MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

David J. Therkelsen,
Appellant-Respondent,

v.

Michelle L. Therkelsen,
Appellee-Petitioner

February 16, 2023

Court of Appeals Case No. 22A-DC-163

Appeal from the Allen Circuit Court

The Honorable Ashley N. Hand, Magistrate

Trial Court Cause No. 02C01-1908-DC-994

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

[1] David J. Therkelsen (Father), pro se, appeals the decree dissolving his marriage to Michelle L. Therkelsen (Mother). Specifically, he appeals the trial court's determination of child custody as well as its denial of his request for attorney's fees. We affirm.

Facts and Procedural History

[2] Father and Mother were married in 2007. This was the third marriage for both parties. Prior to the marriage, in December 2006, the parties entered into a premarital agreement that provided for the division of assets in the event of a dissolution of the marriage. Father and Mother had one child during the marriage, daughter J.T. (Child), born on June 11, 2008.[1] The record indicates that the parties had an extremely tumultuous relationship that included numerous verbal altercations and multiple physical altercations. There is no question that Child witnessed some of these altercations. Mother was Child's primary care provider during the marriage and, between the parties, Mother developed a stronger bond with Child than Father did. Mother and Child took many vacations separately from Father. Father has said things overheard by Child such as that he "wished she had never been born" or that he and Mother

[1] The evidence indicates that Father had one child from his first marriage, a daughter, who is now thirty-five years old and from whom Father has been estranged since her early teenage years. Father was not invited to her high school graduation or her wedding. Father claims the estrangement from this daughter is due to parental alienation by his first wife. Mother has five daughters from her previous two marriages. Mother has a normal and healthy relationship with these adult women.

"should have never had children." Appealed Order at 4. Father has advised Child that she would never go to heaven because she is a sinner. Father has also made negative comments to Child about her weight and the food she eats.

[3] Mother filed a petition for dissolution of marriage on August 14, 2019. Mother sought and obtained an ex parte order of protection on August 13, one day before filing the dissolution action, because Father had threatened to shoot her if she ever tried to divorce him. Father has a substantial number of firearms, he carries a handgun in his vehicle, and he had told Mother on a prior occasion that "she was going to hell." *Id.* at 8. A provisional dissolution hearing was held in September 2019. The trial court ordered that Mother would have temporary primary physical custody of Child with the parties having joint legal custody.

[4] In November 2020, Mother filed a motion for declaratory judgment seeking an order from the court declaring the parties' premarital agreement valid and enforceable. Father opposed the motion. The trial court issued an order in December 2020, determining that the agreement was indeed valid and enforceable. Father filed a petition with the trial court to certify the matter for interlocutory appeal, which the trial court granted. However, this Court subsequently denied Father's motion to accept jurisdiction in February 2021.

[5] A five-day dissolution evidentiary hearing was held in June 2021. Prior to the hearing, Father requested a custody evaluation, and he selected Dr. John Newbauer to perform the evaluation. Mother did not object to the evaluation or the selection of Dr. Newbauer. Father had made allegations against Mother

accusing her of parental alienation, enmeshment, mental disorder, and alcoholism. Dr. Newbauer testified that he was aware of Father's allegations against Mother, but he found nothing to support the allegations in the testing, interviews, and evaluation he performed. The evaluation established that Child views Mother as the "preferred parent" as it relates to final custody, and it was Dr. Newbauer's opinion that it would be in Child's best interest to be placed with Mother as sole custodian. *Id*. at 20.

[6] Father presented the testimony of other experts to discredit Dr. Newbauer's opinion, especially his opinion regarding the lack of parental alienation. However, none of the experts who testified in this case definitively offered or could confirm a diagnosis of parental alienation. All experts who testified in this case agreed that "this is a high conflict case which makes joint legal custody impractical." *Id.* at 13.

[7] The trial court issued its dissolution decree on August 30, 2021. The decree consists of fifty-eight pages of extensive findings of fact and conclusions thereon. In relevant part, the trial court awarded Mother primary physical and sole legal custody of Child. Father was granted parenting time in accordance with the Indiana Parenting Time Guidelines. Both parties requested an assessment of attorney's fees against the other, and Father also requested that Mother reimburse him for the expense of two expert witnesses he retained for

trial. The trial court denied both parties' requests and ordered that the parties pay their own fees.[2]

[8] Father filed a motion to correct error challenging the trial court's decision regarding the property division specific to the ownership of certain precious metals. Mother filed a motion to correct error on the same issue. The trial court subsequently granted Mother's motion and denied Father's motion. This appeal ensued.[3]

Discussion and Decision

[9] Father appeals the trial court's dissolution decree, which includes extensive findings of fact and conclusions thereon. Our supreme court has explained that an appellate court will not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

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[2] The trial court did order Mother to pay fifty percent of the expense Father incurred as a result of Dr. Newbauer's custody evaluation.

