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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF J.H., MINOR CHILD	)	
	)	
DARA L. BOARDMAN BUTLER,	)	
	)	
Appellant-Petitioner,	)	No. 89A05-0610-CV-621
	)	
vs.	)	
	)	
TERRY L. HILLARD,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0108-DR-131

July 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dara L. Boardman Butler ("Mother") appeals the trial court's grant of the petition for modification of custody filed by Terry L. Hillard ("Father") regarding their son, J.H. We affirm and remand.[1]

Issues[2]

Mother raises twelve[3] issues, which we consolidate and restate as the following eight:

I. Whether the trial court abused its discretion by granting Father's petition to modify custody;

II. Whether the trial court abused its discretion by excluding evidence of events occurring prior to the dissolution of Mother and Father's marriage;

III. Whether the trial court abused its discretion by admitting several guardian ad litem reports and a custodial evaluation report;

IV. Whether Father and/or David Butler perpetrated fraud on the trial court;

V. Whether the trial court erred when it denied Mother's petition to exercise first right of refusal for babysitting J.H.;

VI. Whether the trial court abused its discretion in ordering Mother to pay 35% of J.H.'s psychological counseling expenses;

VII. Whether the trial court erred in denying Mother's motion for attorney fees; and

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[1] On April 13, 2007, Father filed a motion to strike portions of appellant's appendix, a motion to strike portions of appellant's brief, and a memorandum in support thereof. Because we rule in Father's favor, we deny these motions as moot.

[2] We note that Mother also asks us to review her counsel's alleged "misrepresentation" at trial. Appellant's Br. at 3. She lists many "mistakes" that she believes her counsel made in this case. *Id*. at 3-4. In civil cases such as this one, we cannot review the issue of effectiveness of counsel.

[3] While Mother clearly identifies only ten topics in her "Issues" section, she actually discusses two more topics in other portions of her brief. In the interest of completeness, we will address these items as well.

VIII. Whether the trial court and/or court officials were biased against Mother or in favor of Father.

Father raises one issue, which we restate as whether he is entitled to attorney fees pursuant to Indiana Appellate Rule 66(E).

Facts and Procedural History

J.H. was born to Mother and Father on March 13, 1999. Mother and Father were married in 2000 and divorced in 2002. At the time of dissolution, the trial court awarded custody of J.H. to Mother, with supervised visitation by Father. In December 2002, the trial court ordered that supervision was no longer required during Father's parenting time with J.H. In July 2003, Father married his current wife, Cathy. Together they are raising Cathy's two children from a previous marriage. Mother married David Butler in June 2002, and they have two young children. Butler filed for divorce in May 2005 and moved out of the house he shared with Mother. At the time of trial, the couple was attempting to reconcile, and Butler, a truck driver who is rarely in town, stayed with Mother "now and then" to "give her a break" from caring for their children. Tr. at 112-13.

On May 27, 2005, Father filed his verified petition for modification of custody of J.H. Father also requested the appointment of a guardian ad litem, a provisional order, and an emergency order transferring custody. On June 10, 2005, Mother filed her cross-petition seeking a support increase as well as her answer to Father's petitions. On June 21, the parties agreed to the appointment of Tammy Henry to act as guardian ad litem. The parties also agreed to vacate the emergency hearing. On October 10, 2005, the trial court ordered a

custodial evaluation, and the parties agreed to the appointment of Dr. Richard Lawlor to perform that evaluation.

On November 10, 2005, Father filed a verified emergency petition to remove the child from Mother's custody. A hearing on said motion was held on November 30, 2005. Trial was held on July 12, 13, 14, and 28, 2006, on all pending petitions. On August 8, 2006, the trial court entered an order modifying custody, establishing support to be paid by Mother, ordering Mother to reimburse Father for her portion of the custodial evaluation, and denying Mother's cross-petition to modify the dissolution decree as to support. On August 16, 2006, Mother filed a motion to correct error and for clarification. Father filed his response on August 30, 2006. On October 2, 2006, the trial court granted Mother's motion to the extent that it ordered a correction in the threshold amount for the payment of uninsured medical bills and modified the support amount payable by Mother. In all other respects, the trial court denied Mother's motion. Mother now appeals.

