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APPELLANT PRO SE:

BARRINGTON A. SMITH
Elkhart, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: MARRIAGE OF)	
)	
BARRINGTON A. SMITH)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 02A03-0608-CV-371
)	
LISA M. SMITH,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-0012-DR-1035

February 28, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Barrington Smith (“Father”) appeals from the Allen Circuit Court’s denial of his motion for relief from judgment. Father raises multiple issues, which we consolidate and restate as:

- I. Whether the trial court erroneously failed to have the modification hearing recorded;
- II. Whether the trial court erroneously granted Lisa Smith (“Mother”) full legal and physical custody of their three children;
- III. Whether the trial court erroneously denied Father’s request to emancipate nineteen-year-old B.S.;
- IV. Whether the trial court erroneously modified Father’s child support obligation;
- V. Whether the trial court erroneously granted Mother the exclusive right to claim two of the three children as dependents for income tax purposes;
- VI. Whether the trial court erroneously excluded evidence of Mother’s “bad acts” and the duress Mother had allegedly caused Father;
- VII. Whether the trial court erroneously ordered Father to pay \$300 of Mother’s attorney’s fees; and,
- VIII. Whether the trial court erroneously failed to render findings of fact and conclusions of law pursuant to Father’s Trial Rule 52(A) request.

We affirm.

Facts and Procedural History

Father and Mother have three children: B.S., S.S. and P.S. They were divorced in 2001 and entered into a mediated marital settlement agreement, which was later approved by the trial court. Under the original custody agreement, Father was awarded primary physical custody of B.S and S.S., and Mother was awarded primary physical custody of

P.S. Father also agreed to pay Mother \$50 a week in child support. Both parties maintained joint legal custody of all three children. However, pursuant to an oral agreement between Father and Mother, since October of 2003 all three children have been living with Mother. Despite this change in custody, Father has not provided any child support to Mother since 2003. He has also averaged no more than two overnights a month with the children.

On August 11, 2005, Mother filed a Petition to Modify Primary Placement with the trial court. On March 9, 2006, the trial court held a hearing on Mother's petition. After hearing evidence, the trial court concluded that the relationship between Father and Mother had broken down and they were unable to effectively communicate at the level required of joint legal custodians. The trial court awarded full legal and physical custody of the children to Mother. It also ordered Father to pay Mother \$130 a week in child support as well as \$300 of her attorney's fees. The trial court's order further stipulated Mother would be able to claim two of the children as dependents for federal and state income tax purposes and that Father would be able to claim one child as a dependent.

Father subsequently filed a motion to correct error, which was presumed denied when the trial court did not rule on it. Father now appeals. Additional facts will be added as necessary.

Standard of Review

Initially, we acknowledge that Father is disputing the trial court's denial of his motion to correct error. While we typically review such a denial for an abuse of discretion, we note that, here, Mother did not submit an appellee's brief. See Gard v.

Gard, 825 N.E.2d 907, 910 (Ind. Ct. App. 2005). In such a situation, we do not undertake the burden of developing arguments on behalf of Mother. Rather, we apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the trial court if the appellant can establish prima facie error. State Farm Ins. v. Freeman, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). In this context, prima facie is defined as “at first sight, on first appearance, or on the face of it.” Id. (quoting AmRhein v. Eden, 779 N.E.2d 1197, 1205-06 (Ind. Ct. App. 2002)). The purpose of this rule is not to benefit the appellant, but to relieve this court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. Where an appellant is unable to establish prima facie error, we will affirm. Id.

I. Waiver of Recording

Father first contends that the trial court erroneously failed to have the proceeding recorded. He maintains that this was erroneous as the trial court did not explicitly ask the parties whether they wanted to record the proceeding, but rather deemed that the parties had waived their right to have the proceeding recorded by not requesting that an electronic recording be made. Appellant’s App. p. 65.

In Showley v. Showley, 454 N.E.2d 1230, 1231 (Ind. Ct. App. 1983), we held that a trial court did not abuse its discretion in failing to record a proceeding when the parties did not request that such a recording be made. We concluded that:

[u]nquestionably, any party has the absolute right to have any evidentiary proceeding reported. However, it is a right that at times may not be self-executing but may need to be invoked by request. Our combined experience is that there are certain matters which by custom are not reported as a matter of course in our trial courts. Dissolutions frequently fall within this category when only limited issues are in dispute.

