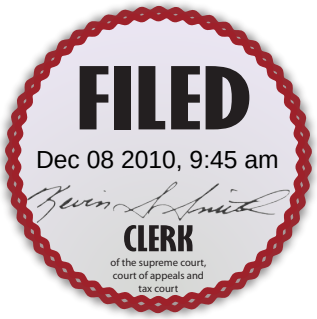

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IN THE COURT OF APPEALS OF INDIANA

TAMRA THOMPSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 64A03-1003-DR-240
	)	
DUANE THOMPSON,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Jeffrey L. Thode, Special Judge
Cause No. 64D02-0709-DR-8881

December 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Tamra Thompson appeals from the decree dissolving her marriage to appellee-respondent Duane Thompson. Tamra argues that the trial court erred in enforcing a partial mediation agreement between the parties and that the trial court abused its discretion in granting the parties joint legal custody of their two daughters, An. and Am. Tamra further contends that the trial court erred in denying her motion to have the guardian ad litem (GAL) removed from the case, the trial court's deviation from the Indiana Child Support Guidelines (Guidelines) was improper, and that the trial court abused its discretion in dividing the marital property. Concluding that the trial court properly enforced the partial mediation agreement and finding no other error, we affirm.

FACTS

The parties were married on May 16, 1992. An. was born in March 1993, and Am. was born in May 1999. At some point, Tamra and Duane separated. On September 20, 2007, Tamra filed a petition for dissolution of marriage.

Throughout the pendency of the divorce proceedings, Tamra accused Duane of being a violent person who posed a serious threat to the children. Tamra asserted that Duane is "manipulative, controlling, and devious, and has a long history of acts of domestic violence." Appellant's App. p. 256. However, the GAL determined that there was no evidence of such conduct, despite his questioning of both Tamra and the children for specific examples of Duane's alleged conduct. In fact, the GAL concluded that Tamra's belief that Duane posed a threat to the children was "speculative at best." Id. at

258. Although Tamra was "terrified for the safety" of Am., the GAL pointed out that the child never reported a single incident in which Duane "behaved in a violent, physically aggressive, or verbally abusive manner" toward the girls. Id. Although Am. was somewhat uncomfortable around Duane, the GAL believed that Tamra had implanted that fear and discomfort. There was also evidence that Am. "has been coached to refuse to converse with her father, and to repeatedly ask that they not have visits." Id. at 260. The GAL determined that if Duane is no longer able to see the children, "permanent damage will result to the parent-child relationship." Id.

In an attempt to amicably resolve matters, Duane and Tamra attended a mediation conference on April 29, 2009, at attorney Mark Roscoe's office. Roscoe explained the mediation process to Tamra and her counsel, stating that

> My role as a mediator is to determine whether I can facilitate such an agreement. But unlike a judge, I can't order you to do anything. Unlike an arbitrator, I can't bind you to anything. So, this is purely a voluntary process, which I urge you to take advantage of.
>
> . . .
>
> Throughout the day I'm going to be taking notes on my notepad evidencing those agreements that we've reached. At the end of the day I'm going to ask you to sign my notes acknowledging those agreements. . . . If I say to you, Tamra, do you agree, and you say yes, and, Duane, you say, yes, I agree, it goes down on my notepad and it will appear on the final agreement. Once you've signed my notes, I will take those notes and reduce them to writing in the form of a court order, I will send them to your attorneys for their review.

Id. at 392.

When Tamra asked whether she was required to present evidence, Roscoe explained that mediation is an informal process where the parties "talk about the issues,"

such as "setting parameters as to how we're going to communicate with respect to the children, what kind of child support's going to be paid, how health insurance issues are going to be addressed, tax exemptions, divisions of property." Id. at 393. Tamra then thanked Rosoce for the explanation. Tamra did not ask any additional questions about the process.

At the conclusion of the mediation, whereupon the parties had agreed on various issues, Tamra's counsel told her that "all right, now the process is, everything we've agreed to so far, now we agree to it by our signature." Id. at 329. Tamra expressly agreed to the notes that Roscoe had taken during the mediation.

Although Tamra signed Roscoe's notes regarding the parties' agreements, she subsequently changed her position and argued that the terms to which the parties had agreed were not suitable. As a result, Tamra refused to sign the typed version of the partial mediation agreement. Thereafter, Duane filed a motion to enforce the agreement, which the trial court granted on November 3, 2009.

