

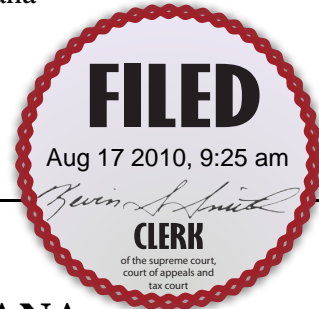
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APPELLANT PRO SE:

N.B.
Gary, Indiana

APPELLEE PRO SE:

J.W.
Medaryville, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE PATERNITY OF: M.B.)
)
N.B.)
)
Appellant-Mother,)
)
vs.)
)
J.W.,)
)
Appellee-Father.)

No. 45A03-0911-PL-536

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Julie N. Cantrell, Special Judge
Cause No. 45D09-0604-PL-50

August 17, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Mother, N.B. (Mother), appeals the trial court's Order modifying the child support obligations and parenting time arrangements for her son, M.B.

ISSUES

Mother presents seven issues on appeal, which we restate as the following four:

- (1) Whether the trial court abused its discretion by making a retroactive adjustment of child-support obligations to reflect the actual parenting time that had been taking place;
- (2) Whether the trial court abused its discretion when it refused to order M.B. to visit Mother;
- (3) Whether the trial court abused its discretion by ordering that Mother meet M.B. at a mid-point between her home and Father's to facilitate parenting time with M.B.; and
- (4) Whether the trial court abused its discretion by allocating the liability of M.B.'s past due dental bills to Mother.

FACTS AND PROCEDURAL HISTORY¹

On April 11, 1991, M.B. was born to Mother and Father, who were not married. Mother was awarded custody. Over the next several years, Mother and Father were engaged in several disputes primarily regarding whether Father had met his support obligations. On September 15, 2007, Father filed a motion to modify custody, and on March 7, 2008, custody was awarded to Father. Sometime thereafter, M.B. began refusing to see his Mother. He

¹ Mother's Appellant's Brief contains several stated 'facts' without citation to the record as required by Ind. Appellate Rule 46(A)(6)(a). We will not consider any contended 'facts' that are unsupported by the record before us.

made excuses, stating that he had work, school, or church related conflicts with the scheduled meeting times.

Beginning on September 25, 2008, Mother and Father filed several competing motions, which culminated in a hearing on July 28, 2009.² The hearing primarily addressed M.B.'s failure to meet with Mother and his poor scholastic achievement.³ M.B. stated that

² At the hearing, the trial court considered the following motions:

- Father's Motion for Payment of Insurance Premiums and Dental Bills, filed September 25, 2008
- Mother's Response Motion regarding Guardian Ad Litem Fees, filed October 28, 2008
- Mother's Motion for Rule to Show Cause alleging Father has not paid \$100.00 per month for medical as previously ordered, filed October 28, 2008
- Mother's Motion for School Expenses or Child Support, filed October 28, 2008
- Mother's Motion to Suspend [M.O.B.'s] driver license filed, December 10, 2008
- Mothers' Petition to Dismiss GAL, Motion for Emancipation and Motion for Rule to Show Cause, filed May 12, 2009
- Father's Motion to Dismiss Mother's Suspension of Driving Privileges and Request Ruling on Summer School, Motion to Produce and Motion For Payment Of Insurance Premiums and Dental Bills, filed May 18, 2009
- Mother's Petition to Compel Discovery, Petition to Set Immediate Hearing for dismissal of GAL and Motion to Deny Motion For Payment Of Insurance Premiums and Dental Bills, filed June 2, 2009
- Mother's Motion for Rule To Show Cause, Motion For Change Of Custody For Repeated Denial Of Parenting Time and Emergency Motion For Change Of Custody and Issues Regarding Summer School, filed June 17, 2009
- Mother's Petition for Outstanding Fees Costs and Bills Owed by Father, filed June 17, 2009
- Father's Motion to Dismiss Rules To Show Cause In Outstanding Fees, Costs and Bills, Motion to Dismiss Change of Custody, Motion to Dismiss Rule to Show Cause and Motion to Dismiss Emergency Motion For Change Of Custody and Issues Regarding Summer School, filed July 1, 2009
- Mother's Motions In Opposition To Motion To Dismiss Rule To Show Cause, Outstanding Fees, Costs and Bills; Opposition To Motion to Dismiss Motion for Change Of Custody For Repeated Denial Of Parenting Time, Motion to Compel Discovery; Opposition To Motion To Dismiss Emergency Motion; Motion In Opposition To Motion To Dismiss Rule To Show Cause, filed July 10, 2009

(Appellant's App. pp. 18-19).

