MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Diamond Z. Wittlief,
Appellant-Petitioner,

v.

Tom F. Hirschauer, III,
Appellee-Respondent.

March 11, 2021

Court of Appeals Case No. 20A-DR-1600

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

The Honorable Darren J. Murphy, Magistrate

Trial Court Cause No. 29D01-1208-DR-8515

Najam, Judge.

Statement of the Case

[1] Since the dissolution of their marriage in 2013, Diamond Z. Wittlief ("Mother") and Tom F. Hirschauer, III ("Father") have extensively litigated various custody and child support matters. In this seventh appeal filed by Mother, Mother appeals the dissolution court's modification of legal custody over the parties' minor child and modification of Father's child support obligation.[1] Mother raises four issues for our review, which we revise and restate as follows:

1. Whether the dissolution court erred when it denied Mother's Indiana Trial Rule 76 motion for a change of judge.

2. Whether the dissolution court erred when it denied Mother's motion to dismiss Father's counter-petition for modification of custody.

3. Whether the dissolution court abused its discretion when it admitted a custody evaluation as evidence.

4. Whether the dissolution court erred when it ordered Father to pay child support in an amount less than that recommended by the child support obligation worksheet.

[2] We affirm.

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[1] This Court has dismissed five of Mother's prior appeals.

Facts and Procedural History

[3] Mother and Father were married in 2006, and they have one minor child together ("Child"). In 2013, the dissolution court dissolved the parties' marriage. Pursuant to an agreed entry, the dissolution court ordered Mother and Father to share joint legal custody of Child but granted Mother primary physical custody. The court then awarded Father parenting time overnight on Mondays and Wednesdays and alternating weekends and ordered Father to pay $127.56 per week in child support.

[4] On July 31, 2017, Mother, *pro se*, filed a petition for modification of parenting time in which she asked the court to eliminate Father's overnight parenting time during the school week. Then, on August 18, Mother filed a motion in which she asked the court to award her sole legal custody. In support of that motion, Mother alleged that Father "has been unwilling to communicate with her[.]" Appellant's App. Vol. 2 at 119. Also in August, Father filed a notice of his intent to relocate to a new home. In response, Mother objected to Father's relocation and asked the court to grant her legal and physical custody of Child. *See id*. at 130.

[5] A year later, in July 2018, Father filed his motion for modification of custody. In that motion, Father requested that the court grant him primary physical custody of Child but that "all other aspects" of the dissolution decree "remain the same with respect to custody and parenting time." *Id*. at 158. Father

alleged that Mother had "become increasingly autocratic" and had "unilaterally made decisions that are inimical to the best interest" of Child. *Id*.

[6] Father then requested that the court appoint Dr. Bart Ferraro as a custody evaluator in order to aid in the "resolution of the custody dispute[.]" *Id*. at 161. Mother agreed with Father's request but asked the court to determine that Dr. Ferraro "has no conflict of interest or prior relationship" with Father. *Id*. at 163. The dissolution court granted Father's motion and appointed Dr. Ferraro to conduct a custody evaluation. Dr. Ferraro submitted his report to the court on July 12, 2019, and recommended that Father be awarded sole legal custody of Child.[2]

[7] Mother filed a motion to strike Dr. Ferraro's report. Mother alleged that Dr. Ferraro's "neutrality and objectivity" were in question because one of his co-workers, Matthew Glasser, is friends with Father. *Id*. at 203. Mother also asserted that Dr. Ferraro's recommendation was based on an incorrect premise because Father had not asked for legal custody of Child. Father responded and alleged that Mother's contentions were "wholly contrived" and that Mother presented no evidence that Glasser "was involved in any way with the custody evaluation" or that "he in any way sought to influence" Dr. Ferraro's opinion. *Id*. at 211.

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[2] Neither party has included a copy of Dr. Ferraro's report in an appendix on appeal.

