

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Paternity of D.M.
(Minor Child),
Tiffany Brandon,
Appellant-Respondent,

v.

Daniel Moore,
Appellee-Petitioner.

September 15, 2021
Court of Appeals Case No.
21A-JP-742
Appeal from the Marion Superior
Court
The Honorable Gary L. Miller,
Judge
Trial Court Cause No.
49D03-2008-JP-27716

Brown, Judge.

[1] Tiffany Brandon (“Mother”) appeals the trial court’s order establishing paternity, legal custody, child support, and other issues related to the parties’ minor child, D.M. (“Child”). Mother argues the court erred in entering its order. We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] On August 27, 2013, Child was born to Mother and Daniel Moore (“Father”). Mother and Father lived together for six to eight years, but Father was incarcerated at the time Child was born. Mother and Child were living with Mother’s mother, and Father moved back in with Mother and Child a few months after he was released from incarceration when the criminal charges were dropped. After about one year of living with Mother’s mother, Mother found an apartment where she, Father, and Child lived together until September 2016. According to Mother, Father “became angry and he became physical” toward her in front of Child and her older sibling. Transcript Volume II at 37. Also, according to Mother, on one occasion, Father pulled her hair while they were in Father’s vehicle, the altercation continued when the parties arrived home, and Father pushed Mother to the floor while in the presence of Child and her older sibling. Mother separated from Father in September 2016. Father saw Child the day after he moved out and “that was it.” *Id.* at 10.

[3] According to Mother, Father threatened her while she was at work after the two had separated. Mother, who was living in Illinois at the time, requested a protective order against Father in Illinois, which was granted for a period of two years. In November 2016, Mother returned to Indiana. According to

Mother, on the day she left Illinois, Father took a screwdriver to a tire on her vehicle while she was in a community college class. In November or December 2016, Father learned that Mother had moved from Illinois to Indiana, and at the end of 2016 moved to Indiana to be closer to Child. Father attempted to call Mother and claimed she had changed her phone number, but Mother stated she had not done so and acknowledged that she had blocked Father's number when she moved from Illinois to Indiana. Father engaged the services of two lawyers in an attempt to assert his parental rights to Child, but those efforts were unsuccessful.

[4] Mother had no contact with Father until approximately two weeks before Father filed a petition to establish paternity in 2019, when Father left a note written on the back of a fabric softener box that he left on the back of her vehicle. Father did not appear for the hearing, and the action was dismissed. Father left another note on the door of Mother's residence, and Mother then filed for a protective order under Cause Number 49G16-2006-PO-19583 ("Cause No. 19583") in the Marion Superior Court.

[5] On July 14, 2020, the court granted Mother's request for a protective order. The protective order in Cause No. 19583 indicates it is effective for two years, expiring on July 14, 2022. The cover sheet lists Mother as the protected person and states "N/A" under the line for "And/or on behalf of minor family member(s)." Appellant's Appendix Volume 2 at 14. The order states that "[t]his order does not protect an intimate partner or child" but also specifies "[t]he Court orders the following additional relief to provide for the safety and

welfare of the Petitioner and each family or household member designated in Paragraph 1 of this Order: [Child and Child’s older sibling.]” *Id.* at 15, 16.

After the protective order went into effect, Father left birthday gifts for Child at the front door to Mother’s residence along with a note to Mother which began “F--- your order of protection.” Exhibits Volume I at 3.

[6] On August 13, 2020, Father filed a verified petition to establish paternity. In September 2020, the State charged Father with invasion of privacy as a class A misdemeanor under Cause Number 49D33-2009-CM-28105 (“Cause No. 28105”) for violating the protective order. On January 5, 2021, Father pled guilty in Cause No. 28105, and a no contact order was issued as a condition of his probation for the offense, which prohibited him from having any contact with Mother until January 5, 2022.

