

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

In Re: The Matter of the Paternity of V.J-S.,
Faith Elise Jones,
Appellant / Respondent / Cross-Appellee

v.

Deven Alan Strader,
Appellee / Petitioner / Cross-Appellant

March 20, 2024

Court of Appeals Case No.
23A-JP-2145

Appeal from the Allen Circuit Court
The Honorable Jesus R. Treviño, Magistrate

Trial Court Cause No.
02C01-2108-JP-482

Memorandum Decision by Judge Bradford

Chief Judge Altice and Judge Felix concur.

Bradford, Judge.

Case Summary

[1] Deven Strader (“Father”) and Faith Jones (“Mother”) have a daughter, V.S-J. (“Child”), who was born in May of 2021. At first, Mother was Child’s primary caregiver. In August of 2021, Father petitioned to have his paternity of Child established, and, in December, he and Mother executed a provisional agreement, which included, *inter alia*, a visitation schedule allowing Father sixteen hours of visitation per week. In December of 2022, the trial court issued its order, which awarded Mother and Father joint legal and physical custody of Child. The trial court denied Mother’s motion to correct error and declined her invitation to find Father in contempt of court. Mother contends that the trial court erred in denying her motion to correct error because it had previously (1) erred in finding that she and Father had been exercising a near-equal amount of parenting time, (2) failed to follow the provisions of the Indiana Parenting Time Guidelines (“Guidelines”), and (3) failed to properly consider the relevant statutory factors. Father contends that none of the Mother’s contentions have merit and also requests that we award him appellate attorney’s fees. We affirm.

Facts and Procedural History

[2] Child was born to the unmarried Mother and Father on May 6, 2021, and, for a while, Mother was Child’s legal custodian and primary caretaker. On August

17, 2021, Father petitioned to have paternity of Child established and requested that the trial court enter continuing orders related to support and legal and physical custody. On November 22, 2021, Mother counter-petitioned, agreeing that Father's paternity should be established but arguing that she should have sole physical and legal custody of Child, with Father to have supervised visitation only and be required to pay support. On December 14, 2021, the parties unsuccessfully attempted to mediate the case. Three days later, the parties executed a provisional agreement, pursuant to which Mother would maintain physical and legal custody of Child while Father would have scheduled visitation totaling sixteen hours per week (including two days per week when he was to pick Child up at 5:30 a.m.) and pay child support of \$188.00 per week.

[3] On September 30, 2022, the trial court conducted an evidentiary hearing, at which Father testified that he had been exercising between forty to fifty percent of parenting time with Child and seeing her five or six days per week. Father also indicated that Mother had not allowed him to have any overnight parenting time with Child despite him having requested it. Father estimated that he had been “technically” exercising close to fifty percent of visitation time once Mother's work schedule and Child's sleep time were taken into account. Tr. Vol. II p. 24. Moreover, Father indicated that the early-morning exchanges provided for in the provisional agreement, which caused him to pick Child up at 5:30 a.m., had been “regularly disrupting her sleep routine, her deep sleep[.]” Tr. Vol. II p. 16. Father also indicated that he was in a long-term relationship

with Jessica Gould and that she, along with her two daughters, lived with him in his home.

[4] On December 21, 2022, the trial court issued its order, which provides, in part, as follows:

1. CUSTODY:

- A. The Court finds that it is in the best interest of [Child] that [Mother] and [Father] be granted joint legal custody. The Court now grants [Mother] and [Father] joint legal custody of [Child].
- B. The Court finds that the parties already split time with [Child] on a nearly fifty/fifty (50/50) basis. The parties are granted shared physical custody of [Child] as set forth hereinafter.

2. PARENTING TIME:

- A. Parties shall have a fifty/fifty (50/50) split parenting time schedule of a weekly rotation with the parenting time exchange to occur on Sunday.
- B. For Special days and Holidays the parties shall follow the Indiana Parenting Time Guidelines with Mother being designated the custodial parent and Father the non-custodial parent for interpretation purposes and as they otherwise agree.

[....]

