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ATTORNEY FOR APPELLANT:

DANIEL K. WHITEHEAD
Yorktown, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES E. DIXON, SR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A02-0902-CV-194
	)	
DOUNTONIA S. DIXON,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0709-DR-1338

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner James E. Dixon, Sr., appeals the denial of his motion to correct error, following the decree of dissolution of his marriage to appellee-respondent Dountonia S. Dixon. Specifically, James argues that the trial court abused its discretion in temporarily deviating from the Indiana Parenting Time Guidelines (Guidelines), pending the results of a domestic violence mental health assessment. James also maintains that the trial court erred in adopting a portion of Dountonia's proposed findings and recommendations in its final order and that it abused its discretion in ordering him to pay $4700 in attorney's fees to Dountonia's counsel.

We conclude that the trial court's temporary deviation from the Guidelines was proper and that it did not err in adopting a portion of Dountonia's proposed findings. However, although the trial court properly exercised its discretion in ordering James to pay a portion of Dountonia's attorney's fees, we remand this case to the trial court to determine the reasonableness of the fees.

FACTS

James and Dountonia were married on November 28, 1995, and two children—Je. and Ja.—were born during the marriage. The parties separated in September 2007, and James filed a petition for dissolution of marriage on January 11, 2008.

Following the conclusion of the final hearing on September 12, 2008, Dountonia submitted a proposed "Memorandum Decision" (Decision) to the trial court regarding the disposition of the marital property, custody and child support, and attorney's fees. Dountonia's proposed findings included, among others, the following: "11. The above

evidence shows that HUSBAND is untruthful, narcissistic, manipulative, vengeful and has a propensity toward violence." Appellant's App. p. 59.

On November 7, 2008, the trial court issued the following Decision, which included several of Dountonia's proposed findings and conclusions:

> 4. The Court awards custody of [the children] to Wife, reserving reasonable visitation to the Husband. The Court's custody decision is supported by the evidence at trial and the following specific findings:
>
> a) WIFE is a fit and proper custodian who seeks custody of both children. All things being equal, it is desirable for siblings to be reared in the same household. The Petitioner/HUSBAND has shown a clear preference for one child over the other, and desires custody of only one child.
>
> b) WIFE has custody of her two older children and a healthy relationship with the father of those children; WIFE has a strong relationship with her parents, and a good support system. HUSBAND has a strained relationship with Carrie Dixon the mother of his child, [K.] He does not see this child except for some time each summer and he has failed to maintain his support obligations for [K.].
>
> c) Except for periods of illness or debilitating pregnancy, the WIFE was the primary caregiver and psychological parent for all of her children during the marriage. While the HUSBAND assumed child care responsibilities during the wife's illness and at times of separation, it is clear that he did so under duress, and that he expected his wife to clean the house, cook the meals and care for the children even if it was medically difficult for her to do so. This was true despite the fact that husband appeared to have had adequate time for cleaning and childcare, and an unusually flexible schedule.
>
> d) HUSBAND has engaged in a systematic effort to demean, isolate and control the WIFE, and he is unlikely to have the motivation or insight to facilitate and encourage a healthy relationship between the children and their mother.
>
> e) From time to time, both parties have exercised bad judgment in their tumultuous relationship. While explaining her behavior as motivated by trying to follow Biblical principles and an effort to support and protect her husband, the WIFE . . . take[s] responsibility for her bad choices. <u>The HUSBAND takes no responsibility. He is narcissistic and lacking in insight. The trial was replete with</u>

testimony from witnesses who recounted examples of his inappropriate sexual comments and his sharing of discreet personal information with strangers. He fabricated battery and invasion of privacy charges against his own wife, an adult woman who had never been accused of violence or had any adverse contact with law enforcement prior to her marriage to Petitioner. The HUSBAND'S efforts to control the wife have included intimidation and some violence. While the husband's history of prior violence in previous relationships is circumstantial and inferential, there is clear evidence that threats and intimidation have been exhibited in his prior relationships with both peers and women.

f) There is also evidence that the HUSBAND has sometimes been neglectful of the children's physical, supervisory, or health care needs when they were in his care.