[7] On April 6, 2021, the court held a hearing on Father’s paternity petition. Father testified he has a subsequently born child who is two years old. He indicated he earns \$24.50 per hour and works a forty-hour week plus five hours of guaranteed overtime each week. He requested joint legal custody of Child, parenting time, and to list Child as a dependent on his state and federal income tax returns every other year. Mother indicated that she works at Lowe’s and makes an annual salary of \$50,000, and requested that she be awarded sole legal custody, that Father have supervised parenting time until he completed his probation in Cause No. 28105, and that Father not be permitted to claim Child as a dependent. Mother also requested that Father be ordered to pay child support pursuant to the Indiana Child Support Guidelines effective April 5,

2021. She stated Father had not seen the child consistently since September 2016.

[8] On April 15, 2021, the court entered an order which established Father’s paternity as to Child,¹ awarded Mother primary physical custody, awarded the parties joint legal custody, and specified that the parties were to use email or text message to communicate regarding matters pertaining to Child and that such communication was not a violation of the protective order, and the parties could both attend Child’s extracurricular activities so long as they “remain at a distance from each other and shall not interact.” Appellant’s Appendix Volume 2 at 10. The order also provided that Father was to have parenting time with the first six visits to be supervised after which time his parenting time would be in accordance with the Indiana Parenting Time Guidelines and that the parties were to exchange Child at the police station and remain in their vehicles during the exchange. The order further required Father to pay child support in the amount of seventy-three dollars per week and provided that Father could claim Child as a dependent on his state and federal income tax returns in odd-numbered years so long as he was ninety-five percent current on his child support obligation for that tax year.

¹ At the outset of the hearing, the parties had agreed that Father was Child’s father.

Discussion

[9] Where a trial court enters findings of fact and conclusions, we first determine whether the evidence supports the findings, and we then determine whether the findings support the judgment. *Lechien v. Wren*, 950 N.E.2d 838, 841 (Ind. Ct. App. 2011). A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* The findings control only as to the issues they cover, and a general judgment standard applies to issues upon which the trial court made no findings. *Id.* Mother challenges the trial court’s determinations as to: (A) legal custody; (B) parenting time; (C) child support; and (D) dependent tax exemption.²

A. Legal Custody

[10] Mother first argues that the court abused its discretion in awarding joint legal custody. We review child custody determinations for an abuse of discretion. *See Gonzalez v. Gonzalez*, 893 N.E.2d 333, 335 (Ind. Ct. App. 2008). Ind. Code § 31-14-13-2.3(a) provides “the court may award legal custody of a child jointly” if it finds an “award of joint legal custody would be in the best interest of the child.” In determining whether joint legal custody would be in the child’s best interest, the court “shall consider it a matter of primary, but not determinative,

² Mother asserts that the trial court adopted Father’s proposed findings and conclusions verbatim. However, Mother did not include a copy of the proposed findings and conclusions in her appendix.

importance that the persons awarded joint legal custody have agreed to an award of joint legal custody” and shall also consider:

- (1) the fitness and suitability of each of the persons awarded joint legal custody;
- (2) whether the persons awarded joint legal custody are willing and able to communicate and cooperate in advancing the child’s welfare;
- (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint legal custody;
- (5) whether the persons awarded joint legal custody:
 - (A) live in close proximity to each other; and
 - (B) plan to continue to do so;
- (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint legal custody; and
- (7) whether there is a pattern of domestic or family violence.³

Ind. Code § 31-14-13-2.3(c). “‘Joint legal custody’ for purposes of IC 31-14-13 . . . means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child’s upbringing,

³ “Domestic or family violence” is a defined term. *See* Ind. Code § 31-9-2-42. It includes another defined term, “family or household member” whose definition is set forth in Ind. Code § 31-9-2-44.5.

including the child's education, health care, and religious training." Ind. Code § 31-9-2-67.

[11] The second factor above regarding willingness and ability to communicate and cooperate in advancing the child's welfare is of particular importance in making legal custody determinations. *See Milcherska v. Hoerstman*, 56 N.E.3d 634, 641 (Ind. Ct. App. 2016). Where the parties have made child-rearing a battleground, joint custody is not appropriate. *Id.* at 642. "Indeed, to award joint legal custody to individually capable parents who cannot work together is tantamount to the proverbial folly of cutting the baby in half in order to effect a fair distribution of the child to competing parents." *Id.* (citation omitted). The primary concern of the courts with respect to legal custody is the welfare of the children and not the wishes of the parents. *See Carmichael v. Siegel*, 754 N.E.2d 619, 635 (Ind. Ct. App. 2001).

