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IN THE INDIANA COURT OF APPEALS
CAUSE NO. 19A-DC-02728

JOSHUA ANSELM,	)	
Appellant,	)	**Appeal from the Jasper Superior Court**
	)	
vs.	)	**Trial Ct Cause No. 37D01-1803-DC-205**
	)	
ASHLEY ANSELM,	)	**Hon. Russell D. Bailey, Judge**
Appellee.	)	

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

In this matter, the trial court's Findings are clearly erroneous as to three separate issues. First, the trial court's award of primary physical custody to Mother is clearly erroneous because the Findings fail to support the award. A trial court is not required to enter findings of fact and conclusions of law absent the request of one of the parties. The trial court may, however, do so *sua sponte*, as was the case in this present matter. This Court has made clear that once a trial court walks down the path of making findings, it is bound under Indiana Trial Rule 52 to make findings that support the judgment.

In this present matter, the trial court's Findings do not support its judgment that the it is in the best interests of the Minor Children for Mother to be awarded primary physical custody. The insufficiency of the trial court's Findings is best evidenced by the fact the trial court failed to make any mention of Indiana Code section 31-17-2-8 (i.e., the statutory factors the trial court must consider in determining custody). Mother, in her Brief of Appellee, makes several unpersuasive arguments as to why the trial court did not error in awarding her custody. However, Mother's arguments carry little to no weight due to the fact Mother provides almost no citations to legal authority in support of same.

Second, the trial court's award of $16,500.00 to Ashley as half the equity in the home is clearly erroneous because it is unsupported by the facts and inferences of the record. Mother does not challenge the erroneous nature of this award and concedes the issues should be reversed and remanded.

Third, the trial court's child support calculation is clearly erroneous for two reasons. First, the trial court did not create its own child support worksheet detailing the amount awarded or enter findings explaining, in detail, how the trial court arrived at such an amount. Furthermore, neither

Mother nor Father submitted a signed, verified child support worksheet. While Mother submitted two (2) different child support worksheets at the final hearing, neither were signed or verified.

Mother, in her Appellee's Brief, argues that the trial court's child support calculation is consistent with the worksheets that Mother submitted into evidence. However, Indiana precedent makes it that basing a child support order on unverified and unsigned worksheet is error because use of such a worksheet has no sanction under either the child support guidelines or the rules of evidence and trial procedure. As such, the trial court erred in ordering Father to pay an amount of one hundred seventy-three ($173.00) dollars per week because there is no basis explaining such award.

Furthermore, the trial court's child support award is clearly erroneous because it is unclear whether Father was properly credited for his healthcare expenses, nor is there any explanation for a deviation from the Guidelines. Specifically, the trial court ordered Father responsible for maintaining healthcare insurance on the Minor Children, but it is unstated whether Father received a credit for same.

Mother argues that Father was properly credited for healthcare expenses through her testimony at the hearing. This argument is illogical as Mother is not the judge and therefore has no ability to "credit" Father. Again, Mother argues that Father was credited in her unsigned child support worksheet, but as explained above, a trial court cannot base its award amount on an unsigned child support worksheet.

Finally, Father was also ordered to pay all uninsured medical expenses for the Minor Children because Father has a Health Saving Account. However, the trial court failed to account for the fact that Father pays two-hundred dollars ($200.00) a month for same, which should be credited towards Father's child support amount. In addition, requiring Father to pay all uninsured

medical expenses without properly crediting Father for same is in contravention to the six-percent (6%) rule, and as such acts as a deviation from the Guidelines, which requires an explanation from the trial court.

Mother, in Appellee's Brief, argues that there is no evidence that Father pays $200 per month for the Health Saving Account. Mother apparently "forgot" about her testimony specifically stating that Father pays $200 per month for the Health Saving Account, testimony that Father cited to in Appellant's Brief. Despite Mother's contentions, the trial court's child support award is clearly erroneous because there is no basis supporting same.

ARGUMENT

I. The Trial Court's Award of Primary Physical Custody to Mother was Clearly Erroneous Because the Trial Court's Findings Fail to Support Same.

