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IN THE
COURT OF APPEALS OF INDIANA

ASHLEY STORM,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 32A01-1010-DR-535
	)	
KYLE STORM,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephanie LeMay-Luken, Judge
Cause No. 32D05-0912-DR-159

July 8, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Ashley Storm appeals the trial court's order dissolving her marriage to Kyle Storm. We affirm in part, reverse in part, and remand.

Issues

Ashley raises three issues, which we restate as:

> I. whether the trial court properly prohibited her boyfriend, Bryce Carter, from having contact with the parties' children;
>
> II. whether the trial court properly awarded Kyle three weekends per month of parenting time; and
>
> III. whether the trial court properly divided the marital estate.

Facts[1]

Ashley and Kyle were married on March 25, 2006. During the marriage, they had two children, J.S. and L.S. In November 2009, Ashley petitioned for dissolution. On May 25, 2010, the trial court issued a provisional order. On August 18, 2010, the trial court held a final hearing. Based on Kyle's request, on October 5, 2010, the trial court issued findings and conclusions that provided in part:

> 3. There were two (2) children born of the marriage, namely to-wit: [J.S.], whose date of birth is September 17, 2006, and [L.S.], whose date of birth is October 14, 2008. Court accepts the stipulation of parties and grants to Wife primary physical custody of the minor children and grants both parties joint legal custody.

* * * * *

[1] Kyle contends that Ashley's Statement of Facts should be disregarded as argumentative, one-sided, and not in accordance with the standard of review. We deny this request.

> 7. The Court has considered IC 31-15-7-4 and IC 31-15-7-5 and finds that the Wife has presented relevant evidence that equal division of the marital estate would not be just and reasonable. Specifically, Husband earns approximately three times the income of Wife.
>
> * * * * *
>
> 13. Husband shall have Parenting Time with the minor children three (3) weekends out of every (4). Husband shall have two consecutive weekends of Parenting Time then Wife shall have a weekend then Husband shall have a weekend of Parenting Time. Husband's weekend Parenting Time shall begin Fridays as soon as Husband or his parents can pick up the children and shall conclude Sunday at 7:00 p.m.
>
> * * * * *
>
> 17. The Court finds Bryce Carter poses a continuing threat to the emotional and physical well being of the minor children.
>
> 18. Parties shall permit zero contact between the minor children and Bryce Carter.

App. pp. 9-11. The trial court awarded each party various marital assets and debts and ordered the parties to split the proceeds from sale of the marital home 50/50. Ashley now appeals.

Analysis

Kyle requested findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). When a trial court enters findings and conclusions, we apply a two-tiered standard of review; first we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. Smith v. Smith, 938 N.E.2d 857, 860 (Ind. Ct. App. 2010). "In deference to the trial court's proximity to the

issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment." Id. We do not reweigh the evidence, and we consider only the evidence favorable to the trial court's judgment. Id. The party appealing the trial court's judgment must establish that the findings are clearly erroneous. Id. "Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made." Id. We do not defer to conclusions of law, which are evaluated de novo. Id.

I. No Contact

Pointing to her uncontradicted testimony that Carter had been around the children and had been appropriate toward them, Ashley contends the trial court abused its discretion in prohibiting him from having contact with them. Ashley contends that "before a court can place restrictions on a parent's time with their children, there must first be a showing of harm to the children, which might endanger their physical health or significantly impair their emotional development." Appellant's Br. p. 12. She goes on to argue that the trial court "made no specific finding that Carter's presence with the children had any adverse effect on the children, or that they were, in any way, traumatized or emotionally abused." Id. at 12-13.