[8] The dissolution court found insufficient evidence "at this point" to strike Dr. Ferraro's report. *Id*. at 217. However, the court informed Mother that she could subpoena Dr. Ferraro and Glasser to explore at the hearing, which was scheduled for May 18, 2020, "whether there was improper influence" that would affect the court's reliance on the report. *Id*.

[9] Between 2017 and 2019, while the parties litigated the custody issues, they also litigated various financial issues. Due to the "numerous" filings, the court bifurcated the matters and, in 2019, held a hearing on the financial issues. Tr. at 5. On October 11, the dissolution court issued an order in which it, in relevant part, amended Father's child support obligation. Specifically, the court found that the child support obligation worksheet recommended that Father pay $235 per week in child support, but the court reduced that obligation down to $200 per week due to Father's assumption of Child's educational expenses at a private school. *See Wittlief v. Hirschauer*, No. 19A-DC-2647, 2020 WL 6253343, at *6 (Ind. Ct. App. Oct. 23, 2020). Mother appealed that order.

[10] While that appeal was pending, the parties continued to litigate the custody issues. On May 13, 2020, Father filed a counter-petition for custody in which he requested full legal and physical custody of Child. In response, on May 14, Mother filed a motion to continue the May 18 hearing. The trial court granted Mother's motion and continued the hearing to June 1. However, the court found that Mother knew or should have known that Father intended to seek legal custody and gave Mother until May 20 to conduct discovery and Father until May 27 to respond.

[11] On May 28, Mother filed a "Trial Rule 12(C) Motion to Dismiss"[3] Father's counter-petition for custody. Appellant's App. Vol. 2 at 233. Mother asserted that Father's petition contained "absolutely no legal or factual basis" to grant his request and that a dismissal was "appropriate." *Id*. at 234. Mother also filed another motion to continue the June 1 hearing "for many of the same reasons listed in her May 14, 2020 request." Appellant's App. Vol. 3 at 2. The dissolution court denied Mother's motion to continue and proceeded with the hearing as scheduled on June 1.

[12] At the beginning of the hearing, Mother, who had obtained counsel the day prior, orally moved for a change of judge pursuant to Indiana Trial Rule 76. The court denied that motion on the ground that it needed to be in writing and filed prior to the hearing. Mother then submitted a written motion for change of judge on the afternoon of the hearing, which the court denied. And Mother again asked the court to strike Dr. Ferraro's evaluation, which motion the court denied.

[13] Additionally, during her testimony at the hearing, Mother reiterated her assertion that the court "should dismiss" Father's May 2020 counter-petition for custody because "there is absolutely nothing on the face of" the petition to "substantiate the relief requested." Tr. at 39. Father responded and asserted that "Indiana has notice pleading" and that all he had to do was say he

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[3] While Mother filed her motion pursuant to Indiana Trial Rule 12(C), it is clear that she sought a dismissal of Father's counter-petition as opposed to a judgment on the pleadings.

"want[ed] a change of custody[.]" *Id*. at 43. He also asserted that "[e]veryone has known that the issue is custody" and that, "[o]nce custody is at issue," the dissolution court has full power to decide all issues related to custody. *Id*. The court denied Mother's motion.

[14] On August 26, the trial court entered findings of fact and conclusions thereon. Specifically, the court found that the "record is replete with evidence that the parties cannot communicate effectively to advance their child's interest." Appellant's App. Vol. 2 at 79. And the court found that, "of the two parents, Father is far more likely to listen to the wishes of Mother as it relates to health, education, religion and extracurricular activities." *Id*. at 82. Accordingly, the court concluded that joint legal custody was no longer in Child's best interests and awarded Father sole legal custody of Child. The court also concluded that joint physical custody was in Child's best interests but modified the parenting time arrangement so that Mother and Father have "equal full-week blocks of time[.]" *Id*. at 84.

