

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Morgan S. Mayer,
Appellant,

v.

Jeffrey L. Mayer,
Appellee.

September 19, 2023

Court of Appeals Case No.
23A-DC-301

Appeal from the DeKalb Superior
Court

The Honorable Douglas M. Fahl,
Special Judge

Trial Court Cause No.
17D02-1712-DC-233

Memorandum Decision by Judge Brown
Judges Crone and Felix concur.

Brown, Judge.

[1] Morgan S. Mayer (“Mother”) appeals the trial court’s order granting sole legal and physical custody of her children to Jeffrey Mayer (“Father”). We affirm.

Facts and Procedural History

[2] Mother and Father are the parents of C.M., born in April 2011, and E.M., born in September 2013. On December 4, 2017, Father filed a Verified Petition for Dissolution of Marriage. On July 17, 2018, the parties filed a Mediated Marital Settlement Agreement indicating they agreed to act as joint legal custodians, Mother would be the primary physical custodian of the children, and Father would have parenting time pursuant to the Indiana Parenting Time Guidelines with certain deviations. On July 17, 2018, the court entered a Decree of Dissolution of Marriage approving the Mediated Marital Settlement Agreement.

[3] On August 20, 2019, Father filed a Verified Motion to Modify Custody alleging Mother had relocated her residence to a different school district, resided in a home with inadequate space for the children, and had failed to make payment for and ensure the children had appropriate daycare. On February 5, 2020, the court appointed Lierin Rossman as guardian ad litem.

[4] On October 28, 2020, Guardian Ad Litem Rossman (“GAL Rossman”) filed a report recommending that the parties retain joint legal custody and that parenting time be modified such that the parties share equal parenting time. GAL Rossman also asserted that there was an investigation by the Department of Child Services (“DCS”) which resulted in substantiation against Mother and

her then boyfriend, Nathan, and that Mother was no longer in a relationship with Nathan. She also stated: “Given the end of the relationship between [Mother] and Nathan, and confirmation that there has not been any contact since they ended their relationship, I believe the children have been safely removed from the situation [in] which DCS investigated.” Appellant’s Appendix Volume II at 77.

[5] On November 10, 2020, the court held a hearing and took the matter under advisement. On December 3, 2020, Father filed a Verified Motion to Reopen Evidence in Matter Under Advisement alleging that Nathan was again staying the night at Mother’s home and Mother’s vehicle was seen outside of Nathan’s home. On December 6, 2020, GAL Rossman filed a motion in support of Husband’s motion asserting that, due to recent developments and Mother’s misrepresentations to her and the court, “it is imperative for the Court to hear additional evidence regarding the developments in the relationship between [Mother] and Nathan.” *Id.* at 93. On December 11, 2020, the court scheduled a hearing for December 29, 2020.

[6] On December 16, 2020, Mother’s counsel, Attorney Kevin Likes, filed a motion to continue the hearing and a motion to withdraw indicating that Mother requested he withdraw as her attorney because she was obtaining new counsel. On December 21, 2020, the court granted the motion to withdraw and denied the motion to continue.

- [7] On December 28, 2020, Mother, *pro se*, filed a letter indicating she did not have legal representation and requesting a continuance of the December 29, 2020 hearing. On December 29, 2020, the court held a hearing on Father’s December 3, 2020 Verified Motion to Reopen Evidence in Matter Under Advisement. On January 14, 2021, Attorney Linda Chrzan filed an appearance for Mother and a Petition for Rule to Show Cause and Contempt Citation alleging Father had interfered with or denied her custodial time, parenting time, and telephone communications.
- [8] On January 29, 2021, the court entered an Order on Custody, Parenting Time, and Child Support. Mother appealed and argued that the trial court abused its discretion when it denied her motion to continue. *See Mayer v. Mayer*, No. 21A-DC-288, slip op. at 2 (Ind. Ct. App. July 26, 2021). This Court held in part that “the denial of a continuance resulted in the deprivation of counsel at a crucial stage of the proceedings as it happened while a petition to modify custody was pending and as the trial court was in the course of determining whether to modify custody from Mother to Father” and that “[s]uch a hearing involved substantial rights of Mother” *Id.* at 14. We concluded the court abused its discretion by denying Mother’s motion to continue and remanded “for a new hearing.” *Id.* at 15.
- [9] On July 29, 2021, Mother filed a Motion for Change of Judge. On July 29, 2021, Father filed an Objection to Mother’s Motion for Change of Judge and a Verified Emergency Motion for Temporary Custody. In August 2021, Special Judge Douglas M. Fahl accepted appointment.