Mother's first argument, it appears, in support of the award of primary physical custody is that Mother had primary physical custody of the Minor Child during the pendency of the dissolution matter. Appellee Br., p. 8. Mother goes on to state that Father was awarded parenting-time, and that parenting time basically amounted to the parenting time Father would be entitled to under the Indiana Parenting Time Guidelines ("IPTGs"). Appellee Br., p. 8. However, it is unclear what Mother's argument is in this regard.

It is true that "it is permissible as part of a determination of the children's best interests for the court to consider the status and well-being of the children pending the final hearing." *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 511 (Ind. Ct. App. 2002). However, this Court has made clear that "it would be improper for a trial court to award permanent custody to a parent simply because that parent had been awarded temporary custody." *Id*. Furthermore, statutory code dictates that "[t]he issuance of a provisional order is without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceedings." Indiana Code § 31-15-4-13.

Therefore, Mother's argument, that the trial court did not error in awarding her primary physical custody because she was awarded preliminary custody, is unsupported by the case law and prohibited by statutory code. Finally, it is unknown how Father being granted parenting time during the pendency of this matter has any bearing on whether the trial court erred in granting Mother primary physical custody. Thus, Mother's argument is not cogent.

Next, Mother claims that "significant testimony was presented by both the Guardian Ad Litem and Mother about concerns as to Father being awarded primary physical custody."

Appellee's Br., p. 8. However, Mother provides no citation to any material in the record to support such a statement, nor does Mother provide examples of same. Appellee's Br., p. 8.

Mother goes on to discuss how the Guardian Ad Litem suggested that Mother be awarded primary physical custody. Appellee Br. p. 8. Again, however, Mother fails to make a cogent argument as to how the Guardian Ad Litem's recommendation makes the trial court's findings any less inadequate. Indiana Code section 31-17-2-7 makes it clear that the "court without a jury shall determine questions of law and fact." As such, the fact that the Guardian Ad Litem made a recommendation has no bearing on the duty of the trial court to make adequate findings to support its custody determination.

Additionally, Mother states that the Guardian Ad Litem delineated the statutory factors required to be considered pursuant to Indiana Code section 31-17-2-8. Appellee Br., p. 9. However, whether the Guardian Ad Litem applied the Statutory Factors to her recommendation has no bearing on the court's duty to consider the Statutory Factors. The trial court, not the Guardian Ad Litem, is to apply the Statutory Factors and determine the weight of each piece of evidence – including the Guardian Ad Litem's report and/or testimony.

Precisely, Indiana Code section 31-17-2-8, makes it clear that " **[t]he court shall determine custody** and enter a custody order in accordance with the best interests of the child." (emphasis added). Furthermore, "**the court shall consider** all relevant factors, including the following:

> (1) The age and sex of the child; (2) the wishes of the 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 parents; (B) the child's siblings; and (C) any other person who may significantly affect the child's best interest; (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."

Ind. Code § 31-17-2-8[1] (emphasis added) (hereafter, "Statutory Factors"). Nowhere in the statutory code does it say that a trial court must determine custody *unless a guardian ad litem does*, or a trial court must consider the Statutory Factors *unless a guardian ad litem does*.

Furthermore, Indiana precedent has made clear that "the fact-finder is not required to accept the opinions of experts regarding custody." *Maddux v. Maddux*, 40 N.E.3d 971, 980 (Ind. Ct. App. 2015). As such, Mother's argument that the Guardian Ad Litem considered the Statutory Factors is unpersuasive and has no impact on whether the trial court's Findings were sufficient to support a custody modification.

Mother ends her argument as to the custody portion of the trial court's order by stating that "there was sufficient evidence presented to show what was in the best interests of the minor child, and those factors were clearly delineated in the Guardian Ad Litem's report which was part of the record and discussed in the day-long final hearing." Appellee's Br., p. 9. Once again, Mother provides no citation to the record to support her statement that "sufficient evidence was presented" other than citing to the Guardian Ad Litem's report in toto. Appellee's Br., p. 9. The Guardian Ad Litem is not the judge, and therefore, is not the decision maker, so the fact Mother continues to rely on the Guardan Ad Litem as a source of judicial authority is unsupported by all law in Indiana.

