MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Brian Worrell,
Appellant-Petitioner,

v.

Cynthia Worrell,
Appellee-Respondent,

July 26, 2021

Court of Appeals Case No. 20A-DR-2106

Appeal from the Boone Superior Court

The Honorable Donald E. Currie, Special Judge Pro Tempore

Trial Court Cause No. 06D01-0710-DR-512

Robb, Judge.

Case Summary and Issue

[1] Brian Worrell ("Father") and Cynthia Worrell ("Mother") are the parents of five children, three of whom are now emancipated, and have been divorced since November 2011. The current post-dissolution proceeding began in 2018, when Father filed a motion for rule to show cause alleging Mother was in contempt of a court order regarding one of the children's extracurricular activities. He subsequently filed a motion seeking to restrict Mother's parenting time with the children and modify child support accordingly. Mother filed a motion for rule to show cause alleging Father was also in contempt. Those three motions were heard by the trial court in 2020. The trial court denied all pending motions. In addition, the trial court considered issues remanded to it from an earlier appeal in this case and determined that 1) Father should pay $10,000 of Mother's attorney fees; 2) Father should reimburse Mother $2,830 for her overpayment of child support for two of their emancipated children, and 3) Father's request for Mother to pay his appellate attorney fees had been deemed denied.

[2] Father now appeals, raising two issues for our review: 1) whether the trial court erred in denying his petition to restrict Mother's parenting time; and 2) whether the trial court erred in its orders on the financial issues. Concluding the trial court did not err in denying Father's petition to restrict Mother's parenting time, ordering reimbursement of Mother's overpayment, or not awarding Father appellate attorney fees, but did err in ordering Father to pay $10,000 of

Mother's attorney fees without conducting an analysis of the attorney fees each owed to the other, we affirm in part and remand in part.

Facts and Procedural History

[3] When the parties divorced in 2011, they agreed to joint legal custody of their five children, with Father having primary physical custody of the parties' two oldest children ("the girls") and Mother having primary physical custody of the parties' three youngest children, C., P., and M. ("the boys"). They set a parenting time schedule and determined the child support obligation each owed to the other, resulting in a net payment from Father to Mother of $174.00 per week.[1] Soon after the dissolution decree was signed, the parties began to file numerous motions to modify custody and parenting time and motions for contempt based on parenting time issues. As described in one of the trial court's post-dissolution orders, "Since the dissolution, the parties' relationship has remained contentious and fraught with conflict." Appellee's Appendix, Volume 2 at 56.

[4] In June 2015, the trial court ruled on various motions to modify parenting time and/or custody and motions for contempt filed by both parties. The court found that the girls had turned eighteen years of age and were no longer subject to the court's orders regarding custody and parenting time. The trial court

[1] Father's child support obligation was figured at $254.00 for the boys and Mother's at $80.00 for the girls, for a difference of $174.00. Appellee's Appendix, Volume 2 at 6.

further found that a change in custody was not in the boys' best interests, keeping primary physical custody with Mother. The court also found both parties in contempt of previous court orders: Mother for failing to ensure that Father had visitation with the boys and Father for failing to ensure that Mother had visitation with the girls. Because the girls were over eighteen by this time, Father was "simply unable to purge his Contempt by restoring [Mother] with meaningful visitation[.]" *Id.* at 61. Therefore, the court ordered Father to purge his contempt by paying $10,000 of Mother's attorney fees over sixteen months beginning in September 2015. *See id.*[2] Prior to this order, Mother's attorney had submitted a summary of her fees showing Mother owed her $27,086.20 as of October 3, 2014. *See id.* at 49-54. Father filed a motion to correct error raising issues related to the trial court's failure to modify custody of the boys and the contempt sanction against him. While that motion was pending, the parties filed multiple additional motions.[3]

[5] In May 2016, the trial court ruled on Father's motion to correct error and other pending motions. The trial court modified custody of the boys to grant Father primary physical custody with Mother to have parenting time pursuant to the Indiana Parenting Time Guidelines. They continued to share joint legal

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[2] With respect to Mother, the trial court found that "to purge her Contempt, she must cease to demand that [Father] attend activities during [Father's] weekend parenting time with the boys." *Id.*

[3] In addition to various other motions not directly bearing on the issues in the case, Father filed five motions for rule to show cause; Mother filed a motion to modify child support, parenting time, extra-curricular activities, and communication and made a request for attorney fees; and Father filed a cross-petition in response to that motion. *See* Appellant's Appendix, Volume 2 at 21-22.

custody with Father having final medical decision-making authority. The trial court found the girls were emancipated as of their high school graduation and modified Mother's child support obligation to zero as of June 19, 2015, but did not address whether or in what amount Mother had overpaid child support since that date. And finally, the trial court found that Mother "willfully, wantonly, and regularly denied Father visitation time with the [boys] without notice or good cause." Appellee's App., Vol. 2 at 65. With respect to Mother's contempt, the trial court ordered:

> Due to Mother's wanton and willful contempt of the Court's order, she shall pay to Father attorney's fees. Father was previously ordered to pay attorney fees for contempt. Father previously paid attorney fees under the Court's last order.[4] As of the date of this order, the parties shall no longer be indebted to one another resulting in a zero sum net to Mother or Father.

