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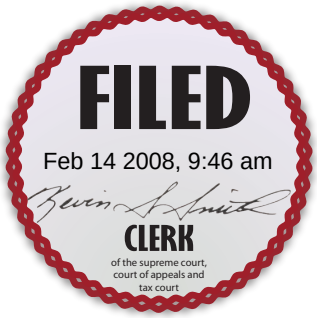

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IN THE
COURT OF APPEALS OF INDIANA

SHARON IMMEL,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 82A05-0707-CV-378
	)	
RANDY IMMEL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert Pigman, Judge
Cause No. 82D04-0408-DR-830

February 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Sharon Immel ("Mother") appeals the trial court's denial of her petition to modify custody and petition to find Randy Immel ("Father") in contempt. Mother raises three issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion by denying Mother's petition to find Father in contempt; and

II. Whether the trial court abused its discretion by denying Mother's petition to modify custody.

We affirm.

The relevant facts follow. Mother and Father were married and had three daughters, H.I., born in July 1991, K.I., born in February 1993, and E.I., born in February 1998. Mother and Father separated, and Mother moved to Texas in July 2005. The children went to school in Texas during the fall semester of 2005 while the dissolution proceedings were pending. E.I. and K.I. returned to Indiana for the spring semester of 2006, but H.I. remained in Texas with Mother.

The dissolution decree was entered in February 2006. Pursuant to the parties' written agreement, Mother received custody of H.I., and Father received custody of K.I. and E.I. The decree required both Mother and Father to "keep the other party informed of any significant developments with regard to the child or children in his or her physical custody. This will include, without limitation, serious illness, injuries, changes in residence, school, doctors, telephone numbers or any other identifying or contact information." Appellant's Appendix at 16. Additionally, the decree made the Indiana Parenting Time Guidelines applicable "where distance is a major factor" except that the parties agreed "that it is in the best interest of the children that they spend as much time

together as possible." Id. Mother and Father agreed to "attempt to coordinate the children's schedules and their personal schedules so as to accommodate the children being able to spend as much time together as possible." Id.

H.I. spent her 2006 spring break in Indiana with Father. E.I. spent her 2006 spring break in Texas with Mother, but K.I. did not want to visit Mother and stayed in Indiana with Father. H.I. then spent part of the summer in 2006 in Indiana with Father. E.I. also spent part of the summer in 2006 in Texas with Mother, but K.I. again refused to visit Mother in Texas.

In October 2006, K.I. started counseling due to sleep problems, anxiety, and suicide threats. Mother did not learn of the counseling until H.I. told her at Thanksgiving 2006. Mother did not learn of the suicide threats until she received the counselor's records in January 2007. K.I. again refused to visit with Mother at Christmas 2006. However, K.I. did visit with Mother in Texas during her spring break in 2007.

In January 2007, Mother filed a petition to modify custody and petition for contempt. Mother alleged that: (1) in addition to the agreement incorporated by the dissolution decree, Mother and Father had also entered into a verbal agreement that the children would alternate school semesters between Indiana and Texas; (2) Father had failed to comply with the decree by failing to provide parenting time, telephone contact, and notice regarding counseling that K.I. was receiving; and (3) there was a substantial change in circumstances warranting a modification of the custody arrangement. Mother also argued that Father had failed to comply with some property agreements, but withdrew that contention at the evidentiary hearing. Mother requested custody of all

three children, modification of the child support, and a finding that Father was in contempt.

The trial court held an evidentiary hearing on Mother's motions. After the hearing, the trial court entered the following sua sponte findings of fact and conclusions thereon:

> 1. The Court finds that there was no evidence introduced at the hearing in support of the Mother's allegations that the Father was in contempt of Court for failing to divide personal and financial assets of the marriage as previously ordered, thereby resulting in financial damage to the Mother. The Mother having withdrawn this allegation during the hearing of this cause the Court now finds that the Father is not in Contempt.
>
> 2. The Court now DENIES the Petition to Modify. The Mother is responsible for proving the allegations of her Petition to Modify by a preponderance of the evidence . . . .
>
> 3. Mother has alleged that the parties entered into a verbal agreement at the time of signing the Summary Divorce Decree, which provided that the parties' minor child, [E.I.], would alternate semesters in the custody of the parties.
>
> 4. The Court finds that the Mother has failed in her burden of proving this allegation by a preponderance of the evidence. The evidence shows that the parties entered into a Summary Divorce Decree and an extensive agreement concerning their property and custody of their minor children on February 28, 2006. Court approved this agreement and made its Order on February 28, 2006. The Summary Dissolution Decree contain[s] the signatures of both parties and their legal counsel at the time. The Summary Dissolution Decree makes no mention of any agreement such as recited by the Mother.
>
> 5. For there to have been an oral modification of the written agreement of the parties that was approved by the Court, the Mother would have to prove some additional consideration for the modification of that agreement. Here there is no evidence of any such additional consideration and Mother has not proffered any evidence of such additional consideration. Finally, the evidence shows that the Father

