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IN THE
COURT OF APPEALS OF INDIANA

JAMES JASON BOREN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A04-0701-CV-68
	)	
VALERIE L. BOREN,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Mary Margaret Lloyd, Judge
Cause No. 82D04-0101-DR-104

October 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Jason Boren ("Father") appeals the trial court's orders denying his petitions for contempt and to terminate parenting time, modifying his parenting time arrangement with Valerie Boren ("Mother"), and rescinding an earlier order appointing a Court Appointed Special Advocate ("CASA"). He raises multiple issues, which we rephrase as: (1) whether the trial court properly denied his petition to terminate Mother's parenting time, (2) whether the trial court erred in granting Mother's petition to modify parenting time, (3) whether the trial court properly denied his petition for a contempt citation, and (4) whether the trial court erred in rescinding its order appointing a CASA. Finding no error, we affirm.[1]

Facts and Procedural History

The facts most favorable to the trial court's decision are as follows.[2] Father and Mother were married and had two children, K.B. and J.B. Father petitioned for dissolution, and the trial court granted a default divorce on May 18, 2001, shortly before Mother was jailed for driving the getaway car during an armed robbery. The Decree of

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[1] We hereby grant Mother's May 22, 2007, Motion to Strike pages eighteen and nineteen of Father's appendix. In his Response, Father does not object to the striking of these documents, but he does object to striking related arguments found in paragraph one of his Statement of the Case on page one of his appellate brief and on page seventeen of his appellate brief, arguing that this material was otherwise introduced to the trial court through testimony or exhibits. The information contained in these portions of Father's appellate brief goes to the circumstances of Mother's criminal conviction, which were not in evidence before the trial court. Thus, we strike the requested references on pages one and seventeen of the Appellant's Brief.

We deny Mother's Motion to Strike page thirty-one of the Appellant's Appendix. Although she argues that this document was not part of the record before the trial court, this document was submitted to the trial court as an attachment to Father's August 22, 2006, petition to modify. Therefore, it is properly considered as a part of the appellate record.

[2] We remind Father's counsel that the Statement of Facts must consist of those facts most favorable to the trial court's judgment. Ind. Appellate Rule 46(A)(6)(b); *Schaefer v. Kumar*, 804 N.E.2d 184, 195 (Ind. Ct. App. 2004), *trans. denied*. Further, the Statement of Facts should not be a witness by witness summary of the testimony. App. R. 46(A)(6)(c).

Dissolution granted custody to Father, provided that Mother would have "reasonable visitation with the parties' minor children as agreed upon by the parties," and ordered Mother to pay fifty dollars per week in child support. Appellant's App. p. 14-15.

The following year, Mother received a letter, dated May 8, 2002, from the Vanderburgh County Prosecutor's Office, advising her that "[t]he dependent has not reached the age of majority, but there is no longer a current support order and arrearage." Ex. p. 15. She then telephoned Father to inquire about the status of her support obligation and any arrearage. Appellant's App. p. 201. Father told her that there was no current support order. *Id.*

While Mother was incarcerated and later while she was in a Community Corrections Work Release program, Father brought the children to visit her. However, the relationship between the parties deteriorated after Mother was released in December 2002. Father never permitted Mother to have unsupervised visitation with the children. He failed to return her phone calls, limited her time spent with the children during visits, and changed residences in December 2005 without advising Mother of his new address.

In February 2006, Father remarried. On July 19, 2006, Father's wife filed a petition for adoption of the two children, which acknowledged that Mother did not consent to the adoption. Appellant's App. p. 20-21. On August 16, 2006, Mother filed a petition to modify the terms of parenting time provided in the Decree of Dissolution, *id.* at 23, and an Information for Indirect Contempt, alleging that Father violated the trial court's order by not allowing her reasonable visitation with the children, *id.* at 24. In response, on August 22, 2006, Father filed a petition to modify parenting time to

terminate Mother's visitation rights with the children altogether, *id.* at 26, and an Information for Contempt, alleging that Mother refused to pay her weekly child support obligation, *id.* at 28. Subsequently, Mother received a copy of the divorce decree for the first time and learned that she owed child support. She has paid child support consistently since August 25, 2006. Respondent's Ex. B.[3]

Prior to the evidentiary hearing on these motions, the trial court granted Father's motion for the appointment of a CASA to represent the children's interests. After an evidentiary hearing conducted on November 14, 2006, and December 1, 2006, the trial court denied Father's petitions for contempt and to terminate parenting time and granted Mother's petition to modify. The trial court then rescinded its order appointing a CASA, noting that it was not until the first day of the hearing that the order was presented to the court and filed. Father now appeals.

