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FILED
Jun 05 2009, 9:15 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

TIMOTHY E. STUCKY
Blume, Connelly, Jordan, Stucky
& Lauer, LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

MARK C. CHAMBERS
MELANIE L. FARR
Haller & Colvin, P.C.
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE PATERNITY OF T.M.:	)	
	)	
J.M.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0811-JV-552
	)	
A.C.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Stephen S. Spindler, Senior Judge
Cause No. 02D07-0506-JP-612

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

J.M. ("Father") appeals an order denying him parenting time with his son, T.M., and ordering the payment of attorney's fees incurred by A.C. ("Mother"). We affirm.

Issues

Father presents three issues for review:

I. Whether there is sufficient evidence to support the denial of parenting time;

II. Whether the trial court abused its discretion in the admission of evidence; and

III. Whether the trial court abused its discretion by ordering the payment of attorney's fees.

Facts and Procedural History

T.M. was born in 2003. In October of 2005, Father established his paternity of T.M. and began paying child support. Mother was awarded temporary custody of T.M. The issues of permanent custody and parenting time were deferred. At that time, Father had three other children living in North Carolina, two of whom Father was alleged to have sexually abused. During 2006 and 2007, Father had supervised parenting time with T.M.

On January 28, 2008, in the course of custody proceedings, a forensic psychology report prepared by Dr. Michael Jenuwine of the University of Notre Dame was filed with the trial court. In relevant part, Dr. Jenuwine opined "[Father's] testing results yield a pattern of responding that is inconsistent with the profiles generated by known sex offenders." (App. 69.) In light of Dr. Jenuwine's report, the parties agreed that Father would exercise unsupervised parenting time with T.M. Father's unsupervised parenting time with T.M.

began on February 9, 2008.

On March 11, 2008, the trial court awarded Mother the legal and physical custody of T.M., based in part upon the trial court's findings of fact (1) that the North Carolina Child Protective Services had substantiated Father's sexual abuse of one of his older children, (2) that Father's neglect of his other two older children had been substantiated, and (3) that Father's parenting time with his three older children had been suspended pursuant to an agreement between him and his ex-wife.

After T.M. began unsupervised visits with Father, T.M.'s behavior dramatically changed and Mother sought therapy for T.M. During some of these sessions, T.M. reported to his therapist, Tyson Flora ("Flora"), that Father had "tickled [T.M.'s] butt hole really hard" and that Father had touched T.M.'s penis. (Tr. 82.) On March 29, 2008, Mother obtained an emergency protective order prohibiting Father's unsupervised visits with T.M.

Father filed a petition for contempt against Mother, alleging deprivation of parenting time, and Mother filed a petition for contempt against Father, alleging that Father had used drugs during his parenting time with T.M. Mother also petitioned for modification of Father's parenting time, to exclude unsupervised visits. The trial court conducted a hearing on September 15, 2008. On October 6, 2008, the trial court entered an order denying Father parenting time, supervised or unsupervised, and ordering his payment of a portion of Mother's attorney's fees. Father now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Restriction of parenting time is governed by Indiana Code Section 31-17-4-1(a), which provides: "A parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development."

When we review a trial court's determination of a parenting time issue, we will reverse only when the trial court has manifestly abused its discretion. J.M. v. N.M., 844 N.E.2d 590, 599 (Ind. Ct. App. 2006), trans. denied. No abuse of discretion occurs if there is a rational basis in the record supporting the trial court's determination. Id. In reviewing the record for the existence of a rational basis, we will neither reweigh evidence nor judge the credibility of witnesses. Id. In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child or children involved. Id.

Mother testified that, shortly after Father began exercising unsupervised parenting time with T.M., four-year-old T.M. began to display marked behavioral changes. T.M. became defiant and refused to speak to his stepfather, insisting that he would only speak with Mother. He began to hit and bite his stepfather and Mother. T.M. abused the family dog, choking it and throwing it downstairs. When T.M. encountered a cousin's male dog, T.M. repeatedly tried to grab the dog's penis. Also, without medical explanation, T.M. began to have difficulty breathing and often soiled himself, despite having been toilet trained two

years earlier. T.M.'s preschool teacher spoke with Mother about the dramatic behavior changes, and Mother sought therapy for T.M. After T.M. ceased visiting with Father pursuant to the protective order, T.M.'s physical condition and behavior improved.