³ At the time of the hearing, M.B. was still in high school, and we assume he has yet to graduate as neither Mother nor Father have informed us that he has graduated.

interaction with Mother adversely affected him, which is the reason he had stopped meeting with her. Mother blamed Father for the lack of visitation, but Father testified that he had encouraged M.B. to meet with his Mother. The trial court expressed its displeasure with M.B.'s academic performance and the state of the relationship between Mother and M.B. The trial court threatened M.B. with removal of his driving privileges if he did not meet with Mother for parenting time, and discussed a potential mid-point between Mother and Father's home where M.B. and Mother could meet.

On August 24, 2009, the trial court issued its Order on Mother and Father's competing motions. The trial court concluded that Mother owed an arrearage on her child support obligation in the amount of \$487.15, and ordered her to pay an additional \$10 per week until the arrearage was paid in full. The trial court found that M.B. had unilaterally decided to end visitation with Mother "because their relationship is horrible." (Appellant's App. p. 20). The trial court required M.B. and Mother to "do all that's necessary to restore their relationship," and designated a midpoint at which M.B. and Mother could meet to facilitate parenting time. (Appellant's App. p. 20). Additionally, the trial court modified the prior support order to reflect the reality that Mother was not providing any overnight parenting time for M.B. Therefore, the trial court removed all credit for overnight parenting time from the calculation of Mother's support obligation and ordered her to pay \$104 per week, effective as of July 31, 2009, three days after the hearing. Mother filed a motion to correct error, which the trial court summarily denied on September 21, 2009.

Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Here, neither Mother nor Father requested findings. When a trial court enters findings *sua sponte*, the specific findings control only as to the issues they cover, while the general judgment standard applies to any issue upon which the court has not made findings. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1254 (Ind. Ct. App. 2010). Specific findings will not be set aside unless they are clearly erroneous, and we will affirm the general judgment on any legal theory supported by the evidence. *Id.* A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *Id.* In reviewing the trial court's findings, we neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* To the contrary, we consider only the evidence and reasonable inferences drawn therefrom that support the findings. *Id.*

We also note that, generally, decisions regarding child support rest within the sound discretion of the trial court. *Painter v. Painter*, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). "We will reverse a trial court's decision in child support matters only for an abuse of discretion or if the trial court's determination is contrary to law." *Id.*

Additionally, when reviewing a trial court's determination of parenting time issues, we grant latitude and deference to the trial court's decision, reversing only when the trial court abuses its discretion. *Gomez v. Gomez*, 887 N.E.2d 977, 983 (Ind. Ct. App. 2008). No abuse of discretion occurs if a rational basis supports the trial court's determination. *Id.* On appeal, it is not enough that the evidence may support some other conclusion, but it must

positively require the conclusion contended for by appellant before there is a basis for reversal. *Id.*

II. *Modification of Support*

Mother contends that the trial court abused its discretion by *sua sponte* adjusting the child support obligations to reflect the actual parenting time that was occurring.⁴ The trial court found that the previous support Order “was based on the Mother having 96 overnights per year and the testimony was that since April 2009, there has been no overnight.” (Appellant’s App. p. 21). The trial court decided that it was appropriate to modify the support Order to address this discrepancy in the amount of overnight parenting time taking place compared to that accounted for in the prior support Order.

Mother cites to *Gielsdorf-Aliah v. Aliah*, 560 N.E.2d 1275 (Ind. Ct. App. 1990) and *O’Campo v. O’Campo*, 597 N.E.2d 1314 (Ind. Ct. App. 1992), to argue that a “[t]rial [c]ourt is not allowed to modify child support *sua sponte* in the absence of any motion whatsoever to modify said child support.” (Appellant’s Br. p. 18). However, as we explained in *O’Campo*, *Aliah* does not prohibit modification of child support obligations in the absence of a pending motion; rather, “[t]he specific holding in *Aliah* is[:] ‘Where parents agree that the needs of their children are being met under an existing order, and neither is petitioning the court for modification, the court is not required to initiate modifications to conform existing orders to guideline amounts.’” *O’Campo*, 597 N.E.2d at 1315. We went on to explain:

⁴ Mother introduces this contention in the “SUMMARY OF ARGUMENT” section of her Appellant’s Brief, but does not revisit this contention in the “ARGUMENT” section of her Appellant’s Brief or in her Reply Brief. Nevertheless, we will address Mother’s contention as if she had fully developed and advanced it.

Implicit in our discussion is the understanding that modification of support in the absence of a petition is permissible under limited circumstances. This may occur when, for example . . . the issue has actually been litigated (i.e. by introducing evidence in that regard), or upon oral motion of either party.