5. For the reasons set out above, the Court is deviating from the Indiana Parenting Time Guidelines on visitation. While the custody order is final, the deviation from Indiana Parenting Guidelines is provisional or interlocutory. If Husband promptly arranges for a domestic violence/mental health assessment with a licensed psychologist approved by the court and completes a course of study or therapy approved by the psychologist to address Husband's characterological and behavioral difficulties, as well as the other issues noted in this Memorandum Decision, then the court contemplates a normalization of visitation with full implementation of the Indiana Parenting Guidelines.

. . .

7. Attorney Fees. HUSBAND's trial testimony lacked candor, and was characterized by evasiveness and obfuscation. Beyond that, the prosecution of WIFE's case was made time-consuming and difficult by HUSBAND's lack of cooperation.. . . . (In addition, Husband repeatedly avoided and refused to comply with discovery requests.) Husband also attempted to intimidate Wife's Attorney by the filing of a meritless Disciplinary complaint. Based on a finding of bad faith and a disparity of income Husband is ordered to pay the Wife's Attorney the sum of $4700.00 within 90 days to be applied to her fees in this cause.

8. The assignment and payment of these joint debts and the award of attorney fees is considered a Domestic Order of Support and shall not be subject to discharge in bankruptcy, unless mutually agreed.

. . .

11. Within 10 days, Counsel for WIFE shall prepare, for the court's consideration, a proposed Decree of Dissolution of Marriage and final judgment incorporating the orders of this Memorandum Decision.

Appellant's App. p. 30-34 (emphasis added).

The trial court subsequently issued its final decree on December 3, 2008, which provided that

> B. Wife is to have custody of the minor children. . . .
>
> C. The Court is deviating from the Indiana Parenting Time Guidelines on visitation. While the custody order is final, the deviation from the Indiana Parenting Time Guidelines is provisional or interlocutory. If HUSBAND promptly arranges for a domestic violence/mental health assessment with a licensed psychologist approved by the Court and, completes a course of study or therapy approved by the psychologist to address HUSBAND'S characterological and behavioral difficulties, as well as the other issues noted in the Memorandum Decision, then the Court contemplates a normalization of visitation with full implementation of the Indiana Parenting Time Guidelines. Pending further order of the Court, visitation shall be as follows: Saturdays from 11:00 a.m. to 7:00 p.m., and Christmas Eve from 11:00 a.m. to 7:00 p.m. Visitation exchange shall occur at the Anderson Police Department, or at another location agreed upon in writing.
>
> D. HUSBAND shall pay support in the amount of $139.00 per week, effective Friday, November 7, 2008. Support shall be paid through the Clerk of the Court. HUSBAND is hereby ordered to keep the Court advised of his mailing address at all times.
>
> . . .
>
> F. HUSBAND is hereby order to pay WIFE'S attorney the sum of $4,700.00 within ninety days to be applied to her fees in this cause.
>
> G. Each party shall be responsible for any debts in their own names. Both parties shall be responsible for any joint debts (i.e. family and medical obligations occurred prior to the filing of the dissolution petition) with each party paying exactly one half of the joint debts and holding the other party harmless therefrom on their one half obligation. The assignment and payment of these joint debts and the award of attorney fees is considered a

> Domestic Order of Support and shall not be subject to discharge in bankruptcy, unless mutually agreed.
>
> H. Personal property shall be awarded to the party now in possession, with debts, if any, to follow the property.

Id. at 38-41. Husband now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that Dountonia 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 her and we apply a less stringent standard of review with respect to showings of reversible error. Murfitt v. Murfitt, 809 N.E.2d 332, 333 (Ind. Ct. App. 2004). 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.

II. James's Contentions

A. Mental Health Assessment and Parenting Time

James argues that the trial court abused its discretion in temporarily deviating from the Guidelines and in ordering him to submit to a domestic violence mental health assessment. More specifically, James argues that the trial court erred because there was no evidence to "remotely indicate that [he] ever posed or poses a threat to the physical or emotional well being of the children." Appellant's Br. p. 13. Thus, James maintains that

the trial court's restriction of his parenting time with the children is contrary to the facts and circumstances before it.