Discussion and Decision

Where, as here, the trial court *sua sponte* issues specific findings of fact and conclusions of law in its order, the reviewing court examines whether the evidence supports the findings and the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005) (citing *Learman v. Auto Owners Ins. Co.*, 769 N.E.2d 1171, 1174 (Ind. Ct. App. 2002), *trans. denied*). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* Findings of fact are clearly erroneous where there is no substantial evidence of probative value supporting them. *In re A.H.*, 751 N.E.2d 690, 695 (Ind. Ct. App. 2001), *trans. denied*. In deference

[3] This exhibit is found on the unnumbered page between the pages labeled thirteen and fourteen in the Volume of Exhibits.

to the trial court, we will neither reweigh the evidence nor assess the credibility of witnesses but will only consider the evidence most favorable to the judgment. *Fowler*, 830 N.E.2d at 102 (citing *Clark v. Crowe*, 778 N.E.2d 835, 839-40 (Ind. Ct. App. 2002)). "In the absence of special findings, we review a trial court decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence." *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 240 (Ind. 1997).

I. Denial of Father's Petition to Terminate Mother's Parenting Time

Father first argues that the trial court erred in denying his petition requesting termination of Mother's parenting time. Restriction of parenting time is governed by Indiana Code § 31-17-4-2, which provides:

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

(Emphasis added). Father's petition to modify alleges the following in support of his request:

> That the mother, Valerie L. Boren has not seen or attempted to see the children since July 2003. . . . That the mother, Valerie L. Boren has been incarcerated for armed robbery and her lifestyle is potentially harmful to the well being of the children. . . . That the father, James Jason Boren, is requesting the courts terminate the parental rights of the mother in a separate proceeding. . . . It is believed that the only reason the mother is attempting to initiate visitation at this time is because an adoption petition has been filed in Warrick County, IN.

Appellant's App. p. 26.

In response to these allegations, the trial court made the following relevant findings of fact:

> [A]fter the Mother was released from incarceration, all parenting time with the Mother occurred at the Father's residence or one (1) time at a playground near the Father's church or one time at the baseball fields while one of the children was playing a game. The Father has never allowed the Mother unsupervised parenting time, nor has he presented any evidence to substantiate the allegation that parenting time with the Mother would endanger the children's physical health or significantly impair their emotional development. . . . [T]he Court finds the Father moved in December of 2005 and did not advise the Mother of the change of address. . . . [T]he Court finds the Father controlled the Mother's Parenting Time completely. No evidence exists that the children's physical health has been endangered or their emotional development significantly impaired from the Mother's behavior. Rather, the Court finds it is the Father's controlling behavior which led to the children's estrangement from their Mother. No evidence was presented showing the Mother's lifestyle was in any way harmful to the children.

Id. at 10.

Father attacks several of these findings, arguing that they are not supported by the evidence. He first contends that the trial court overlooked that Mother visited with the children once at Father's parents' home and that the trial court mistakenly found that Mother was incarcerated at the time of the parties' dissolution. While he is correct, *see id.* at 357 and 176, these factual discrepancies are immaterial to the judgment. These facts do not pertain to the question of whether Mother's "parenting time might endanger the child[ren]'s physical health or significantly impair the child[ren]'s emotional development." Ind. Code § 31-17-4-2.

Father further argues that the trial court erred in finding that he moved and did not advise Mother of his change of address. In support of this argument, Father lists relatives of Mother who were aware of his new address and mentions that he left a forwarding

address with the postal service. Appellant's Br. p. 18-19. Accepting these contentions as true, we do not conclude that the trial court's factual finding was in error. Indeed, Father does not claim that he directly informed Mother of his change of address. *Id*. Regardless, this finding does not go to the relevant inquiry posed by Indiana Code § 31-17-4-2 and is therefore immaterial to our review of the propriety of the trial court's denial of Father's petition to modify.

