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ATTORNEY FOR APPELLANT:

CARL PAUL LAMB
Carl Lamb and Associates
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

ANDREW C. MALLOR
KENDRA G. GJERDINGEN
Mallor Clendening Grodner & Bohrer LLP
Bloomington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

A.K.C.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 28A05-0812-CV-749
	)	
J.B.C.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable Stephen R. Galvin, Special Judge
Cause No. 28D01-0802-DR-69

August 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

A.K.C ("Mother") appeals the trial court's decree of dissolution of her marriage to J.B.C ("Father"). For our review, Mother raises four issues, which we restate as: 1) whether the trial court abused its discretion by awarding custody of the couple's two minor children to Father; 2) whether the trial court abused its discretion by admitting certain evidence; 3) whether the trial court abused its discretion in distributing the marital estate; and 4) whether the trial court abused its discretion when it granted Father's motion for change of judge. Finding no abuse of discretion in the award of custody, the admission of evidence, and the granting of Father's motion for a change of judge, we affirm on those issues. We also affirm the trial court's distribution of the parties' personal property and the .84-acre vacant lot. However, we remand to the trial court to address the disparity of the distribution of the parties' retirement funds.

Facts and Procedural History

Mother and Father were married on September 23, 1989, and the marriage produced two children, Ky. and Ka. Father filed for dissolution of marriage on February 14, 2008. Mother filed her counter-petition the next day. On February 26, 2008, the trial court held a preliminary hearing and issued preliminary orders granting temporary custody of the children to Mother. Father filed a motion to reconsider on March 3, 2008, which the trial court denied on March 11, 2008. That same day, Father filed a motion for change of judge pursuant to Indiana Trial Rule 76(B). The trial court, Judge David Holt, granted Father's motion and venue was transferred to Judge Stephen Galvin on April 14, 2008.

On April 24, 2008, the trial court entered an agreed order appointing Dr. Lois Rifner as a custody evaluator. Both parties stipulated to the appointment, and the order empowers Rifner to "investigate and report to the Court on the interrelationship between the parents and the children regarding custody, parenting time arrangements, and other matters." Appellee's Appendix at 6. The trial court also appointed a guardian ad litem ("GAL") to represent the interests of the children. On August 29, 2008, the trial court held a final hearing at which Rifner and the GAL testified, among others. On December 1, 2008, the trial court issued its dissolution decree, which included detailed findings, awarding primary physical custody of the children to Father. Mother now appeals.[1]

Discussion and Decision

I. Standard of Review

Where, as here, the trial court enters findings of fact and conclusions of law, we employ a two tiered standard of review; first, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Davis v. Davis, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008). We will not reweigh the evidence and consider only the evidence favorable to the trial court's judgment. Id. We will reverse the trial court's judgment only when its findings are clearly erroneous, which occurs when our review of the record leaves us with the firm conviction that a mistake has been made. Id.

[1] Additional relevant facts will be provided in the context of the discussion below.

II. Custody of the Children

Mother first argues the trial court erred when it granted primary physical custody of the children to Father. We review custody modifications for an abuse of discretion, with a preference for granting latitude and deference to trial court judges in family matters. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). In so doing, we will not re-weigh the evidence or judge the credibility of the witnesses. Leonard v. Leonard, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007). The trial court can observe the parties' conduct and demeanor and listen to their testimony; the value of such close proximity cannot be overstated in the matter of deciding custody, where the trial court is called upon to make Solomon-like decisions in complex and sensitive matters. Pawlik v. Pawlik, 823 N.E.2d 328, 329-30 (Ind. Ct. App. 2005), trans. denied. Therefore, we will set aside the trial court's judgment only when it is clearly against the logic and effect of the facts and circumstances before the trial court. Liddy v. Liddy, 881 N.E.2d 62, 68 (Ind. Ct. App. 2008).

