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**IN THE
COURT OF APPEALS OF INDIANA**

EDITH ANN HAUSER,
Appellant-Respondent,

vs.

ROBERT L. HAUSER,
Appellee-Petitioner.

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No. 48A04-0810-CV-579

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0411-DR-1085

March 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Edith Dubree (“Mother”)¹ appeals the trial court’s grant of a petition for modification of child custody and child support filed by Robert Hauser (“Father”).

Mother raises two issues, which we revise and restate as:

- I. Whether the trial court abused its discretion by modifying custody;
and
- II. Whether the trial court erred by modifying Father’s child support obligation.

We affirm in part, reverse in part, and remand.

The relevant facts follow. Mother and Father were married on January 20, 2001, and had one son, J.H., born on August 13, 2001. A dissolution action was filed, and on January 24, 2005, the trial court entered a decree of dissolution that adopted and incorporated the parties’ property settlement agreement. The property settlement agreement provided that Mother and Father would have joint legal custody over J.H., and Mother would have primary physical custody. The property settlement agreement also provided that J.H. “should further enjoy parenting time with his father consistent with the Indiana Parenting Time Guidelines as presently in effect and as amended from time to time, except that with respect to holiday or special visitation, the even-odd years will be reversed.” Appellant’s Appendix at 17. The property settlement agreement also provided that Father pay \$125 per week in child support. On October 6, 2007, Mother married Dustin Dubree (“Dustin”). In November 2007, Mother moved from Anderson to Pendleton.

¹ We note that Mother’s brief refers to Mother as Edith Hauser; however, Mother stated that her name was Edith Dubree at the hearing.

On June 29, 2007, Father filed a petition alleging that there had been a substantial change in circumstances to warrant a change in custody, parenting time, and child support. The trial court held hearings on Father's petition in April 2008. On July 16, 2008, the trial court entered the following order:

I. Facts Established by the Evidence:

1. That the parties are the parents of one (1) child, to-wit: [J.H.], born 8/13/01.
2. That the parties received a Decree of Dissolution on January 24, 2005, and the parties were granted joint legal custody with physical custody to [Mother].
3. That [Mother] works every weekend on both Friday and Saturday at Crackle [sic] Barrel.
4. That [Mother] moved out of Anderson and out of the Anderson School District without [Father]'s consent which is in violation of the joint custody order.
5. That [Mother] has not offered [Father] the first right for [J.H.] when daycare is needed.
6. That [Mother] has not permitted [Father] to enroll [J.H.] in different sporting activities, and [Father] wants to be able to coach his son.
7. That [J.H.] has Two (2) stepbrothers living with [Father], and [J.H.] wants to spend more time with them.
8. That [J.H.] was three (3) years old when the dissolution was granted, and now he wants to divide his time equally with his parents.
9. That [J.H.] needs a positive male role model.
10. That [Mother] has now married for the 4th time.

11. That [Mother] and her new husband slept with [J.H.] between them in their bed until their new baby was born. Now they share their bed with the baby.
12. Both parties live in nice homes in nice neighborhoods and obviously love their children very much.

* * * * *

III. Conclusion:

13. That since the dissolution was granted, there has been a substantial change of circumstances which warrants a modification of the previous physical custody order.
14. That a modification of [J.H.]’s physical custody is in his best interest, and the existing order is unreasonable.
15. That the parties’ parenting time should be set out as presented in Exhibit A (see attached).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that:

1. The parties shall have joint legal and physical custody of [J.H.].
2. Parenting time shall be set out as set forth in the attached exhibit (see Exhibit “A”).
 - a. In the event the parties cannot agree, the parenting time guidelines shall be implemented with [Father] as custodial parent;
 - b. [J.H.]’s school enrollment shall be in the school district where [Father] resides;
 - c. That [Father] shall be permitted to enroll [J.H.] in all extracurricular activities including, but not limited to, sporting activities;

- d. That [Father] shall be permitted to participate in [J.H.]’s activities.
3. The Court finds that [Mother]’s income adjustment in her favor is not material in the scope of this case and, therefore, does not modify the previous order of child support.
4. That [Father] shall pay child support in the amount of \$112.00 per week commencing the first Friday following the approval of this Order.
5. That the 6% Rule shall apply with [Mother] paying the first \$614.64 annually of any and all uninsured medical, dental, and optical, and prescription expenses of the child. Thereafter, [Father] shall pay 83% and [Mother] shall pay 17% of said expenses.
6. All prior orders not inconsistent with this Order shall remain in full force and effect.

