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
Dec 08 2010, 9:47 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

JULIA N. COMPTON
Franklin, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE MARRIAGE OF:	)	
BRANDI TERRY,	)	
Appellant-Respondent,	)	
vs.	)	No. 41A01-1009-DR-437
DAMIEN TERRY,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0908-DR-307

December 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brandi Terry ("Mother") appeals the trial court's order finding her in contempt for denying Damien Terry ("Father") extended parenting time for the summer and the opportunity for additional parenting time pursuant to the right of first refusal. Concluding that the trial court did not abuse its discretion by finding Mother in contempt, we affirm.

Facts and Procedural History

Mother and Father married in 1999 and have one child together: B.T., born March 2, 2004. During dissolution proceedings, Mother and Father entered into a settlement agreement, which provides that the parties are to have joint legal custody of B.T. with Mother having primary physical custody. It further provides:

> Except as noted immediately below, [Father] shall have reasonable visitation with [B.T.] pursuant to the Indiana Parenting [Time] Guidelines and at all other reasonable times and places. [Father]'s every other Sunday weekend parenting time shall include an overnight on that Sunday with [Father] returning [B.T.] to [Mother] or to school as the case may be.

Appellant's App. p. 10. The Indiana Parenting Time Guidelines give a noncustodial parent with extended parenting time of a child five years of age or older half of summer vacation, with the time being either consecutive or split into two segments. Ind. Parenting Time Guideline II(B)(3). The Guidelines also afford the opportunity for additional parenting time by allowing each parent the right of first refusal to provide child care. Ind. Parenting Time Guideline I(C)(3). The dissolution court approved and incorporated the settlement agreement into the dissolution decree and dissolved the parties' marriage on April 19, 2010.

Just over six weeks later, on June 3, Father filed a petition to show cause, alleging that Mother denied him extended parenting time for the summer and the opportunity for additional parenting time pursuant to the right of first refusal. The petition also requested attorney's fees.

At a contempt hearing on June 30, Father testified on direct that he contacted Mother on May 24 or 25 and requested the first half of the summer for his extended parenting time. Mother refused, saying that he "wasn't getting half of the summer," but that he "could get a couple days here and there." Tr. p. 3. During a conversation on May 26, Mother became angry, hung up on Father, and sent him text messages. Three text messages from Mother to Father, sent within minutes of each other, were admitted without objection:

> You DO NOT have [B.T.]'S BEST INTEREST AT HEART!!!! Stop thinking about yourself. He will not be screwed up or traumatized by you. Stop talking GUIDELINES!!!!

Petitioner's Ex. C.

> I have them in front of me……no problem….the judge wont let u take him from me..grow up…for [B.T.]…he has been through enough. Oh.. that's right u don't even care about his condition

Petitioner's Ex. D.

> I will make his schedule, or I will c u in court. U had better write down your work schedule, and I provide his child care…….!!!!!! U have done nothing!!!!

Petitioner's Ex. E. Father testified that as of the date of the contempt hearing, Mother had not furnished him with a schedule. Father then testified that Mother's mother cares

for B.T. while Mother is working even though he has told Mother that he would like B.T. when he is not working:

> Q Okay. When you and [Mother] were living together did she have late hours?
> A Yes.
> Q How many?
> A Usually Tuesdays and Thursdays.
> Q Tuesdays and Thursdays?
> A Yeah were usually her late nights.
> Q What, how late would she work in the hair design shop?
> A Usually she'd be home around 9:00, sometimes she would have later nights, you know, between 10:00 (INAUDIBLE).
> Q What is your work schedule?
> A I'm usually done by 4:00.
> Q Everyday?
> A Yeah.
> Q And are you occasionally available during the week all day?
> A Yes.
> Q And have you asked that she notify you about this so that you can have your child when she's working?
> A Yes.
> Q And she has refused?
> A Yes.
> Q Have you requested the child at 4:00, that you pick up the child [at] 4:00?
> A We never got that far because she told me that, you know, he's on a set schedule and that's how it is.
> Q That's how it is? So she has refused you the first right of refusal? Who, who takes care of your child?
> A Her mother.

Tr. p. 7-8. Father also testified that he had incurred attorney's fees totaling $1293.88.

On cross, Father testified that Mother has only twice offered additional parenting time. He also testified that he has called Mother when he does not have to work to ask if he can have additional time with B.T., but "[s]he usually does not answer the phone and the times that I have asked she says no." *Id.* at 12. When asked about B.T.'s medical issues, Father testified that he has never been permitted to go to any of B.T.'s doctor's

visits. When asked about B.T.'s developmental issues, Father testified, "I have been left out." *Id.* at 14.