Id. at 69.[5]

[6] Mother and Father both appealed the trial court's 2016 order. As relevant to this appeal, Mother appealed the trial court's failure to calculate her child

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[4] It is unclear what this refers to. The record does not show that Father paid anything toward the $10,000 he was ordered to pay Mother's attorney in June 2015. It does appear that on at least two occasions prior to the June 2015 order, Father had been ordered to pay various amounts toward Mother's attorney fees and that those amounts had been paid, as Mother's attorney had filed a satisfaction of judgment for those amounts. *See* Appellant's App., Vol. 2 at 19-20, 41.

[5] It appears this language came from a proposed order submitted by Father. In a later brief to the trial court, Father stated that he had proposed the "zero sum" attorney fee paragraph in the trial court's May 2016 order because he wanted "to create a clean slate and end the antagonistic process" and that "the design of the order [was] to reduce the necessity to invoke the Court's authority[.]" Appellant's App., Vol. 2 at 42-43.

support overpayment based on the emancipation date of the girls and its modification of the 2015 order that Father pay a portion of her attorney fees. With respect to child support, a panel of this court noted that the trial court correctly found that Mother's child support obligation ended on the date of emancipation. However, because the trial court failed to indicate the amount Mother paid in child support after that date, we remanded for the trial court to calculate and order Father to reimburse Mother in that amount. *See* Appellant's Appendix, Volume 2 at 95 (*Worrell v. Worrell*, Cause No. 06A-1606-DR-1456 at ¶ 20 (Ind. Ct. App. Aug. 9, 2017)). As to the "zero sum" attorney fee provision, we held the order did not "explain how it arrived at a 'zero sum' balance [and] did [not] provide any findings that support that 'zero sum.'" *Id.* at 97. We therefore remanded to the trial court to clarify its order regarding attorney fees. *Id.* As for Father's request that the court award him appellate attorney fees pursuant to Appellate Rule 66(E), we found Mother's appeal was not frivolous or in bad faith and therefore "each party shall be left to pay his or her own appellate attorney fees." *Id.*[6]

[7] Father filed a new motion for rule to show cause just days after the Court of Appeals opinion was handed down, alleging that despite a prior court order that Mother facilitate C.'s participation in band during her parenting time, Mother had failed to take C. to band practice for a week in July 2017. Father requested

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[6] Mother also appealed the trial court's order modifying custody of the boys. Father's cross-appeal argued the trial court erred in setting the emancipation date for the girls. We affirmed the trial court on both of those issues. *See id.* at 93-94.

Mother be found in contempt and ordered to pay his attorney fees incurred in preparing the motion. The trial court held a hearing on August 17, 2017, to address Mother's compliance with its previous orders, Father's new motion for rule to show cause, and the issues remanded back to the trial court by the Court of Appeals.[7] Following the hearing, Father filed a Brief in Support of Award of Attorney Fees and Motion for Appellate Attorney Fees. He requested an order that Mother pay $1,000 for attorney fees incurred due to the most recent motion for rule to show cause and also requested the trial court "award him attorney fees for the appellate costs incurred for [Mother's] baseless appeal[,]" citing no authority for such award and failing, despite quoting extensively from the Court of Appeals opinion, to acknowledge the Court found Mother's appeal was not frivolous or in bad faith and had therefore denied his request for such fees pursuant to Appellate Rule 66(E). *Id.* at 43. He argued that even after crediting Mother the amount she had overpaid in child support, she should still owe him in excess of $5,000 in attorney fees. *See id.* at 44-45.

[8] On September 8, the trial court issued an order from the August 17 hearing. With respect to the remanded issue of Mother's overpayment of child support, the trial court determined Mother had overpaid by $4,080[8] but owed Father $1,250 in fees for various instances of contempt, and therefore ordered Father

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[7] A transcript of this hearing was not requested and is not part of the record on appeal.

[8] In other words, for fifty-one weeks after the girls were emancipated, Father continued to take the $80.00 "credit" toward his child support obligation for the boys that represented Mother's child support obligation for the girls. Fifty-one weeks times $80.00 per week = $4,080.

to reimburse Mother the difference of $2,830 within twelve months. The court did not address the remanded "zero sum" attorney fee provision. The court acknowledged that Father had requested an additional setoff from Mother's child support overpayment for his appellate attorney fees but stated it would rule on that issue no earlier than September 25 to give Mother time to respond.

