

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Mariea Best (“Mother”) appeals the trial court’s order modifying physical and legal custody of her daughter, M.B., in favor of her ex-husband, Russell Best (“Father”). Mother also challenges the trial court’s finding that she is contempt for failing to pay attorney fees awarded to Father at earlier stages of these proceedings. We affirm in part, reverse in part, and remand.

Issues

The restated issues before us are:

- I. whether the trial court erred in refusing Mother’s request to order a custody evaluation;
- II. whether the trial court properly modified legal custody of M.B.;
- III. whether the trial court properly modified physical custody of M.B.; and
- IV. whether the trial court properly found Mother in contempt.

Facts

Mother and Father married in 1985. They had two children while married: A.B., born in 1992, and M.B., born in 1995. M.B. has Down Syndrome. Father filed for divorce in 2002. The parties submitted to custody evaluations by two different

individuals, both of which later were updated. On July 2, 2004, the trial court entered a bifurcated decree of dissolution, which incorporated the parties' property settlement agreement but did not determine child custody and support issues. On February 15, 2005, the trial court approved the parties' settlement agreement related to child custody and support. This agreement provided for joint legal and physical custody of both A.B. and M.B. A.B. and M.B. together would, during the school year, spend seven days at Father's house, then seven days at Mother's house, with the summer divided into equal quarters.

Since this 2005 agreement, however, the parties have been extremely litigious on matters related to custody of their children.¹ In March 2006, Father filed a petition to modify custody, and Mother filed her own petition to modify custody in April 2006. The parties then submitted to a fifth custody evaluation. After considerable negotiation and discussions with various experts, on April 11, 2007, the trial court approved an agreement on custody that the parties had reached ("the April 2007 agreement"). It provided for continued joint physical custody, but granted sole legal custody of A.B. to Father and sole legal custody of M.B. to Mother. With respect to M.B.'s education, the April 2007 agreement stated:

[M.B.] shall begin her transition into public school (Zionsville Schools so long as Mother lives in the Zionsville School District) as follows: In the 2007-08 academic year [M.B.] shall be enrolled in selected "specials" classes (e.g.,

¹ In the interests of brevity and clarity, we will not be relating all of the motions that the parties have filed in this case since 2005, but will attempt only to relate those directly relevant to this appeal.

art, music, and the like), and that independent transition shall continue and be completed by the 2008-09 academic year.

Appellant's App. p. 124. Prior to this agreement, M.B.'s education came from private tutoring.

Despite this agreement, Mother took no steps to facilitate M.B.'s transition to public school, even though Father asked her what needed to be done to facilitate the transition. Instead, on August 14, 2007, Mother informed Father that she was not going to enroll M.B. in public school. Father responded by filing a contempt petition against Mother for not complying with the April 2007 agreement. On August 30, 2007, the trial court found Mother in contempt and ordered her to enroll M.B. in "specials" classes at Zionsville schools on or before September 7, 2007. That same day, Mother filed a petition to modify the April 2007 agreement to permit M.B. to continue her exclusively private education. M.B. began attending Zionsville Middle School on September 7, 2007. Mother dropped M.B. off in front of the school with her long-time tutor, Tammy Hahn, but did not go in with M.B. herself. Father was waiting at the school for M.B. to arrive on her first day, went in with her, and accompanied her to get her school picture taken.

Prior to summer 2008, Mother proposed to Father a summer school schedule for M.B. to work with Hahn, but with all of that work occurring during Father's summer parenting time. Father responded that he agreed that some summer school for M.B. was

necessary, but he did not want it all to occur during his parenting time. The parties ultimately were unable to reach an agreement for M.B.'s summer school.

On July 29-31, 2008, the trial court held a hearing on Mother's motion to modify M.B.'s educational plan, which motion she had renewed in June 2008. On August 7, 2008, the trial court entered its order denying Mother's motion ("August 2008 order"). It concluded that the April 2007 agreement clearly reflected the parties' intent that M.B. be a full-time student at Zionsville schools, beginning in the 2008-09 school year. Additionally, the trial court found no substantial change in circumstances that would warrant modification of the April 2007 agreement, although it further stated, "the Court understands the concerns expressed by [Mother], and if the Court were to rule, based solely upon the best interest of the child, it would order that [M.B.] continue her 2007-08 education plan during the 2008-09 academic year" (i.e., part-time enrollment at Zionsville schools only for "specials" classes, supplemented by private tutoring). *Id.* at 145. Nevertheless, the trial court ordered Mother to enroll M.B. at Zionsville Middle School full-time within three days and to facilitate a smooth transition there for the 2008-09 school year. After filing a motion to reconsider the August 2008 order, which the trial court denied, Mother initiated an appeal from that order. However, the appeal was dismissed with prejudice on March 27, 2009, at Mother's request.

