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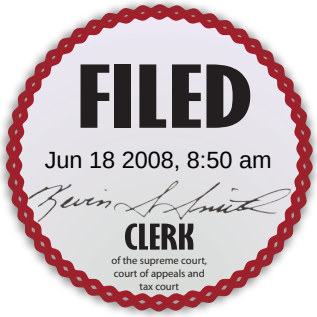

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IN THE
COURT OF APPEALS OF INDIANA

NICHOLAS L. GEORGAKOPOULOS,	)	
	)	
Appellant-Cross-Appellee,	)	
	)	
vs.	)	No. 29A04-0710-CV-597
	)	
ELIZABETH A. COIT,	)	
	)	
Appellee-Cross-Appellant.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable, Judith S. Proffitt , Judge
Cause No. 29C01-0408-DR-1056

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Nicholas Georgakopoulos appeals the trial court's denial of his motion to correct error in which he requested the modification of child support. We affirm.

Issues

Georgakopoulos raises two issues, which we consolidate and restate as whether the trial court was required to modify his child support obligation. On cross-appeal, Coit raises one issue, which we restate as whether the trial court improperly denied her request for attorney fees.

Facts

On March 14, 2005, the trial court dissolved Georgakopoulos and Coit's marriage. In doing so, the trial court approved the parties' final settlement agreement. According to the settlement agreement, the parties would have joint legal and physical custody of their two children. The settlement agreement included a detailed plan for parenting time to be shared equally between the parties. The settlement agreement also contained the following term regarding child support:

> 5.01 Child support and Educational Expenses. Husband shall pay, to Wife, through the Clerk of Hamilton County, for the benefit of the children, child support in the amount of One Hundred Thousand Dollars ($100,000.00) per year payable at Eighty-Three Hundred Thirty-Three Dollars ($8,333.00) a month, commencing on a prorata basis on the date of the granting of a dissolution of marriage herein, and monthly

> thereafter until the children are twenty-one years of age or emancipated, whichever first occurs. The Parties stipulate that Husband's fiscal estate is sufficient to pay this amount, which is in excess of the Indiana Child Support Guidelines. The parties believe that the children should be raised in the same atmosphere and have the same lifestyle that they had prior to the Parties' dissolution. In paying this amount in excess of the Guidelines, the parents believe that it is in the best interest of the children.
>
> Husband shall pay all school tuition, room, board and lab fees for the children through post-graduate studies as required. Decisions regarding schooling will be joint and due consideration will be given to the wishes of the children as appropriate.

Appellant's App. pp. 30-31.

On April 24, 2006, the trial court approved the parties' modification of their settlement agreement. In relevant part, the parties modified how they would agree to changes in the parenting time schedule and included a provision for the award of attorney fees in certain circumstances.

On August 24, 2006, in the parking lot of the children's school, Georgakopoulos and Coit were involved in an altercation over parenting time. Following the altercation, a no contact order was entered against Georgakopoulos.

On November 9, 2006, Coit petitioned for sole legal and physical custody of the children and requested attorney fees. On November 22, 2006, Georgakopoulos objected to Coit's petition and requested that he be awarded sole custody. Coit responded to Georgakopoulos's petition.

An extensive hearing was conducted on the parties' petitions. On July 18, 2007, the trial court awarded Coit legal and physical custody of the children. However, the trial

court ordered parenting time to remain the same, with each parent continuing to exercise equal parenting time. The trial court summarily ordered the child support obligation of the settlement agreement to remain unchanged. The trial court also acknowledged its authority to award attorney fees in this type of proceeding but ordered the parties to pay their respective attorney fees.

On August 15, 2007, Georgakopoulos filed a motion to correct error alleging that the trial court failed to modify child support in connection with its order changing custody. Coit responded to Georgakopoulos's motion to correct error and also alleged that the parties' modification of the settlement agreement supported an award of attorney fees. Georgakopoulos replied to Coit's motion. On September 11, 2007, the trial court denied the motion to correct error and concluded that its findings, conclusions, and judgment remained in full effect. Both parties now appeal.