[15] The court then modified its October 11, 2019, child support order based on the new custody arrangement. Specifically, the court increased Father's overnight credit and found that the child support obligation worksheet recommended that Father pay $182 per week in child support. But the court reduced that

obligation to $100 per week "due to Father's assumption of the child's therapy, the controlled expenses and the child's education." *Id*. This appeal ensued.[4]

Discussion and Decision

[16] Mother appeals the dissolution court's order granting Father sole legal custody of Child and modifying Father's child support obligation.[5] We initially note that Mother is proceeding *pro se*. "It is well settled that *pro se* litigants are held to the same legal standards as licensed attorneys. 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." *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016) (internal citation omitted).

Issue One: Motion for Change of Judge

[17] Mother first asserts that the court erred when it denied her motion for a change of judge. A motion for change of judge is governed by Indiana Trial Rule 76, which provides, in pertinent part:

> (B) In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or [her] attorney. . . . After a final decree is

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[4] After the dissolution court issued the order on the custody issues, this Court issued its opinion in *Wittlief* on October 23. In relevant part, this Court remanded the October 11, 2019, order to the dissolution court for the court to make specific findings regarding Child's educational expenses. *Wittlief*, 2020 WL 6253343, at *10.

[5] In her reply brief, Mother asserts that Father has waived his arguments on appeal because his brief does not comply with our appellate rules. However, in his Appellee's Brief, Father responded to each of Mother's arguments. As such, we decline to say that Father has waived his arguments.

> 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. . . .
>
> (C) In any action except criminal no change of judge . . . shall be granted except within the time herein provided. Any such application for change of judge . . . shall be filed not later than ten [10] days after the issues are first closed on the merits. Except:
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> > (1) in those cases where no pleading or answer may be required to be filed by the defending party to close issues (or no responsive pleading is required under a statute), 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[.]

[18] This Court has interpreted Trial Rule 76(B) to allow "a party to make one change-of-judge-request before entry of a final decree and one change-of-judge request in connection with a petition to modify that decree." *R.A. v. B.Y. (In re Paternity of V.A.)*, 10 N.E.3d 61, 64 (Ind. Ct. App. 2014). Here, Mother made her change-of-judge request in connection with a petition to modify custody of Child following the court's entry of a final dissolution decree.

[19] Specifically, the pleading that placed the present issue before the dissolution court was Mother's petition for modification of custody. And Indiana Code Section 31-17-2-5 (2020) provides that a responsive pleading or counter petition to a custody proceeding "*may* be filed[.]" (Emphasis added.) That statute is

permissive, not mandatory. Thus, while Father was permitted to file a pleading in response to Mother's petition to modify custody, he was not required to.

[20] Because a responsive pleading was not required under the statute, Mother had thirty days from the date the modification was placed on the CCS to file her motion for change of judge. Ind. Trial Rule 76(C)(1). But Mother did not file her motion for change of judge until June 1, 2020, which was almost three years after she had filed her first petition to modify custody on July 31, 2017—well beyond the thirty days required by the trial rules.

[21] Still, Mother asserts that Father raised a new issue when he requested legal custody of Child in his May 13, 2020, counter-petition. Mother maintains that that new issue was first closed on the merits when the dissolution court closed discovery on May 27 and, as such, her motion was due on or before June 8, making her June 1 motion "timely." Appellant's Br. at 22. In the alternative, Mother contends that that new issue had not yet been closed when she filed her motion for change of judge because "the response period for [her] Motion to Dismiss [Father's counter-petition] had not expired." *Id.*

[22] However, contrary to Mother's assertions, Father did not raise a new issue in his counter-petition. While Father's counter-petition was the first time he specifically requested legal custody of Child, Mother placed the issue of legal custody before the dissolution court when she requested it in 2017. Father was simply responding to Mother's request for legal custody with a request of his own when he filed his counter-petition in 2020. Because Father did not raise a

new issue in his counter-petition, Mother did not get a new opportunity to file a motion for change of judge. As discussed above, Mother was required to file her motion within thirty days of the date her petition to modify custody was placed on the CCS, which Mother failed to do. We therefore hold that the trial court did not err when it denied Mother's motion for change of judge.[6]

