ATTORNEY FOR APPELLANT:

**MICHAEL H. MICHMERHUIZEN**
Barrett & McNagny LLP
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

**LINDSEY A. GROSSNICKLE**
**MATTHEW R. SHIPMAN**
Bloom Gates Sigler & Whiteleather, LLP
Columbia City, Indiana



# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| KAYLA JOHNSON, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 92A03-0912-CV-586 |
| | ) | |
| TIMOTHY J. REINHARDT, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0703-DR-152

**July 20, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Following contentious custody proceedings, the trial court ordered Mother to pay a portion of Father's attorney fees. On appeal, Mother asserts the trial court erred in awarding said fees.

We affirm.

Mother and Father's marriage was dissolved by the Whitley Circuit Court on June 6, 2007. Pursuant to a settlement agreement filed that day, the parties shared joint legal custody of their two minor children (C.M. born in November 2004 and C.R. born in March 2007), with Mother having primary physical custody.[1]

On November 12, 2007, Mother filed a petition to modify parenting time, claiming a substantial change in circumstances had occurred in that C.M. had been traumatized during parenting time with Father and was exhibiting signs of abuse. At some point not apparent in the record, Mother also filed for a protective order under a separate cause, the granting of which was later vacated and dismissed by the trial court in the instant case on February 12, 2008. Following a number of hearings and court-ordered visitations between Father and C.R. in the presence of C.R.'s counselor, on April 2, 2008, the trial court ordered each party to enroll in parenting classes and to submit to a psychological evaluation. Pending review of the psychological evaluations and further orders of the court, Father was granted limited supervised visitation with his children. Thereafter, on June 4, the court ordered the parties to participate in a custody evaluation and took the issue of additional parenting time under advisement. Father was subsequently awarded additional parenting time on June 18.

On July 29, 2008, Mother filed a petition to terminate parenting time pending investigation. In the petition, Mother alleged that after Father's parenting time with the children on July 26, C.M. made "allegations" that "led to an investigation by Allen County law enforcement officers and child protection personnel all of whom recommended that Petitioner request the court to terminate parenting time pending their investigation." *Appellee's Appendix* at 3-4. Father responded by filing a motion for appointment of a GAL, a verified petition for rule to show cause, and an emergency motion for modification of custody.

While the petition to terminate was pending in the dissolution cause, Mother sought ex parte orders of protection on behalf of her children under separate cause numbers. Noting that Mother did not seek an emergency hearing in the dissolution cause, on August 14, the court declined to enter ex parte orders in the separate proceedings "in view of the ongoing [dissolution proceedings] wherein [Father's] parenting time is limited and supervised by his parents." *Id*. at 5. Therefore, Mother's petitions for protective orders were set to be heard at the scheduled hearing on her petition to terminate parenting time.

Prior to the scheduled hearing, the GAL filed her report with the trial court on September 16, 2008. In her report, the GAL found "no reliable evidence of any sexual abuse on the part of [Father]." *Id*. at 9. The GAL noted further, "all investigations have led to the conclusion that there is inadequate evidence of sexual abuse. Most recently, the Allen County Department of Child Services investigated the allegations and found that they were

[1] The record before us is frustratingly incomplete. Therefore, with respect to the facts and procedural history following the dissolution, we will glean what we can from the limited record, the bulk of which is contained

unsubstantiated." *Id*. at 10. The GAL opined that it was in the children's best interests to have regular parenting time with Father.

Two days after the GAL's report, the parties entered into a stipulated order pursuant to which Father's parenting time was resumed (as set out in the June 2008 order) and he was given three make-up parenting times. The order also provided for two consecutive overnights to include part of Christmas day, with direct supervision by Father's sister or mother. Moreover, Mother was enjoined from further unilateral interference with Father's telephone access and parenting time. A hearing was set for February 2009, following the filing of the custody evaluation report.

