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IN THE COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF P.B.

D.B.,

Appellant-Petitioner,

vs.

M.B.,

Appellee-Respondent.

No. 03A01-1012-JP-653

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Jon W. Webster, Special Judge
Cause No. 03C01-0110-JP-1440

December 20, 2011

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

BAILEY, Judge

D.B. ("Mother") appealed the trial court's order granting M.B. ("Father") six hours of weekly unsupervised parenting time with their child, P.B. In a memorandum opinion, In re P.B., 03A01–1012–JP–653 (Ind. Ct. App. 2011), we affirmed the trial court's order. Mother petitioned for rehearing on November 10, 2011, and Father filed a cross petition for rehearing on November 21, 2011 requesting attorney's fee pursuant to Appellate Rule 66(E). We grant rehearing for the limited purpose of addressing Father's cross petition for attorney's fees.

In our original opinion, we declined Father's request that we assess attorney's fees in his favor due to what he considered Mother's abuse of the appellate process. In light of Mother's petition for rehearing, he urges us to reconsider. We now agree with Father that attorney's fees should be assessed against Mother in this case.

Indiana Appellate Rule 66(E) provides that "[t]he Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." Our discretion to award attorney's fees is limited, however, to instances when an appeal or petition is permeated with meritlessness, bad faith, frivolity, harassment, or vexatiousness, or is pursued for purpose of delay. Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). Moreover, while Indiana Appellate Rule 66(E) provides the Court with the discretion to award damages on appeal or petition, we must use extreme restraint when exercising this power because of the potential chilling effect it may have upon the exercise of the right of appeal or petition for rehearing. Id.

Indiana appellate courts have categorized claims for appellate attorney fees into "substantive" and "procedural" bad faith claims. Id. To prevail on a substantive bad faith

claim, contentions must be utterly devoid of all plausibility. Id. Substantive bad faith "'implies the conscious doing of wrong because of dishonest purpose or moral obliquity.'" Gabriel v. Windsor, Inc., 843 N.E.2d 29, 49 (Ind. Ct. App. 2006) (quoting Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002)). Procedural bad faith occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates facts in the record, and files briefs written in a manner calculated to require maximum expenditure of time both by the opposing party and the reviewing court. Thacker, 797 N.E.2d at 346. Even if conduct is not deliberate, procedural bad faith can still be found. Id.

A petition for rehearing is a vehicle that affords the reviewing court an "'opportunity to correct its own omissions or errors.'" Griffin v. State, 763 N.E.2d 450 (Ind. 2002) (quoting Daviess-Martin County Rural Tel. Corp v. Pub. Serv. Comm., 132 Ind. App. 610, 625, 175 N.E.2d 439, 440 (1961)). It is not the proper function of a petition for rehearing to ask appellate courts to generally reexamine and reconsider matters decided adversely to the petitioner. Hadley v. State, 251 Ind. 24, 26, 242 N.E.2d 357, 359 (1968). Rather, such a motion should point out to the Court mistakes of law or of fact made in arriving at its decision. Id.

Mother's petition for rehearing does not point out an error of law or of fact in our opinion. Instead, it essentially amounts to an invitation for us to reweigh the evidence supporting the trial court's conclusion.[1] We expressly declined to do this in our original

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[1] Mother frames the issue on rehearing as follows: "Whether the Court of Appeals, without any supporting

opinion because decisions regarding parenting time are committed to the sound discretion of the trial court, and in reviewing these decisions, appellate courts do not reweigh the evidence or reexamine the credibility of the witnesses. Walker v. Nelson, 911 N.E.2d 124, 130 (Ind. Ct. App. 2009). Instead, we view the evidence in the light most favorable to the court's decision to determine whether the evidence and reasonable inferences therefrom support its decision. Id.

Following Mother's first appeal, In re Paternity of P.B., 932 N.E.2d 712 (Ind. Ct. App. 2010), the issue before the trial court was clear: "[it] must consider and weigh the conflicting evidence and determine whether the evidentiary balance tips in favor of Mother, that is, whether it is more likely than not that visitation with Father would endanger P.B.'s physical health or well-being or significantly impair his emotional development." 932 N.E.2d at 721. The trial court again considered the evidence in light of this standard, and did not find that parenting time with Father would endanger or significantly impair P.B. Thus, in this second appeal, we affirmed because there was evidence in the record to support the trial court's conclusion—evidence that Mother acknowledges, but dismisses, in her petition for rehearing.

We can only conclude, then, that Mother's petition for rehearing constitutes procedural bad faith calculated to require maximum expenditure of time both by the opposing party and the reviewing court because it does not point out any mistake of law or fact, ignores our standard of review, and merely asks us to reweigh the evidence, which we will not do. We therefore deny Mother's petition for rehearing, grant Father's cross petition for attorney's

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evidence, facts, or testimony, erred by determining that the appellant/mother did not meet her burden[.]" Appellant's Petition for Reh'g p. 1.

fees, and remand to the trial court for a determination of fees associated with the time involved in Father's petition for rehearing. In all other respects, we reaffirm our prior opinion.

Affirmed and remanded.

MATHIAS, J., and CRONE, J., concur.