As this Court has made clear, "[i]n the initial custody determination, both parents are presumed equally entitled to custody." *Green v. Green*, 843 N.E.2d 23, 26-27 (Ind. Ct. App. 2006) (citing, *Leisure v. Wheeler*, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005)). Furthermore, "an initial custody order is determined 'in accordance with the best interests of the child.'" *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008) (citing, Ind. Code § 31-17-2-8). As this Court has

[1] Factor 8 and 9 are not listed as they are inapplicable to this current matter.

explained, "[i]n determining the child's best interest, **the trial court must** consider all relevant factors, including specifically" the Statutory Factors. *Purnell v. Purnell,* 131 N.E.3d 622, 626 (Ind. Ct. App. 2019) (emphasis added).

Furthermore, while it is true that a trial court is not required to enter Findings without a request made by one of the parties, it is also true that "once a trial court walks down the path of making findings, it is bound under Indiana Trial Rule 52(A) to make findings that support the judgment." *In re C.M.*, 963 N.E.2d 528, 529 (Ind. Ct. App. 2012) (citing, *Parks v. Delaware County Dep't of Child Servs.*, 862 N.E.2d 1275, 1281 (Ind. Ct. App. 2007)).

The trial court in this matter entered *sua sponte* Findings. Appellee's Br., p. 9; Appellant's App. Vol. II, pp. 11-17. As such, the trial court was "bound under Indiana Trial Rule 52(A) to make findings" that supported its award of primary physical custody to Mother. The trial court failed to make any findings relating to the Statutory Factors, or even reference Indiana Code section 31-17-2-8. Appellant's App. Vol. II, pp. 11-17. As such, the Findings are insufficient to support this award and the trial court's Findings, as it relates to physical custody, should be reversed.

II. Trial Court's Findings as to the Equity in the Marital Home is Clearly Erroneous Because it is Unsupported by the Facts and Inferences of the Record.

Because Mother agrees that the trial court erred in the amount of equity it awarded to her, it is unnecessary to develop Father's argument any further on this issue. Appellee's Br., p. 9-10.

It is worth noting that Mother makes a convoluted statement in her brief that "Father did not attempt to allow the trial court to correct this issue as he did not file a Motion to Correct Error, but instead brought this instant appeal before the matter could be clarified."[2] Appellee's Br., p. 10.

[2] Incidentally, while Mother concedes reversal, she too did not file a Motion to Correct Error.

It is confusing in that it seems Mother is implying Father was in the wrong for appealing this issue, or that Father had some duty to file a motion to correct error.

Despite Mother's protestations, Trial Rule 59 is crystal clear when it comes to mandatory motions to correct error. Ind. Rule Tr. Procedure 59(A). There are two (2) instances when a motion to correct errors is mandatory. Ind. Rule Tr. Procedure 59(A). This issue raised by Father does not fall under one of those two (2) circumstances, and as such, "may be initially addressed in the appellate brief." Ind. Rule Tr. Procedure 59(A). Ultimately, Mother's entire argument is surplusage.

III. The Trial Court's Amount of Child Support is Clearly Erroneous Because the Trial Court Did Not Complete its Own Child Support Worksheet, Enter Findings Detailing the Amount Awarded, and Neither Party Submitted a Signed, Verified Child Support Worksheet.

Mother once again fails to make a cogent argument in response to Father's Brief or provide any citation to legal precedent in support of her arguments. Appellee's Br., pp. 10-11. Mother's arguments will be addressed in turn.

A. <u>The Trial Court Did Error by Failing to Include a Child Support Worksheet or Explanation of the Amount Awarded.</u>

Mother begins her argument by stating that the "trial court's support order is consistent with Mother's Exhibit 2." Appellee's Br., pp. 10. While it is true Mother submitted two (2) child support worksheets into evidence, Mother did not sign either of the child support worksheets. Exhibits Vol. III, pp. 3-7. As this Court has explained, "[s]ince 1989, the Indiana Child Support Guidelines have required, in all cases in which the court is requested to order support, that both parents complete and sign, under penalty of perjury, a child support worksheet to be filed with the court verifying the parents' income." *Payton v. Payton*, 847 N.E.2d 251, 254 (Ind. Ct. App. 2006) (citing, *Glover v. Torrence*, 723 N.E.2d 924, 931 n. 2 (Ind. Ct. App. 2000)).