4. TEMPORARY MODIFIED SUPPORT:

- A. Support is modified. The Court prepares a child support worksheet. [Father] is ordered to pay child support in the amount of \$74.00 per week effective December 19, 2022. Your first modified child support payment is due the Friday following this hearing.

December 21, 2022, Order pp. 1–2. On January 17, 2023, Mother moved to correct error and requested a rule to show cause why Father should not be held in contempt of court for allegedly failing to follow provisions of the Guidelines.

Mother primarily argued that the trial court had abused its discretion in awarding joint legal and physical custody in light of evidence that Father had been working as much as sixty hours per week, leaving him with insufficient time to spend with Child. The trial court held a hearing on outstanding matters on June 1, 2023, and, on August 14, 2023, denied Mother's motion to correct error and declined her invitation to find Father in contempt of court.

Discussion and Decision

Direct Appeal Issue

Whether the Trial Court Abused its Discretion in Awarding Joint Physical and Legal Custody

[5] Mother is appealing from the trial court's denial of her motion to correct error, which we review for an abuse of discretion. *Sanchez v. State*, 675 N.E.2d 306, 310 (Ind. 1996). Specifically, Mother contends that the trial court abused its discretion in refusing to correct its earlier, allegedly erroneous, custody determination. Generally, in custody cases

[w]e review custody modifications for abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. 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.

[...]

Therefore, 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.

Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (citations, quotation marks, and footnote omitted). “[W]e will not reweigh the evidence, judge the credibility of witnesses or substitute our judgment for that of the trial court.” *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 946 (Ind. Ct. App. 2006). Mother argues that (1) the trial court’s decision to award joint custody was based in large part upon the erroneous finding that Father and Mother had already been splitting parenting time on a nearly equal basis; (2) the trial court erroneously deviated from the Guidelines in awarding Father equal parenting time; and (3) the trial court ignored overwhelming, unrefuted evidence regarding the relevant statutory factors, which indicated that it was in Child’s best interests that Mother retain sole physical and legal custody.

A. Finding Regarding Equal Exercise of Parenting Time

[6] Mother contends that the trial court’s finding that Mother and Father had essentially been exercising equal parenting time with Child is not supported by the record. It is apparent that, in making this finding, the trial court relied on Father’s testimony that “[w]e have her honestly about an equivalent amount of hours, the difference is the sleep time.” Tr. Vol. II pp. 25. We, however, cannot agree that the time a child spends asleep should not be considered parenting time. First, the Guidelines do not treat overnight parenting time (which will almost always be when the child sleeps) as distinct from parenting time in general. *See* Ind. Parenting Time Guidelines § II(B) (“Unless it can be demonstrated by the custodial parent that the noncustodial parent has not had regular care responsibilities for the child, *parenting time shall include overnights.*”)

(emphasis added). Moreover, it is clear that a parent who has custody of a sleeping child continues to have significant obligations and responsibilities to that sleeping child, such as being present when or if the child wakes, tending to illness, keeping a watchful eye on the home where the child sleeps, and ensuring that it remains quiet and comfortable for the child to ensure a good and restful sleep. All these things require behavior from the custodial parent that is not required of the non-custodial parent and are reasons for us and the trial court to not discount them. Consequently, we conclude that the trial court's finding that Father and Mother had been exercising equal parenting time was not supported by the record. That said, the trial court's error in this regard can only be considered harmless because the trial court did not seem to rely heavily on the equal-parenting-time finding, and, as we shall explain, the record as a whole nevertheless supports its disposition. *See, e.g., Bonnes v. Feldner*, 642 N.E.2d 217, 219 (Ind. 1994) (“An error is harmless if it does not affect the substantial rights of the parties. Ind. Trial Rule 61.”).

B. Deviation from the Guidelines

[7] Relying mostly on the Guidelines, Mother argues that altering custody at Child's age is presumed to cause great harm and that that presumption has not been overcome in this case, much less with a written explanation from the trial court for its supposed deviation from the Guidelines. Mother specifically takes issue with the trial court's award to Father of overnight parenting time in excess of one twenty-four-hour period per week. *See* Ind. Parenting Time Guidelines § II(B)(3) (providing, for infants thirteen to eighteen months old, “[o]vernight

[visitation] if the noncustodial parent has exercised regular care responsibilities for the child but not to exceed one (1) 24 hour period per week”).

