Entry, that Father should support B.B.'s participation on the chosen team and that B.B.'s continued participation could be reevaluated after the upcoming season. There was no evidence presented to the trial court regarding whether Father ultimately followed Dr. Ehrmann's recommendation. Moreover, we observe that Father's alleged refusal to contribute to soccer expenses was not even one of the bases for contempt alleged in Mother's petition or addressed by Mother during her testimony at the hearing.⁵ *See Paternity of J.T.I.*, 875 N.E.2d 451 (Ind. Ct. App. 2007) (alleged contemnor must be given clear notice of the factual accusations against him) (citing Ind. Code Ann. § 34-47-3-5 (West, PREMISE through 2008 2nd Regular Sess.)). Under these circumstances, the trial court's finding of contempt cannot be upheld.

⁴ Mother's argument that Father invited the trial court's reliance on the IPT Guidelines and may not now be heard to complain is wholly without merit, as the trial court did not rely on the IPT Guidelines.

⁵ We note that if Father has not paid his portion of the soccer expenses as required by Dr. Ehrmann's binding recommendation, Mother should properly raise this matter with the trial court.

2.

Father also argues that the trial court erred by ordering him to pay Mother's attorney's fees and Dr. Ehrmann's witness fees.

Ind. Code Ann. § 31-15-10-1(a) (West, PREMISE through 2008 2nd Regular Sess.) empowers a court to award attorney's fees and costs and states as follows:

The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

The award of attorney's fees and costs in dissolution and contempt matters under this statute rests within the sound discretion of the trial court. *Ort v. Schage*, 580 N.E.2d 335 (Ind. Ct. App. 1991). Further, "[t]here is no requirement in the statute that the person awarded attorney fees prevail in the action." *Cavazzi v. Cavazzi*, 597 N.E.2d 1289 (Ind. Ct. App. 1992).

Here, Father was directed to pay Mother's attorney's fees and Dr. Ehrmann's fees for testifying at the hearing based solely upon the finding of contempt against Father. As set forth above, we have reversed the finding of contempt. Because the award of attorney's fees and costs can no longer stand on this basis, we remand to the trial court for reconsideration of attorney's fees and costs under I.C. § 31-15-10-1(a).

Judgment reversed and remanded for further proceedings consistent with this opinion.

MAY, J., and BRADFORD, J., concur