[9] In July 2018, Father filed a Petition for Rule to Show Cause and Request for Hearing on Appellate Attorney Fees. The petition alleged that despite the court order requiring Mother to ensure that C. attended all band activities that occur during her parenting time, she again failed to do so on two dates in July 2018. The petition also asked the trial court to schedule a hearing on the appellate attorney fee issue left undecided in the September 2017 order, as Mother had never responded to Father's request and the trial court had not yet ruled on it.[9] Before a hearing was held on that petition, however, Father filed a Petition to Modify Parenting Time and Child Support with respect to C. and P., seeking to terminate Mother's parenting time with them. He alleged that Mother was "doing psychological damage to the minor children" and that "it is no longer in the children's best interest for [M]other to have any physical or legal custody of the children." *Id.* at 167. He asked the trial court to grant him sole physical and legal custody of C. and P. Mother subsequently filed a Motion for Rule to

[9] By July 2018, Father had still not paid anything toward the $2,830 the court had ordered him to reimburse Mother. In this petition for rule to show cause, he asked that order be stayed until the appellate attorney fee issue was heard by the court. The trial court granted the motion and stayed the order for reimbursement pending a hearing, which was ultimately not held until 2020.

Show Cause, alleging Father was interfering with her communication with the boys, had refused to allow her any educational or medical information about the boys, and had obligated the boys to activities that interfered with her parenting time. All three of these motions were heard in 2020 by a special judge who had been appointed in May 2019.[10]

[10] The parenting time arrangements at the time of the hearing were that the boys had parenting time with Mother every other weekend and for two hours on Wednesday evenings each week. On the first day of the hearing, in February 2020, C. testified that Mother lives very near her parents, and most weekends, C. and P. spend the weekend at their maternal grandparents' house while M. stays at Mother's house even though she "normally works afternoons on Saturday and Sunday[.]" Transcript of Evidence, Volume 1 at 49. In a typical weekend, C. and P. "see [Mother] maybe once or twice for depending on . . . time it can be from five minutes to an hour." *Id.* at 48. C. said his relationship with Mother is "not a healthy relationship[;] there's really no connection there [and] there is no point in me seeing her." *Id.* at 47. And he testified that once he turned eighteen, he did not intend to see her anymore. Indeed, C. turned eighteen before the second day of the hearing, held in June 2020, and he had not seen Mother since his birthday.

[10] This was at least the third special judge in this case. Special Judge Justin Hunter had presided since April 2014 and issued the June 2015, May 2016, and September 2017 orders.

[11] Father testified to the reason he ultimately filed the petition to restrict or terminate Mother's parenting time with the boys:

> I can see visibly the signs of drooped shoulders and sighs of do we have to; has she canceled; the . . . questions and physical demeanors when I say no[,] visitation is still on tonight; (sound of sigh). That's just not it's not a kid who wants to go see their parent. That's not how they act. . . . [B]ut there's nothing I can do there.
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> * * *
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> [T]hings as they are cannot continue for the well-being of the boys [or] in my opinion the day they turn eighteen they'll . . . cut off all ties . . . as we already have heard.

Id. at 102, 112. Although Father's petition specifically addressed only C. and P., Father also had concerns about continuing Mother's parenting time with M. because he has medical conditions and specific medication needs that require close supervision. Father does not believe it is advisable to leave M. alone for more than an hour at a time and yet M. is often alone for four or five hours at Mother's house during her parenting time while she works. Based on M.'s behavior when he returns from parenting time with Mother, Father does not believe that Mother ensures he takes his medication as prescribed. Jessica Neely, a social worker who had provided counseling for C. and M. for approximately three years, testified that both boys indicated to her that they no longer wished to have parenting time with Mother because they are "very uncomfortable" and "very much dislike being there[.]" *Id.* at 7. She believed

their wishes were valid because "their behavior . . . is affected when they get home. [T]hey are much more stressed out and not focused for the first couple of days of school. [T]heir activities get impacted . . . with not begin allowed to do certain things. And . . . for [M.] specifically being able to remain consistent medically[.]" *Id.* at 11. She opined that children in the boys' position "could" have lingering effects from forced parenting time, as she has "seen in older children and young adults . . . increasing anxiety, increased depression [and] depending on the severity potential for suicidal ideation [and] problems with relationships both . . . friendship and intimate." *Id.* at 16.

[12] Mother testified that she does give M. his medication during her parenting time or takes steps to make sure he takes it if she is not there. Mother's mother checks on M. when Mother is at work. Mother acknowledged that C. and P. stay with her parents during her parenting time because "that's where they want to be." *Id.*, Vol. 2 at 16. Therefore, she spends only some of her weekend parenting time with C. and P., but she does not want to force them to stay in the house with her. She also acknowledged she has had a difficult relationship with C. and P. since the change in custody but attributed it to Father's interference. After the parties rested their cases, the trial court conducted in camera interviews with P. and M. At that time, P. was fifteen and M. was thirteen.