Issue Two: Motion to Dismiss Father's Counter-Petition

[23] Mother next contends that the trial court erred when it denied her "Trial Rule 12(C) motion to dismiss" Father's counter-petition for modification of custody. Appellant's Br. at 17 (emphasis removed). As our Supreme Court has previously stated:

> A motion . . . under Trial Rule 12(C) tests the sufficiency of a claim or defense presented in the pleadings and should be granted only where it is clear from the face of the complaint that under no circumstances could relief be granted. Because we base our ruling solely on the pleadings, we accept as true the material facts alleged in the complaint. When, as here, a 12(C) motion essentially argues the complaint fails to state a claim upon which relief can be granted, we treat it as a 12(B)(6) motion. Like a trial court's 12(B)(6) ruling, we review a 12(C) ruling *de novo*.

KS&E Sports v. Runnels, 72 N.E.3d 892, 898 (Ind. 2017).

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[6] To the extent Mother also argues that the court erred when it denied a discovery request for health records from Father's therapist, Mother has not supported that argument with cogent reasoning or citation to legal authority. Further, Mother does not address the trial court's conclusion that Mother's request was late as it was not filed until May 28, 2020, despite the fact that custody had been at issue for over two years. *See* Tr. at 13. Accordingly, that purported issue is waived. *See* Ind. Appellate Rule 46(A)(8)(a).

[24] Here, Mother contends that the dissolution court erred when it denied her motion because Father's counter-petition contained only "one sentence" that "presented absolutely no basis for his request" to modify custody. Appellant's Br. at 18. In essence, Mother contends that Father's counter-petition failed to state a claim upon which relief can be granted and that the court should have dismissed it. And Mother appears to maintain that, if Father's counter-petition had been dismissed, the court could not have awarded Father sole legal custody. We cannot agree.

[25] First, this Court has stated that, "if one parent files a custody modification request, a trial court may instead modify custody in favor of the other parent, even if he or she did not file a cross-petition to modify custody[.]" *Bailey v. Bailey*, 7 N.E.3d 340, 344 (Ind. Ct. App. 2014). In addition, our Court has held that a trial court is not precluded from entering a custody arrangement not specifically advanced by a party so long as that custody arrangement is in the child's best interest. *See Richardson v. Richardson*, 34 N.E.3d 696, 704 (Ind. Ct. App. 2015).

[26] Once Mother raised the issue of legal custody, the dissolution court was able to instead grant legal custody to Father even if Father had not filed a counter-petition or specifically requested legal custody. Thus, even if the trial court had granted Mother's motion and dismissed Father's counter-petition, the court would still have been able to award Father sole legal custody of Child based on its conclusion that that was in Child's best interest. Accordingly, Mother has

not demonstrated that the court committed reversible error when it denied her motion to dismiss Father's counter-petition for custody.

Issue Three: Admission of Custody Evaluation

[27] Mother also asserts that the dissolution court abused its discretion when it admitted Dr. Ferraro's custody evaluation as evidence. However, Mother's brief on this issue wholly fails to comply with the Indiana Appellate Rules. Indiana Appellate Rule 46(A)(8)(a) requires an appellant to include in her brief an argument section that "contain[s] the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citation to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]" Here, Mother has not supported her contentions on this issue with citation to any case law, let alone relevant case law.[7] And Mother has not provided a copy of Dr. Ferraro's report in her appendix.

