**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

FILED
Nov 24 2010, 9:32 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

**KIMBERLY J. BACON**
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**BRIAN K. ZOELLER**
**KATHERINE A. HARMON**
Cohen & Malad, LLP
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| M.N., | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 49A02-1002-DR-152 |
| | ) | |
| A.N., | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David A. Shaheed, Judge
The Honorable Victoria M. Ransberger, Magistrate
Cause No. 49D01-0712-DR-55019

**November 24, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

M.N. (Father) appeals the order dissolving his marriage to A.N. (Mother). He challenges the award of sole physical and legal custody of their children to Mother and the order that he $10,500 of Mother's legal expenses. We affirm.

## FACTS AND PROCEDURAL HISTORY

Mother and Father were married on May 13, 1995. They had four children: Ar.N., born October 22, 1998; Mi.N., born January 8, 2000; Ma.N., born January 2, 2002; and An.N., born January 12, 2007. On December 21, 2007, Mother obtained a protective order against Father due to domestic violence. On December 23, Mother took the children and relocated to Iowa. Father petitioned for dissolution of marriage on December 26. An emergency hearing was held on January 11, 2008, and the court awarded temporary custody of the children to Mother. Father was to have supervised visitation.

At the request of the court, the Domestic Relations Counseling Bureau (DRCB) prepared and filed a report. It recommended Mother and Father share legal custody, with Mother retaining primary physical custody and Father exercising parenting time according to the Indiana Parenting Time Guidelines (Guidelines). On February 4, 2009, the trial court held a hearing to address cross claims of contempt, Father's child support arrearage, modification of Father's parenting time, and attorney's fees. Father was ordered to complete the paperwork necessary to have a portion of his income withheld to pay child support and was granted unsupervised visitation with children. All other matters were continued until the final hearing.

Father requested an additional DRCB report, and the trial court granted his request. The new report made the same recommendations. After a final hearing, the trial court granted sole physical and legal custody of all children to Mother, with Father to have parenting time in accordance with the Guidelines. It ordered Father to pay $10,500 of Mother's attorney's fees.

## DISCUSSION AND DECISION

The trial court's order included special findings of fact and conclusions of law at the request of the parties, pursuant to Indiana Trial Rule 52(A). Our standard of review is therefore two-tiered. *Heiligenstein v. Matney*, 691 N.E.2d 1297, 1299 (Ind. Ct. App. 1998). "We first determine whether the evidence supports the findings of fact and then whether those findings support the judgment." *Id.* at 1299-1300. On review, we do not set aside the trial court's findings or judgment unless they are clearly erroneous. T.R. 52(A). A finding is clearly erroneous when there is no evidence or inference reasonably drawn therefrom to support it. *Shively v. Shively*, 680 N.E.2d 877, 882 (Ind. Ct. App. 1997). The judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings. *Id.* In making our determination, we neither reweigh evidence nor judge witness credibility; we consider only the evidence and reasonable inferences therefrom that support the judgment. *Heiligenstein*, 691 N.E.2d at 1299. We may affirm the judgment on any legal theory supported by the findings if that theory is consistent with "all of the trial court's findings of fact and the inferences

reasonably drawn from the findings[,]" and if we deem such a decision prudent in light of the evidence presented at trial and the arguments briefed on appeal. *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998).

1. Child Custody

Custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for abuse of discretion. *Klotz v. Klotz*, 747 N.E.2d 1187, 1189 (Ind. 2001). We will not reverse unless the decision is against the logic and effect of the facts and circumstances before us or the reasonable inferences drawn therefrom. *Id.* In determining child custody, the trial court is to consider eight statutory 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.

Ind. Code § 31-17-2-8.

The trial court found the fourth and fifth factors favored Mother, as she "has seen to the children's needs and ensured that they continue to thrive in school, including the move away from the maternal grandparent's (sic) home." (Appellant's App. at 21.) The court also noted Father had an undisputed child support arrearage of $14,205. (*Id.*) With regard to the seventh factor, the trial court considered the "significant pattern of domestic violence perpetrated by Father upon Mother," (*id.*), the serious nature of the violence, and that it often occurred in the presence of the children. (*Id.*) Specifically, the trial court noted

> grave concerns for the children's mental well-being over the prior record in this matter from the preliminary hearing where testimony is undisputed that Father would pray with the minor children for their unborn brother or sister that their mother 'killed through abortion'; which was an abortion financed by and in agreement with Father, prior to the parties' marriage,

(*id.*), and its concerns about Father's parenting ability and judgment based on testimony that Father told the children "Mother was going to find a new daddy for them who would stick his pee-pee in them." (*Id.*)