This case is distinguishable from the cases upon which Ashley relies, which generally prohibit trial courts from imposing restrictions on parenting time in the absence of a finding of harm or adverse affect on the children. For example, in Downey v. Muffley, 767 N.E.2d 1014, 1020-21 (Ind. Ct. App. 2002), we reversed a trial court's imposition of the standard overnight restriction where the record revealed no rational

basis for such. We held, "The trial court erred by a priori imposing the restriction upon Mother without the requisite finding of harm. Imposition of such restriction can be justified only when it is based upon a finding of harm to the children on a case-by-case basis." Downey, 767 N.E.2d at 1021; see also In re Paternity of V.A.M.C., 768 N.E.2d 990, 1001 (Ind. Ct. App. 2002) (reversing trial court's order prohibiting a father from associating with his fiancée while visiting with child because Indiana Code Section 31-14-14-1, by its plain language, requires the trial court to make a finding of physical endangerment or emotional impairment prior to placing a restriction on the noncustodial parent's visitation and the trial court did not specifically find that the child's emotional well-being or physical health would be endangered); and Teegarden v. Teegarden, 642 N.E.2d 1007, 1010 (Ind. Ct. App. 1994) (concluding that in a custody dispute between a mother and a step-mother, the trial court improperly conditioned mother's custody on not cohabitating with other women with whom she is in a homosexual relationship and not engaging in homosexual activity in the presence of children without evidence of her behavior having an adverse effect on the children).

Here, evidence was presented at the hearing that Carter had been convicted of Class D felony dealing in a controlled substance and Class D felony domestic battery in the presence of his own child and that he was still on probation for that conviction. In its order, the trial court stated that it "finds Bryce Carter poses a continuing threat to the emotional and physical well being of the minor children." App. p. 11. The trial court then ordered, "Parties shall permit zero contact between the minor children and Bryce Carter." Id.

Ashley points out that the Kyle did not present evidence that Carter had harmed the children or that they had exhibited physical or emotional distress. We believe it would be ill-advised to require the children to be placed in actual harm's way before the trial court could restrict Carter's contact with them. Under these circumstances, where the trial court found that Carter posed a continuing threat to the children's emotional and physical well-being, it was within the trial court's discretion to prohibit Carter from having contact with them.

Ashley also appears to assert that the trial court's order is insufficient because the statement regarding Carter is included in the "conclusions" section of the order and not in the "findings" section. "In the event the trial court mischaracterizes findings as conclusions or vice versa, we look past these labels to the substance of the judgment." Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). Although the finding could have been more specific, because it found that Carter posed a threat to the children's well-being, we believe this observation is appropriately characterized as a finding.

Finally, Ashley's argument that Kyle's raising of the issue of her relationship with Carter only moments before the final hearing shows his lack of genuine concern for the children's safety is a request to assess witness credibility, which we must decline. Given that Carter recently had been convicted of domestic battery, which occurred in the presence of his own child, and was still on probation at the time of the final hearing, Ashley has not established that the trial court abused its discretion in imposing this restriction.

II. Parenting Time[2]

Ashley argues that the trial court improperly deviated from the Indiana Parenting Time Guidelines ("the Guidelines") without explaining why such a deviation is necessary or appropriate. Indeed, part 2 of the Scope of Application of the Guidelines provides, "There is a presumption that the Indiana Parenting Time Guidelines are applicable in all cases covered by these guidelines. Any deviation from these Guidelines by either the parties or the court must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case." The commentary explains that, although formal findings and conclusions are not necessary, the trial court must state the reasons for deviation.

Pursuant to the trial court's order, Kyle was awarded parenting time with the children three out of every four weekends. The trial court did not explain, however, why it deviated from the Guidelines, which anticipates parenting time on alternating weekends and one evening per week. See Ind. Parenting Time Guidelines § II(B)(1). Thus, we remand for the entry of an order following the Guidelines or for an explanation of the reasons for the deviation. See Haley v. Haley, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002) (remanding for and order mirroring the Guidelines or explaining the deviation from the Guidelines).

III. Distribution of Marital Estate

[2] Kyle appears to argue that Ashley waived this issue because she did not provide us with the parties' stipulations of preliminary issues. Contrary to this assertion, however, the Appendix does include the May 25, 2010 "Stipulations of Preliminary Issues." App. pp. 22-23. Without more, Kyle has not established that this issue is waived.