We initially observe that the purpose of the Guidelines "is to provide a model which may be adjusted depending upon the unique needs and circumstances of each family." Ind. Parenting Time Guidelines, Preamble. Moreover, the Guidelines "are not meant to foreclose the parents from agreeing to, or the court from granting, such additional or reduced parenting time as may be reasonable in any given case." Id., at § 3. While we encourage parties to negotiate agreements regarding custody and parental visits, the agreement must be in the child's best interest. Keen v. Keen, 629 N.E.2d 938, 941 (Ind. Ct. App. 1994).

Generally speaking, decisions regarding child visitation are committed to the sound discretion of the trial court, and we may reverse such decisions only upon a showing of a manifest abuse of discretion. Walker v. Nelson, 911 N.E.2d 124, 130 (Ind. Ct. App. 2009). An abuse of discretion has occurred if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

When reviewing the trial court's decision, we neither reweigh the evidence nor reexamine the credibility of the witnesses. Id. Rather, we view the record in the light most favorable to the trial court's decision to determine whether the evidence and reasonable inferences therefrom support the judgment. Id. In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child or children involved. J.M. v. N.M., 844 N.E.2d 590, 599 (Ind. Ct. App. 2006).

The restriction of parenting time is governed by Indiana Code section 31-17-4-2, which provides that

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's visitation rights unless the court finds that the visitation might endanger the child's physical health or significantly impair the child's emotional development.

We note that even though this statute uses the term "might" with regard to the endangerment of the child's physical health or impairment of his or her emotional development, we have interpreted the statute to mean that a court may not restrict visitation unless that visitation would endanger the child's physical health or well-being or significantly impair the child's emotional development. Farrell v. Littell, 790 N.E.2d 612, 616 (Ind. Ct. App. 2003). Indeed, "by its plain language, Indiana Code section 31-14-14-1 requires a court to make a specific finding of physical endangerment or emotional impairment prior to placing a restriction on the noncustodial parent's visitation." Id.

In this case, the trial court entered the following order with regard to James's parenting time with the children:

> If Husband promptly arranges for a domestic violence/mental health assessment with a licensed psychologist approved by the court and completes a course of study or therapy approved by the psychologist to address Husband's characterological and behavioral difficulties, as well as the other issues noted in this Memorandum Decision, the court contemplates a normalization of visitation with full implementation of the Indiana Parenting Guidelines.

Appellant's App. p. 31-32.

Although James maintains that this order must be set aside because the trial court did not make a specific finding that his interaction with the children could endanger their health or significantly impair their emotional development, the evidence presented at the hearing established that James "strangled and body slammed" Dountonia when she was pregnant with one of the children. Tr. p. 753-55. A fistfight erupted between James and Dountonia in front of the children on another occasion. Id. at 759. At some point, James left and did not come home for two days when Dountonia was pregnant with one of the children. Id. at 768. Their residence remained very hot for several months because the thermostat was broken and James had not fixed it. As a result, one of the children suffered asthma attacks. Dountonia described a number of other incidents when James had punched and strangled her. Id. at 770-85.

The evidence also showed that James would offer to take care of the children "only in public." Id. at 204, 800-02. Otherwise, James showed very little interest in them. Id. at 801. On at least one occasion, James "ripped" Ja. from Dountonia's arms. Id. at 186. One witness observed James and one of the children at a mall in Anderson. James paid no attention to the two-year-old child and talked on his cell phone for nearly thirty minutes. Id. at 142-43.

Additionally, although James's daughter from a prior relationship lived with them during the summer months, James showed very little interest in her. James commented that she was "retarded" and questioned whether he was her biological father. Id. at 804-

05. James accused Dountonia of having affairs and told strangers that she had a sexually transmitted disease. Id. at 264. James also commented that Je. was not his son, although paternity testing established otherwise. Id. at 810. There was also evidence that the children were not bathed when they visited James. James had also failed to pick up prescriptions for Ja.'s persistent cough. Id. at 815-18.

