

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



---

ATTORNEY FOR APPELLANT

Joanne M. Kolbe  
Warsaw, Indiana

---

## IN THE COURT OF APPEALS OF INDIANA

---

Tarah L. Weaver,  
*Appellant-Petitioner,*

v.

Samuel B. Weaver,  
*Appellee-Respondent.*

August 30, 2023

Court of Appeals Case No.  
22A-DC-2111

Appeal from the Kosciusko  
Superior Court

The Honorable Karin A. McGrath,  
Judge

Trial Court Cause No.  
43D01-1904-DC-154

**Memorandum Decision by Judge Kenworthy**  
Judges Crone and Felix concur.

**Kenworthy, Judge.**

## Case Summary

- [1] In this parenting time case, the trial court ordered Tarah Weaver (“Mother”) to pay Samuel Weaver (“Father”) attorney fees, finding Mother had filed several untimely and defective motions. Mother appeals this order.<sup>1</sup> We affirm.

## Facts and Procedural History

- [2] The parties divorced in September 2019. Father moved to modify parenting time in April 2020. The trial judge overseeing the post-dissolution proceedings passed away in December 2020. A judge *pro tempore* served until Karin McGrath was sworn in on June 1, 2021. In September 2021, the parties agreed to set hearing for January 13, 2022.
- [3] On the morning of the hearing, Mother’s counsel, Joanne Kolbe, contacted the trial court and requested a continuance due to Kolbe’s sudden illness. Father’s counsel, George Guido, had already arrived for the hearing. During an unrecorded, un-transcribed telephone conversation among the judge and both counsel<sup>2</sup> about the reason for the request, the trial court granted the continuance

---

<sup>1</sup> Mother does not challenge the trial court’s parenting time and child support orders. Father does not participate in this appeal.

<sup>2</sup> Indiana Appellate Rule 31 outlines a process for providing a statement of evidence when no transcript is available:

**A. Party’s Statement of Evidence.** If no Transcript of all or part of the evidence is available, a party or the party’s attorney may prepare a verified statement of the evidence from the best available sources, which may include the party’s or the attorney’s recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be submitted with the motion.

and rescheduled the hearing for February 15. In setting the hearing, the court advised counsel “that should they be unable to appear on said date and time, they shall have a surrogate attorney duly prepared and available to appear.”

*Appellant’s App. Vol. 2* at 10. Later, Father filed a motion for reimbursement of attorney fees associated with the late-requested continuance.

[4] The day before the scheduled February 15 hearing, Mother filed a motion to modify the divorce decree to adopt the updated version of the Indiana Parenting Time Guidelines. Mother also filed a motion for change of venue as to the judge but did not allege partiality or bias. The trial court heard these motions before the hearing already scheduled for February 15<sup>3</sup> and issued an order the same day. The trial court denied the Motion for Change of Judge as

---

**B. Response.** Any party may file a verified response to the proposed statement of evidence within fifteen (15) days after service.

**C. Certification by Trial Court or Administrative Agency.** Except as provided in Section D below, the trial court or Administrative Agency shall, after a hearing, if necessary, certify a statement of the evidence, making any necessary modifications to statements proposed by the parties. The certified statement of the evidence shall become part of the Clerk’s Record.

**D. Controversy Regarding Action of Trial Court Judge or Administrative Officer.** If the statements or conduct of the trial court judge or administrative officer are in controversy, and the trial court judge or administrative officer refuses to certify the moving party’s statement of evidence, the trial court judge or administrative officer shall file an affidavit setting forth his or her recollection of the disputed statements or conduct. All verified statements of the evidence and affidavits shall become part of the Clerk’s Record.

Ind. Appellate Rule 31. Mother submitted a verified statement of the evidence regarding the unrecorded telephone conversation. *Appellant’s App. Vol. 2* at 204–08. The trial court refused to certify Mother’s submission and provided a response thereto, along with its own affidavit. *Id.* at 209–19. Mother’s and the trial court’s verified statements recount contradictory events and personal thoughts outside the telephone conversation at issue. The difficulty of untangling these submissions upon appellate review underscores the importance of recording all proceedings.

<sup>3</sup> Argument regarding these motions occurred in chambers prior to the hearing. Mother did not submit a statement of evidence pursuant to Appellate Rule 31 regarding these unrecorded arguments.

facially untimely. The court denied the Motion to Modify Decree because the issue of parenting time was already specifically before the court through Father's Motion to Modify Parenting Time.

[5] The hearing on parenting time and related issues then began on February 15 and concluded on March 22, 2022.<sup>4</sup> Both parties filed proposed findings of fact and conclusions of law on April 29 as ordered by the court. Along with her proposed findings, Mother filed an unverified Motion to Consider New Evidence along with Exhibits. In her motion, Mother alleged she learned shortly after the hearing that Father's work shift had changed. Mother claimed the shift change might affect the court's decision regarding parenting time. Mother did not request a hearing.