On November 26, Mother, by new counsel, filed yet another motion to suspend parenting time, as well as a motion to replace the GAL.[2] Following a hearing, the trial court denied Mother's motion to suspend parenting time on December 23. Mother's motion to replace the GAL was denied on January 14, 2009, following a hearing. At that hearing, Father filed a motion for protective order and rule to show cause with respect to parenting time. The parenting time issues were set to be heard beginning in February.

On January 23, 2009, Mother, on behalf of her minor children, sought and obtained ex parte protective orders against Father in Allen County. The matters were then ordered transferred to the Whitley Circuit Court for proceedings consistent with the dissolution cause. On January 26, Mother filed a pleading entitled, Information to the Court, Motion to Suspend All Parenting Time Until Investigation is Completed, and Motion for Attorney Fees and

---

in Father's appendix.

[2] These motions are not included in the record before us, but they are documented in the CCS.

Independent Evaluation Costs. Mother alleged in part:

> 3. That upon pick up [sic] the minor children on December 27, 2008, [Mother] noted concerning behavior in both minor children. Further, [C.R.] was very upset and reported to [Mother] that she was left alone with [Father] and that something had happened and that she was threatened not to tell anyone.
> 4. [Mother's] counsel sought the opinion of several experts beginning December 29, 2008, about what course of action [Mother] should take as [C.R.] was again displaying fear and signs of possible abuse. [Mother's] counsel advised [Mother] to seek a completely independent, unbiased evaluation of [C.R.] concerning the allegations herein.
> 5. [Mother] retained the services of Amanda Mayle, PH.D, HSPP, of Clinical & Forensic Psychological Services, P.C. Ms. Mayle was provided with no previous counselor names, CPS reports, police reports, etc.; other than the two (2) emergency room reports for [C.R.] that were requested. Upon completion of her independent evaluation, Ms. Mayle forwarded the attached letter[3] to [Mother's] counsel and advised [Mother] that she was obligated to report said incidents to Child Protective Services of Allen County, Indiana and Lapeer, Michigan. Further, [Mother] understood that she was obligated by law to protect the minor children herein.
>
> * * *
>
> 9. [C.R.] continues to suffer from anxiety attacks and nightmares and is afraid that she is going to get into trouble by [Father] and his mother because she told what happened. [Mother] requests this Honorable Court suspend all [Father's] parenting time until a thorough investigation is completed and/or Dr. Wooley's [custody evaluation] report is completed.
>
> * * *

*Id*. at 12-14 (emphases in original and footnote supplied).

The GAL filed a supplemental report with the court on February 10, 2009, after investigating the most-recent allegations of abuse. In her detailed report, the GAL questioned the "accuracy of the information upon which Ms. Mayle relied in making her conclusion." *Id*. at 18. The GAL concluded:

> As of this date, I do not find any reliable evidence of sexual abuse by [Father]. However, as of this date, I have not considered the findings of Dr. Larry

3 This letter is not contained in the record before us.

> Wooley, as he has not yet submitted his custody evaluation report, or the results of any investigation by the Allen County Department of Child Services.

*Id*. at 19. On February 17, the GAL filed an addendum to the supplemental report indicating that she had been informed by the Allen County Department of Child Services (the DCS) that "the investigation referenced in my previous report was closed and that the allegations were unsubstantiated." *Id*. at 20.

On February 18, Mother filed a petition in this case for Father to submit to full offender assessment in Allen County. Mother alleged "upon information and belief [Father] has molested one or both of the parties [sic] minor children" and that Allen County is "where at least one (1) of the alleged molestations took place and should criminal charges be filed against [Father], Allen County, Indiana would have jurisdiction." *Id*. at 21. Mother filed this shortly after the DCS had closed the case as unsubstantiated.[4]

The custody evaluation was filed with the court on March 9, 2009. The lengthy evaluation provided in part:

> To date the preponderance of the evidence is not clinically compelling enough to support a recommendation to continue to limit both [Father's] access to the children and his parental rights….
>
> Several hypotheses may account for the current beliefs and impasse held between the parents. One clear black and white option is that [Father] is abusing the children. The bottom line is that there is no clear evidence incriminating him…. It would appear when considering *all* the data that [Father] has not engaged in sexual impropriety with the girls.
>
> A second black and white hypothesis that has been put forth is that [Mother] is deliberately fabricating false allegations and intentionally soliciting disclosures from [C.R.] They [sic] key words are "deliberate" and "intentionally". Clear

[4] During this time, Mother also sought to inspect Father's personal computers. Following a hearing, Mother's motion was denied and Father's motion to quash was granted.