Mother testified that B.T. "has developmental delays and learning disability due to a brain injury at birth." *Id.* at 20. She testified that she has provided Father with all of the information concerning B.T.'s therapy but that Father has never asked to attend medical visits or to see B.T.'s teachers with her. She then testified that she offers Father additional parenting time on a weekly basis but that the offers are ignored. Regarding extended parenting time, Mother believed it would be traumatizing for B.T. to spend five weeks in a row with Father:

> [T]he longest [B.T.] has spent in a row with his father is Christmas of 2009 for four nights, five days, is the longest ever he has spent with him. And I . . . do want to give [Father] his parenting time in the summer, I believe the child's best interest is not for five weeks in a row. I believe it would be very traumatizing to this child.

Id. at 23-24. She testified that she tried to present alternate ways to give Father fifty percent of the summer. She testified that she has no problem with Father having parenting time for fifty percent of the summer, but that she wanted the court to make a schedule that gives Father parenting time in smaller increments. Mother stated that B.T. is moody, tired, and clingy after spending weekends with Father. Mother also testified that, when their divorce was finalized, Father provided Mother with his mother's telephone number because he did not know where he was going to be living and that Father has not provided her with any information about his employment or child care.

On cross, Mother admitted that she has never provided Father with a summer parenting time schedule. She also admitted that she does not always offer Father additional parenting time when she needs child care for B.T.:

> Q You know what the first right of refusal is?
> A Yes sir.
> Q What is that?
> A Where [Father] wants to have the right to have his son.
> Q No, it's when you are required to notify [Father] where he's going to be and give him the right to have the child rather than the babysitter. Do you understand that?
> A Yes sir.
> Q Do you do that every time that you take the child to a babysitter?
> A No sir.

Id. at 30-31.

On August 6, 2010, the court entered an order finding Mother in contempt for denying Father extended parenting time for the summer and the opportunity for additional parenting time pursuant to the right of first refusal. Its order included the following findings regarding Mother's actions:

> 4. The Decree detailed the duties of the parties in regard to their roles as parents in sections 2.3 "Parent/Child Relationships." Both parties are strongly encouraged to re-read said sections of the Decree in that Mother has, to the detriment of the minor child, lost sight of the importance of that provision. Mother has substituted her judgment for that which she agreed to in the Agreement and Decree and she has unilaterally determined to modify the terms. . . .
> 5. Mother's refusal to allow extended summer parenting time per the Guidelines or offer additional reasonable parenting time to Father per the first right of refusal as stated in the Guidelines, in combination with her general unyielding attitude to Father's desire to spend additional time with the minor child, and her spiteful attitude toward Father as evidenced through their contact in person, through text, telephone and other communications, cause the Court to conclude that the sanctions herein should be proportionate to and mirror the level of her contemptuous behavior.

Appellant's App. p. 28, 29. The court provided a schedule for Father to make up his lost summer parenting time and ordered Mother to pay $750 of Father's attorney's fees.

Mother now appeals.

Discussion and Decision

Mother contends that the trial court abused its discretion by finding her in contempt for denying Father extended parenting time for the summer and the opportunity for additional parenting time pursuant to the right of first refusal.

We initially note that Father did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments for him, and we apply a less stringent standard of review with respect to showings of reversible error. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). That is, we may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

When a trial court enters findings *sua sponte*, as the court did here, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has not found. *Brinkmann v. Brinkmann*, 772 N.E.2d 441, 444 (Ind. Ct. App. 2002). The specific findings will not be set aside unless they are clearly erroneous, and we will affirm the general judgment on any legal theory supported by the evidence. *Hanson v. Spolnik*, 685 N.E.2d 71, 76 (Ind. Ct. App. 1997), *trans. denied*. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *Id.* at 76-77.

A determination of whether a party is in contempt of court is a matter within the trial court's sound discretion, and we reverse only where there has been an abuse of that discretion. *Julie C.*, 924 N.E.2d at 1260. To hold a party in contempt for violation of a court order, the trial court must find that the party acted with willful disobedience. *Id.* The order must have been so clear and certain that there could be no question as to what the party must do, or not do, and so there could be no question regarding whether the order is violated. *Deel v. Deel*, 909 N.E.2d 1028, 1032 (Ind. Ct. App. 2009). Our review is limited to considering the evidence and reasonable inferences drawn therefrom that support the trial court's judgment. *Julie C.*, 924 N.E.2d at 1260. When reviewing a determination on contempt matters, we neither reweigh the evidence nor judge witness credibility. *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 728 (Ind. Ct. App. 2009).

I. Extended Parenting Time

Mother first contends that the trial court abused its discretion by finding her in contempt for denying Father extended parenting time for the summer.

The settlement agreement, which was approved and incorporated into the dissolution decree, provides that Father is to have reasonable visitation with B.T. pursuant to the Indiana Parenting Time Guidelines. The Guidelines set forth a noncustodial parent's extended parenting time with a child five years of age or older as follows: "One-half of the summer vacation. The time may be either consecutive or split into two (2) segments." Ind. Parenting Time Guideline II(B)(3). Thus, according to the dissolution decree, Father is to have B.T. for one-half of summer vacation, with that time to be consecutive or split into two segments.