Id.

We agree with Father that making a record or securing an on-the-record waiver of the recording constitutes good practice, and “we strongly encourage trial courts to make an appropriate record of the proceedings before them or secure an on-the-record waiver.” Graddick v. Graddick, 779 N.E.2d 1209, 1211 (Ind. Ct. App. 2002). However, failure to make a recording is not reversible error under the facts of this case as it was a hearing subsequent to a dissolution proceeding, and such matters are by custom frequently not recorded unless the parties request it. See id.; see also Showley, 454 N.E.2d at 1231.

II. Custody

Father also claims that the trial court erroneously granted Mother sole legal and physical custody of all three children. We review such custody modifications with a “preference for granting latitude and deference to our trial judges in family law matters.” Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). When reviewing a trial court’s ruling on a petition to modify custody, we may neither reweigh the evidence nor judge the credibility of the witnesses. Leisure v. Wheeler, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005). Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn from that evidence. Id.

A petitioner seeking modification of a child support order bears the burden of demonstrating that the existing custody arrangement should be altered. Id. A court may not modify a child custody order unless (1) the modification is in the best interests of the child and (2) there is a substantial change in one or more of the factors, set forth in

Indiana Code section 31-17-2-8 (1998 & Supp. 2002). Ind. Code § 31-17-2-21 (1998 & Supp. 1999).

The trial court found that, despite the parties' initial agreement, which provided for Father having physical custody of B.S. and S.S., all three of the children had been living with Mother since October 2003 with the oral consent of Father. The trial court determined that all of the children were doing well under Mother's care. Furthermore, in the year before the hearing, Father averaged no more than two overnights per month with the children. The trial court also found that the communication between Mother and Father began to suffer substantially in July 2002, and that "communication between the parties concerning the children became increasingly difficult, leading to a near complete breakdown in their communication at present." Appellant's App. p. 66. Most importantly, in the trial court's statement of the evidence, it certified that "Father stated that he had no objection to the physical placement of the children with Mother. However, Father did argue for the emancipation of the child [B.S.]." Id.

It appears that on appeal, Father has changed his tune. Father now contends that it is not in the "best interests" of the children for Mother to have sole legal and physical custody of them. Supporting this assertion, he claims that the "children have at times been subjected to the immoral and irrational behavior of their Mother," that "Father has always acted in the best interest of his children, and they have never suffered in any regard due to his behavior." Br. of Appellant at 17. However, the trial court clearly found that Father did not object to the physical placement of the children with Mother. "Failure to raise an issue before the trial court will result in waiver of that issue." Van

Winkle v. Nash, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002). In granting full legal and physical custody of the children to Mother, the trial court found that it was in the best interests of the children to continue living with Mother as they had done since October 2003. We decline Father's request to reweigh the evidence regarding Mother's character and the children's best interests.

Father contends that the trial court improperly disregarded the parties' marital settlement agreement, which provided for joint legal custody of the children. No agreement between parties affecting custody automatically binds the trial court. Keen v. Keen, 629 N.E.2d 938, 940 (Ind. Ct. App. 1994). Rather, it is the trial court's responsibility to determine what custody arrangement is in the best interests of the children, and "[a] stipulation [between the parties] cannot place restrictions upon a court's duty to protect the best interest of a child." Beeson v. Beeson, 538 N.E.2d 293, 298-299 (Ind. Ct. App. 1989). We conclude that the trial court did not commit prima facie error in modifying the custodial arrangement from the terms put forth in the parties' original marital settlement agreement.

III. Emancipation of B.S.

Father further claims that the trial court erroneously denied his request to emancipate B.S. At the time of the hearing, B.S. was nineteen years old. The trial court found that B.S. was "at least partially disabled as a result of multiple complications arising from persistent and chronic sickle cell anemia." Appellant's App. p. 66. Father admits that B.S. had an "episode, which resulted in a stroke." Br. of Appellant at 13.

The trial court also found that “[n]o evidence was presented at trial regarding [B.S.’s] ability to support himself through employment.” Appellant’s App. p. 66.