Analysis

I. Child Support Modification

Georgakopoulos argues that the trial court improperly refused to modify child support. Coit responds that the child support issue is waived because Georgakopoulos never petitioned to modify child support, the issue was not tried by consent, and there was no change in custody or parenting time that necessitated a sua sponte change in the child support order. We agree with Coit.

In response to Coit's petition to modify custody, Georgakopoulos filed an objection and his own petition to modify custody. In it, Georgakopoulos discussed the events leading up to Coit's petition to modify custody and claimed that joint custody was

no longer reasonable. Georgakopoulos requested a full hearing and an order giving him custody and providing Coit with parenting time. He also requested "appropriate child support." Id. at 35. In his prayer for relief, Georgakopoulos stated, "WHEREFORE, Nicholas L. Georgakopoulos respectfully moves the Court to deny the Mother's Petition to Modify, to order paternal custody in this case; and to fix appropriate parenting time and support; and for all other proper relief." Id. at 36.

Georgakopoulos's petition did not include any specific information regarding child support, and there was no mention of Indiana Code Section 31-16-8-1(b)[1] or the factors discussed in that statute. Accordingly, we conclude that Georgakopoulos's bare mention of child support in his motion was not sufficient to raise the issue.

As to whether the issue was tried by consent, at the hearing, both parties submitted financial declarations to the trial court. Georgakopoulos submitted a child support

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[1] This statute provides in part:

> (b) Except as provided in section 2 of this chapter, modification may be made only:
>
> > (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
> >
> > (2) upon a showing that:
> >
> > > (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> > >
> > > (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

Ind. Code § 31-16-8-1.

worksheet anticipating he would be the custodial parent. The worksheet calculates Coit's recommended child support obligation at negative $275.01. This is consistent with Georgakopoulos's testimony that should he be awarded custody, he was not seeking child support from Coit. Georgakopoulos offered no corresponding worksheet anticipating that Coit be awarded full custody of the children.

Georgakopoulos claims that Coit "sought to introduce testimony with respect to child support" at the hearing. Appellant's Reply Br. p. 2. Indeed, Coit's attorney questioned Coit regarding the child support provision of the settlement agreement and whether she agreed to it in lieu of a property settlement. Georgakopoulos's attorney, however, objected in part asserting, "It has nothing to do with the proceeding—not relevant." Tr. p. 648. Coit's attorney responded, "but I am asking the questions that are clearly relevant pursuant to the Kinsey case of evidence that is necessary for the Court to have whether they should continue or discontinue the child support order." Id. The trial court sustained Georgakopoulos's objection. Georgakopoulos may not now claim that the issue was before the trial court because Coit sought to introduce evidence regarding child support that was excluded based on his objection.

The conclusion that the modification of child support was not litigated at the hearing is consistent with the trial court's order in which it summarily ordered that the child support provisions of the parties' settlement agreement remain unchanged. The trial court did not otherwise address the issue of modifying child support or the factors of Indiana Code Section 31-16-8-1 in its thirty-two findings of fact and conclusions of law. In one finding, the trial court observed, "the bulk of the evidence at the trial was directed

at the parenting abilities of the parents, as well as their respective availability to be with the children and balance professional responsibilities." Appellant's App. p. 13. The trial court's order does not support Georgakopoulos's argument that the issue of modifying child support was before the trial court and that the trial court ruled on it.[2]

Any question as to whether the parties were litigating the modification of child support is resolved by Georgakopoulos's motion to correct error, in which he alleged the trial court failed to modify child support in connection with the change in the parties' custodial arrangement.[3] Georgakopoulos explained:

> The error arises in peculiar circumstances, for at least two reasons. First, Father's post-trial submission of a proposed order contemplated that he would be the custodian of the parties' two minor children, and in such circumstance he did not seek child support from [Coit]. Thus, his proposed order, as submitted, could not address proper child support in the event of an order for maternal custody, and this is his first opportunity to do so.