- [10] On October 25, 2021, Mother filed a Verified Petition for Rule to Show Cause and Contempt Citation for Non-Payment of Child Support. On November 19, 2021, Father filed a Response to Contempt and Request for Interim Order on Support.
- [11] On December 17, 2021, Mother filed a Motion to Reopen to Consider Evidence alleging that, after this Court’s reversal, the children began residing primarily with her, and the trial court had ruled to reopen the evidence heard at the November 10, 2020 hearing. Mother requested that the court “also reopen the evidence for the limited time period between December 29, 2020, the date of the last hearing, and the current time.” Appellant’s Appendix Volume II at 127. She also asserted that there had been significant changes in factors impacting the children’s best interest “between December 29, 2020 and the current time.” *Id.*
- [12] On December 29, 2021, Father filed a Motion to Deny Mother’s Request to Reopen Evidence alleging that Mother’s motion to reopen evidence was untimely and her motion was so vague and ambiguous that it prevented him from reasonably preparing a response. On January 12, 2022, the court entered an order denying Mother’s motion to reopen to consider the evidence and indicated that the hearing scheduled for February 4, 2022, remained to hear evidence based upon Father’s December 3, 2020 Verified Motion to Reopen Evidence in Matter Under Advisement, Mother’s January 14, 2021 Petition for Rule to Show Cause and Contempt Citation, and Mother’s October 25, 2021

Petition for Rule to Show Cause and Contempt Citation for Non-Payment of Child Support.

[13] On May 13, 2022, Mother filed a Verified Motion to Continue and Motion to Reopen to Consider Current Evidence Regarding the Children’s Best Interests. She argued that she did “not believe it is equitable for Father to have the opportunity to reopen the evidence, but for her not to be allowed the same opportunity.” *Id.* at 138. She requested “an Order reopening the evidence between December 29, 2020, and the current time.” *Id.* at 139.

[14] On May 18, 2022, Father filed a response arguing that “Mother did not file any request to reopen evidence until the case management conference on December 17, 2021 – five months after the Order from the Court of Appeals” and “Mother did not file any motion to correct error or request for certification of an interlocutory appeal after this Court’s denial of her request on January 12, 2022 and now seeks to continue the hearing that is fast approaching.” *Id.* at 170.

[15] On May 23, 2022, the court entered an Order on Mother’s Motion for Continuance which stated:

The Court is presented with the most unique and frustrating scenario that the Court has faced in twelve years of serving on the Bench. The denial of a continuance and subsequent ruling by the Indiana Court of Appeals has placed the Court in an incredibly difficult situation.

The Court grants the motion for continuance. The Court sets the matter for one day. The Court will consider [Mother’s] Motion

to Reopen Evidence up to and including the current circumstances.

1. [Mother] will have from 8:30 a.m. to 11:00 a.m. to present her case in chief.
2. [Husband] will have from 11:00 a.m. to 12:00 p.m. to conduct cross-examination.
3. There will be no re-direct.
4. [Husband] will have from 1:00 p.m. to 3:00 p.m. to present his case in chief.
5. [Mother] will have from 3:00 p.m. to 4:00 p.m. to conduct cross-examination.

Each party shall provide detailed trial briefs no later than fourteen (14) days prior to the hearing date.

The Court will only be ruling whether to enforce the prior Court's Order or to re-open the evidence.

Id. at 172.

[16] On May 25, 2022, the court scheduled a hearing for August 5, 2022. On July 26, 2022, GAL Rossman filed a Supplement to Initial Guardian Ad Litem Report. On August 5, 2022, counsel for the parties met in chambers and agreed to continue the issues of child support, medical expense payments, and child

support arrearages to a future hearing date. The court held a hearing on the matters not otherwise agreed to be continued.¹

[17] On September 14, 2022, GAL Rossman filed a Motion to Reopen Evidence in Matter Under Advisement alleging that she learned of new allegations being investigated by DCS regarding Mother, Nathan, and the children. On September 15, 2022, Father filed a Verified Emergency Motion for Physical Custody.

[18] On September 27, 2022, the court entered an Order Granting Guardian Ad Litem's Motion to Reopen Evidence in Matter Under Advisement and scheduled a hearing for November 30, 2022, "so that all newly discovered evidence may be heard." Appellant's Appendix Volume III at 34.

[19] On November 21, 2022, GAL Rossman filed a Second Supplement to Initial Guardian Ad Litem Report. On December 30, 2022, the court entered an order continuing the hearing from November 30, 2022, to January 6, 2023, due to the trial judge's unexpected illness.

¹ Mother's notice of appeal requested a transcript of only the January 6, 2023 hearing, and the record does not contain a transcript of the August 5, 2022 hearing. In its January 13, 2023 order, the trial court stated:

43. On August 5, 2022, prior to the receipt of evidence, counsel for the parties met in chambers and agreed to continue the issues of child support, medical expense payments, and child support arrearages to a future hearing date.

44. Trial to the bench was held on August 5, 2022 with respect to the matters that remained in dispute between the parties and not otherwise agreed to be continued. The parties were duly sworn upon their oath and testimony received subject to each party's right of cross-examination.

Appellant's Appendix Volume II at 30.