Despite the August 2008 order, Mother soon thereafter informed Father of her intention to have Hahn remove M.B. from school for part of the day for private tutoring. This prompted Father to file a contempt petition on August 21, 2008. On September 24,

2008, Father filed a motion to modify legal custody of M.B. to sole legal custody in him, with no exceptions. On October 14, 2008, Mother filed her own petition to modify custody, seeking sole legal and physical custody of both A.B. and M.B.

Also on October 14, 2008, Father filed another contempt petition, this one related to Mother preventing Father from having his scheduled parenting time with A.B. On October 23, 2008, the trial court found Mother in contempt on that point, ordered her to return A.B. to Father's custody, and ordered her to pay \$7000 in attorney fees for Father within thirty days.

The trial court then held a hearing on the August 21, 2008 contempt petition on November 20, 2008. It did not find Mother in contempt because she did not follow through on her plan to remove M.B. from school each day for private tutoring; instead, with the blessing of M.B.'s school teacher, Hahn was permitted to come to the school to provide tutoring there during school hours. However, with respect to an earlier motion Mother had filed that the trial court had summarily denied, the trial court ordered Mother to pay \$3160 in attorney fees for Father within thirty days.

On December 5, 2008, Father filed a petition to also modify physical custody of A.B. and M.B. to him as primary custodian. Mother requested that the trial court appoint a custody evaluator for the proceedings, but the trial court refused to do so. On January 29, 2009, the trial court ordered Mother to pay \$360 in attorney fees related to her unsuccessful attempt to subpoena mental health records of Father's current wife, payable within thirty days.

On April 6-9, 2009, the trial court conducted a hearing on the parties' respective motions to modify custody, as well as other matters not directly relevant to this appeal. During the hearing, the trial court received evidence, including from psychologists and teachers, that M.B. is adjusting very well to attending Zionsville schools full-time, in particular with Hahn coming to the school to provide individual tutoring during study halls. It also received evidence with respect to M.B.'s individual education plan ("IEP") for the upcoming 2009-10 school year and her attendance at Zionsville High School, and evidence that the Zionsville school system is well-equipped to address M.B.'s special needs.

There also was some evidence presented that on a few occasions Mother has cancelled doctor's appointments for M.B. at the last minute,² then failed to reschedule them for many months thereafter, despite Father asking her to do so. One of these appointments related to thyroid testing; regular thyroid testing is crucial for Down Syndrome patients. Mother also refused Father's request that he take M.B. to a podiatrist after she was complaining of foot pain. On two other occasions, Mother has had third parties, her butler and Hahn, take M.B. to appointments.

On June 24, 2009, the trial court entered an order on the parties' motions, accompanied by findings and conclusions as requested by the parties. The trial court granted sole legal custody of M.B. to Father. It also modified physical custody of A.B. and M.B. from the 50/50 split physical custody arrangement in the April 2007 agreement,

² At least one of these cancellations was related to an illness Mother's mother is suffering.

to granting Father primary custody and visitation to Mother during the school year of every other weekend, every Wednesday with M.B. only, and in the summer, equal quarters. The trial court also stated that it was finding Mother in contempt for failing to pay previously-ordered attorney fees. Mother now appeals, challenging the custody rulings with respect to M.B., but not A.B. She also challenges the trial court's contempt finding and its earlier failure to order a custody evaluation.

Analysis

When reviewing a judgment entered with findings and conclusions pursuant to a party's request under Indiana Trial Rule 52(A), we must determine whether the evidence supports the findings and then whether the findings support the judgment. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). We "shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). A judgment is clearly erroneous only if there is no evidence supporting the findings or the findings do not support the judgment. K.I., 903 N.E.2d at 457. A judgment also is clearly erroneous if the trial court applies the wrong legal standard to properly found facts. Id. We may affirm a judgment entered with Rule 52(A) findings on any legal theory supported by those findings. O'Connell v. O'Connell, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008).

I. Custody Evaluation Request

We first address Mother's contention that the trial court should have appointed a custody evaluator to make a custody recommendation to the trial court, or that it should at

least have conducted a hearing to address Mother's request. Mother relies upon Indiana Code Section 31-17-2-12(a), which states in part, "In custody proceedings after evidence is submitted upon the petition, if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child." (Emphasis added).