In our view, the above evidence supported the trial court's findings of James's "systematic effort to demean, isolate, and control Dountonia." Appellant's App. p. 30-34. Moreover, the evidence supported the conclusion that James lacks the "motivation and insight to facilitate and encourage a healthy relationship between the children and their mother," and that he has been "neglectful of the children's physical, supervisory, or health care needs when they were in his care." Id. at 31. Indeed, the evidence establishing James's recklessness, lack of insight, and violence support the trial court's authority to compel James to address these issues to prevent physical and emotional damage to his children.

Put another way, the trial court's findings satisfy the requirements of Indiana Code section 31-17-4-2, which permitted the trial court to temporarily restrict James's parenting time with the children and enter a provisional deviation from the Guidelines. We cannot say that the temporary deviation from Guidelines and ordering James to undergo a mental health assessment and counseling program was an abuse of discretion. Thus, James's claim fails.

B. Trial Court's Adoption of Dountonia's Proposed Findings

James next claims that that the final decree must be set aside because the trial court adopted a portion of Dountonia's proposed Decision in its order. Specifically, James maintains that the trial court's incorporation of Dountonia's proposed findings in its order denied him a "full, fair and unbiased adjudication" in the proceedings. Appellant's Br. p. 15.

In Prowell v. State, 741 N.E.2d 704 (Ind. 2001), our Supreme Court acknowledged that a trial court's verbatim adoption of a party's proposed findings may have important practical advantages. Id. at 708-09. Therefore, the Prowell court expressly declined to prohibit the practice. However, it was also observed that a trial court's wholesale adoption of one party's findings results in an "inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." Id. at 709.

Also, in Stevens v. State, 770 N.E.2d 739 (Ind. 2002), the post-conviction court "essentially adopted verbatim the proposed findings of fact and conclusions of law submitted by the State." Id. at 762. However, the Stevens court observed that the post-conviction court "added two sentences to one issue, a couple of paragraphs to another, and corrected some of the misspellings." Id. As a result, the post-conviction court's "utilization of the State's proposed findings . . . [did not constitute] a failure to provide the defendant with a full, fair and unbiased adjudication." Id.

In support of his contention that the trial court was biased and that the proceedings were unfair, James directs us to finding 4(e), set forth in the trial court's Decision:

> The HUSBAND takes no responsibility. He is narcissistic and lacking in insight. The trial was replete with testimony from witnesses who recounted examples of his inappropriate sexual comments and his sharing of discreet personal information with strangers. He fabricated battery and invasion of privacy charges against his own wife, an adult woman who had never been accused of violence or had any adverse contact with law enforcement prior to her marriage to Petitioner. The HUSBAND'S efforts to control the wife have included intimidation and some violence.

Appellant's App. p. 30-31.

As discussed above, various witnesses testified that James commented to strangers about Dountonia's alleged marital infidelity and that she had a venereal disease. Moreover, the evidence also supported the finding that James had fabricated instances of violence in which Dountonia had engaged.

Notwithstanding the propriety of these findings, we further note that the trial court did not adopt many of Dountonia's proposed findings that included attacks on James's character and detailed allegations of battery against his first two wives, a girlfriend, and a former employer. The trial court also did not incorporate Dountonia's claims of James's alleged tax evasion, claims that he had forged his paystubs, that he had avoided making child support payments, or his intentional refusal to pay an outstanding judgment in an unrelated matter. Appellant's App. p. 50-56. Moreover, Dountonia's contention set forth in her proposed findings that "Husband did not want his younger child," and the statement that "Husband operates his life outside the bounds of the law and appears to hold himself above others as to his legal and ethical obligations," were never adopted by the trial court. Id. at 49-50.

In sum, it is apparent that the trial court carefully considered and purposefully used a portion of Dountonia proposed findings. Therefore, we reject James's claim that he was denied a fair and unbiased adjudication on this basis.

