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**IN THE
COURT OF APPEALS OF INDIANA**

MARK JONES,)
)
Appellant-Respondent,)
)
vs.)
)
MARLENE (JONES) HUCKABY,)
)
Appellee-Petitioner.)

No. 03A01-0901-CV-28

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0111-DR-1559

July 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Mark Jones (“Father”) appeals the trial court’s order on child custody and support.

We affirm.

Issues

Father raises multiple issues, which we consolidate and restate as:

- I. whether the trial court’s refusal to modify the custody arrangement was clearly erroneous;
- II. whether the trial court’s omission of guidelines for contacts with the maternal grandfather was clearly erroneous; and
- III. whether the modified child support obligation of \$130 per week was clearly erroneous.

Facts

Jones and Marlene Huckaby (“Mother”) dissolved their marriage in an agreed pro se petition on March 18, 2002. They agreed to joint custody of both children, T.J. born in 1998, and L.J. born in 2001. Father was to pay \$30 per week in child support. As to the specifics of parenting time terms, the agreement provided:

[Mother] shall have minor children on Monday and Wednesday overnights, and alternating weekends, beginning Friday mornings; [Father] shall have the minor children on Tuesday and Thursday overnights and alternating weekends, beginning Thursday evenings, with [Mother] providing child care during his times of employment. The parties will alternate holiday parenting privileges as agreed.

Appellant’s App. p. 22.

On February 21, 2008, the Bartholomew County prosecutor entered his appearance on behalf of the State and the children to enforce child support. On February

27, 2008, Father filed a petition to modify custody, parenting time, and child support provisions of the dissolution decree. The trial court set a hearing for March 5, 2008, which apparently was not held. The trial court issued an agreed order on May 27, 2008. That order provided: child support was to be determined at a later hearing; Mother was to pay health expenses not covered by insurance incurred to date; children would be added to stepfather's insurance on January 1, 2009; maternal grandfather Marlin Cox, Sr., could not be in presence of children without presence of Mother; and, parties were to participate in family counseling.

On September 2, 2008, Mother filed a petition to modify custody on her behalf. A two-day hearing was conducted on November 7, 2008, and December 5, 2008. The trial court issued an order on December 19, 2008. The trial court increased Father's support to \$130 per week and did not modify the custody arrangement. This appeal followed.

Analysis

Neither party made a specific motion under Indiana Trial Rule 52 prior to the admission of evidence requesting findings of fact and conclusions thereon. If, as here, a trial court enters specific findings of fact and conclusions sua sponte, we apply the following two-tiered standard of review: whether the evidence supports the findings, and whether the findings support the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, meaning the record contains no facts or inferences supporting them. Id. "A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made." Id. "We neither reweigh the evidence nor

assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.” Id. We emphasize that sua sponte findings control only as to the issues they cover, and a general judgment standard will control as to the issues upon which there are no findings. Id. We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id.

I. Custody

Father contends that the trial court should have modified the joint custody arrangement and awarded him full custody. Mother contends she should have sole physical custody during the school year, but does not cross appeal. Modifications of an initial child custody order are governed by Indiana Code Section 31-17-2-21. Modifications are permitted only when they are in the best interests of the child and there has been a “substantial change” in one or more of the factors identified in Indiana Code Section 31-17-2-8 as considerations in the initial custody determination. Ind. Code § 31-17-2-21(a). Because they typically rely on factual determinations, judgments in custody matters will be set aside only when they are clearly erroneous. Baxendale v. Raich, 878 N.E.2d 1252, 1257-58 (Ind. 2008). “We will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment. The concern for finality in custody matters reinforces this doctrine.” Id.

Mother and Father’s original custody agreement provided for joint custody with Mother having the children Monday and Wednesday and alternating weekends, and Father having the children on Tuesday and Thursday with alternating weekends. Mother also would provide childcare when Father was working. Both parents testified that their

respective parenting style was better than the other's style. Father insisted that Mother is not maintaining a healthy diet or adequate hygiene for the children. He also alleged the layout of Mother's home, specifically the design of the children's bedrooms, was not the safest living arrangement. Mother insisted that Father is not consistent with discipline. Both acknowledged that the back and forth arrangement is a bit tiresome and the children need stability and consistency. However, Mother and Father live within blocks of one another. The trial court even noted that the close proximity makes the "back and forth thing work better." Tr. p. 205.

No evidence was presented that the alternating arrangement was detrimental to the children. The trial court even pronounced that "the best thing for the children is to have some sort of continuing joint custody" but that it would be much better if the parties could "work something out." Id. at 215. It opined that it was best for the children if they "continue to have as much contact with both of you as possible." Id. at 209-10. The trial court was hesitant to award one parent sole custody and instead opted to continue the joint custody arrangement.