Ashley also challenges the manner in which the trial court distributed the marital property. "The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion." Galloway v. Galloway, 855 N.E.2d 302, 304 (Ind. Ct. App. 2006).

Ashley specifically challenges the trial court's valuation of her engagement ring and wedding band at $9,200. Under most circumstances, Ashley's argument would be considered a request to reweigh the evidence given Kyle's written assertion that the gross value of the rings was $9,200. Upon careful review of the record, however, we must agree with Ashley. Ashley testified that the ring appraised for $700. Kyle then testified that he paid $7,800 for the engagement ring and that he had not had the ring appraised. On cross-examination, Kyle was questioned as follows:

> Q. Okay. So if Ashley put that on your side of the ledger you could have the $7,800 dollar ring and she can have seventy eight hundred dollars more in value of the home, that would be a fair proposal, wouldn't it?
>
> A. No.
>
> Q. Why?
>
> A. I don't have very much use of an engagement ring.
>
> Q. Well for seventy eight hundred dollars you could sell it for seventy eight hundred dollars, right?
>
> A. Uh, that's retail price.
>
> Q. Right. It's not worth seventy eight hundred dollars today is it?
>
> A. I have no idea.

Tr. p. 107.

Later in the hearing, in response to a question by Kyle's attorney, Ashley testified that she would give the engagement ring and wedding band to Kyle in exchange for $1,500. See Tr. p. 116. Kyle then testified in response to a question by his attorney that he would take the engagement ring and wedding band for $1,500. See Tr. p. 118. Given Kyle's testimony regarding his uncertainty of the value of the engagement ring and the parties' apparent agreement that Kyle would take the rings in exchange for $1,500, the trial court improperly valued the rings at $9,200.

Ashley also contends that the trial court abused its discretion when it divided the marital estate. In support of her argument, she points to a mathematical error in the trial court's calculation of assets it was awarding to her. The trial court totaled those assets at $30,197, and Ashley asserts the correct total of those assets was $26,797. Kyle acknowledges that Ashley's calculation is correct. He claims, however, that any error is nullified because Ashley withdrew $3,500 from an account when she filed the dissolution petition. In its order, however, the trial court acknowledged this withdrawal and included the full value of the account, $3,600, as an asset to be awarded to Ashley. As such, we fail to see how "Kyle has ended up paying . . . more than the trial court's error as cited by Ashley." Appellee's Br. p. 15.

Kyle also argues that the trial court's error is nullified by the fact that Ashley received personal property that was not itemized in the trial court's order. In the absence of an explanation as to how the personal property should have been valued and divided, we reject this argument as a basis to support the trial court's mathematical error. Based

on our conclusion regarding the parties' agreement regarding the rings and the trial court's mathematical error, we reverse the distribution of marital property and remand for recalculation in accordance with the trial court's finding that a deviation from the 50/50 presumption would be appropriate.[3]

Conclusion

Under these circumstances, the trial court did not abuse its discretion in prohibiting Carter from having contact with the children. The trial court is required to explain its deviation from the Guideless. Given Kyle's own testimony regarding the value of the engagement ring and the parties' apparent agreement as to the appropriate distribution of the rings, the trial court improperly valued the rings at $9,200. Because of the erroneous valuation of the rings and the trial court's mathematical error, we remand for a recalculation and distribution of the marital estate. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and DARDEN, J., concur.

[3] In his brief, Kyle argues that "Ashley agreed to the 'lesser end' of a 55/45 division of the marital estate." Appellee's Br. p. 16 (quoting Tr. p. 103). That portion of the transcript, however, refers to Kyle's testimony in which he stated he wanted to split the house proceeds "fifty-five/forty-five" and that he would be on the "lesser end of that percentage." Tr. p. 103.