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**IN THE  
COURT OF APPEALS OF INDIANA**

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JERRY L. COLEMAN, )

Appellant-Petitioner, )

vs. )

No. 38A05-1008-DR-490 )

MARLA J. COLEMAN, )

Appellee-Respondent. )

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APPEAL FROM THE JAY CIRCUIT COURT  
The Honorable Marianne L. Vorhees, Special Judge  
The Honorable Max C. Ludy, Jr., Special Judge  
Cause No. 38C01-0903-DR-11

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**June 27, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Jerry L. Coleman (“Jerry”) appeals the dissolution court’s denial of his motion to correct error after the court awarded custody of Jerry and Marla J. Coleman’s (“Marla”) son, A.C., to Marla, and twice found Jerry in contempt of court.

We affirm.

## **Issues**

Jerry presents several issues for our review, which we restate as:

- I. Whether the dissolution court abused its discretion when it awarded custody of A.C. to Marla; and
- II. Whether the dissolution court abused its discretion when it twice found Jerry in contempt of court.

## **Facts and Procedural History**

Jerry and Marla married in 1984. They had three children together. Two of the children are emancipated, and one, A.C., is a minor. Jerry filed his petition to dissolve the marriage on March 3, 2009.

On June 12, 2009, in an Order on Preliminary Issues, the dissolution court ordered Jerry to pay Marla \$857.15 per month. This amount was the one-half portion of the military retirement benefits paid to Jerry that Marla was eligible to receive. The court ordered payments to begin in July 2009, and also ordered Jerry to pay an arrearage owed from prior months.

Jerry failed to timely pay Marla the September 2009 installment. On September 3, 2009, Marla filed a petition for contempt citation. On September 30, 2009, the court found

Jerry in contempt of court, ordered him to pay the \$857.15 required by the prior order, and ordered payment of \$300.00 in attorney's fees for Marla.

On May 14, 2010, Marla filed a second petition for contempt citation, contending that Jerry had failed to pay the May 2010 installment. On May 28, 2010, the dissolution court again found Jerry in contempt of court. The court sentenced Jerry to two days imprisonment in the Jay County Security Center and ordered him to pay an additional \$450.00 in attorney's fees for Marla.

On June 2, 2010, the dissolution court entered its Final Decree of Dissolution of Marriage. The Decree dissolved the marriage, ordered the distribution of assets and liabilities between Jerry and Marla, held that Marla having custody of A.C. was in his best interests, granted Marla custody of A.C., and granted Jerry parenting time.

On June 23, 2010, Jerry filed his motion to correct error, contesting the allocation of assets and liabilities between him and Marla, and challenging the dissolution court's decision granting Marla custody of A.C. On July 14, 2010, the court denied the motion to correct error, clarifying a single portion of the order not relevant to the issues now before us.

This appeal followed. Additional facts will be provided as needed.

## **Discussion and Decision**

### Custody of A.C.

Jerry appeals from the denial of his motion to correct error. The motion challenged numerous issues in the Final Decree, but Jerry presents only one issue from the motion for our review: whether the dissolution court abused its discretion when it denied his motion to

correct error as to the custody provisions of the Final Decree. Specifically, Jerry argues that the court improperly disregarded A.C.'s wishes, misstated the evidence, and placed too much emphasis on Jerry's promise to give A.C. a car if A.C. came to live with Jerry. Jerry further argues that the evidence, arrayed against the statutory factors related to custody orders, see Ind. Code § 31-17-2-8, demonstrates that the court should have given Jerry custody of A.C., and the court's failure to enumerate the factors and apply these to the evidence resulted in a defective child custody order.

When a trial court denies a motion to correct error, we review that decision for an abuse of discretion. Singh v. Lyday, 889 N.E.2d 342, 348 (Ind. Ct. App. 2008), trans. denied. Here, the underlying issue concerns the trial court's order that Marla have custody of A.C., which we also review for an abuse of discretion. Klotz v. Klotz, 747 N.E.2d 1187, 1189 (Ind. Ct. App. 2001). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or against the reasonable inferences drawn from that evidence. Id.

The dissolution court entered findings of fact and conclusions of law sua sponte, and Jerry challenges the trial court's order in part as to the accuracy of the trial court's findings with reference to the evidence. As to matters sua sponte findings address, we review the findings by determining whether the evidence supports the findings, and then whether the findings support the judgment. We reverse the judgment in such situations only when they are clearly erroneous, that is, when there is no evidence nor reasonable inferences from the evidence that support the judgment, and we consider only the evidence and inferences

favorable to the judgment in our review. Id. at 1190.