Appellant’s Appendix at 6-9. In general, Exhibit A provides for alternating weeks of custody. In the first week, Mother picks up J.H. after school on Monday and has J.H. until Father picks up J.H. from school on Thursday. During the second week, Mother picks up J.H. after school on Monday and has J.H. until Friday morning.

I.

The first issue is whether the trial court abused its discretion by modifying custody. We review custody modifications for an abuse of discretion and have a “preference for granting latitude and deference to our trial judges in family law matters.” Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). “We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or

legitimate inferences support the trial court's judgment." Id. The Indiana Supreme Court explained the reason for this deference in Kirk:

While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we 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 he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). Therefore, "[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." Id. We may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

The trial court entered findings of fact and conclusions thereon when it issued its order modifying custody. When reviewing the trial court's findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. 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.

Ind. Code § 31-17-2-21(a) governs the modification of a child custody order and provides, in part, that “[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8]” When making a determination to modify a child custody order, “the court shall consider the factors listed under [Ind. Code § 31-17-2-8] of this chapter.” Ind. Code § 31-17-2-21(b). Ind. Code § 31-17-2-8 lists the following factors:

- (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.

- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

“[T]he noncustodial parent must show something more than isolated acts of misconduct by the custodial parent to warrant a modification of child custody; the noncustodial parent must show that changed circumstances regarding the custodial parent’s stability and the child’s wellbeing are substantial.” Wallin v. Wallin, 668 N.E.2d 259, 261 (Ind. Ct. App. 1996).

“In summary, all that is required to support modification of custody under I.C. § 31-17-2-21 is a finding that a change would be in the child’s best interests, a consideration of the factors listed in I.C. § 31-17-2-8, and a finding that there has been a substantial change in one of those factors.” Nienaber v. Nienaber, 787 N.E.2d 450, 456 (Ind. Ct. App. 2003). Although both parents are presumed equally entitled to custody in the initial custody determination, a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody order should be altered. Kirk, 770 N.E.2d at 307.

Mother argues that the trial court abused its discretion by modifying custody because there was no substantial change in circumstances and it was not in J.H.’s best interests. The evidence reveals that Mother moved from Anderson to Pendleton without

consulting Father. Mother works on Saturdays and Sundays² and is normally home between 4:00 p.m. and 5:00 p.m. on Saturdays and by 3:30 on Sundays. When Mother works, J.H. usually stays with Dustin, his stepfather. However, Dustin works two Saturdays a month, and during one of those Saturdays, J.H. is in Mother's custody and stays with Dustin's grandparents while Dustin is at work. The Parenting Time Guidelines discuss the opportunity for additional parenting time by allowing the noncustodial parent the right of first refusal to provide child care:

Opportunity for Additional Parenting Time. When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time. The other parent is under no obligation to provide the child care. If the other parent elects to provide this care, it shall be done at no cost.

Ind. Parenting Time Guideline § I(C)(3). Father testified that Mother never called him to ask if he wanted J.H. for the weekend because she was working, and that J.H. would have to stay with Dustin's grandparents for a period of time on Saturday.³

² Mother argues that the trial court's finding that she worked every weekend on both Friday and Saturday at Cracker Barrel was not supported by the evidence. Father concedes that "based on the evidence contained in the record of these proceedings, the trial court must have mistaken Friday and Saturday for Saturday and Sunday." Appellee's Brief at 8. The record reveals that Mother worked on Saturdays and Sundays. We cannot say that the trial court's misstatement affects the outcome of this case.

