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APPELLANT PRO SE:

S.C.
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF B.S.C.	)	
	)	
S.C.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 55A04-1012-JP-780
	)	
N.A.S.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-0106-JP-91

June 13, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, S.C. (Father), appeals the trial court's Order on emergency hearing which denied Father's request to modify the physical custody of his minor child, B.S.C.

We affirm.

ISSUES

Father raises two issues on appeal which we restate as follows:

(1) Whether the trial court abused its discretion in refusing to modify the physical custody of B.S.C.; and

(2.) Whether the trial court violated Father's due process rights by deciding that B.S.C. would be removed if the parties returned to court for "any other reason."

FACTS AND PROCEDURAL HISTORY

On March 15, 1999, B.S.C. was born to N.A.S. (Mother) and Father. On June 25, 2001, the State filed a paternity action on behalf of B.S.C. and on July 11, 2001, the trial court found Father to be the biological father of B.S.C. On that date, custody and child support were awarded to Mother; however, no order was entered on visitation. The trial court informed Father to request a hearing to place an order for visitation when it was advisable. Multiple proceedings were held in the following years regarding the child support order.

On May 26, 2004, Father petitioned the trial court for visitation rights with B.S.C. On August 25, 2004, the trial court set supervised visitation to be supervised on Saturdays from

10:00 a.m. until 4:00 p.m. On November 17, 2004, the trial court held a compliance hearing at which time it issued joint custody with parenting time guidelines or visitation upon agreement of the parties.

On October 5, 2005, Father filed a verified emergency motion for modification of custody and for provisional orders. On December 15, 2005, the trial court held a hearing and suggested that the parties communicate and try to reach an agreement concerning custody of B.S.C. The trial court set the case for a hearing on March 9, 2006, to discuss extended visitation. On March 1, 2006, before the March 9 hearing, Father called the trial court to say he had reached an agreement with Mother and the hearing was no longer necessary. On March 9, 2006, the trial court issued an agreed entry for custody, visitation, and support. On August 28, 2008, a compliance hearing was held and the State reported Father's child support arrearage to be $4,622. On October 21, 2008, the trial court ordered the child support case transferred to "closed files." (Appellant's App. p. 9).

On October 18, 2010, Father filed a motion for modification of custody and requested an emergency hearing. On December 2, 2010, the trial court held the emergency hearing on Father's motion and took the modification of custody under advisement. On December 6, 2010, the trial court entered an Order denying Father's request for change of custody and stated the following findings in support of its conclusion:

> 12) The mother has an extremely poor relationship with her current husband as he has battered her emotionally and physically throughout their marriage.
> 13) That the mother believed the father has a good relationship with the child.
> 14) The father stated he had a good relationship with the child.

* * *

19) The mother's mental health is poor as she has entered into a marriage after two weeks, stayed in a relationship that has been physically and verbally abusive due to alcohol issues with her new husband and she seemingly has no ability or will to make these issues better for her or her children.
20) The mother's current husband has serious physical health issues as he is an alcoholic.
21) That although the mother has stated she was pushing for the divorce that was filed by her current husband, the court was able to verify on its computer that the divorce has been dismissed.
22) As well, there are currently no contact orders between the mother and her husband thanks to pending criminal charges.
23) The court also found on the computer that the mother's current husband has been convicted of crimes before and, as stated above, faces charges currently for acts against the mother.
24) The court will order NO FURTHER contact between the child and mother's current husband.
25) The court also found that the father in this case has convictions in his past as well and he is currently on the sex offender registry for the State of Indiana.
26) That upon further research on the computer during the hearing, the offenses were for Child Exploitation in both 2001 and 2002.
27) Clearly the father has mental and/or physical health issues as well.

* * *

31) The father, although completely cogent and prepared in court to show how poor the mother has done, was convicted of offenses against children and remains on the sex offender list at this time.
32) Quite honestly, neither parent in this matter seems fit to raise a child. The mother cannot seem to get past her relationship issues and seems only to focus on her well being and/or happiness, while the father has committed atrocious acts against children in the past.
33) As such, although the court could find there are substantial changes thanks to mother's complete inability to focus on the well being of the children rather than her well being, the status of the father must impact just as equally against him and the court will find that although there is a substantial change in the factors in favor of the father, it is not in the best interests of the child to modify custody at this time.
34) That, however, for the future or any future judge, it would seem appropriate that if the mother cannot get her act together and focus on her

> child, and in light of father's past convictions, that if the parties come to court again regarding custody or for any other reason, they be instructed to bring the names of third parties that the court can appoint to raise this child.
> 35) Quite simply the best answer here would be for someone other than these two to raise this child and give him a fighting chance.
> 36) Therefore, on the current record, the modification of custody must be denied.
> 37) The mother requested a change of venue.
> 38) That request shall be granted and this case shall be sent to Johnson County as requested by the parties.

