

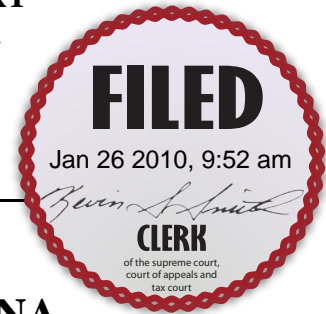
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**IN THE
COURT OF APPEALS OF INDIANA**

EARL GIBSON,

Appellant-Respondent,

vs.

TAMMY (GIBSON) MOYNIHAN,

Appellee-Petitioner.

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No. 02A04-0906-CV-359

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable David VanGilder, Judge Pro Tempore
Cause No. 02D07-8809-DR-733

January 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Earl Gibson (“Father”) appeals the trial court’s grant of a petition to modify child support filed by Tammy Moynihan (“Mother”). Father raises two issues, which we revise and restate as:

- I. Whether the trial court erred by modifying Father’s child support obligations in reliance upon evidence which was not verified by the parties pursuant to local rule; and
- II. Whether the trial court erred by modifying Father’s child support obligations based upon medical expenses incurred by Mother.

We affirm.

The relevant facts follow. The marriage of Father and Mother was ordered dissolved in February 1985. Nicholas Gibson, the adult son of Father and Mother, suffers from sturge weber syndrome and is permanently physically and mentally disabled. The trial court ordered Father to pay child support to Mother, to provide health insurance to cover Nicholas, and to provide that Nicholas be a beneficiary under a life insurance policy insuring Father’s life.¹ In an order modifying Father’s support obligations dated August 22, 1997, the trial court found that Nicholas was permanently disabled and ordered Father to pay support obligations in the amount of \$185 per week, which obligations were to continue beyond Nicholas’s twenty-first birthday.

On September 2, 2008, Mother filed a Verified Motion for Order To Show Cause, Modification of Support and to Determine Support Arrearage. On April 17, 2009, the trial court held a hearing on Mother’s motion. At the hearing, the parties agreed to

¹ The record does not include the trial court’s original order(s) related to Father’s support obligations. The record contains the court’s order modifying Father’s support obligations dated August 22, 1997 and the court’s order modifying Father’s support obligations dated May 5, 2009, which is the order challenged in this appeal.

present evidence “in a summary manner” pursuant to Rule LR02-TR73-723 of the Allen Circuit and Superior Court Family Law Local Rules. During the hearing, neither Mother nor Father was sworn under oath and neither verified the representations made by their respective counsel. Mother and Father presented a number of exhibits, which were admitted by the trial court. The trial court took the matter under advisement, and on May 5, 2009 the trial court issued an order granting Mother’s motion. In its order, the trial court found that deviation from the guidelines was warranted based upon Nicholas’s extraordinary medical needs and the increased incomes of the parties. The trial court ordered Father to pay child support in the amount of \$528.67 per week to Mother and to show proof within ninety days that he had attempted to secure health insurance for Nicholas and that Nicholas is named as a beneficiary on at least one policy of insurance that insures Father’s life. Father filed a motion to correct errors, which the trial court denied.

I.

The first issue is whether the trial court erred by modifying Father’s child support obligations in reliance upon evidence which was not verified by the parties pursuant to local rule. Rule LR02-TR73-723 of the Allen Circuit and Superior Court Family Law Local Rules provides in part:

- (3) At a hearing for provisional orders, a party may elect to present evidence in a summary manner or by direct testimony. If evidence is presented in a summary manner, then the party presenting the evidence shall be sworn under oath and verify the representations made by counsel. . . .

* * * * *

- (5) Subject to the approval of the Court, parties by agreement may present evidence at any hearing in a summary manner consistent with the procedures used for a provisional orders hearing.