> intent and malice is hard to establish but there may be some evidence that [Mother] is not entirely innocent of the accusation. It is suspicious that new allegations tend to occur at opportune moments such as; before an increase of visitation time, court hearings and the custody evaluation…. [Mother] may not have intentionally fabricated allegations but it would appear she may have had a large role in their emergence.
>
> The argument has been raised that because [C.R.] has exhibited her distress reactions and disclosed abuse that [Father] must be a perpetrator. [C.R.'s] disclosures have not been consistent across persons or time however. Younger children are extremely susceptible to even unintentional pressures to please and can be considered highly suggestible. The younger the child is generally means the less reliable is the report. The evaluators observed [C.R.'s] reactivity to [Mother's] anxiety and distress and she is particularly sensitive to her mother's emotional disposition. It is quite possible that [C.R.'s] disclosures have been slowly shaped by the unintentional responses of those around her. [Mother] herself admits fear before any disclosures had been made that [Father] would be sexually abusive. She also admits that even before there was ever a strong suspicion of abuse that she was regularly checking the girls from head to toe upon their return….
>
> What most of the evidence would point to is a long history of misinterpretations combined with an awful mixture of incompatible personalities…. The next leap of faulty logic occurred when [Mother] appears to have believed because [Father] was a poor spouse he was also a poor father. These are entirely different roles. What appear to lead [Mother] to these conclusions is a tendency to use her feelings as proof of her suspicions. This is putting the cart before the horse and usually leads to errors in judgment.
>
> It seems that transgressions and grievances experienced by [Mother] become embellished….
>
> Additionally, there is a pattern of blame by [Mother] if something is not going to her liking. Here is a short list of examples observed by evaluators. She accused her former attorney…of not doing things he was supposed to do. The court allegedly entered an order indicating she had agreed to overnight visitation for [Father] at Christmas when she states she agreed to no such thing. The police department did not take the abuse report seriously enough. DCS and the Allen County Prosecutor mishandled the abuse reports. Even the marital problems are purportedly to be entirely [Father's] fault.
>
> ***

*Id*. at 24-27 (emphasis in original).

In the evaluation report, the examiners recommended, inter alia, as follows:

> 1. It is suggested to the court that a joint legal custody arrangement be considered between [Father] and [Mother]. Furthermore it would likely be in the girls' best interests for [Mother] to remain as the primary custodial parent. This suggestion is not made on any clear advantage in parenting demonstrated by [Mother] but on the grounds that [C.R.] demonstrates a lack of resiliency that would result in excessive distress if physical custody were reversed.
> 2. After much consideration it is suggested that [Father's] visitation be reinstated to an arrangement and frequency more akin to standard Indiana guidelines. Full weekends in his home would not be unreasonable. It is recommended that it be unsupervised although [Father] should strongly consider maintaining his parents' supervision on his own accord for his own protection….
> 7. [Mother] is strongly encouraged to cease the "checking from head to toe" behaviors she feels is responsible parenting. This is a clear example of something that will generate the children's anxiety and is more intrusive than anything that has been substantiated of [Father]. This creates negative expectations of their father and will affect them psychologically if it has not already.
>
> ***
>
> 14. [C.R.] would also benefit from continued counseling. The focus should not be on abuse treatment or evaluation but upon the development of adaptive coping skill and anxiety reduction. All parties should allow her to have this therapeutic relationship by respecting the boundaries between therapy and forensic assessment/reporting….
> 17. Perhaps the most delicate recommendation is as follows and is absolutely not meant as an attempt to eliminate a parent's ability to advocate for the rights and safety of a child. The court may wish to seriously consider holding [Mother] legally accountable if future allegations and/or reports of abuse are made in which there is evidence to the contrary.