[13] On October 13, 2020, the trial court issued its order, denying Father's motion to modify parenting time and child support and denying both parties' motions for

contempt. With regard to parenting time and the lingering issue of attorney fees, the order provides, in relevant part:

> 10. Pending before the Court now are three (3) motions filed by the parties, to wit:
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> a. Father's Verified Petition to Modify Parenting Time and Child Support filed January 7, 2019 . . .;
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> b. Father's Verified Petition for Rule to Show Cause and Request for Hearing on Appellate Attorney Fees filed July 31, 2018 wherein Father alleges Mother is in contempt for not taking [C.] to marching band practice on July 25 and 26, 2018; Father admits he has not paid the $2,830 owed to Mother as ordered by this Court on remand from the Court of Appeals; and Father requests a second hearing on the appellate attorney fee issue, which was already remanded by the Appellate court and heard by this Court on August 17, 2017; and
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> c. Mother's Motion for Rule to Show Cause filed April 20, 2019[.]
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> 11. The "Appellate Attorney Fee" issue raised in Father's pending motion stems from this Court's Order of June 24, 2015 wherein Father was ordered to pay $10,000 in Mother's attorney fees. Father has paid nothing towards this amount or the $2,830 for Mother's overpayment in child support[.]
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> * * *
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> 24. The boys' only access to any of their grandparents is through Mother.

* * *

26. The three (3) boys are involved in 4-H Club only during Mother's time. This is an activity Mother has been involved with since before the parties' divorce in 2011. Father does not encourage or participate in the boys' 4-H Club activities. . . .

* * *

28. [P.] is involved in Robotics club through school. Despite this occurring on Mother's Saturday mornings during her weekends, Mother ensures [P.] attends each meeting.

29. Father signed [M.] up for Chess Club, but did not provide Mother with the schedule over her weekends. [M.] is not allowed to bring his Chess Club ID Card to Mother's house which prohibits him from participating in any tournaments on the weekends that fall on Mother's time.

30. In December 2019, [P.] was in the Science Fair and Mother attempted to go to his school to see his project. Mother was not allowed access at Father's direction when she went to the front desk for a visitor's pass.

31. Mother has attempted to obtain the children's school records and medical records from their doctors, but they all have been directed by Father to obtain his written permission first. To date, Father has not allowed Mother access.

32. [C.] and [M.] participated in counseling with one of Father's personal acquaintances. Mother has tried to contact the counselor but she has not returned Mother's calls. Any information obtained by the therapist is first reported by Father prior to the sessions. . . .

33. [M.] is prescribed medication for ADHD and Mother ensures he takes it as prescribed during her parenting time. If she is working, she regularly calls [M.] to check in and ask if he took his medication. She also sets a timer to remind [M.] to take his medicine. . . .

* * *

36. [C.] and [P.] no longer refer to Mother as "Mom", but instead call her by her first name[.]

37. [C.] and [P.] no longer show affection towards Mother as they once did. They will not hug her. . . .

* * *

39. Father does not take the boys to their Boy Scout meetings during his time. Mother has signed the boys up and provided Father with the schedules. Father will not take them.

40. Mother has not had phone contact with the boys consistently for months. Father seeks to blame it on the boys' decision, but Father at no time has encouraged or facilitated telephone contact.

41. It is clear Mother loves the boys and is involved as much as Father will allow in their lives.

* * *

51. Father's motion to terminate Mother's parenting time . . . is denied. Father's campaign of denigration against Mother shall cease immediately.

* * *

> 56. Father shall pay $10,000 of Mother's appellate attorney fees as previously ordered. The Court took no action on Father's request for a setoff, which was deemed denied. . . .
>
> 57. Father shall also pay $2,830 to Mother for reimbursement of her overpayment of child support for the [girls] within sixty (60) days. This amount shall be reduced to judgment in favor of Mother and against Father.

Appealed Order at 3-4, 6-9, 11-12. Father now appeals.

Discussion and Decision

I. Parenting Time

A. Standard of Review

[14] Father challenges several of the trial court's findings as either not supported by any evidence in the record or simply incorrect. He asks that we remand to the trial court to issue new findings that are supported by the record and make new conclusions thereon. When the trial court makes findings and conclusions, we employ a two-tiered standard of review under which we first determine whether the record supports the findings and then whether the findings support the judgment. *Nelson v. Nelson*, 10 N.E.3d 1283, 1285 (Ind. Ct. App. 2014) (quotation and citation omitted). Findings are clearly erroneous when there are no facts or inferences drawn therefrom to support them. *Lechien v. Wren*, 950 N.E.2d 838, 841 (Ind. Ct. App. 2011). A judgment is clearly erroneous when a

review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

[15] We are mindful that, in family law matters, our supreme court has expressed a preference for granting latitude and deference to the trial court. *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993).

> Appellate deference to the determination of our trial judges . . . is warranted because of their unique, direct interactions with the parties face-to-face, often over an extended period of time. Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, our trial judges are in a superior position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children.

Best v. Best, 941 N.E.2d 499, 502 (Ind. 2011). To the contrary, 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." *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016) (citation omitted). Accordingly, we neither reweigh the evidence nor reassess witness credibility, and we view the evidence most favorably to the judgment. *Id.*

B. Findings of Fact

[16] We begin by stating the standard for modifying or restricting parenting time. Indiana Code section 31-17-4-2 provides as follows:

> The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.