Next, Father argues that Mother's past criminal behavior and living situations reflect poorly upon her character, that the trial court erred in finding that Father impeded Mother's access to their children, and that the trial court erred in determining that Mother had insufficient funds to independently hire counsel. He counters these findings with testimony from other portions of the record and argues that these trial court findings "were based on inconsistent testimony and unsubstantiated allegations provided by [Mother] and her witnesses." *Id.* at 20. Father is asking us to reweigh the evidence, which we cannot do. *Fowler*, 830 N.E.2d at 102 (citing *Clark v. Crowe*, 778 N.E.2d 835, 839-40 (Ind. Ct. App. 2002)).

Here, the trial court heard conflicting testimony regarding whether Mother's visitation with the children would endanger them. The trial court determined that "[n]o evidence exists that the children's physical health has been endangered" by Mother and that "[n]o evidence was presented showing that Mother's lifestyle was in any way harmful to the children." Appellant's App. p. 10. Indeed, Father points to no portions of the record that might reflect a physical endangerment of the children, and the evidence before the trial court was that Mother was gainfully and steadily employed for at least

three years prior to the hearing in this matter, *id.* at 147, that she regularly paid child support upon learning of her obligation, Respondent's Ex. B, and that she has attempted to see her children for years without avail, *see, e.g.*, Appellant's App. p. 208-16. Further, the trial court determined that the children's estrangement from Mother is not due to her behavior but to Father's exclusion of her from their lives. This finding is supported by the testimony of Mother and her mother, and the trial court was free to judge the credibility of the witnesses. We conclude that the trial court's relevant factual findings are not clearly erroneous and that they support its decision to deny Father's petition.

II. Grant of Mother's Petition to Modify Parenting Time

Father next challenges the trial court's decision to grant Mother's petition to modify parenting time to specify times and places for visitation. Again, the trial court's evaluation was governed by Indiana Code § 31-17-4-2. Because Mother did not ask the court to restrict Father's parenting time, the relevant inquiry for the trial court's assessment of Mother's motion was the best interests of the children. I.C. § 31-17-4-2.[4]

The trial court found that Father's behavior estranged the children from Mother, a factual finding based upon the trial court's evaluation of the veracity of the witnesses, which we will not disturb. Evidence supports the trial court's factual findings regarding Mother's unsuccessful attempts to see the children, *see, e.g.*, Appellant's App. p. 42-43, 50-51, 118, 210-11, 247-48, Father's interference with her parenting time, *see, e.g.*, *id.* at

[4] Mother's petition to modify and the trial court's findings regarding this issue discuss the considerations imposed by Indiana Code § 31-17-2-8. However, Indiana Code § 31-17-2-8 pertains to considerations necessary for the modification of custody orders rather than parenting time orders. This Court has previously recognized that Indiana Code § 31-17-2-8 is inapplicable to modifications of parental visitation. *Shady v. Shady*, 858 N.E.2d 128, 139-40 (Ind. Ct. App. 2006), *trans. denied*.

45-46, Mother's attempts to give gifts to the children, *id.* at 51-52, 88-89, 340, and K.B.'s desire to see Mother, *id.* at 37-39.

We are mindful of the fact that "it is usually in the child's best interest to have frequent, meaningful and continuing contact with each parent." Ind. Parenting Time Guidelines, Preamble (2007). Further, we recognize that the parties' current parenting time order calling for "reasonable visitation with the parties' minor children as agreed upon by the parties," *id.* at 14, is simply unworkable at this point. *See Beaman v. Beaman*, 844 N.E.2d 525, 533 (Ind. Ct. App. 2006) (recognizing the need for a visitation schedule to be "workable"). Also noteworthy is the argument by Father's counsel during the evidentiary hearing discussing what might happen "*if the Court grants and starts* parenting time." Appellant's App. p. 428 (emphasis added). We observe that Mother's *right* to parenting time was fully intact from the moment the Decree of Dissolution specified that she would have "reasonable visitation." Mother's petition to modify simply asked the court to specify times and places for the exercise of her parenting time. *Id.* at 23. We conclude that the trial court did not clearly err in granting Mother's petition.

