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IN THE
COURT OF APPEALS OF INDIANA

RICHARD WEST,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 22A01-1102-DR-45
	)	
ELIZABETH WEST (now SMITH),	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Susan L. Orth, Judge
Cause No. 22C01-0504-DR-54

September 20, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Richard West ("Father") appeals the trial court's denial of his petition to modify child custody and the trial court's award of $5000 in attorney fees to his ex-wife, Elizabeth West ("Mother"). We affirm.

Issues

The issues before us are:

I. whether the trial court properly denied Father's request that the trial court conduct an in camera interview of the parties' children;

II. whether the trial court properly denied Father's petition to modify custody; and

III. whether the trial court properly ordered Father to pay $5,000 of Mother's attorney fees.

Facts

Mother and Father were married in 1993, and divorced in 2005. They had two children during the marriage, R.W. and K.W. The original divorce decree granted Mother primary physical custody of both children, with Father having parenting according to the Indiana Parenting Time Guidelines. Mother and the children lived in New Albany, where Mother and Father had previously moved based on the desirability of the New Albany public school system. In October 2007, after consultation with a guardian ad litem ("GAL"), the parties entered into an agreed order that granted Father additional parenting time overnight on alternating Wednesdays and Sundays. At this

time, Father's child support was set at $300 per week based on an annual income of approximately $100,000.

After the October 2007 agreed order, disputes arose between the parties over R.W.'s participation in baseball. There appears to be no doubt that R.W. is a gifted athlete who has been invited to play on national-level youth baseball teams. Father appears to be highly enthusiastic about R.W.'s participation in baseball; in a nutshell, Father seems to contend that Mother does not share his enthusiasm, but should. The intervention of the GAL has been necessary to arrange baseball practice, game, and traveling schedules between Father and Mother.

On August 21, 2009, the Floyd County Prosecutor's Office, on behalf of Mother, filed a motion to hold Father in contempt because he had fallen $3600 in arrears on his child support payments. On September 4, 2009, Father filed a motion to modify his child support obligation, claiming a significant drop in income. Father had filed for bankruptcy in July 2009 after the failure of his tanning bed business. Father's motion also sought a modification of the parenting time schedule. In fact, it later became clear that Father effectively was seeking a modification of custody so that he was the primary physical custodian or that the parties split physical custody of the children evenly. Father's motion also necessitated Mother's hiring of private counsel.

As part of the divorce decree, Father was to hold Mother harmless for certain joint marital debts, including one held by Chase Bank in the amount of approximately $25,000, by transferring the debts to his name only. In Father's Chapter 7 bankruptcy,

this debt was discharged as to Father, but he had not previously transferred the debt to his name only. In February 2010, Chase Bank sued Mother to collect the debt. She was unable to pay it and was forced to enter Chapter 13 bankruptcy to pay it off in installments of $400 per month over five years.

Father obtained new employment in 2010, working for his current wife's father's company and earning a stated salary of $50,000 annually. Father's current wife also works for the same company and earns on average $10,000 per month. Father and his current wife live in Louisville, Kentucky, in a house worth $700,000 and with a monthly mortgage payment of over $4300. Father's current wife also recently purchased a Ford Expedition, which cost approximately $50,000. Father's current wife pays the entirety of the current mortgage and other household expenses and pays Father's attorney fees in his litigation with Mother.[1] Father's current wife also is apparently able to obtain loans from her father if needed to cover living expenses. Mother, by contrast, earns $33,929 annually, and her current husband earns approximately $300 weekly.

Mother was forced to file a motion to compel discovery against Father, which the trial court granted in February 2010. The trial court held hearings on Mother's and Father's petitions on November 5, 2010, and December 9, 2010. Prior to the first hearing, Father filed a motion requesting that the trial court conduct an in camera interview of the children, in support of his contention that both children wanted to spend at least one-half of their time living with him. The trial court did not grant this motion,

[1] Father's bankruptcy petition stated that his current wife had no income.

and expressly denied it when Father renewed it at the conclusion of the December 9 hearing. During the hearings, however, both Father and Mother testified that both children had expressed the desire to spend more time with Father. At the time of the hearings, R.W. was thirteen, and K.W. was eleven.

Father testified that he was seeking a change of custody, or significantly more parenting time, based on his assertion that the Louisville schools where R.W. and K.W. would attend if they moved in with him were significantly better than the New Albany schools. The GAL also testified at the hearing, and stated her belief that the Louisville school system was not appreciably better than the New Albany school system. She also stated, "there's no way that I can recommend that there be a change in custody at this point in time." Tr. p. 181. The GAL did admit, however, that although she had dealt with both Mother and Father in the past year, she had not spoken directly to either R.W. or K.W. during that time. For Mother's part, she presented evidence that she had incurred attorney fees totaling $9603.66 since September 2009, in her litigation with Father.