*Id*. at 27-29.

At the scheduled hearing on March 27, 2009, the parties filed a joint stipulated agreement with respect to parenting time, which was approved by the court. The agreement provided that it was in the best interests of the parties' children to maintain joint legal custody, with Mother having primary physical custody. The parties further agreed that Father would have unsupervised parenting time consistent with the Indiana Parenting Time

Guidelines, unless otherwise noted. Further, the agreement specifically provided: "Issues related to the Guardian Ad Litem, her fees, Dr. Mayle's fees, the Protective Orders…, and attorney fees shall be deferred to the Court to decide." *Id*. at 34. Therefore, the court held an evidentiary hearing on the issues of attorney fees, litigation expenses, and support.[5] These matters were taken under advisement pending the submission of proposed findings by the parties.

On August 24, 2009, the trial court issued an order on the pending matters. The only matter relevant in the instant appeal is the court's decision regarding attorney fees, in which the court ordered Mother to pay one third (i.e., $8715) of Father's fees and litigation expenses. With new counsel, Mother filed a motion to correct error on September 23, 2009.[6] Following a hearing, the trial court denied Mother's motion to correct error. Mother now appeals, challenging only the trial court's determination that she is responsible for a portion of Father's attorney fees.

> The decision to award attorney's fees and the amount of the award are reviewed for an abuse of discretion. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Indiana follows the American Rule, which ordinarily requires each party to pay his own attorney's fees. Generally, attorney's fees are not recoverable from the opposing party as costs, damages, or otherwise, in the absence of an agreement between the parties, statutory authority, or rule to the contrary. *Id*.
>
> Ind. Code [Ann.] § 31-17-7-1(a) [(West, Westlaw through 2009 1st Special Sess.)] provides that a trial court "periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending [a custody proceeding] and for attorney's fees ...." When determining whether

[5] Mother has provided us with only one page of this hearing.

[6] Mother's motion to correct error is not included in the record before us, nor is the transcript of the hearing on said motion. Thus, we do not know the basis of her motion.

> or not to award attorney fees, a trial court "must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such other factors as bear on the reasonableness of the award." *Bertholet v. Bertholet*, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000) (quoting *Barnett v. Barnett*, 447 N.E.2d 1172, 1176 (Ind. Ct. App. 1983)). *Misconduct that directly results in additional litigation expenses may properly be taken into account in the trial court's decision to award attorney fees*.

*Allen v. Proksch*, 832 N.E.2d 1080, 1102 (Ind. Ct. App. 2005) (some internal citations omitted) (emphasis supplied).

Before reaching the merits of the instant case, we are compelled to address certain violations of our appellate rules committed by Mother. Most notably, Mother has failed to provide us with an adequate record to review the issue at hand.[7] "It is the duty of an appellant to provide this court with a record sufficient to enable us to review the claim of error". *Lenhardt Tool & Die Co., Inc. v. Lumpe*, 703 N.E.2d 1079, 1084 (Ind. Ct. App. 1998), *trans. denied*. *See also* Ind. Appellate Rule 49(A) ("appellant shall file its Appendix with its appellant's brief"); Ind. Appellate Rule 50(A) (setting forth purpose and required contents of Appendix). Mother has not done so here, in flagrant violation of our appellate rules.

Of additional concern to us is Mother's statement of facts, the bulk of which contains "facts" and references to testimony and evidence that are found nowhere in the record before us. The appendix citations Mother supplies in her brief are, for the most part, erroneous,

[7] Numerous examples of such shortcomings have been noted *supra*. We are most concerned by the fact Mother chose to provide us with only one page of the transcript from the evidentiary hearing on attorney fees and did not provide us with her motion to correct error or the transcript of the hearing on said motion. Similarly perplexing is the fact that Mother included only three pages of the seven-page custody evaluation in her appendix.

suggesting to us that possibly large portions of her appellate brief were lifted from pleadings filed with the trial court with no regard for the incorrect record citations. Further, Mother's appellate arguments are based largely on these unsupported facts. While Father has filled in several of the gaps in the record, Mother's violations have still clearly hindered our review. Limited by the record before us, we will briefly address the merits of the appeal.