Child therapist Flora testified that she met with T.M. for several sessions, originally to address behavioral concerns. In the second or third session, T.M. began to spontaneously describe some occurrences at Father's house. T.M. reported that Father had touched T.M.'s penis, "tickled his butt hole really hard," and abused the family pit bull in a similar manner. (Tr. 82.) T.M. stated that he "didn't like it" and "didn't think it was funny" when his Father was "being mean" to the dog. (Tr. 83.) Flora opined that T.M. displayed characteristics typically associated with a sexually-abused child.

Samantha Coleman, Father's former live-in girlfriend, testified regarding Father's drug use and his threats against the mothers of his children. Caseworker Michael Bitler testified that the Allen County Department of Child Services had substantiated an allegation of child abuse against Father after having receiving three reports of suspected child abuse and after T.M. disclosed in a forensic interview that Father "tickled his butt hold [sic]." (Tr. 113.)

Finally, the record in this case included extensive documents from North Carolina Child Protective Services. Child Protective Services had substantiated allegations that Father sexually molested his son and neglected his two daughters by exposing them to sexual activity. In light of the investigation and substantiation, Father and his ex-wife had submitted an agreement to a district court in Onslow County, North Carolina whereby Father declined

to seek parenting time with his three older children.

Here, the trial court specifically found, "unsupervised parenting time between [Father and T.M.] would endanger [T.M.]'s physical health or significantly impair [T.M.]'s emotional development" and "no contact between [T.M. and Father] is in [T.M.]'s best interest for the emotional and physical protection of [T.M.]." (App. 13.) In that the record discloses evidence of Father's drug abuse and threats, his sexual abuse of two of his children, and his neglect of two others, there is a rational basis supporting the trial court's decision that Father should not be allowed to exercise parenting time with T.M. We find no manifest abuse of discretion in the parenting time order.

II. Admission of Evidence

Father claims that the trial court violated his "substantial rights" by erroneously permitting, over his objections, "extensive hearsay testimony" and the "vouching testimony of Tyson Flora." Appellant's Brief at 18. He does not confine his argument to particular portions of testimony erroneously admitted; rather, Father implicitly argues that the entirety of the testimony offered by Flora and Bitler should have been excluded.

A trial court's decision to admit or exclude evidence is within the sound discretion of the trial court and is reviewable for a manifest abuse of discretion. Davidson v. Bailey, 826 N.E.2d 80, 85 (Ind. Ct. App. 2005) (quoting Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997)). The erroneous admission of hearsay evidence does not automatically require reversal, and we will reverse only if we conclude that the admission affected a party's substantial rights. In re W.B., 772 N.E.2d 522, 533 (Ind. Ct. App. 2002); Ind. Evidence Rule

103(a).

Father directs our attention to In re Paternity of H.R.M., 864 N.E.2d 442, 444 (Ind. Ct. App. 2007), wherein a panel of this Court reversed a parenting time order after concluding that "the social worker's testimony and the family specialist's notes both constitute hearsay, and that neither falls within an exception to the rule against the admission of hearsay." In H.R.M., a self-employed social worker had testified over the father's objection as to what H.R.M. stated during interviews. See id. at 445. H.R.M.'s father had also objected to the introduction of notes made by a family support specialist at Healthy Families of Bartholomew County. See id. The trial court had found the child's statements to the social worker admissible as statements made for the purposes of medical diagnosis or treatment under Indiana Evidence Rule 803(4) and had found the notes admissible as business records under Indiana Evidence Rule 803(6). The H.R.M. Court concluded that the evidence failed to demonstrate that H.R.M. was subjectively aware of the social worker's role as a mental health care provider, and also that a purported affidavit was insufficient to fulfill substantive requirements for a business records affidavit. See id. at 447, 450. As the trial court had not entered findings or conclusions and the H.R.M. Court could not determine the probable impact of the erroneously admitted evidence upon the trial court's decision, the admission of the challenged evidence was found not to be harmless error. See id. at 452.