On January 15, 2011, the trial court entered an order, accompanied by findings, which denied Father's request to modify custody. The order also made no change in the amount of Father's parenting time. It also granted Father's motion to modify his child support obligation and made it retroactive to September 4, 2009. However, the trial court imputed income to Father of $65,000, rather than $50,000, and imposed a weekly support obligation of $165. The trial court also found Father in contempt, finding that between

August 31, 2009, and October 28, 2010, Father had paid support in a total of only $4950, while even taking into consideration the retroactive modification of his support obligation, he should have paid $9900, leaving an arrearage of $5550. Father now appeals.

Analysis

The trial court here entered an order that contained sua sponte findings. The order does not contain any purported conclusions of law. Sua sponte findings control only the issues they cover, and a general judgment standard of review will control as to the issues upon which there are no findings. In re Trust Created Under Last Will & Testament of Mitchell, 788 N.E.2d 433, 435 (Ind. Ct. App. 2003). "A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." Id. In reviewing a judgment, we will neither reweigh the evidence nor judge the credibility of the witnesses. Id.

Before turning to the merits of Father's appeal, we address Mother's argument that we ought to either dismiss the appeal or waive all of Father's arguments, because of a failure to adhere to the Indiana Rules of Appellate Procedure. Father completely failed to file an appendix, as required of an appellant by Indiana Appellate Rule 50(A) ("The appellant shall file its Appendix with its appellant's brief."). Father also failed to accompany any of the factual assertions in his brief with citations to the record on appeal, as required by Appellate Rule 46(A)(6)(a) and 46(A)(8)(a) ("The facts shall be supported by page references to the Record on Appeal or Appendix . . . . Each contention must be

supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . .").

Father's brief does contain some grossly inaccurate factual claims, which perhaps could have been avoided if counsel had attempted to confirm the accuracy of those assertions by pairing them with citations to the record. As support for his argument that the trial court should have granted his motion to modify custody, Father claims there is "evidence of a pattern of domestic violence carried out by" Mother's current husband, that "he had yelled at both children, [and] 'slammed' one of the children on the bed," and that the husband had "conceded that his conduct was reprehensible." Appellant's Br. p. 31. In fact, there is absolutely no evidence in the record to support these highly inflammatory assertions. Mother's husband testified that he once physically forced R.W. to sit on his bed after R.W. had shoved him, but there was no evidence of "slamming," no evidence of "yelling," no evidence of a "pattern of domestic violence," and certainly no concession by the husband that his conduct was "reprehensible."

Father also states, with respect to evidence Mother presented of attorney fees totaling $9,603.66, that that sum represents fees incurred "from the beginning of the divorce proceedings . . . ." Id. at 36. Again, this a false assertion unsupported by the record. The attorney fee billing document plainly states that it represents fees incurred beginning in September 2009, or when the current contempt and modification proceedings were initiated. See Ex. 13. For Father to suggest otherwise could have been misleading to this court.

Despite Father's failure to comply with some very important rules of appellate procedure, we prefer to decide cases on the merits whenever possible. See Kelly v. Levandoski, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), trans. denied. We will do so here, especially given that the interests of children are involved. However, we admonish counsel in the future to fully comply with our appellate rules.

I. In Camera Interview

The first issue we address is Father's claim that the trial court erred in refusing to conduct an in camera interview of the children. Indiana Code Section 31-17-2-9(a) provides that, when making a decision concerning child custody, a trial court "may interview the child in chambers to ascertain the child's wishes." (Emphasis added). Additionally, Indiana Code Section 31-17-2-8(3) states that, when making a child custody determination, the trial court "shall consider . . . 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." Father contends there was a change in the children's wishes with respect to wanting to spend more time living with him, thus establishing a substantial change in circumstances as required to modify custody under Indiana Code Section 31-17-2-21, and that it was essential for the trial court to interview the children in this case.