Furthermore, nowhere in the trial court's Findings did the trial court adopt Mother's proposed child support worksheet. Appellant's App. Vol. II, pp. 11-17. Again, as this Court has made clear, "[t]o determine whether a child support order complies with the child support guidelines, we must first know the basis for the amount awarded." *Walters v. Walters,* 901 N.E.2d 508, 513 (Ind. Ct. App. 2009) (citing, *Heiligenstein v. Matney*, 691 N.E.2d 1297, 1303 (Ind. Ct. App. 1998)). This can "be accomplished **either by specific findings or by incorporation of a proper worksheet**." *Id*. (emphasis added).

The trial court did not enter specific findings detailing its amount awarded, nor did the trial court incorporate a child support worksheet because there was no proper worksheet available for the trial court to incorporate. Appellant's App. Vol. II, pp. 11-17. Again, Mother's proposed worksheets were not signed. Exhibits Vol. III, pp. 3-7. As this Court explained, "basing child support order on unverified and unsigned worksheet was error because use of such a worksheet 'has no sanction under either the child support guidelines or the rules of evidence and trial procedure.'" *Vandenburgh v. Vandenburgh,* 916 N.E.2d 723 (Ind. Ct. App. 2009) (citing, *Cobb v. Cobb*, 588 N.E.2d 571, 574 (Ind. Ct. App. 1992)).

Furthermore, Mother's argument that the Parties stipulated to income is unpersuasive and has no impact on the trial court's duty to enter findings detailing the amount awarded, enter its own child support worksheet to support the awarded amount, or incorporate a proper child support worksheet submitted by one of the Parties. Appellee's Br. pp. 10; *Walters v. Walters,* 901 N.E.2d 508, 513 (Ind. Ct. App. 2009). Mother also claims that Father's counsel did not object to Mother's entry of her child support worksheet into evidence. Appellee's Br., pp. 11. Again, however, Mother fails to make any argument as to why or how Father's counsel's lack of objection as to entry of

her worksheet into evidence relieves the trial court of its duty to make detailed Findings explaining the amount awarded, enter its own child support worksheet, or incorporating a proper worksheet.

This Court's decision in *Vandenburgh v. Vandenburgh* provides clarity. In *Vandenburgh*, the father was appealing, in part, the trial court's child support award. 916 N.E.2d 723 (Ind. Ct. App. 2009). This Court first noted that "[w]e cannot review a support order to determine if it complies with the guidelines unless the order reveals the basis for the amount awarded." *Id*. at 728. This Court went on to explain that this can "be accomplished either by specific findings or incorporation of a proper worksheet." *Id*. This Court went on to find that "[t]he trial court's findings do not explain in detail how the court arrived at the amounts it awarded, and the worksheets were improper because they were not signed or verified." *Id*. As such, the *Vandenburgh* court found that "[w]e must therefore remand so the trial court may provide more specific findings or signed and verified worksheets." *Id*.

The same is true in this present matter. The trial court's Findings do not detail the amount awarded or how the trial court arrived at such amount, and the trial court did not incorporate a proper child support worksheet because there was not one available for the trial court to incorporate. Appellant's Br. Vol. II, pp. 11-17; Exhibits, Vol. III, pp. 3-7. Furthermore, Mother's arguments in support of the trial court's award is unpersuasive and Mother cites to no legal authority in support of her argument. Appellee's Br., pp. 10-11.

In summary, the child support issue should be remanded so that said award can be properly determined.

B. <u>The Trial Court Did Fail to Credit Father for Healthcare Expenses or Properly Explain its Deviation from the Child Support Guidelines.</u>

Mother argues that the trial court did properly credit Father for healthcare expenses because "on the child support calculation worksheet, as well as through Mother's testimony, Father was

given credit for paying the premium for the children's health care coverage." Appellee's Br., pp. 11.

First, whether Father was given credit on Mother's unsigned Child Support Worksheet that was entered into evidence has absolutely no impact on whether the trial court, in fact, credited Father for healthcare expenses. The trial court's Findings make no mention of the amount Father pays for health insurance. Appellant's App. Vol. II, pp. 11-17. The trial court's Findings make no mention of whether Father was credited for the amount of health insurance he pays for the Minor Children. Appellant's App. Vol. II, pp. 11-17. The only reference to health insurance made by the trial court is that the trial court ordered Father to "continue to provide medical, dental, optical, and pharmaceutical coverage for the minor children . . .". Appellant's App. Vol. II, pp. 13. This finding is insufficient to determine whether Father was properly credited for maintaining same, and if Father was not credited, the trial court failed to enter Findings to support a deviation. Appellant's App. Vol. II, pp. 11-17.