Although Tamra still refused to sign the agreement, the trial court entered the divorce decree on March 23, 2010. The decree awarded the parties joint legal custody of the children, with Tamra receiving physical custody, subject to Duane's reasonable visitation rights. The trial court also awarded Tamra child support in the amount of $68.00 per week for Am. The trial court explained that while it was deviating from the child support guidelines, it was reasonable to do so because the oldest child, An., was not living with Tamra. The decree also distributed the marital assets and the responsibility of

the debts that were incurred during the marriage. Finally, the decree incorporated the partial mediation agreement, to the extent that it was not inconsistent with the decree. Tamra now appeals.

DISCUSSION AND DECISION[1]

I. Mediation Agreement

Tamra contends that the trial court erred in incorporating the terms of the partial mediation agreement into the final decree. Specifically, Tamra argues that the agreement must be set aside because it was not memorialized by an executed written document.

In resolving this issue, we initially observe that that the Indiana Alternative Dispute Resolution Rules provide that

> (2) If an agreement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. In domestic relations matters, the agreement shall then be filed with the court. If the agreement is complete on all issues, a joint stipulation of disposition shall be filed with the court. In all other matters, the agreement shall be filed with the court only by agreement of the parties.

Ind. Alternative Dispute Resolution Rule 2.7(E)(2) (emphasis added).

In construing this rule, we note that the circumstances in Reno v. Haler, 734 N.E.2d 1095 (Ind. Ct. App. 2000), were similar to those presented in this case. In Reno, the husband filed a petition for dissolution of marriage and the case was set for

[1] At the outset, we note that Duane has filed a motion to strike portions of Tamra's appendix to her brief regarding a "police incident," several exhibits, and a Financial Declaration Form that had been filed with the trial court. The trial court previously sustained Duane's objection to these documents and denied the entry of these materials into the record. As a result, Duane also requests an award of damages for attorney fees that he incurred in bringing this motion. We grant Duane's motion to strike but deny his request for damages.

mediation. When the mediation concluded, the parties signed the mediator's handwritten notes. Thereafter, the mediator presented the parties with a typewritten agreement setting forth the terms that the parties had agreed upon. Although the wife refused to sign the document, the trial court entered a decree of dissolution, wherein the court approved the mediation agreement that granted the parties joint legal custody of their child. Id. at 1097. The wife appealed, arguing that even though she signed the mediator's handwritten notes, she did not sign the typewritten agreement and could not be bound by its terms. Id. at 1098.

We rejected that claim, observing that "both parties and their attorneys signed the mediator's handwritten notes of the agreement after the mediator and all parties fully reviewed the terms." Id. at 1099. As a result, because the terms of the handwritten notes signed by the parties conformed to the terms of the typewritten agreement that was filed with the trial court, we determined that the agreement was enforceable. Moreover, it was observed that while the "handwritten notes . . . are in a very rough form, they do contain the terms to which the parties agreed. . . . Therefore, Wife is bound by her agreement to joint custody of the Child with Husband." Id.

We also point out that in Spencer v. Spencer, 752 N.E.2d 661, 664-65 (Ind. Ct. App. 2001), the trial court did not enforce a written mediation agreement between a wife and husband, where the wife repudiated the oral agreement during the mediation conference, and the notes were not signed by either party before being reduced to writing. The Spencer court noted that while oral contracts are generally enforceable, there are

sound policy reasons to require that mediated agreements '"be reduced to writing and signed."' Id. at 664 (quoting Vernon v. Acton, 732 N.E.2d 805, 809 (Ind. 2000)). Although seemingly strict in its requirement for a signed written agreement to enforce a mediation settlement agreement, the Spencer court clarified that handwritten notes signed by both parties that contain the terms that the parties agreed to during the mediation conference, are binding as a valid agreement. Id.

In this case, as were the circumstances in Reno, the evidence showed that Tamra was represented by counsel and signed the mediator's notes on her own accord. And after signing the documents, Tamra attempted to avoid the obligations and agreements that she made during the mediation when she refused to sign the typewritten document. Unlike the circumstances in Spencer, Tamra did not repudiate the terms of the mediation agreement and refuse to sign the notes. Because Tamra willingly signed the notes that set forth the terms of the parties' agreements, Tamra cannot successfully assert that the trial court should have revoked the mediation agreement.

In sum, the evidence demonstrates that Tamra was fully apprised of the terms of the mediation agreement. Thus, she is bound by the terms of that agreement as evidenced by her signature on the mediator's handwritten notes. As a result, we decline to set aside the trial court's approval and incorporation of the mediation agreement into the final decree.

II. Custody

Tamra next claims that the trial court erred in granting joint legal custody of their daughters to her and Duane. Specifically, Tamra argues that the trial court abused its discretion in making this determination because there was no evidence establishing that the award of joint legal custody was appropriate.