We previously have noted that, under Indiana Code Section 31-17-2-9, "the decision concerning whether to conduct an in camera interview is within the trial court's discretion." Cunningham v. Cunningham, 787 N.E.2d 930, 937 (Ind. Ct. App. 2003). A trial court abuses its discretion in making a ruling if the decision is clearly against the

logic and effect of the circumstances before the court, or if is misinterprets or misapplies the law. Wright v. Mount Auburn Daycare/Preschool, 831 N.E.2d 158, 162 (Ind. Ct. App. 2005), trans. denied. To the extent the trial court's refusal to interview the children in camera was similar to an exclusion of evidence, "[e]rroneously excluded evidence requires reversal only if the error relates to a material matter or substantially affects the rights of the parties, and any error in the admission of evidence is harmless if the same or similar evidence is submitted without objection." In re Estate of Holt, 870 N.E.2d 511, 515 (Ind. Ct. App. 2007), trans. denied.

Here, the trial court made a finding in its order noting that it had denied Father's motion for an in camera interview and further stating, "The Court finds that the Guardian Ad Litem has met with the children and considered their wishes in this matter." Appellee's App. p. 17. That finding is inaccurate or misleading, in that the GAL testified that she had not spoken directly with either child for at least a year prior to the change of custody hearing. Thus, to the extent the trial court denied the motion for an in camera interview based in part on the mistaken belief that the GAL had recently spoken to the children, the trial court erred.

Still, Father has not demonstrated that any such error substantially harmed him. Father asserts in his brief that his due process rights were violated by the denial of his motion for an in camera interview because it precluded him from presenting evidence of the children's wishes as to custody. That is incorrect. Substantial evidence was presented by both Father and Mother that, indeed, the wishes of both children were to

spend significantly more time with Father. The trial court additionally made an express finding that Father "presented evidence and testimony that he believes that the children both desire to live with him and [R.W.] especially has expressed a strong desire to live with him." Appellee's App. p. 23. Thus, the trial court had before it and considered evidence that both children wanted to spend more time with Father, but rejected that evidence as insufficient to support a modification of custody. Additionally, Father made no attempt to call the children to testify as witnesses, as he could have done, if he truly wished the children to be heard by the trial court. See White v. White, 655 N.E.2d 523, 528-29 (Ind. Ct. App. 1995) (holding that option to conduct in camera interview of child pursuant to statute did not permit trial court to disallow in-court testimony of competent child). Under the circumstances, given that an in camera interview would, allegedly, merely have duplicated other evidence in the record regarding the children's wishes, we cannot say that the denial of Father's request for an in camera interview requires reversal of the trial court's order, even if that denial was based upon a faulty premise.

II. Modification of Custody

Next, we address Father's contention that the trial court erred in denying his motion to modify custody.[2] Under Indiana Code Section 31-17-2-21, a trial court may not modify a child custody order unless "(1) the modification is in the best interest of the

[2] As noted earlier, Father originally expressly requested a modification of his parenting time, not a modification of custody. It later became clear Father was essentially requesting a modification of custody, and the trial court treated it accordingly, as the parties also do on appeal.

child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 . . . of this chapter." The "section 8" factors are:

> (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.

Ind. Code § 31-17-2-8.

"In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). Custody matters typically turn on essentially factual determinations and will be set aside only if such determinations they are clearly erroneous. Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008). We will not reverse a child custody decision if any evidence or legitimate inferences from such evidence support the trial court's judgment. Id. at 1257-58. "The concern for finality in custody matters reinforces this doctrine." Id. "'On 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.'" Kirk, 770 N.E.2d at 307 (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

The primary reason that Father contends the trial court erred in refusing to modify custody is his claim that it failed to take into consideration the children's changed wishes concerning custody. It certainly is permissible for trial courts to consider a child's wishes in making custody determinations, even children under the age of fourteen. See Sabo v. Sabo, 858 N.E.2d 1064, 1070-71 (Ind. Ct. App. 2006) (holding trial court gave proper weight to twelve-year-old's wishes in custody dispute, particularly where other custody factors were "in equipoise"). However, there is a longstanding rule in Indiana that "a change in the child's wishes, standing alone, cannot support a change in custody." Williamson v. Williamson, 825 N.E.2d 33, 40 (Ind. Ct. App. 2005) (citing Joe v. Lebow,

670 N.E.2d 9, 25 (Ind. Ct. App. 1996)); see also In re Marriage of Richardson, 622 N.E.2d 178, 180 (Ind. 1993). The clear basis for such a rule would be that the law does not recognize a child's ability to dictate his or her own care and custody, or to make life decisions generally, absent concurrence by both parents with the child's wishes.

In any event, whatever desire the children might have had for a modification of custody, there is no evidence that such desire was brought on by any parental shortcomings on Mother's part. The evidence in the record is undisputed that both children are well-adjusted, academically successful, and physically gifted and talented. Moreover, both children, and especially R.W., have been given ample opportunity to develop those physical talents. Despite Father's contention that Louisville would be a better location than New Albany for R.W. to develop a potential baseball career, the evidence would seem to indicate that R.W. already is receiving significant, high-level, national recognition for his playing skills while continuing to reside primarily with Mother in New Albany.