[28] Nevertheless, we have read and considered Mother's argument on this issue. In essence, Mother contends that the dissolution court abused its discretion when it admitted Dr. Ferraro's report because, according to Mother, Dr. Ferraro was biased since one of his co-workers was friends with Father. But we agree with

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[7] The only legal authority to which Mother cites is Indiana Evidence Rule 702. However, Mother does not explain why that evidence rule is relevant when the dissolution court specifically found that that rule did not apply to Dr. Ferraro's report and instead admitted the report pursuant to Indiana Code 31-17-2-12. That statute provides that a custody evaluator's report may not be excluded as evidence if certain conditions are met, which conditions are not in question here. *See* Ind. Code § 31-17-2-12(b).

the dissolution court that Mother's motion to strike Dr. Ferraro's report did not contain any allegation that Glasser "actually attempted to influence the report, participated in drafting the report[,] or was consulted by Dr. Ferraro on the issues contained in the report." Appellant's App. Vol. 2 at 216.

[29] Further, the court gave Mother an opportunity to question Dr. Ferraro and Glasser at the hearing about any involvement Glasser may have had, which would have given the trial court the opportunity to determine whether Glasser had had any impact on Dr. Ferraro's impartiality. But Mother chose not to question either of them at the hearing or otherwise present any evidence other than her own allegations to the dissolution court, based on pure speculation, to demonstrate that Dr. Ferraro was biased. Accordingly, we hold that the dissolution court did not abuse its discretion when it admitted Dr. Ferraro's custody evaluation.

Issue Four: Modification of Child Support

[30] Finally, Mother contends that the dissolution court erred when it amended Father's child support obligation and ordered Father to pay an amount in child support that deviated from the amount recommended by the child support obligation worksheet.[8] Specifically, Mother contends that the trial court erred

[8] The dissolution court amended its October 11, 2019, child support order while that order was on appeal. As a general rule, once an appeal is perfected, the trial court loses subject matter jurisdiction over the case. *Johnson v. State*, 832 N.E.2d 985, 993 (Ind. Ct. Ap. 2005). However, trial courts maintain jurisdiction to alter child support orders despite a pending appeal when a change in circumstances warrants it. *See J.W.J. v. D.C. (In re Paternity of Jo.J.)*, 992 N.E.2d 760, 768 (Ind. Ct. App. 2013).

when it reduced Father's child support obligation by $82 per week due to Father's assumption of the costs related to Child's therapy, controlled expenses, and Child's education. Mother maintains that the court's deviation from the child support worksheet "is not supported by any evidence in the record[.]" Appellant's Br. at 23.

[31] However, we hold that Mother has failed to meet her burden to demonstrate that the dissolution court erred when it calculated Father's child support obligation. Due to the "numerous" motions and petitions filed by both parties, the dissolution court bifurcated the issues and held separate hearings on the financial matters and the custody matters. Tr. at 5. The court then issued two orders, which Mother appealed separately.

[32] In this appeal, Mother not only challenges the dissolution court's custody determination. Rather, she also raises an issue related to the financial matters. But Mother has only provided us with a record of the underlying custody proceeding. She has not provided us with a transcript of the hearing at which the parties litigated the financial matters. Accordingly, we are unable to consider from the record whether or not the court erred. "It is a cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment." *Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006).

[33] It was Mother's burden on appeal to demonstrate that the dissolution court erred. But, by failing to provide us with a record of the hearing during which

the parties discussed the now-disputed financial matters, Mother has not met that burden. *See* Ind. Appellate Rule 46(A)(8)(a). We therefore cannot say that the dissolution court erred when it calculated Father's child support obligation.

Conclusion

[34] In sum, the dissolution court did not err when it denied Mother's Trial Rule 76 motion for change of judge because Mother did not timely file her motion. In addition, Mother has not demonstrated that the court committed reversible error when it denied her motion to dismiss Father's counter-petition for custody because the court had authority to award custody to Father after Mother had raised the issue. Further the court did not abuse its discretion when it admitted Dr. Ferraro's report as evidence. And Mother has not met her burden on appeal to demonstrate that the dissolution court erred when it calculated Father's child support obligation. We therefore affirm the dissolution court's order.

[35] Affirmed.

Riley, J., and Crone, J., concur.