We initially observe that child custody determinations fall squarely within the trial court's discretion and will not be disturbed except for an abuse of discretion. Clark v. Clark, 726 N.E.2d 854, 856 (Ind. Ct. App. 2000). Thus, we will overturn the trial court's order only if the judgment is clearly against the logic and effect of the facts and circumstances before it. Id. Moreover, we will not reweigh the evidence, judge the credibility of the witnesses, or substitute our judgment for that of the trial court. And conflicting evidence alone will not constitute an abuse of discretion. Id. Finally, orders of joint custody will not be reversed unless the trial court is attempting to impose an intolerable situation upon the parties. Periquet-Febres v. Febres, 659 N.E.2d 602, 605 (Ind. Ct. App. 1996). If both parties have demonstrated a "willingness and ability to communicate concerning the child, then joint custody is appropriate even against the wishes of one parent." Id.

Joint legal custodians "may determine the child's upbringing, including the child's education, health care, and religious training." Ind.Code § 31-17-2-17(a)(2). In making such a determination, the trial court shall consider, among other factors, "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare." I. C. § 31-17-2-15(2).

When the trial judge asked Tamra at the final hearing whether the parties had agreed to custody matters, Tamra responded in the affirmative, stating "joint and legal custody." Appellant's App. p. 39. Tamra also acknowledged that "there will be parenting time, I've not asked that he not see the children at any time." Id. at 44.

The trial court heard evidence from the parties and the GAL indicating that both Duane and Tamra demonstrated a willingness and ability to communicate regarding their children's upbringing. To deny joint legal custody in these circumstances would result in the elimination of Duane's ability to have any meaningful input into important decisions in his daughters' lives. Indeed, Duane and the GAL's testimony establish Duane's strong desire to remain active in the girls' upbringing and development.

While we acknowledge that it is not unusual for divorcing couples to have disagreements and arguments, this record is devoid of "evidence of fundamental differences in child rearing philosophies, religious beliefs, or lifestyles." Walker v. Walker, 539 N.E.2d 509, 513 (Ind. Ct. App. 1989). Finally, because the evidence does not suggest "that child rearing [is] a battleground" between Duane and Tamra, see id., we conclude that the trial court did not abuse its discretion in awarding Duane and Tamra joint legal custody of their daughters.

III. Removal of GAL

Tamra argues that the trial court's refusal to rule upon her objection to the appointment of the GAL was an abuse of discretion. More particularly, Tamra maintains

that the trial court's failure to conduct a hearing on her motion and remove the GAL deprived her of due process of law.

At the outset, we note that Duane did not respond to this argument. Where an appellee fails to respond to an argument by an appellant, we may reverse if we find prima facie error. In re Paternity of J.C., 819 N.E.2d 525, 527 (Ind. Ct. App. 2004). Prima facie errors are those that appear "at first sight, on first appearance, or on the face of it." Id. Application of this standard relieves us of the burden of developing arguments for the appellee. Id. However, we still have the obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. Vukovich v. Coleman, 789 N.E.2d 520, 524 n.4 (Ind. Ct. App. 2003).

It is a well-settled rule of appellate practice that a timely and specific objection must generally be made in the trial court to preserve an alleged error on appeal. Cooper v. State, 171 Ind.App. 350, 355, 357 N.E.2d 260, 263 (1976). A party must object to the evidence at the time it is offered into the record, and a party that fails to make a timely objection waives the right to have the evidence excluded at trial and the right on appeal to assert the admission of the evidence was erroneous. Everage v. N. Ind. Pub. Serv. Co., 825 N.E.2d 941, 948 (Ind. Ct. App. 2005).

In accordance with Indiana Code section 31-17-6-3, "[a] guardian ad litem . . . shall represent and protect the best interests of the child. A guardian ad litem . . . serves until the court enters an order for removal." Moreover, under 31-15-6-1, a trial "court may appoint a (1) guardian ad litem . . . for a child at any time."

In this case, Tamra filed a pretrial motion on August 7, 2009, to have the GAL removed from the case because he "failed to consider evidence favorable to [her] position" in preparing his report. Appellant's App. p. 497. Tamra made general, unsupported allegations in her motion that the GAL was biased, failed to conduct adequate investigations, and engaged in various instances of misconduct. Id. at 498-99. Tamra did not request a hearing on that motion, and she has not directed us to any authority entitling her to petition for the GAL's removal.

Additionally, the only objection that Tamra lodged at the final hearing regarding the GAL was that the trial court's admission of the supplemental report into evidence "ambushed" her. Tr. p. 133. Tamra did not object to the GAL's qualifications or to the testimony that Duane had made no threats toward the children since he became involved in this case. Id. at 122. Tamra also engaged in a lengthy cross-examination of the GAL at the final hearing. Id. at 134-44. At the conclusion of the GAL's testimony, it is readily apparent that the trial court believed the GAL to be a credible witness.