³ Mother argues that her employment on the weekends cannot constitute a change because "the evidence showed that [her] work schedule had remained consistent over the years in that she had worked on the weekends during the marriage at Cracker Barrel and continued to do so post-dissolution." Appellant's Brief at 6-7. The record reveals that Mother worked during the weekends when she was married to Father; however, at that time Father did not work during the weekends, and Mother does not direct our attention to evidence that J.H. had to stay with a person other than a parent or family member during the weekends when Mother and Father were married.

The record also reveals that Mother has given Father only the minimum visitation time allowed. When Father has asked Mother to have J.H. for family functions “[n]inety [n]ine percent” of the time it has not “work[ed] out.” Transcript at 42. When Father asked Mother about school “sign ups,” Mother would hang up or refuse to talk with Father. Id. at 46.

The record also reveals that J.H. wanted to make a change and asked to spend time with Father. Mother argues that the trial court’s finding that J.H. now wants to spend equal time with Father was not supported by reliable evidence because J.H. did not testify either in court or in camera during the two evidentiary hearings. Mother argues that “the only evidence supporting such a finding would be [Father]’s testimony concerning [J.H.]’s wishes, which is hearsay.” Appellant’s Brief at 8. However, Mother did not object to Father’s testimony. Consequently, we conclude that Mother waived this argument. See In re Guardianship of Hickman, 805 N.E.2d 808, 822 (Ind. Ct. App. 2004) (holding that party waived argument by failing to object at trial), trans. denied.

Lastly, the record reveals that Father is the baseball coach for his other children in the Riverfield baseball league and wanted to coach J.H.’s baseball team as well. Father requested that Mother sign J.H. up for Riverfield baseball, but Mother refused and signed J.H. up for baseball in Meadowbrook.

Based upon the record, we cannot say that the evidence positively requires the conclusion contended for by Mother. We conclude that, in light of the evidence of Mother’s failure to encourage J.H.’s relationship with Father, a substantial change has

taken place in J.H.'s wishes, Father's wishes, and the interaction and interrelationship of J.H. with J.H.'s parents. Accordingly, we conclude that the trial court did not abuse its discretion by granting Father's petition to modify custody.

II.

The next issue is whether the trial court erred by modifying Father's child support obligation. "We place a 'strong emphasis on trial court discretion in determining child support obligations' and regularly acknowledge 'the principle that child support modifications will not be set aside unless they are clearly erroneous.'" Lea v. Lea, 691 N.E.2d 1214, 1217 (Ind. 1998) (quoting Stultz v. Stultz, 659 N.E.2d 125, 128 (Ind. 1995)). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. We give due regard to the trial court's ability to assess the credibility of witnesses. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

The modification of a child support order is governed by Ind. Code § 31-16-8-1, which provides:

- (a) Provisions of an order with respect to child support or an order for maintenance (ordered under IC 31-16-7-1 or IC 31-1-11.5-9(c) before their repeal) may be modified or revoked.
- (b) Except as provided in section 2 of this chapter, modification may be made only:
 - (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
 - (2) upon a showing that:
 - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.
- (c) Modification under this section is subject to IC 31-25-4-17(a)(6).

Mother argues that the trial court erred because: (A) the order was inconsistent; and (B) the trial court failed to include Father's overtime in its calculation of Father's weekly gross income.

A. Whether the Order was Inconsistent

Mother argues that the trial court's order is inconsistent in that it states that the court was not modifying the previous order of child support, but then the court modified the previous order of child support of \$125 per week to \$112 per week. The trial court's order provides:

* * * * *

3. The Court finds that [Mother]'s income adjustment in her favor is not material in the scope of this case and, therefore, does not modify the previous order of child support.
4. That [Father] shall pay child support in the amount of \$112.00 per week commencing the first Friday following the approval of this Order.

* * * * *

We agree with Mother that the foregoing paragraphs are inconsistent.

B. Father's Weekly Gross Income

Mother argues that the trial court erred by failing to include Father's overtime earnings as part of his weekly gross income in determining his child support obligation. Father agreed that his income was \$69,420 for 2007. Father also testified that he worked about 120 hours of overtime in 2007 and had worked about twenty hours of overtime in 2008 as of the April 1, 2008 hearing. Father admitted a child support obligation worksheet as an exhibit that listed his weekly gross income as \$1,153. The trial court's child support obligation worksheet also lists Father's weekly gross income as \$1,153.