Appellee's App. p. 44 (emphasis added). Georgakopoulos also argued that a recent decision of this court clarified the applicable standard for modification of child support when the parties agree to a child support arrangement other than that called for in the Indiana Child Support Guidelines. See In re Marriage of Kraft, 868 N.E.2d 1181, 1188

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[2] Georgakopoulos's own assertions regarding whether the trial court addressed the issue are inconsistent. In his Appellant's Brief, Georgakopoulos claims, "The Judgment modified the parties' joint custody arrangement, placing sole legal and physical custody with Elizabeth, denied Nicholas's request for sole custody, but failed to address the issue of child support." Appellant's Br. p. 2 (emphasis added). In his reply brief he claims, "the court below directly ruled on the issue in its Order and Judgment entered in this case." Appellant's Reply Br. p. 3.

[3] Georgakopoulos attached an incomplete and unsigned child support obligation worksheet to his motion to correct error. Oddly, the figures used to calculate child support in the motion to correct error worksheet are different from the figures Georgakopoulos used on the child support obligation worksheet he submitted at the custody modification hearing. Cf Appellee's App. p. 64 with Exhibit T.

(Ind. Ct. App. 2007) ("In other words, the fact that a child support order has been entered pursuant to the terms of a settlement agreement, even where, as here, it is intended as forever determinative by the parties, is of no consequence to the question whether the order should subsequently be modified.").

Based on Georgakopoulos's own concession in his motion to correct error that this was his first opportunity to address the child support issue,[4] it is clear that the parties did not intend to litigate the modification of child support at the hearing. It is well-settled that a party may not raise an issue for the first time in a motion to correct error. See Troxel v. Troxel, 737 N.E.2d 745, 752 (Ind. 2000). Thus, we agree with Coit that the issue was waived. See Clary v. Lite Machines Corp., 850 N.E.2d 423, 441 (Ind. Ct. App. 2006).

Georgakopoulos seeks to avoid waiver by arguing that the modification of child support was inherent to a change of custody. We have held:

> Waiver may be avoided if the newly-raised issue was inherent in the resolution of the case, the other party had unequivocal notice of the issue below and had an opportunity to litigate it, or if the trial court actually addressed the issue in the absence of argument by the parties.

Grathwohl v. Garrity, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007).

Under these facts, the issue of child support modification was not inherent to the custody modification. We agree with the general proposition that a change of custody

[4] We note that Georgakopoulos's assertion is incorrect. The issue of Coit obtaining sole custody was not a surprise to Georgakopoulos. Coit initially petitioned to modify custody in her favor, and Georgakopoulos responded to her petition and filed his own petition for sole custody. A hearing was conducted over several days from February 2007 through June 2007. The issue of maternal custody was before the trial court from the very beginning of this litigation.

from one parent to the other is in itself a substantial change in circumstances that would justify the modification of support. See Rice v. Rice, 460 N.E.2d 1228, 1230 (Ind. Ct. App. 1984); Ind. Code § 31-16-8-1 (permitting child support to be modified upon a showing of substantial and continuing changed circumstances). However, we do not agree with Georgakopoulos's assertion that the modification of custody "compels a review and modification of child support, as appropriate." Appellant's Reply Br. p. 4.

Pursuant to the settlement agreement, Georgakopoulos and Coit had joint legal and physical custody of the children and exercised equal parenting time with the children. Then they each petitioned for sole legal and physical custody. The trial court awarded Coit sole legal and physical custody of the children. Importantly, however, the trial court ordered that they continue to exercise equal parenting time as described in the settlement agreement. Therefore, although the custody was modified, parenting time remained the same. Under these circumstances, where the change in custody was unlikely to significantly alter the expenses associated with the children, we cannot conclude that the modification of the child support was inherent to the change of custody. Georgakopoulos waived the modification of child support issue by not properly raising it prior to his motion to correct error.

Although Coit argues that the child support issue was waived, she also asks us to determine the appropriate standard to be applied should Georgakopoulos petition to modify child support in the future. We decline to do so. Georgakopoulos has not properly raised the child support modification issue, and he may choose to avoid the in depth discovery of his financial holdings that would likely ensue as a result of him

seeking to modify child support. It is premature to decide under what circumstances Georgakopoulos is permitted to seek a modification of child support.