Although the statute uses the phrase *might* endanger or impair, we have interpreted it to require evidence that parenting time *would* endanger or impair the physical or mental health of the child. *Stewart v. Stewart*, 521 N.E.2d 956, 960 n.3 (Ind. Ct. App. 1988), *trans. denied*; *see also Perkinson v. Perkinson*, 989 N.E.2d 758, 763-65 (Ind. 2013) (noting the *Stewart* interpretation remains the test applied to restriction of parenting time). "[A] factual basis and a finding as to the potential endangerment of [the child's] physical health or safety or significant impairment of his emotional development are necessary" to restrict parenting time. *Rickman v. Rickman*, 993 N.E.2d 1166, 1169 (Ind. Ct. App. 2013).

[17] Several of the findings Father challenges as incorrect have nothing to do with the standard for restricting parenting time. For instance, he challenges finding 8, pointing out that the trial court got the date of the order granting him final medical decision-making authority[11] wrong. *See* Belated Brief of Appellant at

[11] Father refers to this as "sole medical decision making authority," Br. of Appellant at 25, when in fact, the May 27, 2016 order states the parties are joint legal custodians of the boys and as such, "shall both be informed as to medical needs and decisions affecting the children's health," Appellee's App., Vol. 2 at 69. Only if the parties do not agree as to the course of medical treatment does Father have authority to make the final decision. *See id*.

24 ("The date of the order awarding Father medical decision making was May 27, 2016" not March 2, 2017, as recited in finding 8). As mere background, the erroneous date is irrelevant to whether Mother's continued parenting time might endanger the boys' physical health or impair their emotional development. The same is true of findings 15 and 16 concerning the parties' incomes.

[18] Father also challenges finding 35 as incorrect. In finding 35, the trial court found that Father had obtained a court order restricting Mother's access to the boys' physicians and attendance at appointments. We do not find in the record, nor has Mother pointed to, such an order other than the order granting Father final decision-making authority on medical issues. Nonetheless, there is evidence in the record supporting a finding that Father has restricted Mother's attendance at appointments and her access to medical records. *See* Tr., Vol. 1 at 245-46 (Mother testifying that she has tried to be involved with pediatrician appointments but Father "has sole [medical custody] so I'm not allowed to say anything . . . and every time that I request to get medical records I'm denied"). The fact that Mother is denied that access is the point of the finding, not the authority (or assumed authority) under which that occurs.[12]

[12] In addition to the May 2016 order stating that as joint legal custodians, both parties are to be informed as to medical issues, Indiana Code section 16-39-1-7(a) states that in the absence of a court order limiting access, "a custodial parent and a noncustodial parent of a child *have equal access* to the . . . child's health records." (Emphasis added.) As we have found no such order in the record, Father has no grounds on which to deny Mother access to the boys' medical records.

[19] Finally, Father challenges as incorrect finding 41, which reads as follows: "It is clear Mother loves the boys and is involved as much as Father will allow in their lives." Appealed Order at 9. As this statement is more a conclusion the trial court has reached from the evidence than a finding of fact, we cannot say it is "incorrect."[13]

[20] Father also challenges a series of findings as not supported by the record. *See* Br. of Appellant at 21-24 (quoting findings 18-21, 23-24, and 29-32). Our review of the record, however, does find evidence, either by direct testimony or inference, supporting these findings. *See* Brief of Appellee at 24-25.[14] For instance, Father challenges the trial court's finding 30, that Mother was denied access to the school to see P.'s science fair project in December 2019. Although the specific date and purpose of Mother's visit are not clear from the evidence, there was testimony that on at least one occasion, Mother tried to attend one of the children's activities at the school and was asked to leave. *See* Tr., Vol. 1 at 164-65, 174. Therefore, we cannot say that finding 30 as a whole is not supported by the record. The same is true for the remaining findings Father challenges.

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[13] Father also challenges finding 36 as incorrect but does not state why he believes it to be so.

[14] Mother references Volume 3 of the transcript several times in giving citations to the record to support the trial court's findings. There is no Volume 3, but it is clear that the page citations Mother supplies are from Volume 2 of the transcript and citing Volume 3 was a mere typographical error.

C. Parenting Time Restriction

[21] As the evidence supports the challenged findings, we decline Father's invitation to remand to the trial court for new findings. And although Father does not independently challenge the trial court's judgment, we will nonetheless consider whether the trial court's judgment denying Father's petition to restrict Mother's parenting time is clearly erroneous.

[22] Indiana has long recognized that the right of parents to visit their children is "a sacred and precious privilege" that should be enjoyed by non-custodial parents. *Stewart*, 521 N.E.2d at 960 (citation omitted). As a result, a non-custodial parent is generally entitled to reasonable visitation rights. *Duncan v. Duncan*, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), *trans. denied*. "Extraordinary circumstances must exist to deny parenting time to a parent, which necessarily denies the same to the child." *Perkinson*, 989 N.E.2d at 765. The party seeking to restrict parenting time rights bears the burden of proving by a preponderance of the evidence that such a restriction is justified. *S.M. v. A.A.*, 136 N.E.3d 227, 230 (Ind. Ct. App. 2019). A decision about parenting time requires us to give foremost consideration to the best interests of the child. *Perkinson*, 989 N.E.2d at 761; Ind. Code § 31-17-4-2.