6. Finally, the Court can only modify an existing Child Custody Order if it finds that a modification is in the best interest of the child. I.C. 31-17-2-21. The Court heard virtually no evidence that would convince it that a shared time arrangement which would require the youngest child to live part of the time in San Antonio, Texas and part of the time in Evansville, Indiana would be in the child's best interest. In fact there is significant evidence available that such shared time arrangement would not be in the child's best interest (See Indiana Parenting Time Guidelines). Nevertheless, there was no specific evidence that the Court hears that would lead it to believe that such a shared time arrangement with the youngest child is in the child's best interest.

7. A settlement agreement entered into by the parties to a marital dissolution proceeding, must be reduced to writing, signed by the parties and approved by the Court, to be effective. I.C. 31-15-2-17. . . . Any alleged oral agreement that the Mother is suggesting was made, prior to or as part of the execution of the Summary divorce Decree is obviously not in writing and not approved by the Court and therefore is not binding on either of the parties.

8. The evidence does not show any fraud on behalf of the Father concerning the negotiation or execution of the Summary Divorce Decree. Absent fraud the agreements reached pursuant to I.C. 31-15-2-17 are intended to be final.

9. For all of the above stated reasons Mother[']s Petition to Modify the Summary Divorce Decree is hereby DENIED.

10. All orders previously entered in this cause shall remain in full force and effect.

11. Each party shall pay their own attorney fees and costs.

Appellant's Appendix at 32-34 (internal citations omitted).

I.

The first issue is whether the trial court abused its discretion by denying Mother's petition to find Father in contempt. First, Mother argues that the trial court failed to rule on each issue raised in her petition for contempt. Mother's petition for contempt alleged that Father had failed to comply with the decree by failing to provide parenting time, telephone contact, and notice regarding counseling that K.I. was receiving and that Father had failed to comply with some property agreements. Mother withdrew the property issues at the evidentiary hearing. The trial court's order denied Mother's petition for contempt but only specifically mentioned the withdrawal of the property issues.

The trial court here entered sua sponte findings of fact and conclusions of law. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. Because the trial court did not issue findings regarding Father's failure to enforce Mother's parenting time with K.I. and his failure to give Mother notice of K.I.'s counseling and mental health issues but denied the contempt petition, the trial court issued a general judgment on this issue. Consequently, we will affirm if the general judgment can be sustained on any legal theory supported by the evidence.

Mother argues that the trial court abused its discretion because Father clearly violated the decree when K.I. failed to visit Mother between January 2006 and spring break in 2007 and when Father failed to notify Mother of K.I.'s mental health issues. A determination of whether a party is in contempt of court is a matter committed to the trial

court's sound discretion, and we will reverse a trial court's decision in that regard only for an abuse of discretion. Kicken v. Kicken, 798 N.E.2d 529, 533 (Ind. Ct. App. 2003). An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances before the court or is contrary to law. Id. When reviewing a trial court's contempt determination, we will neither reweigh evidence nor judge witness credibility. Id. "Our review is limited to considering the evidence and reasonable inferences drawn therefrom that support the trial court's judgment." Id. "Unless after a review of the entire record we have a firm and definite belief a mistake has been made by the trial court, the trial court's judgment will be affirmed." Id. "To hold a party in contempt for violating a court order, the trial court must find that the party acted with 'willful disobedience.'" Id. (quoting Piercey v. Piercey, 727 N.E.2d 26, 32 (Ind. Ct. App. 2000)).

The Indiana Parenting Time Guidelines, which were made applicable to the parties in the trial court's dissolution decree, provide that, "If a child is reluctant to participate in parenting time, each parent shall be responsible to ensure the child complies with the scheduled parenting time. In no event shall a child be allowed to make the decision on whether scheduled parenting time takes place." Ind. Parenting Time Guidelines, Section I, Rule E(3). It is undisputed that K.I. did not visit Mother between January 2006 and her spring break in 2007. Both parties testified that K.I. refused to visit Mother. The trial court interviewed K.I. *in camera*, and K.I. testified that she had refused to visit Mother. K.I. testified that Father encouraged her to visit Mother but he said, "if Mom wasn't going to make [her] then he wasn't going to." Transcript at 325. K.I. testified that

Mother asked her to visit, but Mother said she "didn't want to force [K.I.]." Id. Father also testified that K.I. and Mother had a verbal and physical altercation in November 2005 in Texas. Mother told Father, who was visiting with them at that time, "don't even bother bringing [K.I.] back down here again," and K.I. heard Mother's comment. Id. at 457. When K.I. was supposed to visit Mother during spring break in 2006, she refused, and Mother agreed that "it was in [K.I.'s] best interest not to force her to go." Id. 463. K.I. also testified that Mother was physically and mentally abusive to her. Father testified that he had made mistakes but that he would ensure that K.I. visited with Mother in the future.