Father also attempted to argue before the trial court that the children would be better off in the Louisville school system than in the New Albany school system, relying primarily upon graduation and college attendance rates for high schools in each system. However, there is no evidence that the merits of either system have dramatically declined or improved since the time of the original custody decree. The GAL also rejected Father's characterization as Louisville schools being considerably better than New Albany schools, noting that graduation and college attendance figures are not exclusive

measures of the quality of a school. The parties also specifically moved to New Albany before the divorce because they believed the city's school system was of a high quality.

Even if Father has sufficiently argued that there was a substantial change in circumstances regarding child custody, the trial court was not required to find that a change of custody would be in the children's best interests. Both children have thrived so far under the existing custodial arrangement, and the GAL was adamant that a change of custody would not be beneficial for the children. Father has not demonstrated that the children would be so much better off primarily in his care that a change of custody was mandated or that such a change would be in the children's best interests. The trial court's refusal to modify custody is supported by the record.

III. Attorney Fees

Finally, we address Father's contention that the trial court erred in requiring him to pay $5000 toward Mother's attorney fees.[3] In post-dissolution proceedings, a trial court may order a party to pay a reasonable amount toward the other party's attorney fees. Julie C. v. Andrew C., 924 N.E.2d 1249, 1261 (Ind. Ct. App. 2010); see also I.C. § 31-16-11-1 (authorizing award of attorney fees in child support proceedings); I.C. § 31-17-7-1 (authorizing award of attorney fees in child custody proceedings). A trial court has broad discretion in awarding attorney's fees, and reversal is proper only where the trial

[3] As part of this argument, Father contends the trial court erred in holding him in contempt for failing to pay child support. We believe it is unnecessary to address that issue, as the trial court imposed no penalty upon Father, and there other bases upon which to affirm the award of attorney fees. We also do not address Father's res judicata argument, which is based on the premise that Mother sought attorney fees dating back to the beginning of the divorce proceedings; as we have noted, that assertion is entirely inaccurate.

court's award is clearly against the logic and effect of the facts and circumstances before the court. Id. "In assessing attorney's fees, the trial court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors bearing on the reasonableness of the award." Id. Any misconduct on the part of a party that directly results in the other party incurring additional fees may also be taken into consideration. Id. At least in cases where, as here, special findings have not been requested, the trial court need not cite the reasons for its attorney fees determination. See Whited v. Whited, 859 N.E.2d 657, 665 (Ind. 2007).

Again, we emphasize that the attorney fees that Mother sought from the trial court only were those that she had incurred since September 2009. It does appear, however, that the trial court in its sua sponte findings referenced a matter that occurred before September 2009, which was a motion by Mother to obtain passports from Father, as an incident that caused Mother to incur attorney fees. Regardless of this error, we conclude there is ample justification in the record supporting the trial court's attorney fees award.

The evidence plainly established that Father has much more financial support available to him, through his current wife and father-in-law, than does Mother. While Father filed for bankruptcy in 2009 and subsequently paid very little child support to Mother for over a year, he continued living in a $700,000 house. In fact, Father's current wife handles almost all of Father's living expenses, including payment of Father's own attorney fees. Father's Chapter 7 bankruptcy allowed him to discharge a significant amount of debt. The GAL also expressed concern at the hearing that, during the time

when Father was filing far behind on his child support payments to Mother, he continued purchasing expensive baseball equipment for R.W.

Mother, by contrast, earns considerably less than Father and does not have a spouse or in-laws who can support a lifestyle beyond her own means; rather, she is the primary wage earner in her household. Mother also was forced to file for Chapter 13, non-liquidation bankruptcy because of Father's discharge of a debt during his own bankruptcy for which he was supposed to hold Mother harmless. Mother also was required to successfully litigate a motion to compel discovery. And, as noted, Father fell far behind on his child support payments to Mother, even taking into account the trial court's retroactive modification of his support obligation. Given acts of misconduct by Father and evidence of the parties' vastly different financial situations, we cannot say the trial court's award of slightly more than half of the attorney fees Mother has incurred since September 2009 was an abuse of discretion.

Conclusion

We find no reversible error in the trial court's denial of Father's motion that it conduct an in camera interview of the children. There is sufficient evidence in the record to support the denial of Father's petition to modify custody and the award of $5000 in attorney fees to Mother. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.