The trial court shall determine custody in the best interests of the child with no presumption favoring either parent. Ind. Code § 31-17-2-8. In making its determination, the trial court may choose to interview the child privately in chambers to ascertain the child's wishes. Ind. Code § 31-17-2-9. In determining the best interests of the child, the trial court shall consider all relevant factors including: (1) the age and sex of the child; (2) wishes of the child's parents; (3) wishes of the child; (4) interaction and relationship between the child and the child's parents, siblings, and other significant persons; (5) the child's adjustment to home, school and the community; (6) the mental and physical health of all individuals involved; and

(7) evidence of a pattern of domestic or family violence. Ind. Code § 31-17-2-8. The trial court is not limited to consideration of the statutory factors, but may consider all relevant factors bearing upon the best interest of the child. In re Marriage of Saunders, 496 N.E.2d 419, 421 (Ind. Ct. App. 1986). However, the crucial consideration in any child custody determination is the best interests of the child. Id.

Both Rifner and the GAL recommended that Father be given primary physical custody. The trial court explicitly adopted the findings in Rifner's report, including the following:

> i. Mother is a diabetic. She does not adequately monitor her blood sugar levels. There are times when she needs medical help to control her diabetes. She does not always seek this help in a timely fashion. When suffering from ketoacidosis, she is unable to care for the children.
>
> ii. Mother did not properly discipline and supervise the children during an interview in [Rifner's] office. [Ky.] acts as the primary disciplinarian for [Ka.].
>
> iii. Mother was not always truthful in answering Dr. Riffner's questions.
>
> iv. A member of Mother's family is a convicted sex offender. Although Mother testified against him, her parents feel that he was wrongfully convicted. This individual lives near [Mother's] parents. Mother's parents often provide care for the children. The children may not always be properly supervised.
>
> v. Father dealt with the children's problem behaviors appropriately.

Appellant's Addendum to Brief at 26. The trial court also adopted the findings of the GAL. In addition, the trial court found:

> 6. … Mother struck [Ky.] in the chest, causing him pain. This was not done for disciplinary purposes. She admits that she should not have done this.

> 7. … Mother made a report of sexual abuse to the Department of Children Services, implicating Father. There was no factual basis for these allegations.
>
> 8. … the evidence supports Father's assertion that he can provide the children with more stable and consistent parenting. Father has no history of striking the children. He is available to parent the children for two out of every three days. Mother has health problems that may have an impact on her ability to parent. She has, on at least one occasion, struck [Ky.] in the chest.

Id. at 27.

Mother argues the trial court improperly relied on her medical problems in awarding custody to Father. "The mental and physical health of all individuals involved" is a relevant factor that the trial court is required to consider in determining custody. Ind. Code § 31-17-2-8(6). "[I]n all cases where a parent has some handicap or disability, the trial court must examine the parent's actual and potential physical capabilities, learn how he or she has adapted to the disability and manages its problems." Hughes v. Rogusta, 830 N.E.2d 898, 903 (Ind. Ct. App. 2005) (citation omitted). The trial court must then "determine whether the parent's condition will in fact have a substantial and adverse effect on the best interest of the child." Id.

The trial court heard substantial evidence from several witnesses regarding Mother's inability or unwillingness to effectively treat her diabetes. The results of Mother's inaction are mood swings, blackouts, and hospitalizations. The trial court found Mother's health problems would have an impact on her ability to parent the children. However, the trial court did not rely solely on Mother's health problems in reaching its decision. The trial court also found Mother had struck Ky., did not effectively parent the children during her interview with Rifner, and lodged an unsubstantiated sexual abuse allegation against Father regarding

Ka. In addition, the trial court found Father could provide a more stable environment due to his work schedule. Therefore, the evidence supports the trial court's findings, and the trial court did not abuse its discretion by awarding custody of the children to Father.

III. Admission of Evidence

Mother next argues that the trial court erred when it allowed Rifner to testify as a medical expert regarding Mother's health problems and that Rifner's testimony regarding Mother's medical records constitutes inadmissible hearsay. The trial court appointed Rifner as a child custody evaluator pursuant to Indiana Code section 31-17-2-12. That section allows the investigator's report to be received in evidence at the hearing, and the report may not be excluded on the grounds that the report is hearsay or otherwise incompetent so long as the requirements of Indiana Code section 31-17-2-12(c) are fulfilled. Ind. Code § 31-17-2-12(b). Mother does not claim that the requirements of subsection (c) have not been fulfilled. Rifner's testimony at the hearing was limited to the findings of her report. As a result, her testimony and her report are admissible pursuant to the statute, and the trial court did not err when it admitted the evidence.