(Appellant's App. pp. 11-14).[1]

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

At the outset, we note that Father failed to furnish this court with a complete record. Although Mother did not submit an appellee's brief, it is Father as the party claiming error, who has the burden of producing a complete and accurate record on appeal. *Smith v. Convenience Store Distrib. Co.*, 583 N.E.2d 735, 739 (Ind. 1992). Indiana Appellate Rule 27

[1] We note that the trial court extensively referenced its own independent internet research in its findings. Most notably, through its research the trial court found that Mother's current husband has criminal charges pending and that Father was convicted for child exploitation in 2001 and 2002. We draw the trial court's attention to the Code of Judicial Conduct, Rule 2.9(c) which states that with regard to ex parte communications:

> A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Comment [6] to Rule 2.9 (c) clarifies that "[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums." We strongly caution the trial court to refrain from doing any independent research in the future.

We are mindful of Indiana Evidence Rule 201, which sets out the parameters of judicial notice by the trial court. However, Father did not provide a complete record for review to determine whether a party requested the trial court to take judicial notice. In light of the fact that the trial court in its findings explicitly stated to have done research "on its computer" without further specification of the exact source, it is not appropriate to take judicial notice even though it might fall within the trial court's discretionary powers pursuant to Ind. Evid. R. 201(c).

requires the record on appeal to "consist of the Clerk's Record and all proceedings before the trial court . . .," and Indiana Appellate Rule 46(A) provides specific details regarding the arrangement and contents required in the appellant's brief. Generally, a transcript of the evidence and proceedings before the trial court must be included in the record on appeal for it to be deemed sufficient. *In re Walker v. West*, 665 N.E.2d 586, 588 (Ind. 1996).

Although the clerk's record was completed, Father did not request a copy of the transcript from the trial court when pursuing this appeal. Furthermore, Father's Appendix merely consists of the chronological case summary and the trial court Order on the emergency hearing on December 6, 2010. Father's brief refers to additional context which is not specifically mentioned in materials included in the Appendix. As here, when the evidence is in dispute, a citation "shall be made to the pages of the [t]ranscript where the evidence was identified, offered, and received or rejected." Ind. App. R. 46(A)(8)(d). Matters outside the record cannot be considered by a court on appeal, but rather, this court must decide the case on the record before it, and cannot speculate as to actual facts of the case. *Zapffe v. Srbeny*, 587 N.E.2d 177, 180 (Ind. Ct. App. 1992).

As such, Father's brief presents a one-sided version of the facts of the case which cannot be verified in the record presented on appeal. Moreover, Father's statement of the facts presents facts which are most favorable to his desired outcome. A statement of facts in an appellant's brief should be a concise narrative of the facts stated in the light most favorable to the judgment and should not be argumentative. *Lucas v. Frazee*, 471 N.E.2d 1163, 1166 (Ind. Ct. App. 1984). The fact that Father is a *pro se* litigant does not excuse him

from complying with the appellate rules of procedure. *Angleton v. Estate of Angleton*, 671 N.E.2d 921, 924 (Ind. Ct. App. 1996). Although Father fails to meet these procedural requirements, we will attempt to review Father's arguments on their merits.

I. *Refusal to Modify Custody*

Father contends that the trial court abused its discretion in refusing to modify custody. Specifically, he argues that the trial court erred by denying the modification *solely on the basis of research conducted on a computer during the hearing* which revealed Father's convictions that require him to register as a sex offender. However, in footnote 1, we stated our refusal to consider any evidence obtained by the trial court through an improper internet search. Nevertheless, because there is evidence that the mere fact that Father was a sex offender was properly before the trial court, we will evaluate whether the modification of custody was properly denied due to Father's status.

In general, an appellate court reviews child custody modifications for an abuse of discretion, with a "preference for granting latitude and deference" to trial judges in family law matters. *Green v. Green*, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006). When the trial court enters findings *sua sponte*, the specific findings control only as to the issues they cover. *Brinkmann v. Brinkmann*, 772 N.E.2d 441, 444 (Ind. Ct. App. 2002). The specific findings will not be set aside unless they are clearly erroneous, and we will affirm the general judgment on any legal theory supported by the evidence. *Hanson v. Spolnik*, 685 N.E.2d 71, 76 (Ind. Ct. App. 1997), *trans. denied*. A finding is clearly erroneous when there are no facts or inferences drawn that support it. *Id.* at 76-77. In reviewing the trial court's findings, we

neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* at 77. Rather, we consider only the evidence and reasonable inferences drawn therefrom that support the findings. *Id.*

A trial 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 a court may consider under Indiana Code § 31-17-2-8 when it originally determines custody. *In re Paternity of M.P.M.W.*, 908 N.E.2d 1205, 1208 (Ind. Ct. App. 2009). Here, the trial court found that although there was a substantial change in the factors in favor of Father, it was ultimately "not in the best interests of the child to modify custody." (Appellant's App. p. 14).

