

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kimberly Porter,
Appellant,

v.

Jesse Streikus,
Appellee.

February 10, 2023

Court of Appeals Case No.
22A-JP-1535

Appeal from the Grant Superior
Court

The Honorable Brian F. McLane,
Magistrate

Trial Court Cause No.
27D02-0901-JP-15

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

- [1] Kimberly Porter (Mother) lost physical and legal custody over her now-13-year-old child B.S. (Child) to Jesse Streikus (Father) after pleading guilty and spending time in jail for driving under the influence. Mother appeals, arguing that the trial court erred in assigning primary physical and sole legal custody to Father and in decreasing her parenting time. We affirm.

Facts

- [2] Mother had sole legal and primary custody over Child since his birth in 2009 with little involvement from Father. But in 2018, the parties agreed to modify the custody arrangement to grant Father extended parenting time. This modified arrangement lasted for two years until Mother was arrested for drunken driving.
- [3] At the prospect of Mother going to jail, Father filed for emergency custody over Child, which Mother agreed to. Mother ended up pleading guilty to operating a vehicle while intoxicated and endangering a person, a Class A misdemeanor, and received a one-year sentence with eight days to be served and the rest suspended to probation. Mother ended up spending additional time in jail for violating the terms of her probation. Upon her release from jail, Mother moved to reinstate the 2018 custody agreement while Father moved instead to establish permanent custody.
- [4] A Guardian Ad Litem (GAL) has been assigned to the case since the 2018 modification agreement. In each of the GAL's reports, she explains that Child feels caught in the middle of the custody arguments between Mother and

Father. The GAL reported that Child is “very sensitive” and “does not want to hurt anyone’s feelings and it is obvious he loves both sides of his family very much.” App., Vol. II, p. 47. Although the GAL reported that she believed both parents were putting B.S. in the middle of their custody battle, Mother’s actions stood out.

[5] The GAL testified about multiple times that she felt Mother pressured Child to support her side. These included compelling Child to record a message supporting her side, making unsubstantiated reports to officials about unsafe living conditions in Father’s home, and generally pressuring and manipulating Child to support her custody claim.

[6] The trial court ultimately found that Mother’s “frequent attempts” to use Child to further her case and “oblivious[ness] to the negative impact her actions have had on [Child]” justified changing primary physical and sole legal custody from Mother to Father. *Id.* at 31. The trial court also decreased Mother’s parenting time to the minimum amount allowed by the Indiana Parenting Time Guidelines.

Discussion and Decision

[7] Mother presents two issues in this appeal. She argues that the trial court’s custody modification was not in Child’s best interests and that the trial court abused its discretion in decreasing Mother’s parenting time under the new custody arrangement. Finding that the trial court did not err as to either issue, we affirm.

I. Standard of Review

[8] Father did not file an appellee’s brief. As a result, we apply a less stringent standard of review to Mother’s claims and do not develop arguments on his behalf. *S.M. v. A.A.*, 136 N.E.3d 227, 230 (Ind. Ct. App. 2019). Mother need only establish prima facie error in the trial court’s decision to obtain a reversal. *Id.* “Prima facie error is error at first sight, on first appearance, or on the face of it.” *In re Marriage of Duckworth*, 989 N.E.2d 352, 353 (Ind. Ct. App. 2013) (internal quotation omitted). Questions of law are reviewed de novo. *Id.*

[9] When the trial court sua sponte enters written findings of fact and conclusions of law, the findings control only as to the issues they cover while any remaining issues are reviewed under a general judgment standard. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). The findings will only be set aside if they are clearly erroneous, and the legal judgment will be affirmed on any theory that the evidence can support. *Id.* A finding is clearly erroneous when no fact or reasonable inferences support it. *Id.* We do not reweigh evidence nor judge witness credibility. *Id.* This deference to the trial court’s role as factfinder is only heightened when dealing with family law matters. *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005).

II. Custody Modification

[10] There are two requirements that must be met before a court may modify a custody order. First, the modification must be in the best interests of the child, and second, there must be a substantial change in one or more of the statutory

factors courts use to determine the child's best interests. Indiana Code § 31-17-2-21. These factors are all relevant to determining a child's best interests:

- (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

Indiana Code § 31-17-2-8.

[11] Mother seems to concede that she has not acted blamelessly in these proceedings but insists that a parent's "general lack of cooperation or isolated acts of misconduct cannot serve as a basis for custody modification." *Maddux v.*

Maddux, 40 N.E.3d 971, 979 (Ind. Ct. App. 2015). This is true. Only misconduct “so egregious that it places the child’s mental and physical welfare at stake” justifies a custody modification. *Id.* That said, the trial court did not err in finding that Mother committed such misconduct.

[12] Mother’s incarceration for drunken driving kicked off this custody dispute. Being convicted of—and serving jail time for—a crime qualifies as a substantial change effecting a child’s best interests. *See Ellenburg v. Kropp*, 175 N.E.3d 1208, 1211-12 (Ind. Ct. App. 2021) (affirming modification of primary physical and sole legal custody in favor of father after mother was convicted and arrested for drunken driving). But the trial court also documented numerous instances of Mother’s misconduct during the proceedings that support its decision to grant Father custody. In one instance, Mother manipulated Child into recording a message supporting her side in the dispute. Tr. Vol. II, pp. 89-90; App. Vol. II, p. 30. Mother also contacted DCS and law enforcement on several occasions and alleged unsafe living conditions in Father’s home. Yet, when officials investigated, they found no signs of impropriety. Tr. Vol. II, p. 99; App. Vol. II, p. 30. These actions fit into a pattern of Mother pressuring Child and correspondingly increasing the amount of anxiety Child felt from the custody dispute. The trial court determined that Mother’s actions harmed Child, and we find sufficient evidence in the record supporting this determination. Therefore, we find no error in the trial court’s decision to award primary physical and sole legal custody with Father.

III. Parenting Time

[13] Lastly, there was no error in the trial court’s decision to award Mother the minimum amount of parenting time allowed under the Indiana Parenting Time Guidelines. Despite Mother’s belief that this “can only be construed as punishment” by the trial court, Appellant’s Br., p. 21, she admits that the trial court’s parenting time order complies with the Guidelines. We see no evidence that the trial court sought to punish Mother and “cannot conclude the trial court abused its discretion . . . when its decision is consistent with the recommendations of the Indiana Parenting Time Guidelines.” *Hazelett v. Hazelett*, 119 N.E.3d 153, 163 (Ind. Ct. App. 2019). Thus, we find no error in the trial court’s parenting time decision.

[14] We affirm.

May, J., and Crone, J., concur.