Here, Father testified that he contacted Mother at the end of May and requested the first half of the summer for his extended parenting time. Mother responded that he "wasn't getting half of the summer," but that he "could get a couple days here and there." She sent Father text messages saying, "Stop talking GUIDELINES!!!!" and informing Father that she would make the summer parenting time schedule. At the time of the contempt hearing at the end June, Mother had yet to furnish Father with a summer parenting time schedule.

Despite this clear evidence, Mother asserts that the trial court abused its discretion by finding her in contempt because she was not denying Father his extended parenting time but merely wanted that time broken into smaller segments throughout the course of the summer. To the extent Mother argues that she offered fifty percent of the summer but in smaller segments, the court was entitled to disbelieve her. And regardless, the Guidelines provide that a noncustodial parent's extended parenting time with a child five years of age or older should be one-half of the summer, with that time to be consecutive or split into two segments.

Mother points to the Preamble of the Guidelines, which states that parents "should be flexible and create a parenting time agreement which addresses the unique needs of the child and their circumstances." To the extent Mother is arguing that extended parenting time as provided in the Guidelines is inappropriate for B.T., we note that she agreed in the settlement agreement that Father would have reasonable visitation with B.T. pursuant to the Indiana Parenting Time Guidelines. Thus, the proper course of action

would have been to petition the court for modification of parenting time, not to unilaterally modify the terms to which she agreed.

Mother cites *Heagy v. Kean*, 864 N.E.2d 383 (Ind. Ct. App. 2007), *trans. denied*, and *Consolidated Rail Corp. v. Estate of Martin ex rel. Martin*, 720 N.E.2d 1261 (Ind. Ct. App. 1999), for the proposition that "a mere technical violation of a court order does not in and of itself necessar[il]y rise to the level of willful disobedience of a court order." Appellant's Br. p. 18. In *Heagy*, this Court affirmed the trial court's denial of a father's motion for contempt of the court's order that the mother refrain from smoking around the parties' minor child where the evidence could support a finding that, while the mother violated the order, she did not do so as an act of willful disobedience. 864 N.E.2d at 388. In *Consolidated Rail Corp.*, the trial court found Conrail in contempt of its order to have available at a settlement conference a representative with full settlement authority. 720 N.E.2d at 1264. This Court reversed, finding that Conrail's actions were not willful where, although the representative did not have full settlement authority, he did have the means by which to achieve it if necessary. *Id.* at 1266. In each of these cases, then, this Court found that although the court's order was violated, there was no willful disobedience of the order.

The situation here is different. The evidence most favorable to the trial court's judgment supports a finding of willful disobedience. Mother agreed in the settlement agreement that Father would exercise reasonable visitation with B.T. pursuant to the Indiana Parenting Time Guidelines. No matter what Mother's reasons were for denying Father extended parenting time per the Guidelines, the key fact remains that Mother did

not allow Father to exercise his extended parenting time in one or two segments. In addition, she texted Father to "[s]top talking GUIDELINES!!!!" We conclude that the trial court did not abuse its discretion by finding Mother in contempt for denying Father extended parenting time during the summer.

II. Right of First Refusal

Mother next contends that the trial court abused its discretion by finding her in contempt for denying Father the opportunity for additional parenting time pursuant to the right of first refusal.

Again, the settlement agreement, which was approved and incorporated into the dissolution decree, provides that Father is to have reasonable visitation with B.T. pursuant to the Indiana Parenting Time Guidelines. The Guidelines afford the opportunity for additional parenting time by allowing each parent the right of first refusal to provide child care:

> When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time.

Ind. Parenting Time Guideline I(C)(3). "Family member" as used in this provision is limited to a responsible person within the same household as the parent with physical custody. *Shelton v. Shelton*, 835 N.E.2d 513, 517-18 (Ind. Ct. App. 2005), *summarily aff'd*, 840 N.E.2d 835 (Ind. 2006).

Here, Father testified that Mother's mother cares for B.T. while Mother is working even though he has told Mother that he would like B.T. when he is not working. Father testified that he calls Mother when he does not have to work to ask if he can have

additional time with B.T., but "[s]he usually does not answer the phone and the times that I have asked she says no." Although Father testified that Mother has offered additional parenting time two times, Mother admitted that she does not notify Father each time she needs child care for B.T.

Nonetheless, Mother argues that she offers Father additional parenting time on a weekly basis but that the offers are ignored. This argument is merely a request to reweigh the evidence and reassess witness credibility, which we may not do.

Mother also argues that Father has a good relationship with her mother and that "he has never once attempted to contact her [mother] to let her know that he did not have to work and would like to come and pick up his son." Appellant's Br. p. 23. However, the relevant question is whether Mother offered Father additional parenting time when she needed child care, not whether Father attempted to pick up B.T. from her mother when Mother had already denied him the right of first refusal.

The evidence most favorable to the trial court's judgment shows that Mother willfully disobeyed the court's order by denying Father the opportunity for additional parenting time pursuant to the right of first refusal. We conclude that the trial court did not abuse its discretion by finding Mother in contempt.

Affirmed.

BAKER, C.J., and BARNES, J., concur.