[23] The trial court acknowledged that the standard for restricting parenting time is that continued parenting time would endanger the child's physical health or emotional development. *See* Appealed Order at 9-10. Yet, the trial court did not make any such finding and denied Father's petition to modify Mother's

parenting time. Therefore, the trial court clearly did not believe Mother's continued parenting time posed a significant risk to the boys' physical or emotional well-being. Father notes that the trial court did not refer to counselor Neely's testimony that the boys' wishes to stop parenting time with Mother should be honored but also did not make a determination that she was not credible even though she was the "only witness without any clear-cut axe to grind." Br. of Appellant at 26-27. First, we note that Neely's testimony and recommendation alone are not determinative. *See D.B. v. M.B.V.*, 913 N.E.2d 1271, 1275 (Ind. Ct. App. 2009) (reversing an order terminating the father's parenting time even though the guardian ad litem testified eliminating parenting time would be in the children's best interests because the children were fearful of father, did not want parenting time with him, and should have their wishes considered because of their ages). Moreover, it is clear from the trial court's finding 32 – that the counselor receives information from Father but not Mother about the boys – that the trial court found her testimony to be slanted toward Father's position. It is the factfinder's province to assess the credibility of witnesses and to weigh all of the evidence, *L.G. v. S.L.*, 88 N.E.3d 1069, 1073 (Ind. 2018), and the trial court was not obligated to take Neely's testimony at face value nor was it required to explain why it did not do so.

[24] We have previously acknowledged "the challenge of protecting a child's emotional development and physical health and well-being while also recognizing a parent's precious privilege of exercising parenting time with that child." *In re Paternity of W.C.*, 952 N.E.2d 810, 817 (Ind. Ct. App. 2011)

(internal quotation marks omitted). And we do not minimize the current fractious relationship between Mother and the boys or the stress that likely causes on both sides. But a fraught relationship between a parent and a teen is simply not the egregious or extraordinary circumstance which we have previously found supported the termination of parenting time. *See, e.g., Duncan*, 843 N.E.2d at 972 (affirming suspension of parenting time where father's sexual abuse of another of his children was substantiated, he had threatened his oldest child with a loaded gun, he showed no remorse, and he refused counseling). "Clearly, our parenting time statute does not provide for the elimination of parenting time . . . because teenagers do not wish to interact with a parent while accepting substantial financial benefits from that parent." *D.B.*, 913 N.E.2d at 1275. There is certainly work to be done – by both parents and by the boys – to mend the rift between Mother and the boys. But there is no evidence that continued parenting time with Mother will endanger P. and M.'s physical health or significantly impair their emotional development. Therefore, the trial court did not clearly err in denying Father's motion to restrict Mother's parenting time.

II. Financial Matters

[25] Because the financial issues in this case date back to a June 2015 order and have been addressed in a variety of circumstances since, we briefly restate the relevant procedural history:

- June 24, 2015 Order: The trial court finds Father in contempt and orders him to pay $10,000 of Mother's attorney fees within sixteen months beginning in September 2015.
- May 27, 2016 Order: The trial court finds, among other things, that Mother is in contempt and orders her to pay Father's attorney fees, without setting an amount. Instead, because Father was previously ordered to pay Mother's attorney fees for his own contempt, the trial court determines that "the parties shall no longer be indebted to one another resulting in a zero sum net to Mother or Father." Appellee's App., Volume 2 at 69. Also, the trial court finds that Mother's child support obligation for the girls had ended on June 19, 2015.
- August 9, 2017 Court of Appeals opinion: We remand for the trial court to determine the amount of Mother's overpayment of child support after the date of the girls' emancipation and to order Father to reimburse her. We also remand for the trial court to clarify its order regarding the "zero sum" attorney fees balance because the trial court did not explain how it arrived at a "zero sum" balance or provide any support for such a result. We deny Father's request for appellate attorney fees pursuant to Appellate Rule 66(E) upon finding Mother's appeal was not frivolous or in bad faith.
- August 14, 2017: Father files a motion for rule to show cause alleging Mother is in contempt and asking for her to pay his attorney fees incurred in preparing the motion.