C. Attorney's Fees

Finally, James contends that the trial court erred in ordering him to pay Dountonia's attorney's fees in the amount of $4,700. Specifically, James maintains that the "trial court abused its discretion by finding a sufficient disparity of income as a factor for award of attorney fees." Appellant's Br. p. 9. Moreover, James contends that even if the trial court properly ordered him to pay a portion of Dountonia's attorney's fees, we must remand this case for a further hearing because Dountonia did not submit a "damage motion and affidavit regarding the reasonableness of such a fee." Appellant's Br. p. 9.

In resolving this issue, we initially observe that Indiana Code section 31-16-11-1 provides that:

> (a) The court periodically may order a party to pay a reasonable amount for:
>
> > (1) the cost to the other party of maintaining or defending any proceeding under this chapter, IC 31-16-2 through IC 31-16-10, or IC 31-16-12;
> >
> > (2) attorney's fees; and
> >
> > (3) mediation services;
>
> including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

> (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's name.

In interpreting this statute, we note that trial courts have broad discretion in awarding attorney fees in post-dissolution proceedings. Claypool v. Claypool, 712 N.E.2d 1104, 1110 (Ind. Ct. App. 1999). Moreover, the trial court need not cite the reasons for its determination to award attorney fees in a family law matter. Bean v. Bean, 902 N.E.2d 256, 266 (Ind. Ct. App. 2009). In deciding whether to award attorney fees, the trial court should consider the resources of the parties, their economic condition, their ability to engage in gainful employment, and other factors that bear on the award's reasonableness. Id. When one party is in a superior position to pay fees over the other party, an award of attorney fees is proper. Ratliff v. Ratliff, 804 N.E.2d 237, 249 (Ind. Ct. App. 2004).

We also note that misconduct that directly results in additional litigation expenses is a proper consideration in the trial court's decision to award attorney fees in the context of a dissolution proceeding. Lewis v. Lewis, 638 N.E.2d 859, 861 (Ind. Ct. App. 1994). Misconduct on the part of one party that causes the other party to directly incur additional fees may be taken into consideration. Haley v. Haley, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002).

In this case, the record shows that Dountonia earns $567 per week and James earns $700 per week. James pays $139 in weekly support, and Dountonia pays $80 of the weekly child care, leaving income of $487 per week. Although the disparity in

income is not substantial, the trial court also determined that James's testimony lacked candor and was "characterized by evasiveness and obfuscation." Appellant's App. p. 33. The record further reflects that James repeatedly failed to comply with discovery requests. Moreover, the trial court found that James filed a disciplinary complaint against Wife's attorney in an attempt to intimidate. Id.

Although we agree that the trial court acted within its discretion in ordering James to pay a portion of Dountonia's attorney's fees, we nonetheless agree with James that there is not sufficient evidence to assist the trial court in determining the reasonableness of the amount of the attorney's fees that were awarded. Indeed, Dountonia's counsel did not submit an affidavit documenting the attorney fees upon which the trial court could have based its award of attorney fees. Moreover, there is no evidence indicating the time that Dountonia's counsel expended on the matter or the hourly rate that was charged. Although the trial court may consider a number of factors in determining the reasonableness of attorney fees, we have noted that "the hours worked and the rate charged are a common starting point for determining the reasonableness of a fee." Fortner v. Farm Valley-Applewood Apartments, 898 N.E.2d 393, 400 (Ind. Ct. App. 2008). As a result, we are unable to determine whether the attorney's fees awarded by the trial court were reasonable. Therefore, we must remand this issue to the trial court so it may determine the reasonableness of the attorney's fees. Bean , 902 N.E.2d at 266; see also Fortner, 898 N.E.2d 393 at 400 (noting that the record did not "establish[ ] the number of hours that counsel . . . spent on the case or the hourly rate that was charged,"

concluding the record was insufficient to determine the reasonableness of the requested fees, and remanding to the trial court to conduct a hearing to determine the reasonableness of the fees).

The judgment of the trial court is affirmed in part and remanded with instructions. DARDEN, J., and MAY, J., concur.