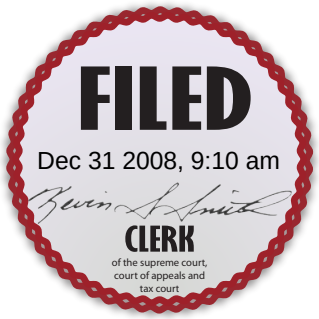

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE PATERNITY OF: B.C. and H.C. (minor children by their next of friend),	)	
DARLENE F. PIRTLE,	)	
Appellant-Respondent,	)	
vs.	)	No. 77A01-0807-JV-344
WILLIAM COLLINS,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE SULLIVAN CIRCUIT COURT
The Honorable Thomas E. Johnson, Judge
Cause Nos. 77C01-0505-JP-79 & 77C01-0505-JP-80

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Darlene Pirtle ("Mother") and William Collins ("Father") had two children together before separating in 2005. Paternity was established, and Father was granted parenting time. However, in 2007, the trial court suspended Father's parenting time after allegations of abuse surfaced. At the 2008 hearing to determine whether to reinstate Father's parenting time, the trial court refused to consider evidence of abuse from before the 2007 hearing and reinstated Father's parenting time. Mother appeals the trial court's decision, arguing that the trial court erred by failing to require the Sullivan County Department of Child Services ("SCDCS") to file a report and by excluding evidence of abuse from before the 2007 hearing. Because we find that Mother did not make a sufficient offer of proof, we affirm.

Facts and Procedural History

After fifteen years of living together, Mother and Father separated in 2005. Mother and Father had two children together, H.C. and B.C. Paternity was established in Sullivan County Circuit Court in 2005. Mother was granted physical custody of the children, while Mother and Father were granted joint legal custody. Father was granted reasonable parenting time and ordered to pay child support. Mother and Father reached and filed with the court a mediated settlement agreement which provided in part that Father would have daily phone parenting time and in-person parenting time on the first and third weekends of each month, with an additional half weekend for months with a fifth weekend.

Mother and Father soon filed cross motions for rule to show cause, each alleging that the other had failed to comply with the terms of the mediated settlement agreement. The court held a hearing on February 27, 2007, and ordered that Father's parenting time be suspended pending an investigation by the SCDCS into allegations that Father had abused the children. The trial court ordered that Father would still have liberal telephone privileges with the children.

The SCDCS filed a report with the trial court on September 17, 2007, explaining that it had not previously filed an investigation report with the trial court because the SCDCS had never received the February 27 order. The SCDCS reported to the trial court that its original records regarding the allegations had been expunged pursuant to its policy that all screened out and unsubstantiated records be expunged six months after the decision to screen out or expunge is approved. The SCDCS concluded that "[a]fter reviewing this [investigation] report, it was determined that this report had either already been investigated and unsubstantiated by the [SCDCS] or did not meet legal sufficiency to investigate." Appellant's App. p. 48.

Father filed a motion to reinstate the previously-entered mediated settlement agreement. The trial court conducted its hearing on Father's motion on February 21, 2008. During the hearing, the trial court refused to consider any evidence of events occurring before the February 27, 2007, hearing. The trial court then granted Father's motion and reinstated the mediation agreement. Mother filed a motion to correct error, which was denied. Mother now appeals.

Discussion and Decision

We initially note that Father has failed to submit an appellee's brief. When an appellee does not file a brief, we have no obligation to undertake the burden of developing an argument on its behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). If the appellant's brief presents a case of prima facie error, we will reverse the trial court's judgment. *Id*. (citing *Gibson v. City of Indianapolis*, 242 Ind. 447, 179 N.E.2d 291, 292 (1962)). Prima facie error in this context is defined as "at first sight, on first appearance, or on the face of it." *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999) (quoting *Johnson County Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind. Ct. App. 1985)). If the appellant is unable to meet this burden, we will affirm. *Trinity Homes*, 848 N.E.2d at 1068.

Upon review of a trial court's determination of a parenting time issue, we reverse only when the trial court manifestly abuses its discretion. *Reno v. Haler*, 734 N.E.2d 1095, 1101 (Ind. Ct. App. 2000), *trans. denied*. No abuse of discretion occurs if there is a rational basis in the record supporting the trial court's determination. *Id*. We will neither reweigh evidence nor judge the credibility of witnesses. *Id*. In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child. *Pennington v. Pennington*, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992), *trans. denied*. Mother argues on appeal that the trial court abused its discretion by failing to require the SCDCS to complete an investigation and report regarding allegations of abuse against Father and by excluding from the hearing evidence of events occurring before February 27, 2007.

As for Mother's first argument, the trial court did not err because the SCDCS did file a report informing the trial court that, although the record from the case had since been expunged, the abuse allegations had either been investigated and found unsubstantiated or did not meet legal sufficiency for an investigation. Appellant's App. p. 48-49. Mother presents no authority demonstrating that the trial court was required to delve further into the abuse allegations that the SCDCS had deemed unsubstantiated or legally insufficient.