Second, Mother's claim that Father was given credit for the health insurance "through Mother's testimony" is illogical. Appellee's Br., pp. 11. Mother is not the trial judge, and as such, Mother does not have the ability to "credit" Father for the health insurance he pays for the Minor Children. Mother's testimony, again, has absolutely no impact on whether Father was properly credited for the health insurance he was ordered to maintain.

Finally, Mother does not make a cogent argument as to Father's contention that the trial court failed to take into account the amount of $200 per month that Father pays for the Health Saving Account. Appellee's Br., pp. 11. Mother claims that "Mother testified that his employer puts money into the health savings account and the parties have never exceed that amount for the children's expenses." Appellee's Br., pp. 11.

However, Mother inexplicably leaves out relevant parts of her testimony ***relating to the amount Father pays each month into the health saving account***. Specifically, at the June 27, 2019 hearing, Mother testified to the following:

> "Q. So through his employment, Josh – Josh has a health saving account?
> A. Yes.
> . . .
> Q. Okay. **Do you know approximately what is paid into that account by Josh?**
> A. **$200 a month**, at least while we were living there.
> Q. Okay. **And you said his employer also made money (sic) paid towards it**; is that correct?
> A. **Yes.**"
> Tr. Vol. II, pp. 42 (emphasis added).

As evidenced by Mother's own testimony, Mother did not simply testify that Father's employer puts money into the health savings account. Tr. Vol. II, pp. 42; Appellee's Br., pp. 11. Mother specifically testified that Father pays $200 per month for the account and his employer contributes money toward same. Tr. Vol. II, pp. 42. As such, Mother either misspoke on the witness stand by testifying that Father paid $200 a month toward the health saving account, or Mother misspoke in her Brief by stating that she only ever testified that Father's employer contributed to the health saving account. Additionally, in closing arguments, Father's counsel made clear that Father contributes his own money towards the health savings account. Tr. Vol. II, pp. 174.

As this Court has explained, "[c]ommentary to the Indiana Child Support Guideline 3 makes it clear that the child support obligation as determined by the Guidelines includes a component for ordinary medical expenses." *Tigner v. Tigner*, 878 N.E.2d 324, 328 (Ind. Ct. App. 2007). Expanding on same, this Court explained, "[s]pecifically, six percent (6%) of the support amount is for health care. The noncustodial parent is, in effect, prepaying health care expenses every time a support payment is made." *Id*. (citing, Commentary to Ind. Child Support Guideline

3(H)). Therefore, "[t]he six percent rule, then, is designed to ensure that the non-custodial parent does not pay twice for the same medical expenses." *Id*.

The fact of the matter is that the trial court ordered Father, in addition to maintaining health insurance, to be "solely responsible for all uninsured medical costs based upon his having the Health Saving Account." Appellant's App. Vol. II, pp. 13. Father pays $200 per month for said Health Saving Account. Tr. Vol. II, pp. 42. Ordering Father to be solely responsible for all uninsured medical expenses results in Father paying twice for the same medical expenses.

In summary, the Findings are insufficient to determine whether Father was properly credited for maintaining health insurance. Finally, the trial court abused its discretion in failing to account for, and credit, the amount Father pays per month to maintain the Health Saving Account, or explain its deviation from the six percent (6%) rule. Appellant's App. Vol. II, pp. 11-17. As such, the issues should be remanded to the trial court so that Father is properly credited for same, or at the very minimum, so the trial court can explain its deviation and provide a child support worksheet.

CONCLUSION AND SIGNATURE BLOCK

For the reasons stated herein, this Court should reverse the trial court's award of primary physical custody of the Minor Children to Ashley as the Findings fail to support such award. Next, this Court should reverse the trial court's award of $16,000.00 to Ashley as half of the equity of the marital home and remand same for proper valuation. Finally, this Court should reverse the trial court's child support award and remand the issue to be properly considered and explained.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Reply Brief of Appellant contains 4,007 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010.

/s/ Alexander N. Moseley
Alexander N. Moseley

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following this 13th day of March, 2020 via the Court's electronic filing system:

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