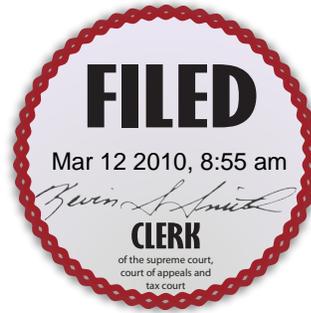


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

B.D.H.,)
)
Appellant,)
)
vs.) No. 34A02-0910-CV-961
)
J. H. (now J.E.),)
)
Appellee.)

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0812-DR-1413

March 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

B.D.H. (“Father”) appeals the trial court’s order that granted the petition of J.H. (“Mother”) to modify the custody of their two minor children.

We affirm.

ISSUES

1. Whether the trial court’s order must be reversed because it failed (a) to make the finding required by statute when there is a restriction in parenting time, or (b) to follow *MacLafferty v. MacLafferty*, 811 N.E.2d 450 (Ind. Ct. App. 2004), *superseded by MacLafferty v. MacLafferty*, 829 N.E.2d 938 (Ind. 2005).
2. Whether the trial court’s order must be reversed based on procedural irregularities.

FACTS

Father and Mother were married in 1989. Two children were born of the marriage: R.H. (12/6/1992), and S.H. (2/6/1995). The marriage was dissolved on April 21, 1998; as agreed by the parties, the trial court awarded them joint legal custody of the children, with Mother having physical custody. Father was granted visitation on alternate weekends; a weeknight of the corresponding alternate week – for three hours during the school year and four hours during the summer; and three weeks during the summer. On June 13, 2002, the trial court issued an order of modification, indicating that the Indiana Parenting Time Guidelines should be followed. The order then “deviated” therefrom, as being “in the best interests of the children,” by providing that Father “should have additional” weekly “mid-week visitations” on a second weeknight – for three hours

during the school year and four hours during the summer, but left “in full effect” the existing biweekly weekend and weeknight visitations. (Father’s App. 41). Thereafter, Father had four weeks of visitation with the children during the summers, and “three hours on each Tuesday . . . during the school year and [four hours] during the summer,” and “the same schedule on the alternate Thursdays.” (Tr. 245).

On September 29, 2008, Mother filed a petition to modify custody and request for permanent injunction.¹ She alleged that there had “been a substantial change in circumstances” which warranted her being awarded sole custody of the children, and that Father’s current wife should be enjoined from “subject[ing] the children to elective medical treatment,” *i.e.*, “non-emergency medical or mental health services,” without her consent. *Id.* 97. On November 7, 2008, Father filed a counter-petition, seeking “to maintain the parties’ joint custody status” but “to modify the award of physical custody, transferring the physical custody of both children” to him. *Id.* 119.

The trial court held hearings on February 2, 2009, and June 29, 2009. It heard testimony from Mother, Father, Father’s current wife Nannette (“Nan”), the mental health

¹ We direct Father’s counsel to Indiana Appellate Rule 46(A)(5), providing that “[p]age references to the Record . . . are required” in the “Statement of Case” in the appellant’s brief. Father’s brief contains an initial 3 ½ page “Factual Event/Procedural Event” chronology and a later “mini-chronology,” Father’s Br. at 3, 20, but neither contains any page references to the Appendix.

therapist who counseled the children in the late summer of 2008, and S.'s cheerleading coach.² On July 20, 2009, the trial court issued its order.

In the court's findings which Father does not challenge and which are supported by the testimony presented, the trial court's order made specific factual findings as to the following. In the years following the dissolution, the parties communicated well with respect to issues concerning their children. Communications between the parties began to deteriorate, however, when Father began dating Nan and then became worse after their marriage. Father normally refuses to make decisions pertaining to the children without consulting Nan. Nan frequently "screens" telephone calls made by Mother and often will not allow her to talk with Father.

On July 25 and August 7, 2008, Nan took the children to a counselor. Father never discussed with Mother any perceived need for the children to engage in counseling. Mother learned of the therapy sessions from the children, after the fact, and Father failed to present evidence of an emergency requiring counseling. The counselor had recommended that Father participate with the children in counseling, but he failed to follow such recommendation.³

In November 2007, Mother informed Father that a special reunion with numerous extended family members was planned in North Carolina during the summer of 2008, and

² In the interest of judicial economy, and because this an expedited appeal involving visitation issues, *see* Indiana Appellate Rule 21(A), we have taken the liberty of redacting Exhibit G to comply with Indiana Administrative Rule 9(G)(1)(b) for excluding certain information from public access.

³ We note the counselor testified that she had never conferred with Mother.

that the plan was for the children to be there for an entire specific week. She asked that Father accommodate this planned vacation in his scheduled visitation period and offered to make up for any adjustment. Father made no timely response to Mother's request. When he later realized that the planned trip would interfere with one day of his visitation, he demanded that Mother change the plans for the trip and return to Indiana early. At one point in the discussions, Nan told Mother that if the children were not returned, the sheriff would be involved. Mother acceded to Father's demand, cut short the reunion, and returned to Indiana.