We observe that the word "may" in a statute ordinarily implies a permissive condition and a grant of discretion. Romine v. Gagle, 782 N.E.2d 369, 380 (Ind. Ct. App. 2003), trans. denied. Thus, the trial court here clearly was not required to grant Mother's request for a professional custody evaluation, and it is completely silent on any need for a hearing to address such a request. We will, therefore, address the trial court's refusal to appoint a custody evaluator for an abuse of discretion. An abuse of discretion occurs if a trial court's ruling is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. Bridgestone Americas Holding, Inc. v. Mayberry, 878 N.E.2d 189, 191 (Ind. 2007).

Here, we note that Mother's request for a custody evaluation was premature. The statute says that such a request should come "after evidence is submitted upon [a] petition," and Mother made her request before the April 2009 custody modification hearing. Ind. Code § 31-17-2-12(a). During that hearing, the trial court received testimony from several psychologists, physicians, and educators, as well as the parties themselves, on the question of custody. Additionally, the parties and their children have undergone several custody evaluations over the years: two before the original custody

agreement, with both of those evaluations being amended and/or supplemented, and one before the April 2007 agreement. The trial court reasonably concluded that it was unnecessary to expend the additional time and resources necessary for yet another evaluation. It did not abuse its discretion in refusing Mother's request.

II. Legal Custody

We now turn to the trial court's decision to modify legal custody of M.B. from Mother to Father. We review custody modifications for an abuse of discretion and prefer to grant latitude and deference to trial courts in family law matters. K.I., 903 N.E.2d at 457. A parent seeking subsequent modification bears the burden of demonstrating that the existing custody order should be altered. Apter v. Ross, 781 N.E.2d 744, 758 (Ind. Ct. App. 2003), trans. denied. A court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one or more of the factors a court may consider under Indiana Code Section 31-17-2-8 when it originally determined custody. Id. (citing I.C. § 31-17-2-21). Those factors are:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

I.C. § 31-17-2-8.

We have previously noted that these factors appear to be largely more related to the issue of physical, not legal, custody. Carmichael v. Siegel, 754 N.E.2d 619, 635 n.7 (Ind. Ct. App. 2001). It is important to note that a child's legal custodian is given the authority to "determine the child's upbringing, including the child's education, health care, and religious training." I.C. § 31-17-2-17(a). Thus, when considering a petition to modify legal custody, we believe it is vital to consider whether there has been a substantial change regarding the parties and matters such as the child's education and health care. With respect to legal custody, the welfare of the children, not the wishes and

desires of the parents, is the primary concern of the courts. Carmichael, 754 N.E.2d at 635.

M.B.'s education as a special needs child has been a source of constant concern for both Mother and Father. To that end, there clearly was much negotiation, compromise, and input from various perspectives that led to the April 2007 agreement, including the agreement that M.B. would transition from private education to public school. The April 2007 agreement reflected an attempt by the parties to grant legal custody of M.B. to Mother, provided however that she abide by the education plan for M.B. Thus, Mother's authority as legal custodian was not unlimited as it related to M.B.'s education. Mother, however, has repeatedly attempted to undermine the education plan, requiring numerous trips to court at Father's request to enforce it.

The April 2007 agreement's attempt at a compromise position has failed. Perhaps M.B. would have done just as well to continue with primarily or exclusively private tutoring. But there is no way of knowing that, and that is not what the parties agreed to. The only evidence in the record is that the education plan regarding M.B.'s transition to public school has worked very well, and it is Father who has insisted on compliance with that plan. Conversely, there are indications that Mother's pattern of repeatedly resisting the plan will continue.

Father's commitment to M.B.'s education also includes a commitment to retain Hahn as a private tutor for M.B., which everyone, from the parents to psychologists to educators, have agreed is a good idea. Father signed off on M.B.'s IEP for the 2009-10

school year, which includes Hahn coming to Zionsville High School to work with M.B. during two study hall periods every day. Unlike Mother, Father does not agree that Hahn needs to privately tutor M.B. after or outside of school; there is no finding and no definitive evidence in the record that such tutoring is essential for M.B.'s development.

There are also findings, and evidence to support them, that Father is somewhat more reliable than Mother when it comes to things such as scheduling and keeping doctor's appointments, which are critical to M.B.'s health. Since the April 2007 agreement, there have been several occasions when Mother has cancelled appointments for M.B. at the last minute, then has failed to follow up rescheduling them for many months, despite emails from Father asking her to do so. Regardless of whether the cancellations were justified, failing to reschedule them in a timely manner cannot be. On at least two occasions, Mother also sent M.B. to appointments with Hahn and her butler, respectively. Finally, Mother refused to give Father permission to take M.B. to a podiatrist after M.B. complained of foot pain. It is difficult to perceive any valid justification for such a refusal.

