MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

W.D.N.,

Appellant-Respondent,

v.

R.L.N.,

Appellee-Petitioner.

May 13, 2021

Court of Appeals Case No. 21A-DC-142

Appeal from the Kosciusko Superior Court

The Honorable Christopher D. Kehler, Judge

Trial Court Cause No. 43D04-2005-DC-118

Bailey, Judge.

Case Summary

[1] W.N. ("Father") appeals an order dissolving his marriage to R.N. ("Mother"), awarding the physical custody of the parties' four children ("Children") to Mother, dividing the marital property, and ordering that Father pay child support. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Issues

[2] Father presents four issues for review, which we restate as follows:

I. Whether a custody evaluation report ordered pursuant to Indiana Code Section 31-17-2-10 is inadmissible absent testimony from the court-appointed evaluator;

II. Whether the award of physical custody to Mother constitutes an abuse of discretion;

III. Whether the dissolution court erroneously attributed self-employment income to Father equivalent to his prior wage employment; and

IV. Whether the dissolution court abused its discretion in the valuation of marital property.

Facts and Procedural History

[3] On May 8, 2020, Mother petitioned for dissolution of her marriage to Father and requested the physical custody of Children. Father also petitioned for

custody of Children, and he requested that Mother submit to a psychological examination and parenting assessment. On June 9, 2020, the dissolution court appointed a custody evaluator.

[4] On December 22, 2020, the parties appeared for a final hearing. At the outset, Mother moved for admission of the custody evaluator's report and Father objected. The court admitted the report into evidence and heard testimony from each parent.

[5] On January 7, 2021, the dissolution court entered an order dissolving the parties' marriage, awarding the physical custody of Children to Mother, ordering Father to pay child support, and dividing the marital estate 50/50. Father now appeals.

Discussion and Decision

Custody Evaluation Report

[6] Indiana Code Section 31-17-2-10 provides for the appointment of a custody evaluator, as follows:

> (a) The court may seek the advice of professional personnel even if the professional personnel are not employed on a regular basis by the court. The advice shall be given in writing and made available by the court to counsel upon request.
>
> (b) Counsel may call for cross-examination of any professional personnel consulted by the court.

[7] The dissolution court appointed Eric Foster ("Foster") to perform a custody evaluation. Foster conducted eleven hours of interviews with Mother, Father, and Children. He administered parenting inventories to each parent, and compiled a written report dated October 12, 2020. Foster recommended that the parents share legal custody of Children and that Mother have the physical custody of Children, with Father exercising parenting time pursuant to the Indiana Parenting Time Guidelines.

[8] At the final hearing, Mother's counsel moved to admit the custody evaluation into evidence and the court asked Father, who appeared pro se, whether he had any objection. The following exchange ensued:

> Father: Yeah, I object to his findings.
>
> Court: Okay. If you're going to submit an objection, which you have the legal right to do, it is your obligation to give me the reason or the basis for your objection and cite any applicable rules of evidence if you know of any.
>
> Father: Half the information that he put in there was falsified and then he also was very bias [sic] towards the Petitioner, and the events that I told him about, my attorneys at the time were supposed to dig in there deeper. They did not want me to talk to any of the witnesses and the events that I told Mr. Eric Foster. And so I think that is why he tried saying I was a liar on there and so he basically blew it off that, you know, that it meant nothing because there's no proof at the time because my attorneys at the time failed to track down those witnesses.

> Court: Okay. I'm going to overrule that objection. You will have the right to supplement that report with your testimony. So we will admit that custody evaluation as Petitioner's Exhibit A.

(Tr. Vol. II, pg. 7.)

[9] On appeal, Father challenges the custody evaluation report as hearsay, and argues that he was deprived of his right of cross-examination. More specifically, Father claims "The mechanism adopted by the court – that of accepting a report without the proponent providing any testimony or cross examination – does not sufficiently allow the trier of fact to determine hearsay repeated by the expert." Appellant's Brief at 18. Father asks that the matter "be remanded for a hearing at which the evaluator is required to be present and testify in support of his report unless the parties agree to admit the report." *Id.*

[10] Indiana Code Section 31-17-2-10 permits a trial court to obtain professional advice, sua sponte, but also explicitly provides for a right of cross-examination. *See Theobald v. Theobald*, 804 N.E.2d 284, 286 (Ind. Ct. App. 2004). "The right to cross-examine witnesses under oath is a fundamental right which cannot be denied unless waived." *Id.* We found waiver in *Theobald*, where a parent had been advised that the court was ordering a home study before making its custody determination, but that parent's counsel declined to present additional evidence. *Id.* We further stated: "once a party has waived the right to cross-examination, it remains waived." *Id.*

[11] Here, Father represented himself and could have exercised a statutory right to cross-examine Foster upon the substance of the written report, if he chose to do so. *See* Ind. Code § 31-17-2-10(b) (providing that counsel "may" call for cross-examination). There is no statutory obligation upon the trial court to call for the cross-examination. Father asserted to the trial court that Foster was biased and lacked credibility. However, Father did not call Foster as a witness and thus waived his right of cross-examination.[1] The custody evaluation report was not inadmissible. *See Theobald*, 804 N.E.2d at 286.