[3] We note that Mother asserts that Father did not preserve any of the issues raised in his appellant's brief for our review because he did not first raise them to the trial court in his motion to correct error. In addition to arguing that Father has waived these issues on appeal, Mother seeks appellate attorney fees for having to defend these issues. However, Father was not required to raise these issues in his motion to correct error and they are still available for our review. *See Burelli v. Martin*, 130 N.E.3d 661, 671 (Ind. Ct. App. 2019) (citing Ind. Trial Rule 59(A), which provides that only newly discovered material evidence and a claim that a jury verdict is excessive or inadequate must be presented by a motion to correct error; "[a]ll other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief."). Indeed, it is well understood that "a party filing a motion to correct error need not raise every issue in the motion that will be raised on appeal," *Dixon v. State*, 566 N.E.2d 594, 595 (Ind. Ct. App. 1991), *trans. denied*, and "a party does not waive" his right to appeal an issue by omitting the issue from his motion to correct error. *Marsh v. Dixon*, 707 N.E.2d 998, 1000 (Ind. Ct. App. 1999), *trans. denied*. Accordingly, we will address Father's claims on the merits, and we deny Mother's request for appellate attorney fees on this basis.

judge the credibility of the witnesses. *Steele-Giri v. Steele*, 51 N.E.3d 119, 123-24 (Ind. 2016). Additionally,

> there is a well-established preference in Indiana for granting latitude and deference to our trial judges in family law matters. Appellate courts 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. On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal. Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.

Id. (citations and quotation marks omitted).

[10] We note that Father is proceeding pro se on appeal. A pro se litigant is held to the same legal standards as a licensed attorney. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so.[4] *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App.

[4] Father's brief is deficient in many respects. First, his statement of the issues does not concisely describe each issue presented for review as required by Indiana Appellate Rule 46(A)(4). Moreover, contrary to Indiana Appellate Rule 46(A)(6)(c), Father's twenty-five-page statement of facts is argumentative, rambling, and contains numerous subsection titles that are entirely inappropriate for a legal brief submitted to a judicial tribunal. *See, e.g.*, Appellant's Br. at 8-33 (containing the following "fact" subsections: "I Don't Love Him Anymore"; "He Did What?!"; "Um…But It is Detective Work"; "It's Child Psychological Abuse"; "Quacks Like a Duck"; "Two Boxes of Wine and Hummels to Boot"). Finally, many of Father's contentions in his argument section are unsupported by cogent reasoning as required by Indiana Appellate Rule 46(A)(8)(a).

2016). We will not become an advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood. *Id*. at 984. In other words, this Court owes Father no inherent leniency simply by virtue of being self-represented. *Zavodnik*, 17 N.E.3d at 266.

Section 1 – The trial court did not abuse its discretion in awarding Mother sole legal and primary physical custody of Child.

[11] Father first contends that the trial court erred in awarding Mother sole legal and primary physical custody of Child. In an initial custody determination, both parents are presumed equally entitled to custody, and the trial court shall "enter a custody order in accordance with the best interests of the child." Ind. Code § 31-17-2-8. In determining the best interests of the child, the court shall consider all relevant factors, including the following:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parent or parents;
>
> (B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, …

(9) A designation in a power of attorney of:

(A) the child's parent; or

(B) a person found to be a de facto custodian of the child.

Id. A trial court's decisions on child custody are reviewed only for an abuse of discretion. *Sabo v. Sabo*, 858 N.E.2d 1064, 1068 (Ind. Ct. App. 2006).

[12] Our review of the record indicates that the trial court thoroughly considered each of the relevant factors in determining custody in this case, and Father does

not suggest otherwise. As noted above, this is a high-conflict case that would not be conducive to joint custody, and thus each party sought sole legal custody. Father does not specifically challenge the factors, such as Child's age and sex, Child's wishes, and the interaction and interrelationship of Child with both parents, that clearly favor Mother. Still, Father disagrees with the trial court's ultimate conclusion regarding Child's best interests and argues that the evidence regarding "factors five (5), six (6) and seven (7) … vigorously points to [Father] as the healthier, mentally stable and sober parent, and the one to provide [Child] with a safe haven to love both parents." Appellant's Br. at 38-39.