Father argues nine of the trial court's findings are not supported by the evidence. However, our review revealed each finding was supported by testimony at the dissolution hearing or reports from the DRCB. Specifically, the findings are supported by the record as follows: Findings 15 and 22 are supported by testimony by both Mother and Father regarding their communication difficulties, (Tr. at 33, 122); Finding 16, regarding Father's child support arrearage is supported by Father's employment history and his testimony, (*id.* at 66-68); Finding 17 is supported by the DRCB reports, which indicate

Mother, Father, and children reported incidents in which Father called the Iowa Department of Child Services in an effort to intervene in Mother's disciplinary practices, (Appellee's App. at 104, 107, 111; Tr. at 109); Finding 18, regarding the "children's interaction and interrelationship with each of the parents and each of their siblings," (Appellant's App. at 20), is supported by the recommendations of the social worker who completed the DRCB reports, (Appellee's App. at 99, 117); Finding 19, regarding the alleged incidents of domestic violence, is supported by hearing testimony and the DRCB reports, which indicate Mother and children discussed the Ex Parte Protection Order filed by Mother at the beginning of the dissolution proceedings, (*id.* at 22, 89); Findings 20 and 21, regarding Father's parenting abilities, are supported by the DRCB reports, (*id.* at 92); and Finding 27, regarding Father's child support arrearage and the trial court's finding of contempt, is supported by Father's testimony regarding the arrearage, (Tr. at 65-66), and by Mother's testimony regarding the hardships faced because Father did not pay child support. (*Id.* at 134.)

Father's arguments are an invitation to reweigh the evidence and assess the credibility of witnesses, which we can not do. *See Heiligenstein*, 691 N.E.2d at 1299. We may not disregard evidence supporting the trial court's findings and consider only those facts favorable to Father. There was ample evidence to support those challenged findings.

Father asserts the court should have granted joint legal custody. "The court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child." Ind. Code § 31-17-2-13.

> In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:
>
> (1) the fitness and suitability of each of the persons awarded joint custody;
>
> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
>
> (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
>
> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
>
> (B) plan to continue to do so; and
>
> (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

Ind. Code § 31-17-2-15.

The trial court considered those statutory factors in determining whether joint legal custody of the children would be appropriate. It found

> the parties do not meet the requirements for awarding joint legal custody. Specifically, the parties are unable to communicate and cooperate in advancing the children's welfare. The parties do not live in close proximity to one another and do not plan to do so in the future. Finally, [the] nature of the physical and emotional environment in the home of each person does not lend itself to an order of joint custody in this matter. It is clear that Father has undermined Mother's parenting authority on several occasions.

(Appellant's App. at 21-22.)

At the dissolution hearing, Mother testified she and Father were unable to communicate and Mother had resorted to email correspondence because "if I don't have that paper trail it has a tendency to go really, really wrong." (Tr. at 122.) Father testified there was "no communication" between him and Mother regarding the children, (*id.* at 33), and communication via email was a problem. Thus the evidence supports finding the parties are "unable to communicate and cooperate in advancing the children's welfare." (Appellant's App. at 21-22.)

As for the distance between the parties, their homes are not "in close proximity," Ind. Code § 31-17-2-15(5)(A), as Father lives in Indiana[1] and Mother lives in Iowa. Father argues the court should have considered that Mother relocated to Iowa, in violation of Ind. Code § 31-17-2.2-1.[2] It did so consider, as it explicitly noted in its order,

---

[1] Father asserts joint legal custody should be awarded because "he contemplated relocating to Iowa to be close to the children if the court awarded mother custody and allowed her to remain in Iowa." (Appellant's Br. at 15.) We cannot agree as a trial court's custody order should not be based on a hypothetical relocation that may occur in the future. *See Bojrab v. Bojrab*, 810 N.E.2d 1008, 1012 (Ind. 2004).

[2] Ind. Code § 31-17-2.2-1 states in relevant part:

> (a) A relocating individual must file a notice of the intent to move with the clerk of the court that:
>
> > (1) issued the custody order or parenting time order; or
> > (2) if subdivision (1) does not apply, has jurisdiction over the legal proceedings concerning the custody of or parenting time with a child;
> > and send a copy of the notice to any nonrelocating individual.
>
> (b) Upon motion of a party, the court shall set the matter for a hearing to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation order, or child support order. The court shall take into account the following in determining whether to modify a custody order, parenting time order, grandparent visitation order, or child support order:
>
> > (1) The distance involved in the proposed change of residence.
> > (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.