When considering the circumstances here, we must conclude that Tamra has waived the issue regarding the GAL's removal. And waiver notwithstanding, Tamra has failed to establish any basis for the removal of the GAL.

IV. Child Support Guidelines

Tamra next argues that the trial court improperly deviated from the Guidelines. Specifically, Tamra contends that Duane should have been ordered to pay the full amount

of support for An., even though the evidence established that An. stayed with Tamra's parents on school nights.

We note that reversal of a support order that deviates from the appropriate Guideline amount is merited only when the determination is clearly against the logic and effect of the facts and circumstances before the trial court. Kinsey v. Kinsey, 640 N.E.2d 42, 43 (Ind. 1994). We will give due regard to the trial court's opportunity to judge the credibility of the witnesses and will only consider "evidence and reasonable inferences favorable to the judgment." Id. at 44.

In this case, Duane was ordered to pay Tamra $68 per week for Am.'s support. The trial court specifically stated that "this amount represents a deviation from the child support guidelines and is based upon the fact that the parties' oldest child, An., does not presently reside with [Tamra]." Appellant's App. p. 28. Also, according to Tamra, both of the children only reside in the households "on weekends." Id. at 313. Tamra admitted that Am. stays with her parents during the school week. Id.

In light of these circumstances, we cannot say that the trial court's order deviating from the Guidelines is clearly against the logic and effect of the facts and circumstances before it. Indeed, the trial court cited the facts in the decree in support of its reasons for the deviation. As a result, Tamra's claim fails.

V. Division of Marital Property

Tamra next claims that the trial court erred in dividing the marital property. Specifically, Tamra argues that the "deviation from the statutory fifty-fifty split, achieved

by allocating almost all the marital debt to Tamra, was an abuse of the dissolution court's discretion." Appellant's Br. p. 24.

We apply a strict standard of review to a trial court's distribution of property upon dissolution. Smith v. Smith, 854 N.E.2d 1, 5 (Ind. Ct. App. 2006). The division of marital assets is within the sound discretion of the trial court. Id. The party challenging the property division bears the burden of proof and must overcome a strong presumption that the trial court complied with the relevant statutes and considered the evidence on each of the statutory factors. Id. at 5-6. In fact, the presumption that a dissolution court correctly followed the law and made all the proper considerations when dividing the property is one of the strongest presumptions applicable to a court's consideration on appeal. Id. at 6. We will only reverse a property distribution if there is no rational basis for the award. Id.

In dividing the marital estate, Indiana Code section 31-15-7-5 provides that

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> > (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
> >
> > (2) The extent to which the property was acquired by each spouse:
> >
> > (A) before the marriage; or

(B) through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and
(B) a final determination of the property rights of the parties.

In examining the dissolution decree and the evidence that was presented at the final hearing, it is apparent that the trial court considered the above factors in dividing the marital estate. Although Tamra requests that we remand the case to the trial court with instructions that it divide the marital estate "equally," appellant's br. p. 28, the decree establishes that Tamra was awarded a percentage of the marital estate that was actually greater than 50%. Although the trial court ordered Tamra to pay a higher amount of the marital debt than Duane, Tamra fails to acknowledge that she was awarded a greater percentage of the property.

Also, even though Tamra maintains that the trial court erred because it failed to take into account the fact that Duane did not make any mortgage payments on the former

marital residence, she fails to point out that the trial court's order entitled her to have "exclusive possession of the marital residence until it is sold and [will] be responsible for payment of mortgage." Appellant's App. p. 29. Moreover, in exchange for Tamra's responsibility to make the mortgage payments, she was "entitled from the proceeds of the sale [of the residence], to credit for any reduction in the principal balance on the mortgage indebtedness from the date of this decree until the sale of the marital residence." Id. In short, Duane did not contribute to the mortgage payments because the decree required Tamra to retain sole responsibility for such payments, in return for a greater share of the ultimate proceeds of the house.

Finally, although Tamra contends that the trial court did not have an accurate picture of the parties' financial situations in this case, the record shows that the trial court was apprised of all financial information that Tamra considered relevant through her narrative to the trial court, the direct and cross-examination of Duane, and the financial documents that were filed with the court. Id. at 45-56, 75-81.

For all these reasons, we conclude that the trial court did not abuse its discretion in dividing the marital assets. Tamra received a greater amount of the property than did Duane, and she has failed to satisfy her burden that the trial court did not correctly follow the law and consider the relevant statutory considerations when dividing the property.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.