The decree also required both Mother and Father to "keep the other party informed of any significant developments with regard to the child or children in his or her physical custody. This will include, without limitation, serious illness, injuries, changes in residence, school, doctors, telephone numbers or any other identifying or contact information." Appellant's Appendix at 16. It is undisputed that K.I. started counseling in October 2006, and Mother learned of the counseling from H.I. at Thanksgiving 2006.

While we do not condone Father's failure to provide Mother with information regarding K.I. and failure to ensure that K.I. visited Mother, given the acrimonious relationship between Mother and K.I., we cannot say that Father's actions amounted to willful disobedience. Under these circumstances, we cannot say that the trial court abused its discretion by denying Mother's contempt petition. See, e.g., Kicken, 798 N.E.2d at 534 ("Based on the trial court's desire to provide Mother and Father with a

clean slate coupled with confusion regarding the protective order, we cannot say it was an abuse of discretion for the trial court to not find Mother in contempt.").

II.

The next issue is whether the trial court abused its discretion by denying Mother's petition to modify custody. We review custody modifications for an abuse of discretion and have 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). "We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." Id. The Indiana Supreme Court explained the reason for this deference in Kirk:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). Therefore, "[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." Id. We may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

The child custody modification statute provides, in part, that "[t]he 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 (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8] . . . ." Ind. Code § 31-17-2-21(a). Ind. Code § 31-17-2-8 lists the following factors:

> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (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) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Mother again argues that the trial court failed to rule on the issues presented in her modification petition. Specifically, Mother's petition requested custody of all three children, but the trial court's order addressed only a "shared time" custody arrangement of E.I. First, we note that Mother argued that she and Father had orally agreed that E.I. would alternate school semesters between Texas and Indiana. In fact, during opening arguments, Mother's counsel contended that under their agreement E.I. would alternate semesters between Texas and Indiana until "she reached a grade where that became

troublesome for her." Transcript at 8. Moreover, K.I. testified that, according to Mother, Mother would allow K.I. to stay with Father even if she received custody of both K.I. and E.I. Father also testified that Mother informed him that she wanted more time with E.I. but that she "didn't care if [K.I.] came down or not." Transcript at 462. Given the evidence presented, any confusion on the part of the trial court as to Mother's proposed custody arrangements was understandable.

Secondly, as we previously noted, the trial court here entered sua sponte findings of fact and conclusions thereon. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff, 688 N.E.2d at 1262. We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. Because the trial court did not issue findings regarding Mother's proposed change in custody of E.I. and K.I. but denied the custody modification petition, the trial court issued a general judgment on this issue. Consequently, we will affirm if the general judgment can be sustained on any legal theory supported by the evidence.

Mother argues that she demonstrated a substantial change in one or more of the factors listed in Ind. Code § 31-17-2-8. Mother contends that Father delayed in obtaining treatment for K.I., that Father allowed K.I. to accrue a school attendance problem, that Father damaged Mother's relationship with K.I. by speaking negatively of Mother, and that Father did not appropriately supervise K.I. and E.I. However, the evidence most favorable to the trial court's ruling demonstrates no substantial change warranting a modification of custody.

Father presented evidence rebutting Mother's contention that he was not adequately supervising K.I. and E.I. E.I. was doing well in her elementary school. K.I. was improving with counseling, she was receiving good grades in school, and she had improved her school attendance. She expressed a very strong desire to remain in Indiana with Father, and she gave the trial court a detailed description of her acrimonious relationship with Mother, which she alleged included physical and mental abuse.

Mother's argument is effectively a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. We conclude that Mother failed to demonstrate that modification is in the best interests of K.I. and E.I. or that there was a substantial change in one of the necessary factors. The trial court did not abuse its discretion by denying Mother's petition to modify custody. See, e.g., Kirk, 770 N.E.2d at 308 ("We cannot say from the record that the trial court clearly erred in deciding to leave G.L. with her mother while continuing to exert the court's authority to re-establish G.L.'s relationship with her father."); Cunningham v. Cunningham, 787 N.E.2d 930, 936-937 (Ind. Ct. App. 2003) ("Acknowledging the high degree of deference we must give to the trial court's decision, we conclude that the trial did not err when it denied Father's petition to modify custody.").

For the foregoing reasons, we affirm the trial court's denial of Mother's petition for modification of custody and petition for contempt.

Affirmed.

BARNES, J. and VAIDIK, J. concur