Custody

[12] Father contends that the dissolution court abused its discretion by awarding the physical custody of Children to Mother. More specifically, Father claims that the court summarily adopted the custody evaluator's recommendation without sufficient consideration of evidence relative to statutory factors.

[13] The 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). There is a well-established preference in Indiana "'for granting latitude and deference to our trial judges in family law matters.'" *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind.

[1] Father may not have recognized the implications of his omission. However, "pro se litigants are held to the same standards as licensed attorneys, and thus they are required to follow procedural rules." *Martin v. Hunt*, 130 N.E.3d 135, 136 (Ind. Ct. App. 2019). Father was previously represented by counsel, who withdrew his representation, and advised Father in writing that a pro se litigant would be held to the same standards as a licensed attorney. Father elected to proceed pro se.

1993)). We neither reweigh evidence nor reassess witness credibility, and we view the evidence most favorably to the judgment. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011).

[14] In an initial custody determination, both parents are presumed equally entitled to custody, and the "[t]he court shall determine custody and enter a custody order in accordance with the best interest of the child." I. C. § 31-17-2-8. There is no presumption favoring either parent. *Id.* In determining the child's best interest, the trial court must consider all relevant factors, including specifically 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 siblings; 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 [.]

I.C. § 31-17-2-8.

[15] According to Father, "Mother presented no testimony that can be considered directed to these factors. Father presented testimony as to how he worked with the eldest son with autism and what his plans were for custody." Appellant's Brief at 21. Father argues that the matter should be remanded for an evidentiary hearing on the custodial factors, to include the presence of the custody evaluator. At bottom, he asks that we discard the custody evaluator's report in its entirety. As previously stated, we have declined to do so.

[16] The custody evaluation report was derived from lengthy family interviews, inclusive of both parents and each of their children, and from parenting assessment tools. Foster concluded that both Father and Mother were fit

parents and should enjoy significant parenting time with Children. Foster described Mother as having more family support when compared with Father, and a history of more appropriate discipline techniques. He also observed that Mother had been the primary caregiver for Children. Foster was complimentary of both parents relative to their interactions with Children during the interviews. Foster raised some concern that Father had internalized strict parenting beliefs but also observed a "positive step," in that the strictness had been moderated. (Ex. Vol. III, pg. 15.) He described Mother's assessment scores as "positive and above average." (*Id.* at 14.) He also expressed some concern that Father was considering moving more than two hours away from the marital residence. Ultimately, Foster recommended that Mother have the physical custody of Children and Father have Guideline-based parenting time.

[17] As Father observes, the parental testimony was very brief. Mother testified that she had arranged her work hours to coincide with school drop-offs and pick-ups. The eldest child was enrolled in a school designed for autistic children, with no provision of public transportation. Mother also testified that she lived with her parents, who could provide practical assistance. Father testified that he had quit his factory job to care for Children; he had more flexibility as a self-employed power washing contractor. He opined that Mother was, at times, negligent in her supervision of Children.

[18] There is evidence supporting the dissolution court's custody determination and we will not substitute our judgment. As stated by our Supreme Court:

> 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." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "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." *Id.* "Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011).

Steele-Giri, 51 N.E.3d at 124. Inclusive of the custody evaluation report and parental testimony, there was evidence presented relative to the statutory factors. Father has failed to persuade us that the dissolution court simply adopted a recommendation and ignored the statutory factors. We find no abuse of discretion.

Attribution of Income

[19] Father next argues that the dissolution court clearly erred by ordering him to pay $308.00 weekly child support. The calculation is based upon attribution to Father of $954.00 in weekly self-employment income, commensurate with his prior factory wages, omitting any deduction for income-generating expenses. Father contends that the evidence fails to establish this level of earnings; he instead contends that his gross receipts less expenses for several months in 2020

show that his average monthly income is "closer to" $1,425.00 [per month] or $331.40 per week.[2] Appellant's Brief at 22.

[20] A trial court's calculation of child support is presumptively valid. *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008). We will reverse a trial court's decision in child support matters only if it is clearly erroneous or contrary to law. *Id.* A decision is clearly erroneous if it is clearly against the logic and effect of the facts and circumstances that were before the trial court. *Id.*

[21] The initial step in establishing a child support award is to determine the weekly gross income of each parent. Indiana Child Support Guideline 3(A)(1) defines weekly gross income as "actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and the value of in-kind benefits received by the parent." Weekly gross income "includes income from any source" [except as specifically excluded] and "includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, structured settlements, capital gains, social security benefits, workers compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes and alimony or maintenance received." *Id.*

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[2] In his calculation, Father is applying a 21.88% tax rate to his self-employment income.

[22] Here, there was evidence that Father had been employed at a factory for approximately five years, with an average weekly gross income of $954.00 per week. When Father and Mother separated, they alternated parenting time on a weekly basis and Father did not report to work as scheduled. Father's employer communicated an intent to terminate him due to his absences and a misconduct allegation; Father did not await formal notice of termination but quit his employment. The dissolution court made no finding that Father was voluntarily unemployed or underemployed.