[8] As for Mother’s contention that any custody order that deviates from the Guidelines is presumed to cause great harm, the language of the Guidelines does not support it. Indeed, commentary to the Guidelines counsels against the creation of presumptions: “Given the vast number of parenting plans which may exceed the minimum plan in these Guidelines and the particular needs and characteristics of each child and parent, it is impossible to impose any set of presumptions which will benefit almost all children and families.” *Ind. Parenting Time Guidelines cmt. to Section II(A)*. Moreover, the Preamble to the Guidelines indicates that “these guidelines represent the minimum time a parent should have to maintain frequent, meaningful, and continuing contact with a child.” *Ind. Parenting Time Guidelines Preamble*. As for Mother’s suggestion that the trial court was required to provide a written explanation for any deviation from the Guidelines, “[a] court is not required to give a written explanation as to why a parent is awarded more time with the child than the minimum in these guidelines.” *Id.* In summary, the Guidelines (1) do not create a strong presumption that any custody shift is harmful to an infant, (2) set the minimum amount of visitation that should be awarded, and (3) do not require the trial court to provide a written explanation for an award of more than that minimum of visitation.

[9] With this in mind, there was no evidence that allowing Father to have more than one overnight per week would harm Child in any way. Prior to the trial

court's custody determination, Father had been exercising substantial parenting time with Child five or six days per week, with no indication of any negative effect. Moreover, there is evidence that the visitation routine in place at the time of the hearing had been highly disruptive of Child's sleep routine. Father indicated that the visitation schedule, which had often required Father to collect Child at 5:30 in the morning, had been "regularly disrupting her sleep routine, her deep sleep[and a]ffecting her attitude" and that "it's very visible [in the] morning when she has too little sleep or too much sleep." Tr. Vol. II p. 16. According to Father, "[e]verything is currently based around my daughter waking up at 5:00 in the morning in the middle of each sleep, to jump into a car to drive another thirty-five (35) or thirty (30) minutes to then get in the house and have to be put back to bed." Tr. Vol. II p. 24. "It is thought best if scheduled parenting time in infancy be minimally disruptive to the infant's schedule[,]” Ind. Parenting Time Guidelines § II(C)(1), and, if anything, the exchange schedule ordered by the trial court, with one exchange per week, is far less disruptive to Child's sleep routine than the old schedule, which involved ten or twelve exchanges per week. Mother has failed to establish that the trial court failed to follow the Guidelines or otherwise abused its discretion in awarding Father more than one overnight per week.

C. The Statutory Factors

[10] Mother also argues that the trial court failed to properly consider the statutory factors in reaching its decision.¹ Indiana Code section 31-14-13-2 governs physical custody determinations in paternity cases, and provides as follows:

The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. 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 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 parents;
 - (B) the child's siblings; and
 - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and 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, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

A trial court's "paramount concern" in fashioning a custody award in juvenile paternity proceedings is the minor child's best interests. *Sills v. Irelan*, 663 N.E.2d 1210, 1213 (Ind. Ct. App. 1996); *see also A.F. v. Marion Cnty. Off. of Fam.*

¹ Mother does not seem to challenge the trial court's award of joint legal custody.

& *Child.*, 762 N.E.2d 1244, 1250 (Ind. Ct. App. 2002) (“[A parent’s] rights are not absolute and must be subordinated to the children’s interests when the children’s emotional and physical development is threatened.”), *trans. denied*.

[11] Although Mother notes that there are no findings specifically addressing most of the statutory factors, the mere absence of findings is not reversible error; a trial court is not required to make special findings in support of its custody determination if, as here, neither party requested them. Ind. Trial Rule 52; *Anselm v. Anselm*, 146 N.E.3d 1042, 1047 (Ind. Ct. App. 2020) (“[T]he plain language of the statute only requires a court to ‘consider’ the factors, not to make a finding regarding each one.”), *trans. denied*. Moreover, a trial court is presumed to have known and followed the law. *Matter of Z.H.*, 219 N.E.3d 187, 193 (Ind. Ct. App. 2023). We will abandon this presumption “only if the trial court’s order leads us to conclude that an unjustifiable risk exists that the trial court did not follow the applicable law.” *In re Paternity of A.R.S.*, 198 N.E.3d 423, 431 (Ind. Ct. App. 2022) (citation omitted). Mother has failed to establish an unjustifiable risk that the trial court failed to follow the law.