All of this evidence supports a conclusion that since April 2007, it has become clear that Father is the more appropriate person to entrust with decisions concerning M.B.'s education and health care. There is sufficient evidence of a substantial change in circumstances since April 2007 such that Father ought to be M.B.'s legal custodian, and

that such modification is in M.B.'s best interests. We affirm the trial court's decision modifying legal custody of M.B. solely to Father.³

III. Physical Custody

Next, we address the trial court's decision to modify M.B.'s physical custody arrangement from a 50/50 split between Mother and Father to primary physical custody with Father. To modify a custody arrangement, a court must conclude that (1) the modification is in the best interests of the child; and (2) there is a substantial change in one or more of the factors a court may consider under Indiana Code Section 31-17-2-8 when it originally determined custody. Apter, 781 N.E.2d at 758. "Also, with respect to physical custody, a noncustodial parent must show something more than isolated acts of misconduct by the custodial parent to warrant a modification of child custody; he or she must show that changed circumstances regarding the custodial parent's stability and the child's well-being are substantial." Carmichael, 754 N.E.2d at 635. Stability is a crucial factor that trial courts must consider when determining the best interests of a child in the context of a custody modification. Harris v. Smith, 752 N.E.2d 1283, 1288 (Ind. Ct. App. 2001). We additionally note that the modification of the parties' legal custody arrangement does not, by itself, warrant a modification of the joint physical custody

³ It is self-evident from the voluminous litigation in this case that the parties lack the necessary ability to communicate effectively regarding their children so as to support an award of joint legal custody. "One of the key factors to consider when determining whether joint legal custody is appropriate is 'whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare.'" Carmichael, 754 N.E.2d at 635 (quoting I.C. § 31-17-2-15(2)).

arrangement. See Van Wieren v. Van Wieren, 858 N.E.2d 216, 221-22 (Ind. Ct. App. 2006).

We do not believe the trial court made any findings that would justify a modification of the parties' physical custody arrangement for M.B. Regarding modifying custody, the trial court ultimately concluded:

27. [Mother's] actions constitute more than isolated acts. Her actions are demonstrative of a pattern of activity constituting a substantial and continuing change in circumstances.

28. The Court finds that [Father] makes decisions of import regarding education, health care and social interactions in the children's lives more in the children's best interest than does [Mother].

Appellant's App. p. 105. Mother's "actions" that the trial court referenced in conclusion 27, as indicated by its earlier findings with respect to M.B., were those related to her education and health care, which we have discussed. Conclusion 28 likewise focuses on the responsibilities of a legal custodian, not necessarily a physical custodian. We believe that by granting Father sole legal custody of M.B., the trial court adequately addressed the concerns about M.B.'s health care and education by placing those issues completely within Father's purview. There are no findings, for example, that M.B. has had attendance problems in the Zionsville schools during the weeks she is living with Mother. Thus, although Mother has not always been supportive of M.B. attending public school, she has not gone so far as to physically interfere with M.B.'s attendance.

Conversely, there are no findings, nor any evidence in the record to suggest, that the joint physical custody arrangement was in any way detrimental to M.B. All of the evidence clearly indicates that M.B. very much loves Mother, and vice versa, and that M.B. enjoys her time at Mother's residence. In fact, there is evidence that if anything, M.B. is slightly happier during the periods of time when she is staying with Mother as opposed to Father. Nor is there any evidence, save for one occasion with respect to A.B., that Mother has interfered with Father's scheduled parenting time.⁴

Father notes that there is some evidence Mother attempted to undermine A.B.'s relationship with Father with respect to disciplinary issues, and speculates that she might attempt to do the same with M.B. or that the undermining might "rub off" on M.B. The fact that Mother might have attempted to undermine Father's relationship with A.B. hardly justifies a change of physical custody of M.B., particularly where all the evidence plainly indicates that M.B., a special needs child, is very attached to Mother and there is no evidence of a similar attempt to undermine M.B.'s relationship with Father.

Moreover, we agree that allowing M.B. to maintain a substantial relationship with A.B. is, of course, important, but with a split physical custody arrangement for M.B., and physical custody of A.B. with Father, M.B. will still have frequent interaction with A.B. In any event, M.B.'s relationship with her Mother and maintaining stability in her life is

⁴ Father notes that he has on occasion granted some extra parenting time to Mother, while she has never returned the favor. This is laudable on Father's part, but Mother's strict adherence to the parenting schedule does not warrant "penalizing" Mother by altering the split physical custody arrangement.

much more crucial, and we see no justification in the findings or the record for severely curtailing the time M.B. spends with Mother.