Father cites to Indiana Code section 31-16-6-6 (1998), claiming that this provision was amended in 2005 to say that “the duty to support a child under this chapter ceases when the child reach [sic] 18 years of age.” Br. of Appellant at 14. This is a misstatement of law. Indiana Code section 31-16-6-6 continues to provide that “[t]he duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age.” Therefore, the trial court did not commit prima facie error in denying Father’s petition to emancipate B.S.

IV. Child Support

Father next contends that the trial court erroneously determined that his weekly gross income was \$472.50 in its computation of his child support obligation. Father provides us with a W-2 form stating that his yearly salary for 2005 was \$21,595.99, or about \$450 a week. He claims that the trial court erroneously imputed an additional \$22.50 to his gross income due to days that he takes off work to care for disabled family members and to attend B.S.’s doctor appointments.

A trial court’s calculation of a child support obligation under the child support guidelines is presumptively valid. Marmaduke v. Marmaduke, 640 N.E.2d 441, 443 (Ind. Ct. App. 1994), trans. denied. Reversal of a trial court’s child support order is merited only where the determination is clearly against the logic and effect of the facts and circumstances. Kinsey v. Kinsey, 640 N.E.2d 42, 43 (Ind. 1994). On the appellate review of a child support order, weight and credibility issues are disregarded and only the

evidence and reasonable inferences favorable to the judgment are considered. Id. at 43-44.

“Weekly gross income” is broadly defined to include not only actual income from employment but also potential income and imputed income from “in-kind” benefits. Glover v. Torrence, 723 N.E.2d 924, 936 (Ind. Ct. App. 2000) (citation omitted). A trial court may determine, after consideration of an obligor’s work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community, that he or she is voluntarily underemployed and should have potential income attributed to him or her. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001).

In 2001, the parties submitted a child support worksheet with their marital settlement agreement, which stated that Father’s weekly gross income was \$580. Appellant’s App. p. 36. In the past five years, his weekly income has decreased by \$130 a week. Father freely admits that he voluntarily leaves work to care for disabled family members, even though he is still capable of working. “When a parent becomes voluntarily unemployed or underemployed, the trial court *must* calculate support based upon a determination of potential income.” Meredith v. Meredith, 854 N.E.2d 942, 947 (Ind. Ct. App. 2006) (citing Ind. Child Support Guideline 3(A)(3)) (emphasis added). As father is voluntarily underemployed, the trial court did not commit prima facie error in imputing an additional \$22.50 to his weekly gross income.

Father further contends that the child support should not have been modified because the parties had already determined what his support obligation would be in their initial mediated marital settlement agreement. Our court has observed that “[w]hen

custody, support, or visitation issues are being determined, the best interests of the child are the primary consideration.” In re Paternity of K.J.L., 725 N.E.2d 155, 158 (Ind. Ct. App. 2000). Although courts should give great weight to the wishes of the parents, it is the duty of the trial court to determine if any agreement is in the best interests of the child. Id. Therefore, no agreement between parties that affects child custody, support, and visitation issues is automatically binding upon the trial court. Id.

When Mother and Father initially entered into the marital settlement agreement, Father had physical custody of two children and Mother had physical custody of only one child. Presently, Mother has physical custody of all three children, and subsequently it was in the best interests of the children to modify the previous support arrangement so that the children would have more financial resources available to them. Therefore, we conclude that the trial court did not commit prima facie error in modifying Father’s child support obligation.

IV. Tax Exemption

Smith next claims that the trial court erred in sua sponte granting Mother the exclusive right to claim B.S. and P.S. as dependents for federal and state income tax purposes.¹ In particular, he argues that this modification is contrary to the terms of the parties’ mediated marital settlement agreement, in which he claims Mother waived her right to claim more than one child as a dependent.

¹ In his brief, Father claims that “[t]he court made a determination that Mother would be allowed to claim all of the children for state and federal tax purposes.” Br. of Appellant at 12. This is incorrect. The trial court’s order only grants Mother the right to claim B.S. and P.S. as dependents. It grants Father the exclusive right to claim S.S. as a dependent. Appellant’s App. p. 51.