- August 17, 2017: The trial court holds a hearing on the issues remanded by the Court of Appeals and Father's new motion for rule to show cause. During this hearing, Father apparently asks for Mother to pay his appellate attorney fees in excess of $4,000 because of her "baseless and meritless" appeal and also asks that the amount of his appellate fees be set off against any amount he is ordered to reimburse Mother for overpayment of child support. *See* Appellant's App., Vol. 2 at 43-44.
- September 8, 2017 Order: As instructed by the Court of Appeals, the trial court calculates the amount of Mother's overpayment of child support and orders Father to reimburse her $2,830 within twelve months. The court does not issue a ruling on Father's request for appellate attorney fees, holding that issue in abeyance until Mother has a chance to respond. The court does not address the "zero sum" balance attorney fees order.
- July 2018: Father files a Petition for Rule to Show Cause and Request for Hearing on Appellate Attorney Fees.
- April 2019: Mother files a Motion for Rule to Show Cause.
- May 2019: A different special judge from the one who had issued the previous rulings is appointed.
- February and June 2020: The trial court holds a two-day hearing on the pending motions.
- October 13, 2020 Order: The trial court orders:

> 56. Father shall pay $10,000 of Mother's appellate attorney fees as previously ordered. The Court took no action on Father's request for a setoff [for his appellate attorney fees], which was deemed denied. . . .
>
> 57. Father shall also pay $2,830 to Mother for reimbursement of her overpayment of child support[.]

Appealed Order at 11-12.

[26] Father argues the trial court erred in ordering that he pay the previously ordered $10,000 of Mother's attorney fees and reimburse Mother for $2,830 in child support overpayment, and in finding that his request for a setoff from the child support overpayment for his own appellate attorney fees had been deemed denied. Br. of Appellant at 17. Thus, there are three separate financial issues:

- The $10,000 of Mother's attorney fees that Father was originally ordered to pay in 2015;
- The $2,830 Father was ordered to pay Mother for her overpayment of child support in 2017; and
- Father's request for appellate attorney fees stemming from Mother's appeal of the 2016 order.

[27] We begin with the child support overpayment issue. Father asserts that "[n]o testimony, evidence, or motion before the trial court was introduced during the hearing or after [the Court of Appeals'] memorandum decision in August 2017 to indicate or infer that [Father] should be ordered to reimburse [Mother] an overpayment of support." *Id.* at 17. He is incorrect. In the trial court's May

2016 order that was appealed to this court, the trial court found that Mother had filed a petition for modification of child support in October 2015, the girls were emancipated as of June 12, 2015, and child support was modified as of June 19, 2015. *See* Appellee's App., Vol. 2 at 63. Yet, the trial court did not determine how much child support Mother had paid between June 19, 2015 and May 27, 2016. We agreed with Mother's argument on appeal that the trial court should have ordered Father to reimburse her for the support she "paid" (via the credit Father received toward his own child support obligation) after June 19, 2015,[15] and we remanded for the court to determine that amount and "order [Father] to reimburse [Mother] for those payments." *Id.* at 90. The Court of Appeals opinion could hardly be plainer that Father was required to reimburse Mother. In fact, Father acknowledged as much in his Brief in Support of Award of Attorney Fees and Motion for Appellate Fees, filed after the hearing on August 17, 2017 to address issues from the Court of Appeals' opinion when he did the calculation of Mother's overpayment. *See id.* at 40. In its September 2017 order, the trial court did as instructed, calculating Mother's overpayment based on the child support order and child support payment records and ordering Father to reimburse her $2,830 within twelve

[15] The modification dated back to June 19, 2015 rather than the date of Mother's petition to modify because "[u]nlike other modifications of child support, a termination of support based upon emancipation dates back to the actual date of emancipation, not the date the petition to terminate was filed." Appellee's App., Vol. 2 at 90 (quotation and citation omitted).

months. Father has not paid any of that amount,[16] and the trial court did not err in ordering him to do so and reducing that amount to a judgment in Mother's favor.

[28] We next address the appellate attorney fee issue.[17] The trial court found that Father's request for appellate attorney fees was deemed denied but offered no explanation for why that would be so, aside from the simple passage of time without a ruling. Some trial rules have specific deemed denied provisions, *see, e.g.,* Ind. Trial Rule 53.3(A) (motions to correct error), but there is no similar trial rule specific to a motion for attorney fees. And although Trial Rules 53.1 and 53.2 address a trial court's failure to rule on a motion within a certain time period, they include no provisions for deeming a motion denied. Thus, we agree with Father that this issue is still pending before the trial court.

[29] However, to facilitate the resolution of issues in this case and allow the parties and the trial court to move forward, we note that Father is not entitled to an award of appellate attorney fees. The Court of Appeals already denied his request for appellate attorney fees pursuant to Appellate Rule 66(E), finding

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[16] As noted above, *supra* n.9, Father did receive a stay of the trial court's reimbursement order in August 2018, shortly before the twelve months he was given to pay expired. Essentially, the trial court's current order just lifted the stay on the already-existing order.