II. Attorney Fees

On cross-appeal, Coit claims that the trial court improperly denied her request for attorney fees. Here, Coit requested findings of fact and conclusions thereon prior to the hearing. In reviewing findings made pursuant to Indiana Trial Rule 52(A), we first determine whether the evidence supports the findings and then whether the findings support the judgment. Borth v. Borth, 806 N.E.2d 866, 869 (Ind. Ct. App. 2004). On appeal, we may "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). "While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo." Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). A finding or conclusion is clearly erroneous when a review of the evidence leaves us with the firm conviction that a mistake has been made. Id.

Parties drafting dissolution settlement agreements are free to make such continuing financial arrangements as they wish. Pond v. Pond, 700 N.E.2d 1130, 1136 (Ind. 1998). "As a general rule, a contract for attorney fees is enforceable according to its terms unless contrary to law or public policy." Id. "General rules applicable to construction of contracts govern construction of marriage settlement agreements." Kiltz v. Kiltz, 708 N.E.2d 600, 602 (Ind. Ct. App. 1999), trans. denied. "Unless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning." Id.

Coit asserts that she is entitled to attorney fees based on the language in the parties' modification of their settlement agreement, which provides, "In the event that the court finds that either party has intentionally violated a provision of the Final Settlement Agreement or this Agreement, the court shall sanction that party appropriately, which sanctions shall include legal fees, make up time and/or other punishment the court deems appropriate." Appellant's App. p. 43.

Coit argues the evidence was clear that Georgakopoulos intentionally violated a provision of the modification of the settlement agreement, which provided:

> 1. . . . . Changes to the parenting time schedule shall in future be made only in writing and executed by both parents. The requirement may be satisfied by an email from one parent to the other and responsive email from the other parent agreeing to the change. In the absence of a responsive email agreeing to a specific change, the schedule is not changed.

Id. at 41.

Regarding the August 24, 2006, incident, the trial court found:

> 8. The Court finds that there was an altercation in the Orchard School parking lot late in the afternoon on August 24, 2006. It was Mother's day to have the children, she had a meeting scheduled at the school in connection with [L.G.'s] activities. This meeting conflicted with a scheduled soccer practice for [D.G.] on the team which Father coached. By email, Mother declined to have Father take [D.G.] to his scheduled soccer practice. . . . Although there was no agreement, Father persisted in his efforts to alter the schedule and came to the school to try to work the matter out and take [D.G.] to practice. Mother continued to refuse, however, and an argument ensued. In the course of the argument, Father grabbed and shook Mother's arms. [D.G.] was present during the altercation. During the incident, one of the Orchard teachers, Anthony Kline, came into the parking lot and witnessed part of the incident. Mother and [D.G.] went back

> into the school and Father left and conducted the soccer practice. The incident was emotional for the parties and [D.G.].

Id. at 8-10.

Coit claims that all of her attorney fees are a "direct result" of Georgakopoulos violating the terms of the modification of the settlement agreement. Appellee's Br. p. 28. This is not consistent with Coit's hearing testimony, during which she stated:

> The reason why I wanted - - felt that it was time for sole custody to be put in place is because an ongoing abuse and manipulation by Nicholas had escalated to the point where I was no longer safe, no longer did I feel safe to even make an attempt at sole, um, joint custody. And I felt like I had no choice on the basis above that line having been crossed for going forward or continuing to even try to work through a joint custody arrangement. That was the basis on which that was filed.

Tr. p. 114. Coit went on to testify that the termination of the joint custody arrangement was "inevitable" and that the August 24, 2006 incident was the "last straw." Tr. p. 262.

Coit's own testimony shows that her decision to seek a modification of custody was not based primarily on Georgakopoulos's violation of the modification of the settlement agreement. The attorney fees accrued by Coit were not directly associated with Georgakopoulos's failure to obtain a written change in the parenting schedule as described in the modification of the settlement agreement. Coit's attorney fees are associated with a decision to seek a custody modification based on the deteriorating relationship between the parties. The modification of the settlement agreement does not require the payment of attorney fees under such circumstances. The trial court properly denied Coit's request for attorney fees.

Conclusion

Georgakopoulos waived the issue of child support modification by not properly raising it before the trial court. Coit has not established that her attorney fees for the custody modification were associated with an intentional violation of the settlement agreement modification; therefore, she has not shown that the trial court erred by denying her attorney fee request. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.