[20] On January 6, 2023, the court held a hearing. At the beginning of the hearing, the court stated:

We are here today based on a Motion to Re-Open Evidence that was filed by the Guardian Ad Litem in this matter actually, and then I believe we have an Emergency Motion for Custody with regard to [Father] filing that. . . . I want to make it very clear that I outline the issues that are in front of us. The purpose of the Motion to Re-Open Evidence is to either address a new event that has occurred, for instance, something significant happening since the hearing was taken under advisement, or to address information that was not available to the Parties at the time with that, even with due diligence. And looking at this, I want to limit this to two things. We're going to talk about number one, is there or is there not a substantiated DCS case and two, has [Nathan] been drinking around the children. And when I say that, I'm only going to hear evidence back to August 5, 2022. Anything before that should have been brought to the Court's attention prior to, or at the last hearing. So that is what we are going to be listening to today. So anything outside of that is not going to be heard, so before you call a witness, I'm going to order that you tell me the name of the witness, the subject they are going to testify to, and how it relates to those issues. I will then decide if that witness is going to testify or not testify.

Transcript Volume II at 4. Mother's counsel asked if the court was going to "look at things that have occurred since" August 5th, and the court stated: "No. That's not, that's not been a motion that, that motion was not provided to me to consider that information." *Id.* at 5. Mother's counsel stated: "I'm sorry, what I don't understand is if we are saying there is a substantiation, wouldn't it be relevant on how the children have done since August 5th?" *Id.* The court

stated: “No. Not for purposes of this hearing.” *Id.* at 6. Mother’s counsel stated: “Okay.” *Id.* The court clarified:

This is only to address these two issues. It’s not a re-hash of how the children are doing. I’ve got those matters under advisement. I had the opportunity to observe the witnesses. I had the opportunity to observe their credibility. I’ll make those determination at that time. [GAL Rossman] filed a motion on specific issues and that’s what I’m going to stick to today.

Id. Mother’s counsel stated: “Okay.” *Id.* The court then heard testimony which generally focused on events occurring after August 5th. Husband’s counsel presented the testimony of Mother, Nathan’s children, and Family Case Manager Michelle Hirsch, who testified that an allegation of sexual abuse against Nathan was substantiated by DCS. Wife’s counsel presented the testimony of Nathan’s father, Nathan’s addictions counselor, Nathan, Husband, and Wife. The court also heard testimony from GAL Rossman.

[21] On January 13, 2023, the court entered a thirty-three page order which concluded that a modification of custody was in the best interest of the children and that there was a substantial change in multiple factors addressed in Ind. Code § 31-17-2-8, awarded Father sole legal and physical custody, and granted Mother parenting time in accordance with the Indiana Parenting Time Guidelines.

Discussion

[22] Mother argues that the trial court erred by only re-opening evidence in part and contends that her due process rights were violated. She asserts she was “deprived a fundamentally fair hearing as to the contested custody issues for the reasons neither she nor her counsel were permitted to adduce any evidence” other than that relating to the “discrete parameters articulated by the Trial Court upon commencement of [the] January 6, 2023, hearing.” Appellant’s Brief at 22.

[23] Generally, Ind. Code § 31-17-2-21 provides a court may not modify a child custody order unless modification is in the child’s best interests and there is a substantial change in one or more of the factors the court may consider under Ind. Code § 31-17-2-8. We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to trial judges in family law matters. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). We set aside judgments only when they are clearly erroneous and will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment. *Id.* “[W]e are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence” *Id.* (citation omitted). To the extent Mother does not challenge the trial court’s findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007), *trans. denied*.

[24] With respect to Mother’s due process argument, “[a]s a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court.” *GKC Ind. Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Further, the Indiana Supreme Court has held that “a party on appeal may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal.” *In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016). Here, Mother did not assert to the trial court that she was denied due process, and the issue on appeal is waived. *See id.* (finding the mother waived her due process claim).

[25] Waiver notwithstanding, reversal is not warranted. “Generally stated, due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses.” *McClendon v. Triplett*, 184 N.E.3d 1202, 1210 (Ind. Ct. App. 2022) (quoting *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008) (quoting *Ind. State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp.*, 842 N.E.2d 885, 889 (Ind. Ct. App. 2006))), *trans. denied*.

[26] The record reveals that, after the December 29, 2020 hearing at which Mother was not represented by counsel and this Court’s July 26, 2021 decision which remanded for a new hearing, the trial court held a hearing on August 5, 2022, at which Mother was represented by counsel. During the January 6, 2023 hearing, the trial court indicated that it would hear certain evidence related to the time period since August 5, 2022. Mother does not point to any offer of proof in which she alleged what other evidence she would have presented. She

also does not specifically assert that the evidence presented was insufficient to support the court's order. We cannot say Mother was denied due process, that the court abused its discretion, or that its judgment is clearly erroneous.

[27] For the foregoing reasons, we affirm the trial court's order.

[28] Affirmed.

Crone, J., and Felix, J., concur.