

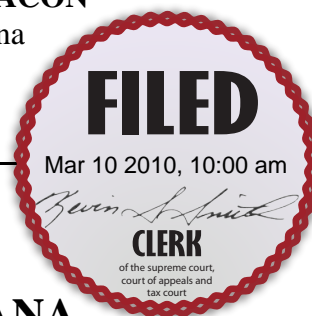
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:)
TAMIKA (B.) H. and)
CARLOS B.,)
)
TAMIKA (B.) H.,)
)
Appellant-Petitioner)
)
vs.)
)
CARLOS B.,)
)
Appellee-Respondent.)

No. 49A02-0902-CV-168

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
Cause No. 49D05-9909-DR-34753

March 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Tamika H. (“Mother”) and Carlos B. (“Father”) have a daughter, D.B. Mother has physical custody of D.B. and lives in Wisconsin. Father lives in Indianapolis. Pursuant to an order dated May 7, 2007, Father would have parenting time in Indianapolis. Mother was responsible for transporting D.B. to and from Indianapolis and was also required to encourage D.B. to speak to Father on the telephone. In January 2008 and nearly every month thereafter, Father filed petitions alleging Mother was in contempt of the parenting time order. On January 28, 2009, a hearing was held on all of Father’s petitions. The court found Mother in contempt and ordered her to pay Father’s attorney fees in the amount of \$2,800. The record supports finding, at a minimum, that Mother was in contempt for not making a reasonable effort to encourage D.B. to talk to Father on the telephone. However, most of Father’s petitions contain inaccuracies that have unnecessarily complicated this case. Therefore, we affirm the contempt finding, but we reverse the award of attorney fees.

FACTS AND PROCEDURAL HISTORY

On May 7, 2007, the court issued an order permitting Mother to relocate to Wisconsin with D.B. The court further ordered:

[Mother] shall encourage the child to speak to her father on the telephone. [Father] shall participate in counseling through White River Psychology until discharged by the program. [Father] shall have parenting time with [D.B.] for a forty-two hour period every third weekend. The parenting time shall be from Friday at 6PM to Sunday 12:00PM. [Father] shall also have extended parenting time of one week in July and one week in August. [Father’s] parenting time shall be supervised by [Father’s fiancée]. [Father] shall be present during the parenting time and [D.B.] shall not be left unattended.

(Appellant's App. at 17.)

In January 2008, Father filed a petition for contempt alleging Mother had not brought D.B. for parenting time and Father had not had telephone contact with D.B. Father continued to file similar petitions.¹

On January 10, 2008, Mother asked for modification of parenting time. Mother was pregnant and restricted from traveling. No hearing was held on that petition, and the May 7, 2007 order remained in place throughout Mother's pregnancy. On February 20, 2008, Mother asked the Indiana court to decline the exercise of jurisdiction on the ground Wisconsin was now D.B.'s home state.

On May 15, 2008, the judge recused himself and the case was transferred to Special Judge Patrick McCarty. Father moved for a change of judge and Judge Robyn Moberly was appointed Special Judge.

The court determined jurisdiction in Indiana was proper and on January 28, 2009, held a hearing on all of Father's pending petitions for contempt. Mother and Father testified and both requested attorney fees. The court found Mother in contempt and ordered her to pay \$2,800 for Father's attorney fees.

DISCUSSION AND DECISION

Mother raises six issues, which we consolidate and restate as: (1) whether the trial court erred by finding Mother in contempt without first issuing a rule to show cause; (2)

¹ It is unclear exactly how many petitions for contempt Father filed. The chronological case summary reflects Father filed seven petitions and two notices with similar allegations. The Appendix contains a petition file-stamped July 25, 2008 that is not docketed in the CCS, (*see* Appellant's App. at 51), and two notices that are file-stamped with dates different than the notices docketed in the CCS. Comments at the hearing suggest he may have filed as many as thirteen petitions.

whether the trial court abused its discretion by finding her in contempt; (3) whether the trial court abused its discretion by ordering her to pay Father's attorney fees; and (4) whether the trial court was biased.

We note initially that an ambiguity in the trial court's original parenting time order has caused much disagreement between these parties. The order provides: "[Father] shall have parenting time with [D.B.] for a forty-two hour period every third weekend." (Appellant's App. at 17.) That wording indicates Father is to have parenting time every third weekend; D.B. would have two weekends with Mother and then one weekend with Father, regardless of how those weekends fell in any particular month. But Mother and Father both interpret that sentence to mean Father was to have parenting time during the third weekend of every month.