Mother testified that in January of 2009, she asked Father to change his weekend visitation with S. in order that she might participate in a church youth group ski trip. Father refused, telling Mother that this would interfere with his weekend plans – but he did not tell Mother what plans he had. Father confirmed Mother's testimony regarding the incident but he could not remember any plans that he had for that weekend; and Nan testified that she did not remember the incident.

The children are active in school extra-curricular activities. S., in particular, is committed to her cheerleading. During the school year of 2008-09, the parties had conflicts regarding S.'s participation in cheerleading – conflicts which started soon after Mother filed her petition. Any communications between Father's home and the cheerleading coach were usually made by Nan, and her comments were usually negative and hostile. Ultimately, Father refused to allow S. to cheerlead, purportedly as punishment for not "minding" and not being responsible. Father did not consult with

Mother or discuss his decision. Mother informed Father that she would support his decision if he could show that it had a reasonable basis. Despite Mother's requests, however, Father would not share any information with Mother as to what conduct of S. led up to his decision. As a result, Mother allowed S. to continue to participate in cheerleading.

After making these findings, the trial court concluded that Father was "inflexible in regard to changing his plans to accommodate the plans of the children"; that communication and cooperation between the parties had waned; and that Father had "violated the concept of joint legal custody when he allowed the children to be taken to counseling without involving [M]other in the decision," and when he imposed discipline on S. without consulting Mother. (Order, p. 4). Accordingly, it concluded that joint legal custody was "no longer in the best interest of the children." *Id.* The trial court then granted Mother's petition to modify custody, placing physical and legal custody of the children with her. It also granted her petition for a permanent injunction. Finally, it rescinded previous court orders pertaining to visitation and ordered implementation of the Indiana Parenting Time Guidelines – while expressly finding that the children's summer vacation period was seventy days (ten weeks).

DECISION

Upon appeal, a trial court's decisions concerning custody modifications are accorded latitude and deference, and will only be reversed for an abuse of discretion. *Higginbotham v. Higginbotham*, 822 N.E.2d 609, 611 (Ind. Ct. App. 2004). An abuse of

discretion is when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* We will not substitute our judgment for the trial court unless no evidence or legitimate inferences supports its judgment. *Id.*

1. Parenting Time

Father contends that when the trial court “rescind[ed] all previous orders pertaining to visitation” and ordered that visitation be as provided in the Indiana Parenting Time Guidelines, he lost the weekly evening hours of additional visitation that had been granted him in the 2002 order. (Order, p. 4). Therefore, Father asserts, the trial court “restricted” his parenting time “to a singular [sic] mid-week parenting time.” Father’s Br. at 11. Such constitutes reversible error, he argues, because the trial court failed to make a proper statutory finding as required by Indiana Code section 31-17-4-2, which states that “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.” Ind. Code § 31-17-4-2.

Father asked the trial court to grant him “50 percent of the summer vacation,” a period he calculated to be 76 days or eleven weeks, wherein he asked for “38 . . . days or five and a half weeks.” (Tr. 227). The trial court found that the children’s summer vacation was “ten (10) weeks (70) days,” (Order p. 5), a fact not challenged by Father. Mother testified that the current visitation arrangement was a deviation from the Guidelines – whereby Father had four weeks of visitation in the summer but an additional evening of visitation during the week, and that his existing extra mid-week evening

equaled one “week’s worth of time” over a year. (Tr. 243). Her testimony is unrefuted, and Father provides no calculation to the contrary. Therefore, we do not find the order that Father’s visitation be pursuant to the Guidelines “restricted” his parenting time. Accordingly, the statutory provision to which he cites is inapposite, and his first argument must fail.

In further argument related to visitation, Father claims that the trial court erred by “disregard[ing]” the “well-recognized ‘fatherly’ model” for visitation, wherein a father should be “encouraged to ‘have parenting time with the children on evenings when he is able to spend meaningful quality time with them.’” Father’s Br. at 17 (citing to and quoting *MacLafferty*, 811 N.E.2d at 456)). In this court’s *MacLafferty* opinion, the visitation portion of which was unaffected by our Supreme Court’s subsequent *MacLafferty* decision, we found no error in the trial court’s modification of the father’s visitation to allow him to choose one of two weeknights for his mid-week visitation. Specifically, we “conclude[d] that the trial court’s order giving Father the option of either Tuesday or Wednesday night parenting time is in the children’s best interests, and therefore, was not clearly erroneous.” 811 N.E.2d at 456. The fact that we did not find the trial court’s action in *MacLafferty* to be clearly erroneous does not result in a mandate for future visitation arrangements. Here, the trial court found that it was in the best interests of the children, now teenagers and increasingly involved in non-familial activities, that Father’s visitation be consistent with the Guidelines’ suggested weeknight and summer vacation times. We do not find that conclusion to be clearly erroneous.