Id. In considering whether it is appropriate to modify a support order *sua sponte*, as with any determination involving support of a minor, “the court’s paramount consideration must be the child’s best interest.” *Id.*

As we have stated, the reason for the trial court’s modification of the child support obligations was the lack of any overnight parenting time between Mother and M.B. A primary focus of the July 28, 2009 hearing was the fact that M.B. had not been visiting with Mother at all, let alone having overnight visits. Therefore, the issue of whether Mother should receive credits for overnight parenting time was actually litigated before the trial court. The trial court essentially determined that, in the best interest of M.B., Mother should not receive credit for nonexistent overnight parenting time, and we conclude that the trial court was well within its discretion when it adjusted Mother’s child support obligation accordingly.

Mother also argues that the modification of support was illegally retroactive. Mother makes her contention in a one sentence statement, and seems to contend that any relating back of a support order should be prohibited, citing “42 U.S.C. 666 (a)(C)” as the sole legal basis to support her contention. (Appellant’s Br. p. 24). It appears that Mother is actually referring to 42 U.S.C. § 666(a)(9)(C), which provides:

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or

through the expedited processes required by paragraph (2), is (on and after the date it is due)—

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State and in any other State, and

(C) *not subject to retroactive modification* by such State or by any other State;

except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

(Emphasis Added). This federal statute is consistent with Indiana law which permits trial courts to relate back modifications of child support only to the date upon which “notice of the petition to modify the support order has been given,” but not earlier. Ind. Code § 31-16-16-6; *see also Becker v. Becker*, 902 N.E.2d 818, 820 (Ind. 2009) (“The general rule in Indiana is that retroactive modification of support payments is erroneous if the modification relates back to a date earlier than the filing of a petition to modify.”).⁵

From our research, it appears that no appellate decision has addressed the issue of whether a modification of support may relate back for any amount of time where no petition to modify support has been filed, but the issue has been actually litigated in accordance with

⁵ In *Becker*, our supreme court noted only two exceptions to this general rule: “(1) when the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree; or (2) the obligated parent takes the child into the obligated parent’s home and assumes custody, provides necessities, and exercises parental control for a period of time that a permanent change of custody is exercised.” *Id.* (citing *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007)).

the holdings of *Aliah* and *O'Campo*. While we can envision equitable reasons that would support the trial court's act of relating the support modification back to shortly after the hearing where the issue supporting modification was actually litigated, retroactive application in the absence of a petition to modify goes against the language of Indiana Code section 31-16-16-6 and the plethora of Indiana appellate decisions consistent with that statute. *See* 14 INDIANA PRACTICE SERIES § 9:80. Prospective Modification Rule. Therefore, we remand for the trial court to adjust its Order modifying the amount of support owed by Mother so that it is prospective in nature only.

III. *Failure to Enforce Parenting Time*

Mother contends that the trial court "abused its discretion when it failed to enforce parenting time." (Appellant's Br. p. 21). Specifically, Mother argues that the trial court should have used its authority over Father to compel him to ensure that M.B. participated in parenting time with Mother.⁶

During the July 28, 2009 hearing, the trial court specifically addressed M.B, stating:

[M.B.], the bottom line is . . . the [c]ourt is still requiring you to attend visitation. The visitation order is still on the table. And if you don't go, you're putting [Father] in jeopardy . . . I can't physically pick you up and carry you and take you there. Okay. [] I'm telling you the state of the law. [] If you don't go, you can put [your Father] in jeopardy. If [Father] does anything to encourage, aid, cause, induce, abet, allow you not to go see her, you're putting him in jeopardy. And I want to make sure you understand that.

⁶ No contention on appeal has been made that the trial court erred by refusing to emancipate M.B., or that the trial court did not have the authority to require M.B. to participate in some form of parenting time, although he was eighteen years old at the time of the July 28, 2009 hearing.

(Tr. p. 47). Furthermore, the trial court explained: “If [M.B.] wants to keep his driver’s license, he has to go to visitation. It’s kind of like a double-edged sword. If he doesn’t want to go to visitation, we’ll just suspend his driver’s license. That’s the way the world works.” (Tr. p. 70).

With these admonishments to M.B., the trial court clearly used its authority to enforce Mother’s parenting time. Therefore, we conclude that Mother’s claim that the trial court “failed to enforce” her parenting time is inaccurate, and her claim that the trial court abused its discretion by doing so must fail.

IV. Place for Parenting Time

Mother next contends that the trial court abused its discretion when ordering that parenting time was to take place at a mid-point between Mother and Father’s homes. She contends that Father chose to move sixty miles away from her home, and she should not have to incur the expense of traveling to exercise her parenting time.