[12] Mother contends the court wrongly awarded joint legal custody because it did not enter any specific findings or conclusions regarding the evidence in support of its order, made no mention as to whether its order was in Child's best interest, and was inconsistent with the protective order and the no contact order.

[13] The order provided: "The parties are awarded joint legal custody of [Child]. While the PO [is] in place, Mother shall email to Father anything he needs to know concerning [Child]. This includes, but is not limited to, medical

appointments, school information, extracurricular information and anything else relating to [Child].” Appellant’s Appendix Volume II at 10.

[14] The record reveals that Father is subject to a protective order that is effective until July 14, 2022, and a no contact order that is effective until January 5, 2022. As noted, an award of joint legal custody requires the parties to “share authority and responsibility for the major decisions concerning the child’s upbringing, including the child’s education, health care, and religious training.” Ind. Code § 31-9-2-67. The terms of the protective order provide, in part, that Father is “prohibited from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with the petitioner.” Appellant’s Appendix Volume 2 at 15. Similarly, the no contact order prevents Father from contacting Mother. Mother had also initially separated from Father after she received a protective order in Illinois due to discord in the parties’ relationship and allegations of physical abuse before she moved to Indiana. Also, the parties were not in agreement that there should be joint legal custody. Mother testified that she wanted sole legal custody and that Father had never been involved in any of the matters relevant to legal custody. Under these circumstances and in light of the parties’ contentious history, we conclude that the court erred in awarding joint legal custody. *See Rasheed v. Rasheed*, 142 N.E.3d 1017, 1021-1022 (Ind. Ct. App. 2020) (reversing trial court’s award of joint legal custody where the parties’ acrimonious relationship prevented them from working together to co-parent and further the children’s best interests), *trans. denied*; *Nunn v. Nunn*, 791 N.E.2d 779, 788 n.4 (Ind. Ct. App. 2003)

(recognizing that the existence of a no contact order during the parties' separation indicated that the parties had a difficult time communicating with each other, thereby "making joint custody an unappealing option at this point"). Accordingly, we reverse the trial court's order that Mother and Father share joint legal custody and remand for modification of the order to provide Mother be awarded sole legal custody.

B. *Parenting Time*

[15] Mother argues the court erred in ordering Father's parenting time. Because parenting time rights are a "precious privilege that should be enjoyed by noncustodial parents," a noncustodial parent in a paternity action is generally entitled to "reasonable parenting time rights." *In re Paternity of W.C.*, 952 N.E.2d 810, 816 (Ind. Ct. App. 2011). However, the right of parenting time is "subordinate to the best interests of the child." *Id.*

[16] Ind. Code § 31-14-14-1 outlines the parenting time rights of a noncustodial parent in a paternity action. The statute provides that a noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that "parenting time might: (1) endanger the child's physical health and well-being; or (2) significantly impair the child's emotional development." Ind. Code § 31-14-14-1(a). Although the statute uses the phrase *might* endanger or impair, we have interpreted it to require evidence that parenting time *would* endanger or impair the physical or mental health of the child. *Stewart v. Stewart*, 521 N.E.2d 956, 960 n.3 (Ind. Ct. App. 1988), *reh'g denied, trans. denied; see also*

Perkinson v. Perkinson, 989 N.E.2d 758, 763-765 (Ind. 2013) (noting the *Stewart* interpretation remains the test applied to restriction of parenting time). “[A] factual basis and a finding as to the potential endangerment of [the child’s] physical health or safety or significant impairment of his emotional development are necessary” to restrict parenting time. *Rickman v. Rickman*, 993 N.E.2d 1166, 1169 (Ind. Ct. App. 2013).

[17] Mother argues the trial court’s order on parenting time was unsupported by the evidence in the record. The court’s order provides, in part:

15. Mother requests Father’s parenting time to be supervised for the next 11 months but failed to provide a rationale as to why this length of time was necessary.

* * * * *

17. Mother did not provide any evidence that unsupervised visitation would be a danger to [Child’s] physical health or significantly hurt [Child’s] emotional development.