2. Procedural Challenges

Father's first assertion of a procedural irregularity that requires us to reverse the trial court's order is as follows. On June 29, 2009, a CCS entry reflects that the parties were directed to "provide any proposed findings of fact and conclusions before July 15, 2009." (Father's App. 3). Father filed proposed findings of fact on July 14th. Mother filed her "Brief in Support of Her Petition to Modify Support" on July 15th.⁴ *Id.* at 185. Father argues that Mother's filing was "belated," and "not the solicited 'proposed findings of fact and conclusions.'" Father's Br. at 21. He directs us to *Buher v. Johnson*, 294 N.E.2d 625, 629 (Ind. Ct. App. 1973), for the proposition that we should not "ignore" Mother's "untimeliness." *Id.* Such implicitly attributes that Mother's filing had great weight. However, it was not in the form of findings of fact and conclusions of law; Father's submission in that regard had been received for the trial court's consideration; and the order issued reflects that it was drafted by the trial court. Further, as noted above, none of the trial court's findings of fact therein are challenged by Father as not supported by the evidence presented.

It has long been the law in Indiana that to prevail on appeal, the appellant "must affirmatively show that there was error prejudicial to his substantial rights." *Hebel v. Conrail*, 475 N.E.2d 652, 659 (Ind. 1985), *see also Southern Ind. Gas & Elect. Co. v. Gerhardt*, 241 Ind. 389, 172 N.E.2d 204, 208 (1961) (appellant has burden of proving

⁴ In a subsequent filing in response to Father's motion to correct error, Mother's counsel stated that he had "misread the CCS entry." (Father's App. 227).

prejudicial error). Based on the record before us, we do not find that the filing by Mother prejudiced Father in any way. Therefore, his argument in this regard fails.

Father next directs us to evidence that (1) the date on the letter of Mother's counsel transmitting a copy of her July 15th filing is July 16, 2009, and (2) the postmark on the envelope that delivered the letter and filing is July 17, 2009. He reminds us that Trial Rule 5 "clearly require[s] timely service of pleadings upon opposing counsel." Father's Br. at 25. We note that the filing at issue was not a "pleading," *see* Ind. Tr. R. 7, but Rule 5 also requires that "every brief submitted to the trial court" be served to "each party." T.R. 5(A)(4). Father cites *Turner v. Williams*, 205 N.E.2d 325 (Ind. Ct. App. 1965), for the proposition that a failure to timely serve opposing counsel warrants the "relief" of a "new trial, untainted by such belated and flawed-service actions by counsel." Father's Br. at 26. In *Turner*, we dismissed an appeal wherein the appellant had failed to timely serve the appellee with his appellant's brief. We do not find the circumstances of the untimely service in *Turner* and those here to be directly on point. Moreover, the result in *Turner* was the dismissal of the appeal – not a new trial. Further, we again conclude for the same reasons discussed above that we can find no prejudice suffered by Father as a consequence of any untimely service of Mother's brief.

Father makes a final argument as to why Mother's brief filed July 15th should result in our reversing the trial court and ordering a new trial. He argues that there were matters asserted in Mother's brief of July 15th that should not have been considered by the trial court, and directs us to Nan's affidavit (submitted with Father's motion to correct

error) to “negate” the “non-supported allegations” in her brief. Father’s Br. at 28. Father cites to no authority whatsoever in this argument.

Nan’s six-page affidavit was filed with Father’s motion to correct error to purportedly demonstrate the “‘taint’ derived from [Mother]’s brief, as manifested in” the trial court’s order. (Father’s App. 213). In her response to Father’s motion to correct error, Mother asked that the affidavit be “stricken as an improper attempt to introduce hearsay evidence.” *Id.* at 227. In its order denying Father’s motion to correct error, the trial court struck the affidavit. Nan had testified at trial, and we find no basis whereby the law requires that she be allowed to make additional factual assertions subsequent to the decision by the finder of fact.

When divorced parents have joint custody under an existing order, and the “record is replete with evidence demonstrating the parties’ inability to communicate with each other” in matters regarding the rearing of their children, the trial court may reasonably conclude that the children’s mental health and well-being are in jeopardy, “and, as a result, a modification in the joint custody arrangement [is] necessary.” *Hanson v. Spolnik*, 685 N.E.2d 71, 78-79 (Ind. Ct. App. 1997), *trans. denied*. The trial court found, and the record reveals, that the parties were no longer able to communicate and cooperate in making decisions with respect to the children. The trial court’s decision is not clearly against the logic and effect of the facts and circumstances presented. *See Higginbotham*, 822 N.E.2d at 611. Therefore, we find no abuse of discretion. *Id.*

Affirmed.⁵

MAY, J., and KIRSCH, J., concur.

⁵ By separate order, the Court of Appeals has stricken from Father's Appendix unnecessary material that was not redacted in conformance with Indiana Appellate Rule 9(J) ("Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G) . . .").