"both parties come with unclean hands and the court does not find either in contempt for the various moves that they have had to make thus far." (Appellant's App. at 20.) Moreover, we note Mother's initial move to Iowa, which created the distance between them, occurred before Father filed his petition for dissolution. Therefore, no court had jurisdiction over legal proceedings involving the children and Mother had no obligation to file notice. *See* Ind. Code § 31-17-2.2-1(a) (notice required if custody order exists or court has jurisdiction over proceeding involving children). The finding regarding proximity is supported by the record.

Father argues joint legal custody is appropriate because it is "undisputed that father and the children are well bonded." (Appellant's Br. at 15.) It is within a court's discretion to grant sole legal custody to one parent despite both parents' involvement in child rearing and strong bonds with their children. *Nunn v. Nunn*, 791 N.E.2d 779, 787 (Ind. Ct. App. 2003). The court did not abuse its discretion in finding that, based on the parents' difficulty in communication and the distance between their residences, Mother

---

(3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
(4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.
(5) The reasons provided by the:
(A) relocating individual for seeking relocation; and
(B) nonrelocating parent for opposing the relocation of the child.
(6) Other factors affecting the best interest of the child.

should have sole legal custody of the children.[3] *See e.g., Aylward v. Aylward*, 592 N.E.2d 1247, 1252 (Ind. Ct. App. 1992) (concluding sole legal custody in favor of one parent was warranted when parties made parenting a battleground and did not live in close proximity to each other).

2. Attorney's Fees

The trial court enjoys broad discretion in awarding attorney's fees, and we accordingly review its decision for abuse of discretion. *Selke v. Selke*, 600 N.E.2d 100, 102 (Ind. 1992). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* In assessing attorney's fees, the court must consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors that bear on the reasonableness of the award. *Bertholet v. Bertholet*, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000). Misconduct that directly results in additional litigation expenses may properly be taken into account. *Id.*

The trial court ordered Father to pay $10,500 of Mother's $18,157.92 bill for attorney's fees.

> Father is in a better position to contribute to attorney fees which have been incurred and should be responsible for paying a portion of Mother's fees for the following reasons:

[3] Father does not challenge the final two findings regarding the "nature of the physical and emotional environment in the home of each person," (Appellant's App. at 22), and Father undermining Mother's parenting authority. Nevertheless, there is evidence that Father encouraged the children to call Mother derogatory names, (Appellee's App. at 104), and accused Mother of abuse in front of the children. (*Id.*) That evidence supports finding Father was undermining Mother's parental authority and suggests the home environments would not facilitate a joint custody arrangement.

> a. He earns more income and has the potential to earn more income than Mother;
> b. He has been found to be in contempt of Court for willfully failing to pay child support;
> c. Father's behavior throughout this more than two year protracted litigation has caused Mother to incur substantially more fees.

(Appellant's App. at 26-27.)

Father argues, "Mother was not represented continuously throughout the proceedings," (Appellant's Br. at 17), "there was no evidence of delay in the proceedings," (*id.*), "there was no evidence that father's earning capacity was greater than mother's," (*id.*) and "Father did not willfully fail to pay support," (*id.*), but Father cites nothing in the record that supports his contentions. We therefore cannot find error on those grounds. *See* Ind. Appellate Rule 46(A)(8)(a) (contentions must be supported by citations to the record).

Evidence was presented that Mother accrued over $18,000 in attorney's fees throughout the two years the dissolution action was pending, (Appellee's App. at 85), and she earned less than Father. (Tr. at 131-32, 145). The trial court found Father in contempt for failure to pay support because "Father has made little effort to support his children." (Appellant's App. at 23.) Father was sporadically employed during the two years of dissolution proceedings and allegedly made $1000 per week in his employment. Father testified at the dissolution hearing he was aware of his arrearage. The trial court considered the parties' resources and earning capacities, evaluated the two year time frame of the proceedings, and found Father in contempt for failure to pay child support --

all factors a court may consider when determining whether to award fees. *See Selke*, 600 N.E.2d at 102 (considering comparative earning capacity, property settlement award, lack of child support, and who initiated the action). Thus, we hold this trial court did not abuse its broad discretion in awarding attorney's fees. *See, e.g.*, *Walters v. Walters*, 901 N.E.2d 508, 515 (Ind. Ct. App. 2009) (requiring Father to pay Mother's attorney's fees because he earned more than she did and he had caused her to incur additional legal fees).

## CONCLUSION

The evidence supports the court's findings, which support the award of sole legal custody to Mother, and the trial court did not abuse its discretion in awarding attorney's fees to Mother. We accordingly affirm.

Affirmed.

ROBB, J., and VAIDIK, J., concur.