Appellant’s Appendix Volume 2 at 8. The order also provides Father is to have parenting time with the first six visits to be supervised after which time his parenting time would not be supervised and in accordance with the Indiana Parenting Time Guidelines.

[18] Mother contends that Findings 15 and 17 are unsupported by the record. The record shows that Mother wanted Father’s parenting time to be supervised while he was on probation in the no contact order case. Mother also testified to an altercation between her and Father that Child witnessed but acknowledged

that Father had not committed any act of physical violence or abuse upon Child. Father indicated that he wanted to “ease into” parenting time with Child after not having seen her for several years. Transcript Volume II at 15. He stated he wanted to spend time with Child without formal supervision to reconnect with Child before proceeding to overnight visits and unsupervised parenting time but was willing to do supervised parenting time for a temporary period of time so that he and Child could become reacquainted. Mother also acknowledged that she refused requests made by Father’s counsel to set up parenting time with Father since the instant paternity action had been pending, and when asked whether “the only person keeping [Father] from being able to reconnect with [Child] and see her is you, right,” she replied “[a]t this point, yes, ma’am.” *Id.* at 47. We cannot say Findings 15 and 17 are unsupported by the evidence.

[19] Mother also argues that Father’s parenting time, which was to be unsupervised and in accordance with the Indiana Parenting Time Guidelines after Father completed “supervised parenting time with [Child] for 6 visits, spanning over at least three weeks through Kids Voice,” should have been supervised for a longer period of time. Appellant’s Appendix Volume 2 at 10. She contends that to order supervised parenting time requires a finding that Child’s physical health and well-being would be endangered or her emotional development would be significantly impaired and, absent such a finding, the court’s order regarding Father’s temporary supervised parenting time is erroneous. The record shows that Father had not seen Child since Mother left Illinois for

Indiana in the fall of 2016, Mother acknowledged she had prevented Father from seeing Child, and Father wanted to reconnect with Child. The court’s order for supervised parenting time was limited – six supervised visits over at least three weeks – and was fashioned so that Father and Child would be able to become reacquainted or reintroduced as Father had not exercised any parenting time with Child for several years. The Indiana Supreme Court has previously observed that the use of “professionally guided supervised visitation” is a method available to trial courts to assist in the reintroduction of parenting time. *Perkinson*, 989 N.E.2d at 766. After the initial period of supervised parenting time, Father’s parenting time was to be in accordance with the Indiana Parenting Time Guidelines. Under these circumstances, we do not disturb the court’s order.

C. *Child Support*

[20] A trial court’s calculation of child support is presumptively valid, and we reverse a decision only where the trial court’s determination is clearly against the logic and effect of the facts and circumstances before it. *Bogner v. Bogner*, 29 N.E.3d 733, 738 (Ind. 2015). We do not reweigh the evidence and consider only the evidence most favorable to the judgment. *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 674 (Ind. Ct. App. 2008).

[21] Mother argues the court abused its discretion in its calculation of Father’s child support. She contends the court’s findings regarding the parties’ weekly gross incomes were not supported by the record. She also argues the court

erroneously awarded Father credit for his subsequently born child and overnight parenting time credit with the subsequently born child.

[22] The court heard the parties' testimony regarding their respective incomes and found Father's weekly gross income to be \$1,163.75 and Mother's weekly gross income to be \$1,461.54. The record reveals that Father testified that he worked forty hours per week at \$24.50 per hour plus five hours of guaranteed overtime, which equates to forty hours per week at \$24.50 per hour plus five hours per week of overtime at a rate of one and one-half times base hourly rate. We cannot say the court abused its discretion in determining Father's weekly gross income.

[23] As for Mother's weekly gross income, the record reveals that Mother testified that she earned an annual salary of \$50,000 and provided health insurance for Child through her employer. Before the final hearing, Mother had filed three of her previous pay stubs with the court. A pay stub dated March 26, 2021, for the two-week pay period ending March 19, 2021, shows that Mother's regular base salary was \$50,000 per year or \$961.54 per week, her bonus earnings for the pay period and her year-to-date bonus earnings were \$3,076.92, and her total gross year-to-date pay for the six covered pay periods was \$14,615.40. It appears that the trial court divided the year-to-date earnings of \$14,615.40 by ten to arrive at a weekly gross income of \$1,461.54. However, it appears the year-to-date earnings specified in the March 26, 2021 pay stub covered six pay periods or twelve weeks. We remand for a redetermination of Mother's weekly gross income and for a recalculation of Father's child support obligation.