Father argues that the trial court's order modifying support must be reversed because Mother, as the petitioner, had the burden of proof and she did not present "credible evidence upon which the court could make a decision." Appellant's Brief at 2. Specifically, Father argues that the parties did not comply with the requirements of Rule LR02-TR73-723 because the parties were not sworn and did not verify "the accuracy of the representation[s] made by their counsel," and that therefore "the record upon which the trial court made its decision is nothing but rank speculation." *Id.* at 4. Mother argues that "[Father] accepted the use of the summary procedure knowing full well that the statements of counsel were to be accepted not as mere argument but as a summary of each party's testimony." Appellee's Brief at 4.

Initially, we observe that failure to object to the admission of evidence results in waiver of the issue on appeal. Brabandt v. State, 797 N.E.2d 855, 861 (Ind. Ct. App. 2003). The Indiana Supreme Court has observed that "[a] claim of trial court error in admitting evidence may not be presented on appeal unless there is a timely trial objection 'stating the specific ground of objection, if the specific ground was not apparent from the context.'" Raess v. Doescher, 883 N.E.2d 790, 797 (Ind. 2008) (citing Ind. Evidence Rule 103(a)(1)), reh'g denied. "To preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection that is sufficiently specific to alert the trial judge fully of the legal issue." *Id.* (citation and internal quotation marks omitted).

We also note that local court rules for the regulation of practice within a local court are authorized by Indiana Trial Rule 81. Buckalew v. Buckalew, 754 N.E.2d 896, 897 (Ind. 2001). “To the extent that the local rule appears to employ mandatory language, the local court must follow its own rule.” Id. at 898 (citing Meredith v. State, 679 N.E.2d 1309, 1311 (Ind. 1997)). “Upon a failure to do so, however, the court’s subsequent action is not void.” Id. “Rather, as with other trial errors, the error may be presented upon appeal if a specific and timely objection was made.” Id.

Here, at the beginning of the hearing, Mother’s counsel stated that “[a]s a preliminary matter, your Honor, the parties have agreed to proceed in summary fashion with presentation of the evidence this morning.” Transcript at 5. At the conclusion of the hearing, the trial court stated that it “appreciate[d] counsel’s agreement with regard to these exhibits, because this could well have been a two or three day trial with lots of objections regarding hearsay and so forth, so I am happy that everybody has just decided to say here are the facts, Judge. Tell us what you think based upon the law and the facts” Id. at 51. At no time during the hearing did Father object to Mother’s presentation of evidence on the grounds that Mother was not sworn under oath and did not verify the representations made by her counsel pursuant to the local rule. Father also presented evidence in a summary manner but failed to comply with the local rule requiring that he be sworn under oath and verify the representations made by his counsel. As a result, Father waived his claim on appeal that Mother’s failure to strictly comply with Rule LR02-TR73-723 requires that the trial court’s order modifying Father’s child support obligations be reversed. See Buckalew, 754 N.E.2d at 898 (holding that the appellant

waived her appellate claim that the parties' noncompliance with a county court's local rule required the court's dissolution decree to be vacated because there was no specific and timely objection to a submission to the court by either parties' counsel based upon the local rule and there was no timely objection to the court's entry of the dissolution decree based upon noncompliance with the local rule); see also Butterfield v. Constantine, 864 N.E.2d 414, 417 (Ind. Ct. App. 2007) (holding that the father waived his right to appeal the trial court's support order based upon the fact that mother submitted an unverified child support worksheet because the father had failed to object to mother's unverified worksheet, the father had submitted an unverified worksheet of his own, and the father tacitly agreed to proceed without a verified worksheet).²

Therefore, we reject Father's claim on appeal that Mother's noncompliance with Allen Circuit and Superior Court Family Law Local Rule LR02-TR73-723 requires the reversal of the trial court's order modifying Father's child support obligations.

II.