[6] Father filed a verified response to the Motion to Consider New Evidence, asserting Father's shift change was temporary, his availability for parenting time presented at trial remained unhindered, and the relief requested remained unchanged. Father objected to the Motion to Consider New Evidence as procedurally deficient because it was unverified. Father also filed a Request for Attorney Fees under the statute for awarding fees in cases involving custody

---

<sup>4</sup> Exhibits containing personal information were not redacted when admitted into evidence and were therefore excluded in whole from Public Access on appeal contrary to Indiana Access to Court Records Rule 5(C)(1). Rule 5(C)(1) provides, "Unless necessary to the disposition of the case, the following information shall be redacted, and no notice of exclusion from Public Access is required: (a) Complete Social Security Numbers of living persons; (b) Complete account numbers, personal identification numbers, and passwords."

and visitation rights<sup>5</sup> and the general attorney fee statute.<sup>6</sup> The court scheduled a telephonic attorney conference for May 13, 2022.

[7] On May 10, Mother filed a Verified Addendum to the Motion for Consideration of New Evidence, reasserting Father’s shift change affected his availability for parenting time. During telephonic attorney conference on May 13, the parties agreed to set further hearing to allow supplementation of evidence on the issue of Father’s schedule. This hearing was held on May 18, 2022.

[8] On June 30, 2022, the trial court issued an order disposing of all pending motions. The trial court granted Father’s Request for Attorney Fees as follows:

49. Father and his Counsel appeared for hearing on January 13, 2022 to discover that Mother’s Counsel was requesting a continuance due to being up all night with an illness. Counsel for Petitioner did not attempt to reach out to Counsel for Father by way of email or otherwise to advise of same prior to his approximate 1-hour trip to Kosciusko County for the hearing that morning. The Court finds it reasonable to attribute \$750.00 to Father in unnecessary attorney fees as a result.

\* \* \*

---

<sup>5</sup> Father cites Indiana Code Section 31-17-7-1, which applies—in cases where parents were not married—to proceedings regarding child custody, parenting time rights, and appointment of guardians ad litem. The appropriate statute for dissolution proceedings is Indiana Code Section 31-15-10-1 (1997), which is otherwise identical to Section 31-17-7-1.

<sup>6</sup> Ind. Code § 34-52-1-1 (1998).

53. Prior to submission of evidence on February 15, 2022, the Court addressed the issue of Mother’s Motion to Modify Decree and Motion for Change of Venue, and found that Mother’s Motion to Modify Decree filed on February 14, 2022 did not introduce any new matters not already before the Court. As such, the Court found Mother’s Motion for change of Venue as to Judge was without merit, and the Court denied said Motion as untimely. The Court finds it reasonable to attribute \$500.00 in unnecessary attorney fees to Father in reviewing the motions, preparing for argument, and engaging in argument in chambers.

54. After two (2) days of evidence on February 14, 2022 and March 22, 2022, Mother filed her Motion to Consider New Evidence on April 29, 2022, claiming Father was demoted and alleging a change in Father’s work schedule such that prior evidence and arguments were no longer applicable, and that it was critical that the Court hear new evidence. The Court scheduled the matter for further hearing on May 18, 2022 and testimony ultimately revealed that Father was not demoted and the change in his work hours did not affect his ability to engage in the parenting time he originally requested. The Court finds it reasonable to attribute \$1000 in unnecessary attorney fees to Father for preparing his response, preparing for hearing, and traveling to and litigating at hearing.

*Appellant’s App. Vol. 2* at 21–22. Mother now appeals the trial court’s order for her to pay a portion of Father’s attorney fees.

## **No Error in Awarding Father Attorney Fees**

[9] Indiana Code Section 31-15-10-1 allows the trial court to “order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under [Article 15].” I.C. § 31-15-10-1(a). Indiana Code Section

34-52-1-1 allows the trial court to award attorney fees to the prevailing party in civil cases when a party brought an action on a claim “that is frivolous, unreasonable, or groundless,” or when the party litigated the action in “bad faith.” I.C. § 34-52-1-1(b).

[10] We review the trial court’s decision to award attorney fees and any amount thereof for an abuse of discretion. *Purcell v. Old Nat’l Bank*, 972 N.E.2d 835, 843 (Ind. 2012). “An abuse of discretion occurs when the court’s decision either clearly contravenes the logic and effect of the facts and circumstances before the court, or the court misinterprets the law.” *Prater v. Harris & Sons Landscaping, LLC*, 175 N.E.3d 855, 859 (Ind. Ct. App. 2021). In awarding attorney fees, the court may consider the parties’ resources, economic condition, and ability to engage in gainful employment and earn an adequate income, along with “[m]isconduct that directly results in additional litigation expenses.” *Claypool v. Claypool*, 712 N.E.2d 1104, 1110 (Ind. Ct. App. 1999), *trans. denied*. Where, as here, the trial court made special findings under Indiana Trial Rule 52(A), “the reviewing court may affirm the judgment on any legal theory supported by the findings.” *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 234 (Ind. 2001).