Mother’s contention primarily relies upon a comment to the Indiana Parenting Time Guidelines regarding implementation of parenting time:

Where the distance between the parents’ residences is such that extended driving time is necessary, the parents should agree on a location for the exchange of the child. The cost of transportation should be shared based on consideration of various factors, including the distance involved, the financial resources of the parents, the reason why the distances exist, and the family situation of each parent at that time.

Parenting Time G. I(B)1, Comment 2.

Mother repeatedly protested at the July 28, 2009 hearing that traveling to a mid-point between her and Father's homes for parenting time was an "unreasonable expense." (Tr. p. 79). Mother has not informed us how far from her home the designated mid-point, Demotte, Indiana, is or what her estimated expenses would be to travel to that location. She complains on appeal that she would have to incur costs such as restaurant costs and would have to pay for a motel if she wished to have overnight parenting time. However, considering the state of the relationship between Mother and her now nineteen-year-old son M.B., we find it unrealistic for Mother to expect overnight parenting time. The reality of the situation is that Mother and M.B. will be making progress if they are able to meet for a few hours on some sort of regular basis. In sum, we conclude that the trial court did not abuse its discretion by designating a mid-point for Mother and M.B. to meet at to facilitate parenting time.

V. Dental Bills

Mother also complains that the trial court abused its discretion by ordering her to pay certain dental bills for M.B. Specifically, Mother argues that there was no evidence "that she had been informed of . . . the dental insurance or its terms and therefore could not have complied with terms of which she had no knowledge." (Appellant's Br. p. 26). She further contends that the dental work for M.B. was a necessary treatment that was not being provided by Father, the custodial parent.

Relevant to this issue, the trial court found the following:

The court finds that the Mother owes Dr. Galanos a total of \$1,230.00 for work done in July and August of 2008. Further, the court finds that the Father obtained health and dental insurance on April 15, 2008 and the Mother did not follow the insurance plan regarding the dental work done by Dr. Galanos, but

since there was a benefit to [M.B.] for this work being done and pursuant to the six percent amount that the Father needs to prepay in a calendar year and since this was prorated pursuant to the court order [of] March 24, 2008[,] the Father would owe \$356.85 and . . . the court deducts said amount from the amount due Dr. Galanos and orders the Mother to pay the total due Dr. Galanos.

(Appellant's App. p. 20).

This issue was not addressed by testimony at the July 28, 2009 hearing. Therefore, we must rely upon assertions made by the parties in their pleadings to inform our decision. Father asserted that Mother took M.B. to the dentist when she was exercising her parenting time as the non-custodial parent. Mother did not contact Father, but, rather, Father learned of what was happening when M.B. contacted Father from the dentist's office. Father claims that he then informed the dentist's office of the insurance provider that covered M.B., but did not authorize any dental work for M.B. Because the dentist was not an approved service provider under Father's dental plan, and further because some of the procedures Mother approved were not covered under Father's dental plan, Father's insurance rejected the claim for the majority of M.B.'s dental work.

The Parenting Time Guidelines do not directly address the circumstance where a non-custodial parent takes their child for non-emergency treatment for a child, but do require an exchange of information between custodial and non-custodial parents regarding evaluations or treatment of a child, including dental work. *See* Parenting Time Guidelines I(D)(4). That being said, the onus is upon the parent who holds the insurance policy for the child to "supply the other parent with current insurance cards, an explanation of benefits, and a list of insurer-

approved or HMO-qualified health care providers in the area where each parent lives.” Parenting Time Guidelines I(D)(5). Thus, there is some conflicting overlap in the Parenting Time Guidelines relevant to the trial court’s decision.

Ultimately, we must bear in mind that the trial court has discretion over child support issues, and the liability for M.B.’s uninsured dental is a support issue. *See Painter*, 773 N.E.2d at 282. It is apparent that the trial court decided that Mother should have determined whether M.B.’s dental procedures would be covered by insurance before authorizing them. Because Mother acted without communicating with Father, we cannot say that the trial court abused its discretion by ordering Mother to pay the majority of the bill owed for M.B.’s dental work.

CONCLUSION

Based on the foregoing, we conclude that: (1) the trial court did not abuse its discretion by *sua sponte* modifying the prior child support Order to reflect the fact that Mother was not providing any overnight parenting time, but the trial court should have made this modification prospective only; (2) the trial court did not abuse its discretion by failing to enforce parenting time because it used its discretionary authority to threaten M.B. and his Father with sanctions if M.B. failed to participate in parenting time; (3) the trial court did not abuse its discretion by designating a mid-point for Mother and M.B. to meet for parenting

time; and (4) the trial court did not abuse its discretion by ordering Mother to pay dental bills incurred due to Mother's authorization of work not covered by M.B.'s dental insurance.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and BRADFORD, J., concur.