The following exchange occurred during cross examination of Father:

- Q. Why have you only shown Eleven Fifty Three (1153) for your income on your exhibit about child support?
- A. That's what my income is.
- Q. Eleven Fifty Three (1153) a week doesn't come close to the Seventy Thousand (70,000) that you grossed.
- A. That's counting overtime. Incidental overtime.

Transcript at 28.

Ind. Child Support Guideline 3(A) provides that weekly gross income includes overtime.⁴ “However, the commentary to Guideline 3(A) states that although overtime is includable in a parent’s weekly gross income figure, it is very fact-sensitive and thus, when a court determines that it is not appropriate to include irregular income in the weekly gross income figure used to determine the child support amount, it should express its reasons.” Hamiter v. Torrence, 717 N.E.2d 1249, 1252 (Ind. Ct. App. 1999). We conclude that the trial court erred because it did not include Father’s overtime pay or express its reasons for excluding Father’s overtime pay. See id.; cf. Carter by Carter v. Morrow, 563 N.E.2d 183, 186 (Ind. Ct. App. 1990) (stating that, in making the determination that father’s overtime pay should not be included in his weekly gross income figure because of future uncertainty, the trial judge complied exactly with the requirement of Child Supp. R. 3 that trial courts articulate the reasons for their decision). In summary, we reverse the trial court’s modification of child support and remand to the

⁴ Ind. Child Support Guideline 3(A)(1) provides:

Definition of Weekly Gross Income (Line 1 of Worksheet). For purposes of these Guidelines, “weekly gross income” is defined as actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and imputed income based upon “in-kind” benefits. Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workmen’s compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received from other marriages. Specifically excluded are benefits from means-tested public assistance programs, including, but not limited to Temporary Aid To Needy Families (TANF), Supplemental Security Income, and Food Stamps.

trial court to clarify its order and include Father's overtime in its calculation of Father's weekly gross income or express its reasons for not doing so.

For the foregoing reasons, we affirm the trial court's modification of custody, reverse the trial court's modification of child support, and remand with instructions.

Affirmed in part, reversed in part, and remanded.

CRONE, J. concurs

ROBB, J. concurs in result with separate opinion

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EDITH ANN HAUSER,)	
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Appellant-Respondent,)	
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vs.)	No. 48A04-0810-CV-579
)	
ROBERT L. HAUSER,)	
)	
Appellee-Petitioner.)	

ROBB, Judge, concurring in result

I concur in the majority opinion with the exception of the majority’s holding that Mother waived her argument regarding the trial court’s finding that J.H. now wants to spend equal time with Father by failing to object to Father’s testimony regarding J.H.’s wishes. See slip op. at 10.

The testimony to which the majority refers arose in the following context: Father’s counsel was questioning him about J.H.’s summer visitation, in which he spent two weeks with Father, two weeks with Mother, then two more weeks with Father. Father testified as follows:

Q: [H]ow did that go?

A: That went awesome.

Q: Ah, was [J.H.] sad when it had to end?

A: Yes he was.

Q: In fact, is that one of the reasons we're here today . . .

A: Yes it is.

Q: . . . is because he has wanted to make a change?

A: Yes.

Q: And he ah, you would like to honor his request and spend time with him, is that right?

A: Yes.

* * *

Q: You've told us that your son has asked to spend this time with you and that's one of the changes that ah, you're basing this modification on, is that right?

A: That's correct.

Transcript at 18, 24.

Father was not asked to testify about the truth of J.H.'s statements that he would like to spend more time with Father, but to explain why Father had filed the petition for modify custody. Therefore, his testimony was not objectionable as hearsay. See Ind. Evidence Rule 801(c) ("Hearsay' is a statement . . . offered in evidence to prove the truth of the matter asserted."). I would not hold that Mother had waived consideration of

her issue by failing to object where an objection was not required nor would it have been sustained if made.

Nonetheless, Father's testimony was uncontradicted, and I agree with the majority that the trial court did not abuse its discretion in granting Father's petition to modify custody.