Congress pronounced in Internal Revenue Code section 152(e) the general rule that the custodial parent is entitled to take the dependent child as an income tax exemption. 26 U.S.C. § 152(e) (2005). The custodial parent is the parent having custody for a greater portion of the calendar year. § 152(e)(1)(B). Clearly, Mother is the custodial parent of all three children here. However, the trial court granted Father the “exclusive right to claim the child [S.S.] as [a] dependent for federal income tax and state income tax purposes.” Appellant’s App. p. 51. The trial court also ordered the parties to “timely execute any and all documents necessary as required by federal and/or state taxing authorities which are necessary to implement the terms” of its order. Id.

Addressing whether the trial court was bound by the terms of the marital settlement agreement, we note that a custodial parent may execute a written waiver of the exemption for a particular tax year. Sims v. Sims, 770 N.E.2d 860, 866 (Ind. Ct. App. 2002).

Pursuant to the authority conferred upon it by section 152(e)(2) as amended, the Internal Revenue Service (IRS) issued Form 8332 to enable a noncustodial parent to satisfy the written declaration requirement of section 152(e)(2). Form 8332 requires a taxpayer to furnish (1) the names of the children for which exemption claims were released, (2) the years for which the claims were released, (3) the signature of the custodial parent confirming his or her consent, (4) the Social Security number of the custodial parent, (5) the date of the custodial parent’s signature, and (6) the name and the Social Security number of the parent claiming the exemption.

Miller v. Commissioner, 114 T.C. 184, 188-189 (2000), affd. on another ground sub nom. Lovejoy v. Commissioner, 293 F.3d 1208 (10th Cir. 2002).

The marital agreement that Father relies on merely states, “[Father] shall be entitled to claim the children [B.S.] and [S.S.] as a dependent for state and federal income

tax purposes. [Mother] shall be entitled to claim the child, [P.S.] as a dependent for state and federal income tax purposes.” Appellant’s App. p. 33. This agreement certainly does not meet the requirements for a written waiver as it does not specify the years in which Mother supposedly waived her right to claim the children as exemptions, nor does it provide their social security numbers. Rather, it appears that this original settlement agreement was only intended to give Father the right to claim two children as dependents while Father maintained physical custody of those two children. See Helms v. Helms, 490 N.E.2d 1153, 1157 (Ind. Ct. App. 1986).

Regardless, we conclude that Mother did not intend to release her claim to the dependency exemption in the event that she became the primary custodial parent. Furthermore, since the trial court determined that Mother was the primary custodial parent of the children, the trial court properly determined that she was allowed to claim B.S. and P.S. as dependents under federal law.

V. Exclusion of Evidence

Father next contends that the trial court improperly refused to let him present evidence on Mother’s “bad acts” and on the duress Mother had caused him. Regarding Mother’s alleged bad acts, Father claims that the trial court erred in not allowing evidence of Mother’s conviction for battery against his wife and a conviction for violating a protective order. However, Father does not cite to any part of the Appendix to support these alleged convictions. He has therefore not put forth any cogent argument for our review. See Ind. Appellate Rule 46(A)(8)(a) (2007).

Waiver notwithstanding, we are not persuaded that such evidence, if it did in fact exist, would have been relevant to the trial court's proceeding. The trial court's statement of evidence reveals that "Father attempted to testify regarding alleged bad conduct of Mother to demonstrate why [B.S.] should be emancipated. Upon Mother's objection, the Court ruled that said testimony would not be relevant to the matter of emancipation." Appellant's App. p. 66. The trial court also found that "Father stated he had no objection to the physical placement of the children with Mother." Id.

Father is correct in contending that a person's character may be a material fact in deciding who should have custody of children because fitness to provide care is of paramount importance. In re J.L.V., Jr., 667 N.E.2d 186, 190 (Ind. Ct. App. 1996). However, such evidence is only relevant if physical custody is in dispute. Indiana Evidence Rule 401 (2007) defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Father did not object to the physical placement of the children with Mother at the proceeding, and he cannot claim for the first time on appeal that the children should not be placed with Mother because of her bad character. We fail to see how evidence of any of Mother's alleged convictions would be relevant to Father's claim that B.S. should be emancipated. Therefore the trial court did not commit prima facie error in excluding such evidence.