[11] Mother argues the trial court erred in awarding Father attorney fees for preparation and travel time when Kolbe woke up with a fever at 2:00 a.m. and did not inform Guido before he left that she would not make it to the hearing. Mother relies on *Claypool*, which reversed the trial court’s award of attorney fees incurred when one counsel traveled to a hearing before the other counsel notified him of her sudden illness. 712 N.E.2d 1104, 1110 (Ind. Ct. App. 1999),

*trans. denied.* In *Claypool*, this Court also considered the fact the party requesting attorney fees earned an income more than three times greater than the other party's income. *Id.* But here, the trial court found Mother earned 24% more than Father in 2021 and 31% more than Father in 2022. *Appellant's App. Vol. 2* at 19. The trial court was within its discretion in awarding Father attorney fees related to the late-requested continuance. *See* I.C. § 31-15-10-1.

[12] Mother contends the trial court abused its discretion in awarding Father attorney fees related to her Motion to Modify Decree and Motion for Change of Judge. “After a final decree is entered in a dissolution of marriage case or paternity case, a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed.” Ind. Trial Rule 76(B). As for the timing of the request for a change of judge, “where no pleading or answer may be required to be filed by the defending party to close issues[,] . . . each party shall have thirty [30] days from the date the case is placed and entered on the chronological case summary of the court as having been filed[.]” T.R. 76(C)(1). The reasonable inferences from the evidence in the record support the trial court's implied conclusion that Mother filed the motions in bad faith. “Bad faith is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will.” *Kitchell v. Franklin*, 26 N.E.3d 1050, 1057 (Ind. Ct. App. 2015), *trans. denied.*

[13] The trial court found Mother's Motion to Modify Decree lacked merit because it “did not introduce any new matters not already before the [c]ourt.”



*Appellant's App. Vol. 2* at 22. We agree Mother's request to implement the Indiana Parenting Time Guidelines did not introduce a new matter not already before the court because the purpose of the hearing was to address (among other pending motions) Father's Motion to Modify Parenting Time. Given the last-minute filing (the day before the hearing) and the lack of any new matter in Mother's Motion to Modify Decree, the Motion appears to have been filed solely to make timely Mother's Motion for Change of Judge and further delay the proceedings. Accordingly, Mother's Motion for Change of Judge was not timely because she did not request a change of judge within thirty days of the case being placed and entered on the chronological case summary under Indiana Trial Rule 76(C)(1).

[14] As to Mother's Motion to Consider New Evidence, Mother claims she thought Father's shift change at work would impact the time Father could spend with his children and thereby affect Father's Motion to Modify Parenting Time. Mother argues she did not request the hearing to consider new evidence on which part of the fee award was based. Yet Mother could not expect the trial court to readily accept the purported new evidence based solely on Mother's motion—especially because Father disputed that evidence. Also, Mother's original Motion to Consider New Evidence was unverified, and she did not file a verified motion until the hearing was already set. The trial court did not abuse its discretion by awarding Father attorney fees related to Mother's Motion to Consider New Evidence.

*The trial court did not abuse its discretion calculating the amount of the fees.*

[15] Mother argues the trial court erred by not providing specific findings to show how it computed the attorney fee awards. Mother alludes to—but does not cite—the eight factors from Indiana Professional Conduct Rule 1.5 for determining a reasonable attorney fee. The factors include “the time and labor required . . . to perform the legal service properly”; “the fee customarily charged in the locality for similar legal services”; and “the experience, reputation, and ability of the lawyer . . . performing the services[.]” Ind. Professional Conduct Rule 1.5.

[16] Guido and Kolbe filed affidavits of attorney fees listing their similar hourly rates. *Appellant’s App. Vol. 2* at 139 & 150. Guido’s affidavit detailed the time he spent on the services he performed for Father in response to Mother’s claims. *Id.* at 148–49. Guido’s attorney fee affidavit shows Father incurred fees of over \$2,500 in preparation for the continued January hearing, attributing \$715 to traveling to and from court and in-chambers conference with Kolbe and Judge McGrath. *Id.* at 149. Father incurred \$1,347.50 in attorney fees in response to Mother’s “ludicrous Motions” and other preparation for the February hearing. *Id.* at 148. Father requested \$1,500 for litigation surrounding Mother’s Motion to Consider New Evidence. *Id.* at 165.

[17] “[T]he trial judge possesses personal expertise that he or she may use when determining reasonable attorney’s fees.” *Bank v. Huizar*, 178 N.E.3d 326, 343 (Ind. Ct. App. 2021). The trial judge here awarded Father substantially less

than he sought: a reasonable sum of \$2,250. Under these circumstances, we find no abuse of discretion.

## **Conclusion**

[18] We affirm the trial court's award of \$2,250 in attorney fees to Father.

[19] Affirmed.

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