As to both parents' displeasure with the constant "back and forth," the trial court instructed them to work out a more even schedule. It suggested that their own arrangement would likely have more success than one it would pronounce "from on high." Id. at 215. Moreover, even if Father was granted primary physical custody, the parties admitted that Mother would watch the children after school and while he was at work. Shuttling the children between their two homes and their school is an inevitable situation for these parents. It was not clearly erroneous for the trial court to decline to

award either parent primary physical custody. The trial court instead opted to allow the parents to continue their joint custody and suggested they adjust the arrangement.

II. Maternal Grandfather

Father contends that the trial court erred by failing to issue a directive to Mother regarding the children's contacts with her father, their grandfather Marlin Cox, Sr. The trial court did issue a directive in the May 27, 2008 agreed order when it stated: "Mother agrees that maternal biological grandfather, Marlin W. Cox, Sr., shall not be in the children's presence without the presence of Mother at all times." Appellant's App. p. 48. During the hearing, the trial court also stated, in no uncertain terms, "your dad should never, ever, ever, ever be with these kids, period." Tr. p. 200. Father now contends that because this directive was not included in the final December 19, 2008 order, that "it might appear to Mother and her family that the restriction has been lifted." Appellant's Br. p. 35.

There is no indication the trial court's May order was temporary. Nor is there any indication in the December order that any restrictions regarding grandfather have been lifted. Mother treats the trial court's May directive regarding her father as an order and maintains Father's mention of it on appeal is a "non issue." Appellee's Br. p. 4. Father's appellate concerns on this issue are without merit. The trial court issued an adequate order directing the parties' actions with respect to contacts with Cox. The trial court's omission of additional directions regarding Cox in its December order was not clearly erroneous.

III. Child Support

Father contends the trial court erred in calculating the amount of support he owes to Mother. The trial court calculated that Father's child support should be increased to \$130 per week based on its Indiana Child Support Guidelines ("the Guidelines") calculation. The trial court also ordered that Mother should pay the first \$805 of annual uninsured medical costs and sixteen percent of costs thereafter.

Father presents a lengthy argument attempting to explain why the trial court incorrectly calculated child support, but at no point does he suggest or calculate what the appropriate figure should be. In his reply brief, Father finally suggests that \$111 per week is a more appropriate child support amount. Mother suggests that if we reverse the trial court's child support order, any revised support should be higher, but she does not cross appeal this issue.

The trial court reconsidered the original child support award of \$30 per week. It found that "Indiana Code 31-16-8-1 permits a modification of child support in cases where the amount previously ordered differs by more than 20% from the amounts indicated based on current calculations and the previous order was issued more than one year before the filing of the pending petition." Appellant's App. p. 7. This finding was supported by the record. Father's income increased since the parties made their joint pro se support agreement. When the parties made their agreement in 2002, Father was making \$608 per week and by the time of this hearing he was making \$978 per week. The trial court based the new calculation on Father's increased weekly income and that calculation was substantially greater than the \$30 per week previously in place.

The trial court calculated the amount Father would be designated to pay under the Guidelines to be \$149.36, with his credit for 183 overnights. It then calculated the amount Mother would be paying, if she was designated to pay, with a credit of 183 overnights, which resulted in a negative number of -\$110.66. Because each of these numbers took into account 183 overnights with either parent and did not result in Mother paying support, the trial court opted to order Father to pay an average of the two, \$130. Without explicitly doing so, Father seems to contend that the trial court's calculation using this average is contrary to law. Appellant's App. p. 7. Father relies on Grant v. Hagar, 879 N.E.2d 628 (Ind. Ct. App. 2008) to suggest that rather than taking the average, the trial court should have ordered him to pay \$111, which is the negative amount of support calculated due by Mother. One important difference is that in Grant, the parties were not sharing physical custody, as they are here. While the parents in Grant did have joint legal custody, the mother had primary physical custody. As the trial court pointed out during the hearing, the Guidelines do not advise a method for determining support in a joint custody arrangement. Given the discretion of the trial court in determining child support, its decision here is not clearly erroneous. See In re Paternity of E.C., 896 N.E.2d 923, 924 (Ind. Ct. App. 2008) (explaining that we reverse a determination of whether child support should be modified only if the trial court has abused its discretion). The figures used to make the calculation are supported by the record and the result is not contrary to law.

Conclusion

The trial court's decisions to continue the joint custody arrangement and increase Father's share of the child support are not clearly erroneous. It was unnecessary for the trial court to include additional directives regarding contacts with maternal grandfather.

We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.