Nevertheless, Mother and Father disagreed about how to determine the third weekend of a month. Father considered a weekend the first weekend of a month if Saturday and Sunday fell in the new month. Mother believed that, because Father's parenting time was to begin on Friday evenings, a weekend was in the new month only if Friday, Saturday, and Sunday fell in the new month. Neither party directs us to authority supporting its definition of a "first weekend." Nor did the trial court clarify how the parties were to determine Father's parenting time weekend. We cannot say either interpretation is unreasonable so we direct the trial court on remand to clarify how the parents are to determine which weekend is Father's parenting time.

1. Rule to Show Cause

Contempt may be direct or indirect. *In re Contempt of Wabash Valley Hosp., Inc.*, 827 N.E.2d 50, 62 (Ind. Ct. App. 2005). “Direct contempts involve actions in the presence of the court, so that the court has personal knowledge of them. Indirect contempts, in contrast, undermine the orders or activities of the court but involve actions outside the trial court’s personal knowledge.” *Id.* (citations omitted). The contempt at issue in this appeal is indirect. “An indirect contempt requires an array of due process protections, including notice and the opportunity to be heard.” *Id.* These rights are set forth in Ind. Code § 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.

Mother contends the trial court did not issue a rule to show cause as required by this statute, but she did not object at the hearing on this ground. Nor did she contend she was unaware of Father’s allegations or that she needed additional time to prepare a defense; instead, she fully litigated all issues Father raised at the hearing. Therefore, Mother has waived this argument. *See Deel v. Deel*, 909 N.E.2d 1028, 1033-34 (Ind. Ct.

App. 2009) (issues not raised in “Affidavit for Rule to Show Cause” and not objected to were tried by consent, pursuant to Ind. Trial Rule 15(B)); *McCulloch v. State*, 174 Ind. 525, 530-31, 92 N.E. 543, 545-46 (1910) (respondents waived formal rule to show cause because they filed an answer, appeared at the hearing, and made no attempt to raise the issue).²

2. Abuse of Discretion

The record supports the finding Mother was in contempt.³ The burden of proving contempt in a civil proceeding is on the accuser, in this case, Father. *See Chadwick v. Alleshouse*, 250 Ind. 348, 351-52, 233 N.E.2d 162, 164 (1968). Mother had the burden of proving an affirmative defense, such as inability to comply with the order. *See Head v. Comm’r, Ind. Dep’t of Env’tl. Mgmt.*, 626 N.E.2d 518, 526 (Ind. Ct. App. 1993), *reh’g denied, trans. denied*.

The determination of whether a party is in contempt of court is a matter within the discretion of the trial court. We review the trial court’s decision for an abuse of discretion and will reverse only if it is against the logic and effect of the facts and circumstances before the court.

Id. We neither reweigh the evidence nor judge the credibility of witnesses. *Adkins Investments, Inc. v. Jackson County REMC*, 731 N.E.2d 1024, 1034 (Ind. Ct. App. 2000), *reh’g denied, trans. denied*. Instead, we consider only the evidence favorable to the

² Mother argues this issue cannot be waived, citing *In re Paternity of J.T.I.*, 875 N.E.2d 447 (Ind. Ct. App. 2007). We disagree, as *J.T.I.* discussed cases in which the issue was waived. *See id.* at 451 (discussing *Mitchell v. Stevenson*, 677 N.E.2d 551 (Ind. Ct. App. 1997)). Moreover, *J.T.I.* is easily distinguished on the facts. In that case, the mother received notice that a hearing regarding “parenting time” would be held, but she had no notice that the child’s father had filed a contempt petition. *Id.*

³ Mother’s arguments focus primarily on Father’s failure to have parenting time on the weekend Mother believed to be the third weekend of the month. As explained above, we cannot address that basis for contempt in light of the ambiguity of the trial court’s order.

judgment and the reasonable inferences drawn therefrom. *Id.*

Mother had been ordered to encourage D.B. to speak to Father on the telephone. Father provided a cell phone for D.B. He testified he regularly tried to call or text D.B., but her phone was usually off. He called numerous times on D.B.'s birthday and on Father's Day, but she did not answer. He testified he knew the phone was off because the calls went straight to voicemail and did not appear on his bills. He testified D.B. had not made any calls in the past three months, and she had only made eight calls in the five months before that. Mother testified she encouraged D.B. to call Father, but did not describe any of her efforts to do so. She provided no evidence D.B. had called Father or answered one of his calls. The record permits a finding Mother did not make a reasonable effort to encourage D.B. to speak to Father and was therefore in contempt.⁴

3. Attorney Fees

Mother challenges the order that she pay a portion of Father's attorney fees. Attorney fees may be awarded for civil contempt. *Crowl v. Berryhill*, 678 N.E.2d 828, 831 (Ind. Ct. App. 1997); Ind. Code § 31-17-4-3 (authorizing award of reasonable attorney fees in any action filed to enforce or modify order granting or denying visitation rights to noncustodial parent).