Here, unlike the appellant in H.R.M., Father did not interpose specific, contemporaneous objections offering the trial court the opportunity to evaluate the purpose of the individual statements now alleged to be inadmissible hearsay, or to consider the

applicability of exceptions to the hearsay rule. The failure to object in the trial court waives any claim of error and allows otherwise inadmissible hearsay evidence to be considered for substantive purposes. Scott v. State, 803 N.E.2d 1231, 1238 (Ind. Ct. App. 2004). In this case, we must disagree with Father's implicit claim that he challenged all hearsay statements, as the record reveals that Father's objections were limited in number, scope, and specificity.

When Flora testified that T.M. reported to her "an inappropriate touch" from Father, Father objected as follows, "I'll have to object on the hearsay even though there's not [a] specified statement." (Tr. 80.) Subsequently, when Mother offered Respondent's Exhibit D, Father interjected, "I would object to any witness ever testifying about the truthfulness of any other individual, be it lay person or expert. That's simply my objection." (Tr. 88.) However, Respondent's Exhibit D did not concern "a witness testifying about truthfulness" but was a listing of criteria commonly considered by therapists as indicative of child sexual abuse.[1]

Father also objected on hearsay grounds, and was granted a continuing objection, when Bitler testified. Thus, Bitler's testimony that T.M. reported sexual abuse from Father was admitted despite Father's contemporaneous hearsay objection. However, Bitler was Mother's last witness and testified after the fact-finder had already received other unchallenged and similar evidence of T.M.'s accusations against Father. In general, the admission of evidence that is merely cumulative of other evidence amounts to harmless error inasmuch as the admission does not affect a party's substantial rights. H.R.M., 864 N.E.2d at

[1] The exhibit listed eleven indicia of child sexual abuse, including self-report of being sexually abused, physical signs, strong interest in or advanced knowledge of sexuality, sexualized behaviors, nightmares, flashbacks, unexplainable feelings of anger, rage, or fear, pronounced disturbance of mood, regressive

450-51.

Father's argument is essentially an invitation to discard the entirety of the testimony unfavorable to him because he interposed three evidentiary objections, one directed to an exhibit, and two directed to testimony. However, the vast majority of the evidence unfavorable to Father was admitted without an objection. Moreover, in contrast to the order involved in H.R.M., here the trial court made extensive findings of fact. It is clear that the trial court relied upon an abundance of unchallenged testimonial and documentary evidence in reaching its decision (including testimony from Mother and from Father's former girlfriend, together with extensive records from the State of North Carolina). To the extent that hearsay testimony from Bitler was erroneously admitted over Father's objection, we are confident from our review of the record that the admission is harmless error.

III.Attorney's Fees

Finally, Father contends that the trial court abused its discretion by ordering that he pay Mother's attorney's fees. More specifically, he argues that his and Mother's earnings capacities are approximately equal, and that Mother failed to establish that he was in contempt of court for using drugs during parenting time, as alleged.

According to Indiana Code Section 31-17-4-3, a court may award reasonable attorney's fees in any action filed to enforce or modify an order granting or denying parenting time rights. The trial court has broad discretion in awarding attorney's fees. Holmes v. Holmes, 726 N.E.2d 1276, 1285 (Ind. Ct. App. 2000), trans. denied. In assessing attorney's

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behaviors, and marked distrust in others. (App. 167.)

fees, the trial court may consider such things as the respective economic conditions of the parties and whether the misconduct of one party resulted in the other party incurring additional fees. Id.

In the instant case, Mother was advised by child protective services that she should take immediate action to stop Father's unsupervised visits with T.M. Mother obtained, as a temporary measure, an ex parte emergency protective order. She was then obliged to seek modification of the existing parenting time order and respond to Father's accusations of contempt in that she had wrongfully deprived him of parenting time. The trial court determined, based upon substantial evidence, that Father committed misconduct during parenting time. The order for the payment of Mother's attorney's fees is within the sound discretion of the trial court.

Conclusion

Father has not demonstrated that the trial court's parenting time order lacks a rational basis; nor has he demonstrated reversible error in the evidentiary rulings of the trial court. Finally, the award of attorney's fees is not an abuse of discretion.

Affirmed.

DARDEN, J., and ROBB, J., concur.