[24] Regarding the court's awarding Father credit for his subsequently born child, Ind. Child Support Guideline 3(C) provides that after weekly gross income is determined for each parent, certain reductions are allowed in computing weekly adjusted income, which is the amount upon which child support is based. Pursuant to Ind. Child Support Guideline 3(C)(1), "[t]here shall be an adjustment to Weekly Gross Income of parents who have a legal duty or court order to support children (1) born or legally adopted subsequent to the birthdates(s) of the child(ren) subject of the child support order and (2) that parent is actually meeting or paying that obligation."

[25] The commentary in Ind. Child Support Guideline 3(C) provides a two-step process in computing weekly adjusted income. The first step is to determine the number of subsequent born or adopted children and the parent seeking the adjustment has the burden to prove that support is actually paid if the subsequent child does not live in the respective parent's household. *See* Child Supp. G. 3(C)(1) cmt. 1. The second step is to calculate the subsequent child credit by multiplying the parent's weekly gross income by the use of a multiplier that reduces the parent's weekly gross income. *Id.* The multiplier varies by the number of subsequently born children; in this case, the court used 0.065, the multiplier for one subsequent child. *Id.*

[26] Father's subsequently born child does not live with him; therefore, Father had the burden to prove that he actually paid support for the child. Father testified that he saw his son "at least two or three days out [of] the week" and replied affirmatively when asked if he saw the child every weekend. Transcript

Volume II at 30. Father acknowledged that his parenting time was not court-ordered but was informally arranged with that child's mother. Father also indicated that he provided financial help to the child's mother. There was no evidence presented controverting Father's testimony. We cannot say that the court abused its discretion in awarding Father credit for his subsequently born child and accompanying parenting time credit.

[27] Based on the foregoing, we cannot say that the court abused its discretion in calculating Father's weekly gross income or in awarding Father credit for his subsequently born child and accompanying parenting time credit. We reverse and remand for a redetermination of Mother's weekly gross income and for recalculating Father's child support obligation.

D. *Dependent Exemption*

[28] Finally, Mother argues that the court erroneously award Father the benefit of claiming Child as a dependent in odd-numbered years on his state and federal income tax returns because Father did not present evidence to show how his receiving the exemption would benefit Child. "The federal tax code automatically grants to a custodial parent the dependency exemption for a child but permits an exception where the custodial parent executes a written waiver of the exemption for a particular tax year." *Quinn v. Threlkel*, 858 N.E.2d 665, 674 (Ind. Ct. App. 2006). A trial court may, in its "equitable discretion," order the custodial parent to sign a waiver of the dependency exemption. *Id.*

[29] Ind. Child Support Guideline 9 recommends a trial court consider the following factors in determining whether to order a custodial parent to release a dependent tax exemption:

- (1) the value of the exemption at the marginal tax rate of each parent;
- (2) the income of each parent;
- (3) the age of the child(ren) and how long the exemption will be available;
- (4) the percentage of the cost of supporting the child(ren) borne by each parent;
- (5) the financial aid benefit for post-secondary education for the child(ren); and
- (6) the financial burden assumed by each parent under the property settlement in the case.

The record shows that Mother and Father had approximately similar weekly gross incomes, which would result in a similar value of the exemption to both parties. Likewise, the percentage of the cost attributable to the support of Child borne by each parent is approximately equal. We cannot say that it was unreasonable for the court to order that the parties take turns benefiting from the tax exemption.

[30] For the foregoing reasons, we reverse the court's award of joint legal custody and remand with instructions to modify the order to provide that Mother have sole legal custody, reverse and remand to redetermine Mother's weekly gross

income and to recalculate Father's child support obligation, and affirm in all other respects.

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

Najam, J., and Riley, J., concur.