In awarding attorney fees, the trial court has broad discretion. We will only reverse the trial court's decision if the award is clearly against the logic and effect of the facts and circumstances before the court. In assessing attorney fees, the court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors which bear on the reasonableness of the award. In addition, any misconduct on the part of

⁴ Because this conclusion is supported by the evidence, we need not address Mother's argument that text messages Father offered into evidence should not have been admitted because they related only to January 2009 parenting time.

one of the parties which directly results in the other party incurring additional fees may be taken into consideration.

Meade v. Levett, 671 N.E.2d 1172, 1179 (Ind. Ct. App. 1996) (citations omitted).

The order is explicit that Father's parenting time is from Friday at 6 p.m. to Sunday at 12:00 p.m. Yet throughout this case, Father and his counsel have inexplicably insisted that Father's parenting time begins at noon on Saturday. Father's disregard of that explicit provision of the parenting time order was the basis for many of his petitions and has unnecessarily complicated our review of this case.

For example, Father filed a petition on January 11, 2008, which alleged:

2. On December 15, 2007, [Father] was to have parenting time pursuant to the order expected [sic] the parties' child and was prepared to celebrate Christmas at that time.

3. On that date [Mother] willfully and intentionally refused [Father] his parenting time by not showing or calling.

(Appellant's App. at 41.) December 15, 2007, was a Saturday, and therefore was not the beginning date of his parenting time. Father filed petitions on February 26, 2008, April 22, 2008, May 20, 2008, July 25, 2008, and September 3, 2008 that were premised at least in part on the same disregard for the terms of the parenting time order.

Other petitions were baseless for different reasons. In the May 20 petition, Father alleged:

4. On May 17, 2007, [Father] was to have parenting time pursuant to the order expected [sic] the parties' child.

5. On May 17, 2007, [Mother] called [Father] from a private number and left a message alleging that the child was in town at a McDonald's on Michigan Road.

* * * * *

9. [Father] believes [Mother] is in violation of the Courts [sic] order in as much [Mother] is to drop their child to [sic] [Father's] home at noon

and not to [sic] McDonald's.

(*Id.* at 50.) Father's petition erroneously asserts the order required Mother to bring D.B. to his house; in fact, the order does not specify an exchange location.⁵ Even if Mother was required to bring D.B. to Father's home, Father admitted he was not at home when his parenting time was scheduled to begin – thus we find objectionable his allegation that Mother violated the order by not delivering D.B. to his home when he was not there.

The July 25 petition alleged:

4. On July 19, 2008, [Father] was to have parenting time pursuant to the order expected [sic] the parties' child.

5. On July 19, 2008, [Father] called the parties' child on her cell phone and also [Mother's] phone to see if they were in town and received no return call.

(*Id.* at 51.) Mother presented evidence that she brought D.B. to McDonald's on Friday, June 18, but Father wanted Mother to bring D.B. to his home. However, Father admitted he was not at home when his parenting time began.

The September 3 petition alleged Mother failed to bring D.B. to Father on July 17 and August 17. Again, the testimony revealed that in July and August, Mother brought D.B. to a McDonald's in Indianapolis on Friday evening, but Father was not at home and would not meet D.B. at McDonald's.

On November 25, 2008, Father alleged:

2. On or about November 11, 2008, [Mother] text message [sic] [Father] to request a change in the parenting time weekend.

3. On November 12, 2008, [Father] reluctantly agreed and responded in writing via fax through this attorney. (*See Exhibit A*)

⁵ Mother preferred to exchange D.B. at a neutral location because of the contentious relationship between Mother and Father, but Father refused to meet D.B. at McDonald's and insisted she be brought to his home.

4. On November 14, 2008, [Father] unsure of [Mother's] desires went to McDonald's on Michigan Road and waited 45 minutes. (*Exhibit B*)

5. Since that date [Father] nor his counsel have received a response from [Mother] or her counsel regarding the Thanksgiving Holiday arrangements. Only her request for this court order to be taken up on interlocutory appeal.

(*Id.* at 57.)⁶ Mother and Father testified they had agreed to reschedule parenting time for Thanksgiving weekend so D.B. would not have to leave school early on Friday in order to be in Indianapolis by 6:00 p.m., as was usually the case. Father agreed to have parenting time on Thanksgiving weekend, yet he went to McDonald's on November 14 and then filed this notice on the Tuesday before Thanksgiving.

Father repeated these assertions in a filing on December 5, 2008. In that filing, he acknowledged receiving a text message from Mother indicating she was waiting at McDonald's with D.B. on Friday, November 28. Although Father agreed to have parenting time over Thanksgiving weekend, he refused to exercise his parenting time when D.B. arrived and yet alleged Mother violated the parenting time order.