Discussion and Decision

I. Modification of Custody

Mother argues that the trial court erred by granting Father's petition for modification of custody. The decision to modify a custody order lies within the sound discretion of the trial court. *Bettencourt v. Ford*, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005). We review such decisions for abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993). When reviewing a trial court's decision to modify custody, we will not reweigh the evidence, nor will we judge the credibility of witnesses. *Van Wieren v. VanWieren*, 858

N.E.2d 216, 221 (Ind. Ct. App. 2006). We will consider only the evidence most favorable to the judgment and any reasonable inferences therefrom. *Id*. It is not enough that the evidence might support another conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal. *Bettencourt*, 822 N.E.2d at 997.

Indiana Code Section 31-17-2-21 states that a trial court may not modify a custody order unless it determines that the modification is in the best interest of the child and there is a substantial change in one of several factors listed in Indiana Code Section 31-17-2-7-8, such as the age and sex of the child; the interaction and interrelationship of the child with the child's parents, siblings, and any other person who may significantly affect the child's best interest; and the mental and physical health of all individuals involved.

The trial court held a lengthy hearing in this case, during which it heard testimony from many individuals, including Mother, Mother's husband, Father, Father's wife, J.H.'s counselor, J.H.'s school principal, J.H.'s school social worker, J.H.'s teacher, Mother's mother, Mother's stepfather, and Mother's sister. The trial court also had available five guardian ad litem reports, prepared from September 2005 through June 2006, and one custodial evaluation report, dated December 15, 2005. The evidence most favorable to the trial court's decision includes evidence that Mother's relationship with David Butler was unstable, that he had filed for divorce, and that he had broken several windows in her home on one occasion. There was evidence of Mother's heavy drinking, driving while intoxicated, and frequenting bars late into the night during weekends that J.H. was in her care. There was evidence that J.H. was often absent from school. There was evidence that illegal drugs were

present in Mother's home and used by Mother, David Butler, and/or Mother's eighteen-year-old daughter.

As for a substantial change in one or more of the statutory factors, the evidence most favorable to the judgment supports a finding of a substantial change in at least one of the following: J.H.'s age, Father's wishes regarding custody, and J.H.'s interaction and interrelationship with his parents and siblings. The trial court found that a modification of custody was in J.H.'s best interest and that a substantial change had occurred in one or more of the factors enumerated in Indiana Code Section 31-17-2-8. Appellant's Amended App. at 18. Because we cannot conclude that the evidence positively requires a denial of Father's petition for modification, we must affirm the trial court's decision.

II. Evidence of Past Events

Mother claims that the trial court erred by excluding evidence of events that occurred prior to the 2002 dissolution of her marriage to Father. The trial court has broad discretion in ruling on the admissibility of evidence. *D.W.S. v. L.D.S.*, 654 N.E.2d 1170, 1172 (Ind. Ct. App. 1995). This Court will only disturb the trial court's ruling upon a showing of abuse of discretion. *Id*.

The evidence at issue—which included documentation of Father's past criminal history dating back to 1994—was offered at trial, and Father objected to its admission. The trial court excluded the evidence, relying upon Indiana Code Section 31-17-2-21(c), which states: "The court shall not hear evidence on any matter occurring before the last custody proceeding between the parties unless the matter relates to a change in the factors relating to the best interests of the child as described by Section 8 and if applicable, Section 8.5 of this

chapter." Mother failed to show how the proffered evidence fell within the exceptions to this rule, and therefore, the trial court did not abuse its discretion in excluding it.

III. Admission of Reports

Mother also claims that the trial court abused its discretion by admitting the reports of Tammy Henry, guardian ad litem, and Richard Lawlor, M.D., child custody evaluator. As Father points out, Mother failed to object when these reports were offered into evidence at trial. Therefore, she has waived review of this issue. *See Weinberg v. Geary*, 686 N.E.2d 1298, 1300 (Ind. Ct. App. 1997) ("Failure to object at trial to the admission of the evidence results in waiver of the error."), *trans. denied*.

IV. Fraud

Mother alleges that Father and David Butler perpetrated a fraud upon the trial court. She claims that Father's testimony about his past communications with David Butler contradicted his answers to interrogatories prepared on February 10, 2006. Mother never raised this issue before the trial court. Mother did not question Father about these alleged contradictions at trial, nor did she allege fraud in her motion to correct error. The issue of fraud is not properly before this court.