IV. Division of Marital Estate

Mother also argues the trial court failed to make findings of the values of significant marital assets, specifically the parties' respective retirement accounts, a vacant .84-acre lot, and various household goods. The division of marital assets is a matter within the sound discretion of the trial court. Hill v. Bolinger, 881 N.E.2d 92, 94-95 (Ind. Ct. App. 2008), trans. denied. A party challenging the trial court's division of marital property bears the

burden of proof and must overcome one of the strongest presumptions applicable to our considerations on appeal. Id. at 95. We will reverse a property distribution only if there is no rational basis for the award. Id.

With respect to the personal property, the trial court awarded property according to the proposed distribution and values presented by Mother in her financial declaration form. Therefore, the evidence supports the values assigned by the trial court to the personal property. Similarly, Father submitted a value of $5,000 for the .84 acre vacant lot and Mother testified to a value closer to $1,500. The trial court valued the lot at $3,000 which is within the range of the values in evidence. Mother did not submit any evidence to the trial court of taxes or other liens owed on the lot, nor did she argue that any existed until her brief on appeal. Arguments raised for the first time on appeal are waived, see Gibson v. Neu, 867 N.E.2d 188, 197 n.2 (Ind. Ct. App. 2007); therefore, the evidence supports the trial court's valuation of the lot.

With respect to the retirement funds, however, we agree with Mother that the trial court did not adequately explain its reasons for its award. Father's retirement account had a value of $16,821.67; while Mother's retirement account had a value of only $185.69. The trial court shall presume an equal division of marital property between the parties is just and reasonable. Ind. Code § 31-15-7-5. Excepting the retirement accounts, the trial court awarded the property nearly equally after accounting for debts owed by Mother to Father. However, the award to each party of his or her respective retirement funds creates a $16,000 plus disparity in favor of Father. The trial court provided no rationale for the disparity.

While the trial court is not required to equally divide the retirement funds between Mother and Father, see Coffey v. Coffey, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995), we cannot affirm such a disparate distribution without an explanation. Therefore, we remand to the trial court to either amend the decree of dissolution to reflect its rationale for the disparity in distributing the retirement accounts or amend the decree to distribute the Father's retirement account in a just and reasonable manner.

V. Change of Judge

Finally, Mother argues Father failed to file a timely motion for change of judge, and therefore, the trial court abused its discretion when it granted the motion. We will reverse a trial court's ruling on a change of judge only for an abuse of discretion. North Texas Steel Co. v. R.R. Donnelley & Sons Co., 679 N.E.2d 513, 521 (Ind. Ct. App. 1997), cert. denied, 523 U.S. 1106 (1998). Trial Rule 76(B) allows a party to move the trial court for a change of judge. The motion must be filed no later than ten days after the issues are first closed on the merits or thirty days after the case is first entered on the chronological case summary ("CCS") of the trial court when no pleading or answer is required to be filed by the defendant or no responsive pleading is required under a statute. Ind. Trial Rule 76(C).

Pursuant to Indiana Code section 31-15-2-9, a responsive pleading or counter petition may be filed in response to a petition for dissolution, but is not required. Therefore, the thirty-day deadline to move for a change of judge applies. See In re Marriage of Brown, 180 Ind. App. 1, 3, 387 N.E.2d 72, 73 (1979). The case was entered on the trial court's CCS on February 14, 2008. Father filed his motion for change of judge on March 11, 2008.

Therefore, Father's motion was timely, and Mother's argument has no merit. So long as Father filed a timely motion, the trial rule allows him a single change of judge. As a result, the trial court did not abuse its discretion when it granted Father's motion for a change of judge.

Conclusion

The trial court did not abuse its discretion when it awarded custody of the children to Father, when it admitted the report and testimony of the custody evaluator, or when it granted Father's motion for a change of judge. The trial court also did not abuse its discretion in the division of the parties' personal property or the valuation of the .84-acre vacant lot. However, the trial court did not adequately explain the $16,000 disparity in its distribution of the parties' retirement funds. Therefore, we remand to the trial court to either explain the disparity or amend the distribution of the retirement funds in a just and reasonable manner.

Affirmed in part and remanded.

DARDEN, J., and BAILEY, J., concur.