The standard under which a trial court must determine custody of a minor is set forth in our statutes:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (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.

I.C. § 31-17-2-8.

In reaching a custody decision, the trial court must consider all factors relevant to making a custody determination. Id. The factors are not exclusive, and no one or more factors are determinative. While a trial court must consider the evidence in light of the factors, it need not make specific findings as to each of them. Russell v. Russell, 682 N.E.2d 513, 515 (Ind. 1997).

The portion of the Final Decree related to custody of A.C. states:

9. [A.C.] is currently suffering from stomach problems and depression. [A.C.] is taking medication for the depression and is being treated by Dr. Joyce Fisher. The existing parental discord appears to be contributing to [A.C.]'s medical problems.

10. [Jerry] and [A.C.] expressed a mutual interest in spending more time together, and even the possibility of [Jerry] being awarded custody of [A.C.].

11. [A.C.] is going through a difficult time in his life, and is in the process of obtaining his driver's license. The competing requests of custody have been complicated by the promise of an automobile made by [Jerry], and the potential motives for said promise.

12. The Court always struggles with children who are [A.C.]'s age in sorting out the motivations for the various requests. Promises of automobiles, potentially more freedom, and a perceived different home atmosphere are difficult to sort out.

13. The Petitioner is to be commended for his military service, but he has been derelict in his duty to visit and be involved in [A.C.]'s live [sic] until the year 2010. Given the history of the parties with respect to [A.C.], and the continued moving by [Jerry] (even after his retirement), the Court does not believe that it is in the best interests of [A.C.] for [Jerry] to have custody of [A.C.] at this time. [Jerry] has not been very active in the life of [A.C.] for many years. In fact, until recently, [Jerry] has not exercised all of the parenting time which he would have been allowed under the Court's preliminary Order. [A.C.]'s stated request may be motivated by a promise of an automobile if he lives with [Jerry], which serves only to cloud the issues.

(App. 12-13.)

The dissolution court's finding that Jerry was not active in A.C.'s life, which in turn supports the court's custody decision, finds ample support in the record. See I.C. § 31-17-2-8(4). Both Marla and Jerry testified that Jerry lived away from the family due to the requirements of military service for many years. Because of the locations in which he was stationed, Jerry would return home only sporadically during his military service: from 2001 to 2004, while stationed in Michigan, he would return almost weekly, and from 2004 to 2007, while stationed in Pennsylvania, he would return monthly or every six weeks. Similarly, both Jerry and Marla testified that after Jerry's retirement from the military in 2007 he lived with Marla and A.C. for only about two months before moving to Ohio.<sup>1</sup>

From this point until after the petition for dissolution, there was no evidence that Jerry was involved in A.C.'s life any more than when he or A.C. "felt like" it (Apr. 19 Tr. 10) or whenever A.C. "wanted" a visit. (Apr. 29 Tr. 83.) Marla characterized these visits as "very sporadic." (Apr. 19 Tr. 10.) Jerry testified that he attended some school band functions when A.C. was in junior high school, but had not attended any school conferences related to A.C. and only became actively involved in A.C.'s education in 2009 and 2010, during the pendency of the dissolution proceedings. Moreover, A.C. testified that Jerry "in the past hasn't always reacted very well to new news sometimes" (Apr. 29 Tr. 34), and thus he was concerned at one point that Jerry might react poorly to learning that he was taking an anti-depressant medication as a result of stress arising from the pending divorce.

The dissolution court noted that A.C. wished to leave Marla's care, Jay County, and

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<sup>1</sup> At the time of the final hearing, Jerry had recently moved to Kentucky from Ohio.

his school, and move in with Jerry, see I.C. § 31-17-2-8(3) & (5), but observed that A.C.'s wishes as a sixteen year-old may have been strongly influenced by the prospect of Jerry giving A.C. a vehicle and A.C.'s expectations of greater freedom and a change in home life that might come with moving in with Jerry. This, too, finds support in the record. A.C. and Jerry testified that A.C. was happy when visiting his father because he could go out and do things like play golf and watch movies. A.C. also testified that he did not like Jay County or have many friends there.

Yet testimony from Dr. Fisher indicated that her diagnosis of depression in A.C., which included physical symptoms of abdominal distress, likely stemmed most strongly from the stress of his parents' divorce. Dr. Fisher also testified that, in her opinion, A.C.'s obesity somewhat contributed to and was likely worsened by his depression. Dr. Fisher further testified that, in her discussions with A.C. about his depression, he stated that he was uncomfortable talking to Jerry about this problem. Moreover, Jerry and A.C. gave contradictory testimony, with both stating at various points either that A.C. would receive a car after moving in with Jerry or that A.C.'s receiving a car was not contingent upon Jerry obtaining custody of A.C.