V. Right of First Refusal

At some time during these proceedings, Mother requested that the trial court order Mother's and Father's compliance with Wayne County Rule of Family Law 13, which pertains to a parent's right of first refusal for childcare or babysitting needs of the other parent. On July 14, 2006, the trial court denied Mother's request, finding that Father and Mother had never before complied with this rule and that its decision was "an effort to

maintain the status quo[.]" Appellant's App. at 22. Mother's appellate argument on this issue is difficult to interpret, but she seems to be saying that the trial court ruled against her on this issue because it was biased in favor of Father. Mother alleges that Father's babysitter is the daughter of Barb Mayle, J.H.'s first guardian ad litem and Cathy Hillard's "nail client."[4] Appellant's Br. at 20.

> [U]pon review of a trial judge's decision not to disqualify himself, we presume that the trial judge is unbiased. In order to overcome that presumption, the appellant must demonstrate actual personal bias. Unless presented with evidence to the contrary, we assume that the judge would have complied with the obligation to disqualify himself had there been any reasonable question concerning his impartiality. Such bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him. Adverse rulings and findings by the trial judge do not constitute bias per se.

In re Guardianship of Hickman, 805 N.E.2d 808, 815 (Ind. Ct. App. 2004) (citations and quotation marks omitted), *trans. denied*. Clearly, Mother has failed to demonstrate "actual personal bias" in this case. We find no error here.

VI. Counseling Expenses

Mother contends that the trial court erred by ordering her to pay 35% of J.H.'s counseling expenses, which is a different division than the court's original order regarding medical payments. Mother fails to present any argument on this issue, and thus, it is waived for review. *See Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509, 514 (Ind. Ct. App. 2005) (finding waiver where a party failed to develop a cogent argument or support it with adequate citation to authority and portions of the record), *trans. denied* (2006); *see also* Ind. Appellate Rule 46(A)(8)(a).

[4] Cathy Hillard is a manicurist.

VII. Mother's Attorney Fees

Mother claims that the trial court erred by failing to grant her request for attorney fees related to Father's petition for modification of custody. Mother fails to present any argument on this issue, and thus, it is waived for review. *See Carter*, 837 N.E.2d at 514; *see also* Ind. Appellate Rule 48(A)(8)(a).

VIII. Alleged Bias of Judge and/or Court Officials

Mother further alleges that the trial judge, the Honorable David A. Kolger, and J.H.'s past and present guardians ad litem were biased against her and/or in favor of Father. As noted in Section V above, we presume that the trial judge is unbiased unless and until a party demonstrates "actual personal bias." *Hickman*, 805 N.E 2d at 815. Mother contends that Judge Kolger was biased because his son is one of Father's clients.[5] She claims that Judge Kolger announced this information to counsel in chambers prior to trial and stated that he would not recuse himself because this connection would not affect his impartiality. There is no record of this conversation, nor did Mother make any objection on the record. Mother also states that Judge Kolger served as the county prosecutor when Father was tried for battery in 2003. Father points out, however, that Judge Kolger acknowledged this fact during the trial and gave the parties an opportunity to express any concerns. Mother was silent. She also failed to raise any claim of bias in her motion to correct error. Therefore, her claims of bias as to the judge are waived. *See Ware v. State*, 560 N.E.2d 536, 538 (Ind. Ct. App. 1990) (failure to include allegations of bias and prejudice on the part of the trial judge in the motion to correct error results in a waiver of the right to have this issue considered on

appeal), *trans. denied* (1991); *see also Lahrman v. State*, 465 N.E.2d 1162, 1168 (Ind. Ct. App. 1984) (a prompt objection to a trial court's allegedly improper conduct is required to preserve the issue on appeal), *trans. denied* (1985). Waiver notwithstanding, Mother fails to present any evidence of "actual personal bias" on the part of Judge Kolger. *Id*.