[17] A few of the trial court's findings make it appear that the trial court may have conflated the $10,000 in attorney fees Father was ordered to pay Mother's attorney in 2015 with the appellate attorney fee issue raised by Father after the 2017 appellate decision. *See* Appealed Order at 4 (finding 11), 11 (finding 56). Despite language to the contrary, Mother has never requested appellate attorney fees, and the $10,000 of Mother's attorney fees that Father was ordered to pay and the appellate attorney fees Father seeks from Mother are separate issues.

that Mother's appeal was neither frivolous nor in bad faith. In certain circumstances, Father could still be entitled to an award of fees from the trial court based on Indiana Code sections 31-15-10-1 and/or 31-16-11-1. Despite the Court's decision regarding Appellate Rule 66(E) fees, which are available when an appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay[,]" a trial court has broader discretion to award appellate attorney fees and may issue such an award for economic reasons. *Bousum v. Bousum*, No. 20A-DR-1834 at *4 (Ind. Ct. App. June 15, 2021). But even after our decision, Father advocated for appellate fees in the trial court on the basis that Mother's appeal was "baseless and meritless." *See* Appellant's App., Vol. 2 at 43. As we have already determined otherwise, and as Father is clearly in the superior economic position such that a statutory award from the trial court would be inappropriate, we conclude the American Rule that each party should pay his or her own attorney fees is applicable here. *See Waterfield v. Waterfield*, 61 N.E.3d 314, 331 (Ind. Ct. App. 2016), *trans. denied*. Accordingly, the trial court did not err in not awarding Father a setoff for his appellate attorney fees, regardless of the basis for not doing so.

[30] We turn now to some housekeeping regarding the order that Father pay $10,000 of Mother's attorney fees. Father's brief makes several arguments that he claims are "evidence" of the trial court's error but that, in fact, are no such thing. *See*, *e.g.*, Br. of Appellant at 20 (stating that the error is "further evidenced by [Mother's] prior counsel filing a satisfaction of judgment on February 17, 2015"; the initial order that he pay $10,000 of Mother's attorney

fees was not issued until June of 2015 so the satisfaction of a previous judgment is irrelevant). The most egregious of these, and the only one we will address in detail, is his assertion that the 2017 Court of Appeals opinion determined that he "*was correct* in his motion to correct error *that the trial court erred* in ordering [him] to pay $10,000 in attorney fees." Reply Brief of Appellant at 6 (emphasis added). However, that is not what the Court of Appeals opinion said. In the earlier appeal, Mother alleged that the May 2016 order modifying the award of attorney fees from the June 2015 order was reversible error because the trial court found a set off between fees each owed to the other, but Father had not requested attorney fees or provided evidence of the amount of his fees. Essentially, Mother argued waiver for failure to raise the issue in the trial court. Father counter-argued that "the matter of attorney fees was included in his motion to correct error, so the court was reviewing its previous sanctions[.]" Appellee's App., Vol. 2 at 91. The opinion states, "[Father] is correct *that his motion to correct error asserted the trial court erred* by requiring him to pay $10,000 in attorney fees." *Id.* at 92 (emphasis added). This is *not* the same as saying, "Father is correct that the trial court erred." It is simply an acknowledgement the argument was made and the matter was properly before the trial court.

[31] Turning to the merits of Father's argument regarding the trial court's resuscitation of the June 2015 order that he pay $10,000 of Mother's attorney fees, we agree with him that the trial court has yet to clarify its May 2016 order as instructed by the Court of Appeals by explaining how it reached the conclusion that the attorney fees each party owed to the other resulted in a

"zero sum" balance. In June 2015, the trial court ordered Father to pay $10,000 of Mother's attorney fees for his contempt. Based on the record before us, Father still owed that sum in May 2016, when the trial court found that Mother now owed Father some amount of his attorney fees for recent instances of contempt on her part. But we do not know, and the trial court neither stated in the May 2016 order nor has yet clarified, whether the amount of Father's attorney fees Mother was found to owe is $0.01 or $10,000 or something in between. However, we do know, by virtue of the trial court finding a setoff, that it is not $0.00. Therefore, Father may owe as much as $9,999.99 when Mother's obligation is subtracted, but he cannot still owe the full $10,000. Accordingly, we must remand to the trial court to do as the Court of Appeals instructed on remand in 2017: determine the amount of Father's attorney fees Mother was required to pay for instances of contempt between the June 2015 and May 2016 orders and modify its October 2020 order as necessary to reflect the amount of Mother's attorney fees from June 2015 that Father still owes after subtracting Mother's obligation.

Conclusion

[32] The trial court's findings regarding parenting time are supported by the evidence and in turn support the trial court's judgment that termination of Mother's parenting time is not warranted; thus, the trial court's order denying Father's Petition to Modify Parenting Time is affirmed. We also affirm the trial court's orders that Father reimburse Mother $2,830 in overpayment of child

support and that Father's request for appellate attorney fees is denied. However, the trial court has never offered a clarification of its "zero sum" attorney fee order, and we remand for the trial court to undertake that analysis and issue a modified order reflecting specifically how much Mother owes Father for attorney fees incurred because of her instances of contempt in 2015 and 2016 and subtracting that amount from the $10,000 in attorney fees Father owes but has yet to pay.

[33] Affirmed in part and remanded in part.

Bailey, J., and May, J., concur.