We conclude there are no findings and no evidence that there has been a substantial change in circumstances with respect to physical custody of M.B., nor that such modification would be in M.B.'s best interests. We reverse the modification of M.B.'s joint physical custody arrangement to primary physical custody with Father, and remand for the trial court to reinstate the physical custody arrangement set in place by the April 2007 agreement with respect to M.B.⁵

IV. Contempt Finding

Finally, we address Mother's argument that the trial court erred in finding her in contempt for failing to pay previously-awarded attorney fees for Father's attorneys. Civil contempt is a violation of a court order benefiting an aggrieved party, and contempt is indirect (as opposed to direct) if it undermines the orders or activities of the court but involves actions outside the trial court's personal knowledge. In re Paternity of J.T.I., 875 N.E.2d 447, 450 (Ind. Ct. App. 2007). "Willful disobedience of any lawfully entered court order of which the offender had notice is indirect contempt." Francies v. Francies, 759 N.E.2d 1106, 1118 (Ind. Ct. App. 2001), trans. denied. It is clear that Mother's

⁵ Mother also contends the trial court erred in declining to grant her primary physical custody of M.B. For much the same reasons as we have decided the trial court should not have altered the physical custody arrangement in favor of Father, we also see no indication of changing it in favor of Mother. All indications are Father has been a good parent, and there is no justification for reducing the amount of time M.B. spends with him.

alleged failure to pay previously-ordered fees to Father's attorneys would constitute indirect, not direct, contempt.

“An indirect contempt proceeding requires an array of due process protections, including notice and the opportunity to be heard.” J.T.I., 875 N.E.2d at 450. Those protections are embodied in Indiana Code Section 34-47-3-5, which provides:

(a) In all cases of indirect contempts, the person charged with indirect contempt is entitled:

- (1) before answering the charge; or
- (2) being punished for the contempt;

to be served with a rule of the court against which the contempt was alleged to have been committed.

(b) The rule to show cause must:

- (1) clearly and distinctly set forth the facts that are alleged to constitute the contempt;
- (2) specify the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant; and
- (3) specify a time and place at which the defendant is required to show cause, in the court, why the defendant should not be attached and punished for such contempt.

(c) The court shall, on proper showing, extend the time provided under subsection (b)(3) to give the defendant a reasonable and just opportunity to be purged of the contempt.

(d) A rule provided for under subsection (b) may not issue until the facts alleged to constitute the contempt have been:

- (1) brought to the knowledge of the court by an information; and
- (2) duly verified by the oath of affirmation of some officers of the court or other responsible person.

Strict compliance with the rule to show cause statute ordinarily is required, but may be excused if it is clear the alleged contemnor nevertheless had clear notice of the accusations against him or her, for example because he or she received a copy of an original contempt information that contained detailed factual allegations, or if he or she appears at a contempt hearing and admits to the factual basis for a contempt finding. J.T.I., 875 N.E.2d at 451. This court has very recently noted that it is improper for a trial court to sua sponte hold a party in contempt where there had been no indication the party might face such a sanction. See Henderson v. Henderson, No. 30A04-0907-CV-387, slip op. p. 9 (Ind. Ct. App. Jan. 21, 2010) (holding husband was improperly found in contempt where he “had no inkling that he might be held in contempt until the trial court spontaneously found him to be in contempt.”).

There is no indication in the record that Mother was aware she faced the potential of being held in contempt following the April 2009 hearing. Father did not file any request that she be held in contempt for failing to pay attorney fees; he has frequently filed contempt petitions against Mother on other occasions but did not do so here. There being no prior notice of any kind to Mother that she faced the potential of being held in contempt for failing to pay previously-ordered attorney fees, we must reverse the trial

court's contempt finding. However, the trial court did not impose any sanctions against Mother to attempt to compel her to pay the attorney fees. Rather, it merely reduced those fees to judgment, with statutory interest. Thus, although we reverse the trial court's statement that Mother was in contempt, we see no reason to vacate that part of the order reducing the fees to judgment.

Conclusion

We affirm the trial court's refusal to order a custody evaluation during the course of the current modification proceedings, and also affirm its decision to grant Father sole legal custody of M.B. We reverse its decision to modify physical custody of M.B., and remand for the physical custody arrangement reflected in the April 2007 agreement to be reinstated as to M.B. We also reverse the trial court's finding that Mother is in contempt, but otherwise affirm its reducing the previously-ordered attorney fees to judgment.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and BROWN, J., concur.