Father and his attorney persisted in using the wrong dates throughout the hearing. Father's attorney does not acknowledge these errors on appeal, and even relies on these erroneous statements to try to show Mother admitted to not bringing D.B. to Indianapolis for parenting time. Father's disregard for the parenting time order he alleges Mother violated has made this matter unnecessarily complicated. His repeated accusations that Mother violated the parenting time order when she brought D.B. to McDonald's instead of his home are offensive in light of his admission he was not at home at the relevant

⁶ The record before us does not contain the exhibits referenced by the petition.

times. We acknowledge the trial court's broad discretion to award attorney fees, but its award of fees to Father was inappropriate because Father's petitions were riddled with errors that caused unnecessary expenditure of resources by both Mother and the courts. *See, e.g., R.E.G. v. L.M.G.*, 571 N.E.2d 298, 306 (Ind. Ct. App. 1991) (misconduct that directly results in additional litigation expenses may properly be taken into account in a decision to award attorney fees); *Shumaker v. Shumaker*, 559 N.E.2d 315, 319 (Ind. Ct. App. 1990) (when wife argued her award of attorney fees was too low, we noted: "This additional litigation was due solely to [wife's] wrongdoing and [husband] should not be made to bear the expense of her misconduct.") Therefore, we reverse the award of attorney fees.

4. Bias

Finally, Mother argues the judge was biased against her. "The law presumes that a judge is unbiased and unprejudiced in the matters that come before the judge." *Flowers v. State*, 738 N.E.2d 1051, 1060 (Ind. 2000), *reh'g denied*. We will not reverse unless the record shows actual bias and prejudice against a party. *Id.* at 1061. Mother must show the judge's action or demeanor "crossed the barrier of impartiality" and prejudiced her case. *Id.*

Mother argues the judge was biased because she scheduled Father's petitions for a hearing before setting a hearing on Mother's pending motions. Mother states she had pending petitions for contempt and for modification of parenting time. Mother does not indicate the basis of her contempt petition and has not included it in her Appendix. Therefore, we cannot determine why the judge addressed Father's petitions first, and we

must presume this action does not demonstrate bias. *See Flowers*, 738 N.E.2d at 1060.

The petition for modification of parenting time to which Mother refers appears to be a petition she filed in January 2008 because of travel restrictions during her pregnancy. Mother acknowledges she was no longer restricted when the case was assigned to Judge Moberly. Although we understand Mother's frustration that her petition was not addressed in a timely manner, the matter appears to have been delayed by multiple reassignments to different judges, not by any ill will toward her. Mother seems to suggest that if her petition were ruled on, she could retroactively be excused from providing parenting time to Father during the time that she was pregnant, but she offers no authority to support this proposition.

Mother also notes the judge stopped her when she began presenting evidence about her travel restrictions. The judge apparently accepted as true that Mother was unable to travel. (*See Tr.* at 49-50) ("I don't think anyone disputes that she couldn't travel . . . when she was pregnant."); (*id.* at 87) ("I think we've established that she was on bed rest.") The judge did not make specific findings and the record does not reflect she found Mother in contempt for not providing parenting time during her pregnancy.

Even if the judge found Mother in contempt on that basis, we note it was Mother's burden to show she was unable to comply with the order. *See Head*, 626 N.E.2d at 526 (person responding to a petition for contempt bears the burden of showing failure to obey the order was due to an inability to comply). Mother did not address, for example, whether someone else was available to transport D.B. to Indianapolis. *See Ind. Parenting Time Guideline I(B)(1)*, cmt. 1 (both parents should ordinarily be present for the

exchange, but when a parent is unable to transport the child, a responsible adult with whom the child is familiar and comfortable may take the parent's place).

Finally, as evidence of bias, Mother points to this exchange at the conclusion of the hearing, when the judge and the parties were discussing when and where parenting time would occur for the next several months:

THE COURT: And what would be the most convenient McDonald's for you?

[FATHER]: There's one on 56th and Georgetown, but I mean, they're – I don't know where they're coming from. Should I try to make it equal?

THE COURT: I'm asking you what's convenient – she's the one that chose to move to Wisconsin.

(Tr. at 126-27.) The May 2007 parenting time order, which was in place well before Judge Moberly was assigned to this case, made Mother responsible for transporting D.B. to and from parenting time. Presumably, Mother's choice to move to Wisconsin was part of the justification for that order. Judge Moberly's comment merely recognizes that fact and does not indicate bias on her part. Therefore, we conclude Mother has not demonstrated bias.

CONCLUSION

The record supports a finding Mother was in contempt of the May 2007 parenting time order, and therefore, the trial court's judgment is affirmed in that regard. However, the trial court abused its discretion in awarding Father attorney fees. Therefore, we reverse the award of attorney fees and direct the trial court to clarify how the parties are to determine Father's weekend for parenting time.

Affirmed in part and reversed in part.

KIRSCH, J., and DARDEN, J., concur.