The next issue is whether the trial court erred by modifying Father's child support obligations based upon medical expenses incurred by Mother. "We place a 'strong

² In support of his argument, Father cites to Chicago Painters and Decorators Pension, Health and Welfare and Deferred Sav. Plan Trust Funds v. Karr Bros., Inc., 755 F.2d 1285, 1288 (7th Cir. 1985), and argues that "if a party fails to verify the statements of counsel, the testimony is unavailable." Appellant's Reply Brief at 2-3. In Karr Bros., Inc., the defendant attempted to raise defenses after trial and rely on exhibits that the defendant failed to admit at trial, and the court concluded that the defendant was not permitted to add the exhibits after trial or raise additional defenses based upon the exhibits. See 755 F.2d at 1288 n.2. Here, Father appears to argue that Mother cannot rely upon evidence that was not properly admitted. However, we hold that Father waived his claim that the evidence presented by Mother pursuant to the local rule was not properly admitted. Consequently, Mother did not fail to present evidence at the hearing and her argument on appeal that the evidence supports the trial court's order is not based upon evidence or exhibits which she failed to present at the hearing. Thus, we do not find Karr Bros., Inc. applicable.

emphasis on trial court discretion in determining child support obligations’ and regularly acknowledge ‘the principle that child support modifications will not be set aside unless they are clearly erroneous.’” Lea v. Lea, 691 N.E.2d 1214, 1217 (Ind. 1998) (quoting Stultz v. Stultz, 659 N.E.2d 125, 128 (Ind. 1995)). “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, Inc. v. Dage-MTL Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh’g denied. In order to determine that a finding or conclusion is clearly erroneous, our review must leave us with the firm conviction that a mistake has been made. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We give due regard to the trial court’s ability to assess the credibility of witnesses. Menard, Inc., 726 N.E.2d at 1210. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

The modification of a child support order is governed by Ind. Code § 31-16-8-1, which provides:

- (a) Provisions of an order with respect to child support . . . may be modified or revoked.
- (b) Except as provided in section 2 of this chapter, modification may be made only:
 - (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or

(2) upon a showing that:

- (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
- (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

The trial court's order modifying Father's child support obligations provides in part:

Findings:

* * * * *

- 5. The parties' child, Nicholas Gibson, is 29 years of age.
- 6. The parties stipulate and the Court finds that Nicholas Gibson is permanently disabled and therefore incapacitated under Ind. Code 31-16-6-6(a)(2). He is physically and mentally disabled such that he cannot provide for himself but must remain at home with a parent.
- 7. The last support modification order in this cause was issued August 22, 1997. There has been a substantial change of circumstances since that time.
- 8. Mother's gross weekly income is \$1,112.00.
- 9. Father's gross weekly income is \$1,769.00.
- 10. Father has not exercised any parenting time since the dissolution.

* * * * *

- 13. Mother pays the sum of \$5,365.15 each month for the extraordinary uninsured medical, physical, day care and transportation expenses incurred as a result of the child's condition.

* * * * *

Conclusions:

1. The child's physical and medical condition is such that he remains entitled to the continuation of child support under Ind. Code 31-16-6-6(a)(2).

* * * * *

5. There has been a substantial and continuing change of circumstances that warrants a modification of the Father's child support obligation; to wit, the income of both parents has increased significantly; the child's needs have increased significantly; and the state and federal benefits available to meet the child's needs have decreased.

Order:

1. [Mother's] Petition to Modify Support is granted.
2. Deviation from the guidelines is warranted based upon the child's extraordinary medical needs, including transportation related to his medical needs.
3. [Father] is ordered to pay support in the sum of \$528.67 per week commencing on September 2, 2008, the date [Mother's] Petition to Modify was filed.

Appellant's Appendix at 14-16.