As for Mother's second argument, as a general matter, the decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Strack & Van Til, Inc. v. Carter*, 803 N.E.2d 666, 670 (Ind. Ct. App. 2004). A trial court's decision to exclude evidence constitutes an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Southtown Props., Inc. v. City of Fort Wayne ex rel. Dep't of Redev.*, 840 N.E.2d 393, 399 (Ind. Ct. App. 2006), *trans. denied*. Although the statutes governing parenting time do not specifically require a change of conditions to modify parenting time, we have held that evidence of conduct occurring before the last parenting time proceeding is inadmissible.[1] *K.B. v. S.B.*, 415 N.E.2d 749, 754 (Ind. Ct. App. 1981). This principle prevents the relitigation of issues decided at previous hearings. *Id.* However, as explained below, we need not decide today whether the trial court abused its discretion by excluding testimony at the February 2008 hearing.

[1] In contrast, the statutes governing custody modifications specifically provide that evidence relating to a matter occurring before the last custody proceeding between the parties is inadmissible. Ind. Code §§ 31-14-13-9; 31-17-2-21(c). The statutes also provide for an exception to the evidentiary exclusion when the evidence relates to a change in the factors relating to the best interests of the child. I.C. §§ 31-14-13-9; 31-17-2-21(c).

Mother points to two instances in the record where she claims the trial court abused its discretion by excluding testimony regarding events that occurred before the February 27, 2007, hearing. As for the first instance, during her counsel's cross-examination of Father, counsel questioned Father as to whether he ever touched his daughters in a manner they would find threatening and Father responded that he never hurt his children. Counsel then asked, "So you've not laid hands on either one of those children and choked them or shook them, anything like that?" Tr. p. 17.[2] Before Father could answer, Father's counsel objected on the ground that the answering testimony, which was evidence that was part of the unsubstantiated SCDCS investigation, was not relevant. The trial court refused to allow Father to answer, stating to Mother's counsel, "If you've got some witnesses, you can call them and present that evidence. Otherwise, it seems to be a waste of the Court's time for you to just ask him to deny each and every allegation, which he's already said that he did not put his hands on them other than those instances. So therefore, we proceed." *Id.* at 18. Thus, the trial court sustained the objection on the ground that the question was asked and answered because Father denied having ever physically abused the children, and the court expressly permitted Mother to present evidence on this issue by calling other witnesses. The trial court was entitled to sustain Father's objection because Father denied ever abusing the children and was not required to deny each allegation specifically. *See Med. & Prof'l Collection Servs.*, 734 N.E.2d 626, 632 (Ind. Ct. App. 2000). As a result, we cannot say that the trial court abused its discretion by sustaining Father's objection here.

[2] Mother has provided us with two copies of the transcript of the February 21, 2008, hearing. One is labeled as "In re: The Paternity of B.C." The other is labeled as "In re: The Paternity of H.C." The transcripts are identical.

As for the second instance, during her direct examination of Officer Jesse Morin, Mother's counsel asked Officer Morin his name and occupation, then asked, "Officer Morin, on approximately September of 2006, were you investigating any incidences involving [Mother] or [Father]?" Tr. p. 22. Father's counsel objected before Officer Morin could answer, arguing that the answer also involved evidence that was part of the unsubstantiated SCDCS report. The trial court sustained the objection, informing the parties that he refused to consider evidence from before the parties' February 27, 2007, hearing. Mother's counsel responded by arguing, "There is something that was not presented at that hearing, mostly because the actual incident itself was so close to that particular hearing date that it was not available to present at that time. Officer Morin can and is familiar with that particular incident. It happened on February 20th and I would like to ask, since I can't ask him about anything earlier, I would like to ask him about that, Your Honor." *Id.* at 23-24. The trial court still refused on the ground that the evidence was from before the hearing and could have been presented at the February 27, 2007, hearing.

Mother argues that the trial court abused its discretion by excluding this evidence. To preserve an objection to the exclusion of evidence, a party must make an offer of proof. Indiana Rule of Evidence 103(a)(2) requires that the substance of the evidence be made known to the trial court or be apparent from the context within which questions are asked. *Baxendale v. Raich*, 878 N.E.2d 1252, 1258 (Ind. 2008). The purpose of an offer of proof is to enable both the trial court and the appellate court to determine the admissibility and relevance of the proffered testimony. *Gouge v. Ind. Commuter Transp.*

Dist., 670 N.E.2d 363, 368 (Ind. Ct. App. 1996). The failure to make an offer of proof results in a waiver of the asserted evidentiary error. *Id.*

After Father's objection, Mother's counsel asked no further questions of Officer Morin. We can determine from the question and counsel's comments that this officer was investigating Mother or Father in September 2006 and had knowledge of an incident involving either Mother or Father that occurred on February 20, 2007. We can also speculate that because a police officer was involved and Father's counsel argued that the incident was part of the previous SCDCS investigation that Officer Morin had knowledge of some allegation of unlawful conduct. However, we cannot determine without an offer of proof the nature of the excluded evidence sufficient to determine its relevancy. As a result, we cannot say that the trial court committed plain error by excluding this testimony.[3]

Affirmed.

RILEY, J., and DARDEN, J., concur.

[3] Our review of the transcript of the February 21, 2008, hearing reveals an incident during the cross-examination of H.C., who was being questioned about whether her father had lied when he denied abusing her. The trial court interrupted questioning at several points to tell H.C. that it would place her in foster care until she reached the age of eighteen because of her behavior, even though the possibility of removal from the home was not at issue in this case. Although trial court judges require broad latitude to run their courtrooms and maintain discipline and control, and we were not present at the hearing to observe H.C.'s demeanor, we remind the trial court that Judicial Canon 3 requires judges to be patient, dignified, and courteous to witnesses and other individuals with whom the judge deals in an official capacity.