Father further contends that the trial court erroneously "refused to hear any evidence surrounding the events [that] facilitated the change in primary physical placement of the children." Br. of Appellant at 16. Specifically, he claims that he

entered into an oral agreement with Mother to relinquish primary physical custody of the children to Mother under duress. We again fail to see how this evidence would have been relevant to the proceedings given that “Father stated he had no objection to the physical placement of the children with Mother.” Appellant’s App. p. 66.

Furthermore, we note that “it is elementary that a contract induced by fraud or duress is not void but only voidable.” Raymundo v. Hammond Clinic Ass’n, 449 N.E.2d 276, 283 (Ind. 1983). Such contracts may be ratified and affirmed by the party upon whom the alleged duress was practiced. Lewis v. Kerns, 175 F. Supp. 115, 118 (D.C. Ind. 1959). The children have been living with Mother since October 2003, and the trial court’s proceeding took place on March 9, 2006. For two and a half years, Father has acquiesced in the oral agreement for Mother to take care of and provide for the children while Father occasionally paid for some necessities. During this time, he never challenged the validity of their oral agreement. Therefore, we conclude that the trial court did not commit prima facie error in denying his request to present evidence of alleged bad acts and duress at the custody proceeding.

VI. Attorney’s Fees

Father next contends that the trial court erroneously ordered him to pay \$300 of Mother’s attorney’s fees. The divorce court may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding in connection with the marriage dissolution. Ind. Code § 31-15-10-1 (1998); Beeson v. Christian, 594 N.E.2d 441, 443 (Ind. 1992). When determining whether an award of attorney’s fees is appropriate, the trial court may consider such factors as the resources of

the parties, the relative earning ability of the parties, and other factors that bear on the reasonableness of the award. In re Marriage of Bartley, 712 N.E.2d 537, 546 (Ind. Ct. App. 1999). The court may also look at the responsibility of the parties in incurring the attorney's fees. Hanson v. Spolnik, 685 N.E.2d 71, 80 (Ind. Ct. App. 1997), trans. denied. A trial court need not give specific reasons for its decision to award attorney's fees in dissolution proceedings. In re Marriage of Pulley, 652 N.E.2d 528, 532 (Ind. Ct. App. 1995), trans. denied.

In this case, Mother requested reimbursement for \$500 of attorney's fees, and the court ordered Father to pay only \$300 of the fees. The trial court specifically found that Father earned or was capable of earning more than Mother. The trial court also found that from 2003 through the date of the hearing, Father had not provided any child support to Mother despite the fact that all children were living with her. We also note that the parties' marital settlement agreement stipulated that Father would pay Mother \$50 a week, which he failed to do. Appellant's App. p. 34. Additionally, Father incurred no attorney's fees of his own during this proceeding. Given Father's breach of their settlement agreement, the fact that Mother has provided for all three children without any financial support from Father for two and a half years, and the fact that Father has the capacity to earn more than Mother, we find the \$300 award of attorney's fees reasonable.

VII. Findings of Fact and Conclusions of Law

Father lastly contends that the trial court failed to render findings of fact and conclusions of law pursuant to his Trial Rule 52(A) request. Indiana Appellate Rule 31(c) (2007) provides that a trial court may certify a statement of the evidence when there

is no transcript available. The trial court in this instance did properly certify a statement of the evidence, and we therefore find no error. See Appellant's App. p. 65. Father also argues that "[t]he court order and the court's 'Certified Statement of Evidence' contradict each other," but does not elaborate on exactly how they contradict each other. He does not cite to any portions of the court's order or the court's statement of evidence and he does not cite to any case law supporting his assertion. Therefore, we deem this argument waived for failure to make a cogent argument. See Ind. Appellate Rule 46(A)(8)(a) (2007).

Conclusion

We conclude that the trial court did not commit prima facie error in failing to record the modification hearing, in granting full legal and physical custody of the children to Mother, or in denying Father's request to emancipate B.S. We further conclude that the trial court properly modified Father's child support obligation and properly granted Mother the exclusive right to claim two of the three children as dependents. The trial court did not commit prima facie error in excluding evidence or in ordering Father to pay a portion of Mother's attorney's fees, and the trial court properly rendered a certified statement of the evidence.

Affirmed.

NAJAM, J., and MAY, J., concur.