Father appears to argue that the trial court erred when it modified his child support obligations because "the 'evidence' cannot support the trial court's findings." Appellant's Brief at 5. Specifically, Father argues that "[Mother] failed to present any evidence regarding the reasonableness or necessity of the extraordinary uninsured medical, physical, daycare, and transportation expenses for which she sought contribution." Id. at 5-6. Father argues that "the trial court's order improperly allows [Mother] to choose a course of action that may neither be reasonable nor necessary, nor the most cost-effective alternative, and simply place [sic] a significant portion of the payment onto [Father]." Id. at 7. Mother argues that the evidence supports the trial

court's findings and order modifying Father's child support obligations, and she argues that the medical expenses are reasonable and necessary.

The record reveals that at the time of the trial court's 1997 modification order, Mother's weekly earnings were \$197 and Father's gross weekly earnings were \$450. The record also shows that Mother's gross weekly income in 2009 is \$1,112 and Father's gross weekly income in 2009 is \$1,769. The evidence supports the trial court's findings regarding the Mother and Father's incomes and the trial court's conclusion that the income of Mother and Father had increased significantly.

The record also reveals that a substantial change of circumstances has occurred with respect to Nicholas's needs. The record reveals it is necessary for Nicholas to have daycare services because Mother works twelve-hour shifts as a nurse for her employer. Mother also presented evidence that it is necessary for Nicholas to have physical therapy two times each week to maintain flexibility and movement in his joints. The evidence shows that Nicholas requires continuous care and that items that are appropriate for use to provide that care include briefs, wipes, a gastric button, extension tubes, syringes, a hooyer lift, and a bath table. The evidence shows that Nicholas is required to take certain dosages of a number of prescription medications. Also, Mother presented evidence that Nicholas requires a "push chair" due to his "size and his limitations" and that Nicholas needs the van that was "outfitted for him," including a lift. See Transcript at 16. Mother's counsel made a representation that Nicholas requires special transportation and that the van "was absolutely necessary to get [Nicholas] anywhere that he needs to go" Id.

The record also reveals the costs incurred by Mother related to Nicholas's daycare program and for his transportation to the daycare facility. Mother presented evidence that Medicaid pays for the costs associated with nineteen hours per week of the daycare program and that she pays the remaining costs. Also, the evidence shows that, except for fifty hours per year for which Medicaid will pay, Mother must pay for Nicholas's physical therapy. Mother also presented evidence regarding the costs associated with the other purchases cited herein necessary for Nicholas.

The record further reveals that Medicaid no longer pays the amounts that it previously paid in connection with Nicholas's care,³ and that Mother has attempted to reduce the costs of his care. Specifically, Mother's counsel represented that Mother communicated with the provider of Nicholas's physical therapy, and the provider agreed to charge Mother approximately \$96.00 per physical therapy session rather than the unreduced amount of approximately \$300.00 per session. Also, evidence presented showed that Mother refinanced Nicholas's transportation vehicle, resulting in lower monthly payments for the vehicle and consequently lower total expenses associated with his care.

Based upon our review of the record, we cannot say that the evidence does not support the trial court's findings, that the trial court abused its discretion, or that the trial court's order modifying Father's child support obligations to \$528.67 per week is clearly

³ Mother's counsel made representations that since the time of the court's last modification order in August, 1997, Medicaid has stopped providing a number of services, including full payment for Nicholas's prescription medications. Also, Mother's counsel represented that since Nicholas turned twenty-one years old, "Medicaid has stopped paying for a number of items," including for example Nicholas's "push chair, his bath table, his peg equipment, his diapers and his physical therapy, all of those things." Transcript at 19.

erroneous. See Schacht v. Schacht, 892 N.E.2d 1271, 1279 (Ind. Ct. App. 2008) (holding that the trial court did not abuse its discretion and that its order modifying child support was not clearly erroneous); Nowels v. Nowels, 836 N.E.2d 481, 489-490 (Ind. Ct. App. 2005) (holding that the trial court's order regarding child support payments was not clearly erroneous).

For the foregoing reasons, we affirm the trial court's order modifying Father's child support obligations.

Affirmed.

MAY, J., and CRONE, J., concur.