At trial, Father asserted multiple grounds for the award of attorney fees. In its order, the trial court found the following rationales supported by the evidence: 1) Father was "forced to defend unsubstantiated allegations of abuse both in this case as well as with the Allen County Sheriff's Department, Allen County and Whitley County DCS, and Lapeer, Michigan Police Department"; 2) the vexatiousness of the litigation resulted in Father being "forced" to file two motions to quash and multiple motions for rule to show cause[8] in order to protect his parenting time; 3) Mother filed three protective orders that were all dismissed, actions which the trial court found to be unreasonable under Ind. Code Ann. § 34-52-1-1 (West, Westlaw through 2009 1st Special Sess.); and 4) Mother's multiple violations of the court's orders, which resulted in the denial of a significant amount of parenting time to Father. *Appellant's Appendix* at 12. On appeal, Mother challenges only the first rationale set forth by the trial court without disputing the others.

---

[8] In addition to contempt, other remedies for violations of court orders relating to visitation time include injunctive relief, criminal penalties, and attorney fees. *See* Ind. Parenting Time Guidelines § I(E)(6). With regard to attorney fees, Guidelines § I(E)(6)(D) provides:

> In any court action to enforce an order granting or denying parenting time, a court may award reasonable attorney fees and expenses of litigation. A court may consider whether the parent seeking attorney fees substantially prevailed and whether the parent violating the order did so knowingly or intentionally. A court can also award attorney fees and expenses against a parent who pursues a frivolous or vexatious court action.

In sum, the award of attorney fees was not based solely upon Mother's multiple, unsubstantiated allegations of child abuse against Father.[9] Rather, the trial court ordered Mother to pay a portion of Father's attorney fees in light of her overall misconduct, violation of court orders, and abuse of the system, forcing Father to incur hefty litigation fees in order to protect and enforce his parenting time. As set forth above, misconduct that directly results in additional litigation expenses may properly be taken into account in the trial court's decision to award attorney fees. *Allen v. Proksch*, 832 N.E.2d 1080. *See also Hanson v. Spolnik*, 685 N.E.2d 71, 80 (Ind. Ct. App. 1997) ("[Mother] persisted in alleging that [Father] had sexually abused M.S., even though Child Protective Services did not substantiate the allegations and closed its investigation"), *trans. denied*.[10] Mother has failed to establish an abuse of discretion. *See Hanson v. Spolnik*, 685 N.E.2d at 80 (refusing to find an abuse of discretion regarding the award of attorney fees where "trial court was in the best position to judge [Mother's] demeanor, the veracity of her claims and her financial resources").

Finally, Mother asserts that the award of attorney fees should have been barred because Father had filed a complaint under a separate cause number in Whitley Circuit Court

[9] Mother acknowledged at the March 27, 2009 hearing that each time DCS did an investigation the allegations were found to be unsubstantiated. Despite the DCS findings, Mother testified that she still believed Father should have no parenting time and his parental rights should be terminated.

[10] Contrary to Mother's assertions on appeal, *Hanson* did involve an award of attorney fees.

alleging malicious prosecution, abuse of process, and defamation. She claims, "once [Father] filed the companion action alleging abuse of process, the Trial Court should have deferred its ruling on that particular subject matter." *Appellant's Brief* at 9. We observe initially that there is nothing in the record before us regarding a separate action filed by Father. Moreover, there is no indication when, if ever, Mother made this argument to the trial court. Even if we accept her assertions as true, it appears she raised this claim for the first time in her motion to correct error. This was too late. *See e.g.*, *Clary v. Lite Machines Corp*., 850 N.E.2d 423, 441 (Ind. Ct. App. 2006) ("a party may not raise an issue for the first time in a motion to correct error"); *Van Winkle v. Nash*, 761 N.E.2d 856 (Ind. Ct. App. 2002).

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.