Father posits that the trial court cannot use his status as a sex offender to deny his modification for custody because those convictions stemmed from "events which took place ten years prior." (Appellant's Br. p. 8). He argues that even though those issues were "present during all prior custody and parenting time hearings," the trial court still found him "fit enough to share joint legal custody and to enjoy parenting time in accordance with the Guidelines." (Appellant's Br. p. 7). Father supports this argument by referencing I.C. § 31-17-2-21 which states that "[T]he court shall not hear evidence on a matter occurring before the last custody proceeding between the parties unless the matter relates to a change in the factors relating to the best interests of the child[.]"

The paramount concern in consideration of child custody modification has always been the child's best interests. *Joe v. Lebow*, 670 N.E.2d 9, 21 (Ind. Ct. App. 1996) (quoting

Pierce v. Pierce, 620 N.E.2d 726, 729 (Ind. Ct. App. 1993)). It is well within the discretion of the trial court to consider evidence entered in prior hearings in the same custody case when ruling on a motion to modify child custody and visitation. *Arms v. Arms*, 803 N.E.2d 1201, 1209 (Ind. Ct. App. 2004) (evidence from prior hearing was just as relevant to instant hearing, as past behavior was a valid predictor of future conduct). In fact, a trial court is to apply a more stringent standard to requests for modification than it is to initial petitions for custody. *In re Paternity of Winkler*, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000).

Here, the trial court denied modification by finding it was against the best interests of the child. As such, there is a reasonable inference that the trial court relied on the statutory exception included in I.C. § 31-17-2-21—matters relating to the best interests of the child—to consider Father's past convictions. It cannot be denied that Father's convictions need to be considered to evaluate the best interests of his minor child.

Father has the burden to prove that the trial court abused its discretion in refusing to modify the child custody order. Based on Father's limited record, we cannot say that Father has satisfied his burden and therefore affirm the trial court's decision.

II. *Due Process Rights*

Father also argues that the trial court violated his procedural due process rights by suggesting that B.S.C. would be removed from the custody of his parents should the parties come to court "for any other reason." (Appellant's Br. p. 11). Specifically, the trial court stated:

> That, however, for the future or any future judge, it would seem appropriate that if the mother cannot get her act together and focus on her child, and in

> light of father's past convictions, that if the parties come to court again regarding custody or for any other reason, they be instructed to bring the names of third parties that the court can appoint to raise this child.

(Appellant's App. p. 14).

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of our fundamental liberty interests. *Bester v. Lake Cty. Office of Family and Children*, 839 N.E.2d 143, 147 (Ind. 2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000)). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Father does not argue that his substantive due process rights were violated at the emergency hearing before the trial court, but rather he contends that the statement made in the Order "preemptively" prohibits his "free access" to the court and precludes his right to petition a court in the future. (Appellant's Br. p. 11). While it is true that the trial court cannot terminate Father's parental rights without granting him due process, the mere risk of those rights being terminated does not amount to a constitutionally significant impairment based on these facts. "[P]rocedural due process does not extend to hypothetical situations, nor does it apply when there is, at best, merely a risk of deprivation." *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 108-09 (Ind. Ct. App. 1995). Father's procedural due process argument is at best, merely a risk of deprivation in future proceedings.

It should also be noted that at Mother's request this case has been transferred to Johnson County, Indiana. The Johnson County Courts are courts of general jurisdiction like the Morgan County Circuit Court which issued the Order on the emergency hearing at issue. The rule is well-settled in this state that one court cannot control the execution of orders and process of another court of equal jurisdiction. The ruling of the first judge who exercises jurisdiction does not become the law of the case. Moreover, the judge who later has jurisdiction is duty-bound to exercise his judicial discretion "as though the matter were presented for the first time." *McLaughlin v. American Oil Company*,181 Ind.App. 356, 391 N.E.2d 864, 865 (1979) (quoting *State ex rel. Williams Coal Co. v. Duncan*, 211 Ind. 203, 207, 6 N.E.2d 342, 343-344 (1937)). "A [trial] court to which a cause is venued has the same jurisdiction and power to make an order or ruling which would have been made by the court in which the cause was originally filed." *Maley v. Citizens Nat. Bank of Evansville*, 120 Ind.App. 642, 92 N.E.2d 727, 732 (1950). Thus, although the Johnson County Court may choose to take judicial notice of the Order issued by Morgan County Circuit Court, it is not bound by the findings or statements in the order. Ind. Evidence Rule 201(b). Even under the circumstance that a trial court takes judicial notice of the records of another court, a litigant still must have the opportunity to respond to the judicially-noticed information. Evid. R. 201(e). Since Father has not yet been denied the opportunity to be heard at a meaningful

time and in a meaningful manner, there is no violation of his constitutional due process rights and no need for judicial intervention exists.

CONCLUSION

Based on the limited record presented, we cannot say that Father has satisfied his burden of proving that the trial court abused its discretion in refusing to modify the existing child custody order, and we therefore affirm the trial court's decision. In addition, the trial court's suggestion that the child would be removed if the parties returned to court for any other reason presented a mere risk of deprivation to be heard at a meaningful time and in a meaningful manner, and therefore did not result in a due process violation.

Affirmed.

DARDEN, J., and BARNES, J., concur.