There was thus evidence to support the dissolution court's conclusion that granting Marla's request for custody was in A.C.'s best interests. The court did not fail to consider the relevant statutory factors in making its custody decision, and its order makes it clear that it properly considered the evidence before it in reaching that decision. With the dissolution court having so weighed the evidence, we are not free to disregard its decision or engage in

our own weighing of the matters in the record. We cannot, therefore, conclude that the dissolution court abused its discretion when it granted Marla custody of A.C. and parenting time to Jerry.

### The Contempt Orders

Jerry also challenges the two contempt orders in this appeal, arguing that he had not received adequate service of process and that there were procedural defects in the dissolution court's entry of these orders. Because Jerry does not timely appeal these matters, however, we conclude that Jerry has waived appeal of both contempt orders.

Appellate Rule 14(A) sets forth the classes of orders from which an interlocutory appeal arises as of right in the absence of a final judgment on the merits of the underlying case. Among these are orders for the payment of money. Ind. Appellate Rule 14(A)(1). A party seeking appellate review of an order that is interlocutory as of right under Rule 14(A) must initiate that appeal within thirty days of the entry of the interlocutory order. Id. Failure to timely initiate an appeal results in waiver of the appeal. App. R. 9(A)(5).

Jerry filed his notice of appeal from the motion to correct error on August 11, 2010. In addition to the Final Order's custody determination, he seeks our review of two findings of contempt. The first contempt order, entered on September 30, 2009, found that Jerry's failure to pay one half of his military retirement benefits, as the court had ordered in its Order on Preliminary Issues, constituted contempt of court. The dissolution court ordered Jerry to pay \$857.15, the arrearage under the Order on Preliminary Issues, and further assessed \$300.00 in attorney's fees for Marla's attorney for the work associated with pursuing and

proving contempt.

The first contempt order was an order to pay money, and thus Jerry had a right to appeal that order within thirty days of its entry. Having failed to seek our review for nearly a year after the first contempt order, Jerry has waived his right to appeal the first contempt order. We therefore affirm the first contempt order.

The second contempt order, entered on May 28, 2010, found that Jerry had again acted counter to the Order on Preliminary Issues with respect to his obligation to pay one-half of his military retirement benefits to Marla, thus disregarding Jerry's claim that he had misunderstood the court's instructions on a proper time for payment. The dissolution court then sentenced Jerry to two days imprisonment in the Jay County Security Center and ordered him to pay \$450.00 in attorney's fees for Marla's attorney.

Jerry's notice of appeal, filed on August 11, 2010, came more than two months after the second contempt order—well outside the thirty-day period for an appeal under Appellate Rule 14(A). We note, however, that the second contempt order is mentioned in the motion to correct error. Regarding the second contempt order, the motion states:

15. A week prior to the final order of dissolution a contempt hearing was held where [the dissolution court] held [Jerry] in contempt for not paying ½ of his retirement on time to [Marla]. The Court was very stern and angry with [Jerry] going so far as to incarcerate [Jerry] for the contempt as well as saying what [he] believed to be derogatory statements about [him].

16. [Jerry] believes that the Court because of these circumstances was bias [sic] in his [sic] ruling on custody.

17. [Jerry] believes that the Court has become bias [sic] and any additional hearings would be tainted by that bias.

(App. 69.) Jerry then went on to request that the dissolution court judge in the matter step aside, seeking appointment of a special judge in the matter going forward.

Thus, the motion to correct error mentions the second contempt order, but it does not seek to reverse the order or dispute its propriety. The motion instead cites the second contempt order as evidence of the dissolution court judge's bias against him. Whatever the merits of that claim<sup>2</sup>, which is not a subject of this appeal, the motion to correct error does not contest the second contempt order, and such a challenge would in any event be untimely and improper as to the second contempt order. Our consideration of the motion to correct error does not "bootstrap" the second contempt order into this appeal, even though Jerry has timely appealed the dissolution court's denial of that motion.

Having failed to timely seek interlocutory appeal of both contempt orders, Jerry has waived our review of each of them. We thus affirm these orders without further consideration.

### **Conclusion**

The dissolution court did not abuse its discretion when it awarded custody of A.C. to Marla and parenting time for Jerry. Because Jerry did not timely appeal the two contempt findings, we will not disturb those orders.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.

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<sup>2</sup> Indeed, we note that the Hon. Marianne Vorhees assumed jurisdiction from the Hon. Max C. Ludy, Jr., as special judge on September 8, 2010.