[13] The evidence regarding factors 5, 6, and 7 supports the trial court's determination to grant Mother primary physical and sole legal custody of Child. Regarding factor 5, the trial court found that Child has done quite well in Mother's home in accordance with the provisional custody order. The record reveals that she is doing well in school, has friends, and is well adjusted. Father does not currently live in Child's school district and was unsure if he could afford to relocate. Regarding factor 6, the mental and physical health of all individuals involved, Father's claims of Mother suffering from an unnamed mental disorder and alcoholism are unsubstantiated by the evidence presented. On the other hand, Father's erratic and sometimes troubling behavior toward Child over the years, not to mention his repeated refusals to engage in therapy with Child, does not indicate that he prioritizes Child's mental health. Regarding factor 7, there is evidence of a clear pattern of domestic or family

violence between these parties, and Father has a pattern of anger and threats of violence toward other family members that was corroborated by the testimony of his own mother.

[14] The crux of Father's complaint on appeal is simply that the trial court should not have relied on the opinion of Dr. Newbauer, the custody evaluator specifically chosen by him. While Father sought to discredit Dr. Newbauer's custody evaluation through the testimony of other experts, it is well settled that "the fact-finder is not required to accept the opinions of experts regarding custody[,]" and that would include any of the experts presented. *Maddux v. Maddux*, 40 N.E.3d 971, 980 (Ind. Ct. App. 2015) (citing *Clark v. Madden*, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000)). Moreover, although the trial court noted Dr. Newbauer's custody opinion, the court made clear in its extensive findings that such opinion was only a partial rationale to support its custody determination and that the court based its determination primarily on the testimony of the parties, their witnesses, and the court's own observations. In other words, even without Dr. Newbauer's opinion, the trial court had ample

evidence before it to support its custody determination in favor of Mother.[5] The trial court did not abuse its discretion.

Section 2 – The trial court did not err in denying Father's request for attorney's fees.

[15] Father next challenges the trial court's denial of his request for attorney's fees.[6] We review a trial court's decision to award or deny attorney's fees in connection with a dissolution decree using an abuse of discretion standard. *Ahls v. Ahls*, 52 N.E.3d 797, 802-03 (Ind. Ct. App. 2016). The trial court has broad discretion in assessing attorney's fees, and we will reverse only if its decision is clearly against the logic and effect of the facts and circumstances before it or if it misapplies the law. *Id*. Pursuant to Indiana Code Section 31-15-10-1, a trial court may order a party in a dissolution proceeding to pay a reasonable portion

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[5] Despite choosing Dr. Newbauer to perform the custody evaluation, Father sought to have the evaluation excluded from evidence pursuant to Indiana Evidence Rule 702, and he maintains on appeal that the trial court abused its discretion in admitting the evaluation. Because any error in the admission of the evaluation would have been harmless in light of the overwhelming evidence supporting the trial court's custody determination, we decline to further address Father's argument in this regard. *In re Adoption of M.A.S.*, 815 N.E.2d 216, 223 (Ind. Ct. App. 2004) (improper admission of evidence is harmless error when the judgment is supported by substantial independent evidence to satisfy reviewing court that there is no substantial likelihood that questioned evidence contributed to the judgment).

[6] Father confusingly frames this issue in the context of the parties' premarital agreement by arguing that the court's decision to deny him fees was based upon an erroneous pretrial determination that the parties' premarital agreement was valid and enforceable. We note that Father does not dispute any portion of the property settlement determined in accordance with the premarital agreement. Rather, Father's only challenge to the enforceability of the premarital agreement is based on the trial court's alleged erroneous reliance "on a provision in the disputed [agreement] barring the award of attorney fees." Appellant's Br. at 6. But our review of the record reveals that the trial court only relied on the "disputed" premarital agreement to deny Mother's request for attorney's fees insofar as she accused Father of dragging out the dissolution proceedings and causing her to incur extra fees when he decided to "challenge the validity and enforceability of the [premarital agreement]." Appealed Order at 39. Father's request for fees, however, was denied on a wholly separate basis. Accordingly, we need not address the trial court's determination regarding the enforceability of the premarital agreement, as it is irrelevant to the attorney fee issue raised by Father.

of the other party's attorney's fees, after considering the parties' resources, economic condition, ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award. *Id*. In considering these factors, we promote the legislative purpose for awarding attorney's fees, that is, to ensure that a party in a dissolution proceeding who could not otherwise afford an attorney is able to retain representation. *Id*.

[16] Here, the trial court concluded that

> both parties have incurred substantial attorney fees, and expert fees relating to various issues in this case. In considering all relevant factors including the economic circumstances of the parties, the resources available to both parties, whether the party had to defend an unmeritorious claim, the results achieved by the parties, and the complexity of the issues, the Court concludes each party shall pay their own attorney fees.

Appealed Order at 51. This conclusion was entirely reasonable in light of the parties' comparable economic circumstances and available resources. Simply put, Father has failed to establish that the trial court abused its discretion when it denied his request for attorney fees. The judgment of the trial court is affirmed.

[17] Affirmed.

Robb, J., and Kenworthy, J., concur.