As for the guardians ad litem, Mother contends that "Barb Mayle's daughter is too close to the Hillard's [sic], and Tammy Henry is too close to Barb Mayle." Appellant's Br. at 27. Again, Mother is apparently referring to her claim that Barb Mayle's daughter babysits for Father, although there is no such evidence in the record. Although Barb Mayle apparently served as J.H.'s guardian ad litem at the time of Mother and Father's dissolution, there is nothing in the record to indicate that she had any involvement in these modification proceedings. Tammy Henry, J.H.'s guardian ad litem in this case, prepared several reports, all of which were entered into evidence with no objection from Mother. Again, Mother offers no evidence of bias other than Henry's alleged "close" relationship with Mayle. *Id*.

In sum, because Mother has presented absolutely no evidence in support of her assertions of bias against the trial judge and court officials, her claim must fail.

IX. Father's Appellate Attorney Fees

Father requests that we use our authority under Indiana Appellate Rule 66(E) to order Mother to pay his appellate attorney fees. Rule 66(E) states in relevant part: "The Court may assess damages if an appeal … is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." As we have noted in the past, our supreme court has cautioned that we should exercise great restraint when determining

[5] Father is a cosmetologist and a real estate agent.

whether an attorney fee award is warranted "so as not to discourage innovation or periodic reevaluation of controlling precedent." *Potter v. Houston*, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006) (citing *Orr v. Turco Mfg. Co*., 512 N.E.2d 151 (Ind. 1987)).

There are two categories of claims for appellate attorney fees—substantive and procedural bad faith.

> Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found.

Id. (quoting *Thacker v. Wentzel*, 797 N.E.2d 342, 346-47 (Ind. Ct. App. 2003) (citations omitted)). A party claiming substantive bad faith must show that the appellant's contentions and arguments are "utterly devoid of all plausibility." *Id*.

We first address the issue of procedural bad faith. Mother's violations of the appellate rules regarding the format and content of an appellant's brief are simply too many to list exhaustively. With regard to format, Mother's brief is single-spaced throughout, while Appellate Rule 43(E) requires double-spacing; her statement of the issues is far from "concise[] and particular[]"as required by Appellate Rule 46(A)(4); her statement of the case contains no citations to the record or appendix, as required by Appellate Rule 46(A)(5); her statement of the facts consists mostly of information specifically excluded by the trial court, in violation of Appellate Rule 46(A)(6); also, pages nine through twenty-four of Mother's brief contain various topical headings that are not designated as part of her argument section. Rather, in her twenty-eight page brief, the summary of the argument does not appear until

page twenty-four, and her argument section appears on pages twenty-five through twenty-seven. As mentioned above, Mother failed to include cogent reasoning as to most of the issues she raised on appeal, as required by Appellate Rule 46(A)(8)(a). Also, Mother failed to identify the standard of review for each issue, as required by Appellate Rule 46(A)(8)(b).

As one might expect, Mother likewise did not follow the rules with regard to the preparation of her appendix. The appendix contains many documents that were not properly before the trial court, and Mother's Appellate Rule 50(A)(2)(i) statement, in which she verifies under penalties of perjury that the documents in the appendix are accurate copies of portions of the record, is clearly not accurate. In sum, based upon the frequency and the seriousness of Mother's disregard for the Indiana Rules of Appellate Procedure, we do find procedural bad faith here. We are aware that Mother appears pro se in this appeal; however, she is held to the same standard as an attorney. An appellant who proceeds pro se is held to the same established rules of procedure that an attorney is bound to follow and, therefore, must be prepared to accept the consequences of his or her action. *Thacker*, 797 N.E.2d at 345.

As for substantive bad faith, Mother fails on all but one of her issues to present logical arguments supported by legal authority. Most of her arguments were waived for review because Mother failed to raise them before the trial court. Further, she attempts to tarnish the image of several court officials with absolutely no factual basis to support her argument of bias. We acknowledge, however, that on the most central issue, that of whether the trial court erred in granting Father's petition for custody modification, Mother's argument is slightly more discernable and logical than the others. Although we reject it here, it is not so

ridiculous as to consider it "utterly devoid of all plausibility." That leaves eleven issues that, in our view, were presented in bad faith.

Having found that Mother committed both procedural and substantive bad faith, we order her to pay Father's appellate attorney fees in this matter. We hereby remand to the trial court for a determination of Father's appellate attorney fees.

Affirmed and remanded.

BAKER, C. J., and FRIEDLANDER, J., concur.