[23] Father's testimony and contemporaneous inquiry from the dissolution court focused upon Father's actual and prospective self-employment earnings. Father testified that he had more flexibility with self-employment and could "[power wash] a house in less than three hours. Some of those houses range from $350 to $550 – occasionally $850." The dissolution court then commented that it "sounded as if Father could make more money power washing than at the previous job" and Father responded affirmatively. (Tr. Vol. II, pg. 59.) Father projected that "it's not uncommon for this industry to see $100,000 at minimum all the way up to a million dollars after four years of business." (*Id.*) Describing his particular business experience over the prior six or seven months, Father reported receipts of $30,000, which he described as "pretty darn good" for a "real stutter step of a year." (*Id.* at 60.) But Father also explained that there were expenses necessary to generate income, specifically, chemical costs of an unspecified amount and fuel costs of approximately $900 per month. He also explained that he would potentially incur storage costs for hazardous

chemicals, dependent upon whether or not he was awarded the marital residence. Finally, Father testified that he hoped to obtain "winter work" and was exploring the prospect of an additional self-employment opportunity with a sewer and drain company. (*Id.*)

[24] "Calculating gross income for the self-employed presents unique problems and calls for careful review of expenses." *Young*, 891 N.E.2d at 1048-49 (citing Child Supp. G. 3(A) cmt. 2(a)). Guideline 3(A)(2) addresses the calculation of gross income for self-employed persons:

> Weekly Gross Income from self-employment [or] operation of a business ... is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly gross income from self-employment may differ from a determination of business income for tax purposes.

Child Supp. G. 3(A)(2). The commentary to Guideline 3(A) further provides that "[w]hile income tax returns may be helpful in arriving at weekly gross income for a self-employed person, the deductions allowed by the Guidelines may differ significantly from those allowed for tax purposes." Child Supp. G. 3(A) cmt. 2(a). Trial courts have discretion in determining which business expenses are deductible for calculating the child support obligation of self-employed persons, but the court must engage in a careful review of the facts and

circumstances in making its determination. *Young*, 891 N.E.2d at 1049. In general, the adjusted gross income from a party's tax return is a useful point of reference, but the court must evaluate the deductions taken in arriving at that figure. *See id.*

[25] Here, the dissolution court did not have the benefit of a tax return reporting Father's gross business receipts, expenses, or net income. The sole evidence of Father's income was his testimony. Although he appeared to be very optimistic about his future earnings, Father did not claim that his new business had in fact generated income roughly equivalent to his prior employment. *See Carmichael v. Siegel*, 754 N.E.2d 619, 628 (Ind. Ct. App. 2001) (clarifying that income for child support purposes is that which is "existing in fact" and "available for immediate use"). Moreover, the dissolution court made no deduction whatsoever for ordinary and necessary business expenses. As such, Father's income available for child support purposes was erroneously calculated.

Marital Estate

[26] The dissolution order purported to divide the marital property equally. Mother was to retain the marital residence and pay the indebtedness thereon; Father was to retain business equipment used in the power washing business (with an assigned value of $20,000.00), and Father was to give Mother an equalization payment of $3,234.94. Father contends that he did not receive business property worth $20,000.00 ($24,000.00 as valued by Mother less $4,000.00 depreciation assigned by the dissolution court).

[27] Indiana Code Section 31-15-7-5 provides in relevant part: "The court shall presume that an equal division of the marital property between the parties is just and reasonable." Here, neither party requested a deviation from the presumptive equal division. The dissolution court admitted into evidence a real estate appraisal and Mother's exhibits identifying various items of marital property with corresponding values. Father's sole challenge relative to valuation was the value Mother attributed to business equipment.

[28] There was documentary evidence that Mother and Father had purchased a recycle power wash system with an enclosed trailer for $15,950.00. Father cross-examined Mother as to her aggregate valuation of business property at $24,000.00. He indicated that he was questioning the value "because the trailer is listed only for $15,950." (Tr. Vol. II, pg. 40.) Mother agreed that the sales price was $15,950.00 but testified that Father had "[taken out home equity] to buy the rest [of his] materials." (*Id.*) She specified that these included shirts, pants, and gear. When Father again questioned the value, Mother responded, "that's what you took out." (*Id.*) As such, there is evidence that the parties obtained a home equity loan exceeding the purchase price of a power washer/trailer, and some of the money was apparently used for business start-up costs such as uniforms. But the sole business asset identified for inclusion in the marital pot was the power washer/trailer. The assigned value of $20,000.00 is not supported by the evidence.

Conclusion

[29] The custody evaluation report was not inadmissible absent sponsoring in-court testimony. The award of physical custody of Children to Mother is not an abuse of discretion. We remand for recalculation of Father's child support obligation, re-valuation of business property, and the equal distribution of the marital estate.

[30] Affirmed in part, reversed in part, and remanded.

May, J., and Robb, J., concur.