III. Denial of Father's Information for Contempt

Father next contends that the trial court erred in denying his Information for Contempt. Parents may seek to enforce child support orders through contempt proceedings. Ind. Code § 31-16-12-1. These proceedings are governed by Indiana Code § 31-16-12-6, which reads in relevant part: "If the court finds that a party is delinquent as

a result of an *intentional* violation of an order for support, the court may find the party in contempt of court." (Emphasis added).

The trial court found that Mother's failure to pay child support was not willful. Appellant's App. p. 11. On appeal, Father argues that "[t]he evidence reflects that it was not ignorance of her obligation to pay child support that restrained [Mother], it was her lack of interest in his children and her animosity towards her exhusband [sic]." Appellant's Br. p. 22. However, the evidence supports the finding that Mother's failure to pay child support before August 2006 was not a willful violation of a court order. The evidence reflects that Mother was absent from the final hearing during which the parties' dissolution was granted and that a copy of the Decree of Dissolution sent to Mother was returned to the court as undeliverable. Appellant's App. p. 4. Following the divorce, Mother was incarcerated. During her incarceration, a letter from the Vanderburgh County Prosecutor's Office informed Mother that she had no arrearage or current support order. Ex. p. 15. When Mother followed up on this information with a telephone call to Father, he told her that there was no current support order. Appellant's App. p. 201. It was not until August 2006 that Mother discovered her child support obligation, and at that point she opened a child support account at the Vanderburgh County Clerk's Office and began making regular payments. *Id.* at 142-43; Respondent's Ex. B. This evidence supports a finding of unintentional noncompliance. Therefore, we cannot conclude that the trial court's denial of Father's Information for Contempt was clearly erroneous.[5]

[5] This conclusion does not entitle Mother to relief from any child support obligations or arrearages to which she may be subject.

IV. Rescission of Order Appointing CASA

Finally, Father argues that the trial court erred by rescinding its prior order appointing a CASA and by denying his motions to reconsider the decision and to reopen the case to employ an investigator to interview the children. We begin by noting that this rescission order was issued orally near the close of the evidentiary hearing. Because the trial court's special findings do not pertain to its order regarding the CASA, we review this order as a general judgment. The question on appellate review, therefore, is whether the trial court's decision can be sustained "upon any theory consistent with the evidence." *Perdue Farms, Inc.*, 683 N.E.2d at 240.

Indiana Code § 31-15-6-1 allows a trial court to appoint a CASA at any time to represent and protect the best interests of the children involved in a proceeding. Ind. Code §§ 31-15-6-1, -3. This statute explicitly vests discretion in the trial court to determine whether the appointment of a CASA is required. *See In re A.L.H.*, 774 N.E.2d 896, 901 (Ind. Ct. App. 2002) (Evaluating an identical provision, we explained that Indiana Code § 31-34-10-3 "explicitly gives discretion to trial courts to determine, in such cases, whether the appointment of a CASA or a GAL is required.").

Father contends that the rescission of the CASA appointment "effectively denied [him] the right to present independent evidence as to the best interests of the minor children." Appellant's Br. p. 23. We disagree. The trial court acted within its discretion in rescinding its earlier order appointing a CASA. As the court explained, "The Order was actually presented to the Court and filed November 14th, 2006[, which] was the exact same date [as] the first part of this hearing. Court will hereby rescind its order, since

there was no way this could [have] been accomplished prior to the evidentiary hearing and still apparently it entered the Order Book November 17, 2006, which was actually after the beginning of the hearing." Appellant's App. p. 424. Both parties had ample opportunity to present evidence of the children's best interests throughout the two-day hearing, which indeed they did, and, additionally, Father does not articulate what supplementary evidence he anticipated from a CASA investigation. We find no error.

We conclude that the trial court did not err in denying Father's petitions for contempt and to terminate parenting time, granting Mother's petition to modify parenting time, and rescinding its order appointing a CASA.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.