[12] Mother argues that the trial court abused its discretion in failing to give more weight to her wish to have primary physical custody of Child, seemingly on the basis that she claims to have purer motives than Father’s. Mother characterizes Father’s stated concerns regarding the disruptive effect of frequent, early-morning exchanges as self-serving, motivated more by Father’s desire to avoid inconvenience to himself than by any genuine concern for Child’s sleep patterns. The trial court was in the best position to evaluate the sincerity of

Father's concerns, and we will not second-guess it in this regard. This argument is nothing more than an invitation to reweigh the evidence, which we will not do. *See Kondamuri*, 852 N.E.2d at 946.

[13] Mother also contends that Child's interactions and interrelationships; Child's adjustment to home, school, and community; and the mental and physical health of all relevant individuals strongly favor awarding her primary physical custody. These arguments are largely based on Mother's mostly unsupported claims that Father's work schedule prevents him from being a good father to Child; Father's efforts to establish a sibling relationship between Child and Gould's children are "artificial[.]" Appellant's Br. p. 42; Mother, as a female, is inherently better-suited to address Child's gender-specific health issues than Father; and Father is unable to prioritize Child's needs over his or those of others (indicated by his failure to provide Child with her own bedroom). These arguments are also based on Mother's suggestion that Gould poses "potential risks to [Child's] safety, well-being, and emotional development unknown to the Trial Court[.]" Appellant's Br. p. 44. We dispose of these arguments by noting that, to the extent that any of them are supported by evidence (as opposed to bald assertions), the trial court was in the best position to evaluate that evidence, and, apparently, rejected Mother's suggested interpretations of it. Indeed, regarding the only one of the above arguments that seems to be based on something in the record, even if we were to assume that forcing Child to share a bedroom with one of Gould's daughters could fairly be characterized as evidence that Father is unable to prioritize Child's needs over his (which we do

not), Father testified at the evidentiary hearing that he was in the process of renovating a bedroom that Child would have to herself for at least three years. Mother's arguments regarding the statutory factors, like her others, are nothing more than invitations to reweigh the evidence, which we will not do. *See Kondamuri*, 852 N.E.2d at 946.²

Cross-Appeal Issue

Appellate Attorney's Fees

[14] Father requests an award of appellate attorney's fees, arguing that they are warranted because he was forced to respond to Mother's appeal "when there were no meritorious assertions" in it. Appellee's Br. p. 17. The discretion to award attorney fees under Indiana Appellate Rule 66(C) is limited to instances "when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay."

[I]n exercising its discretionary power to award damages on appeal, an appellate tribunal must use extreme restraint. Notwithstanding the harmful delay occasioned by crowded judicial dockets and limited resources, we cannot fail to recognize that the imposition of punitive sanctions does have significant negative consequences. It may punish, and will deter, the proper exercise of a lawyer's professional responsibility to argue for modification or reversal of existing law. It will have a chilling effect upon the exercise of the right to appeal. It will discourage

² Mother does not challenge the trial court's refusal to find Father in contempt of court for alleged violations of the Guidelines.

innovation and inhibit the opportunity for periodic reevaluation of controlling precedent.

Orr v. Turco Mfg. Co., 512 N.E.2d 151, 152 (Ind. 1987) (applying the superseded Indiana Appellate Rule 15(G)). While we have agreed that some of Mother's claims lack merit, we cannot agree that they were so permeated with meritlessness that an award of appellate attorney's fees is warranted.

[15] The judgment of the trial court is affirmed.

Altice, C.J., and Felix, J., concur.

ATTORNEY FOR APPELLANT

Micheal H. Michmerhuizen
Barrett McNagny LLP
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE

Yvonne M. Spillers
Fort Wayne, Indiana