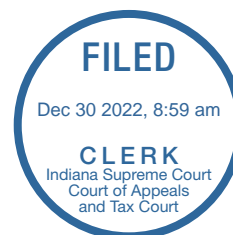


MEMORANDUM DECISION

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

Melissa A. Laney Clark,
Appellant-Petitioner,

v.

Christopher B. Clark,
Appellee-Respondent.

December 30, 2022

Court of Appeals Case No.
22A-DR-86

Appeal from the Monroe Circuit
Court

The Honorable Kelsey Blake
Hanlon, Special Judge

Trial Court Cause No.
53C04-1601-DR-31

Altice, Judge.

Case Summary

- [1] Following lengthy post-dissolution proceedings and a three-day factfinding hearing, Melissa A. Laney Clark (Mother) appeals from the trial court's order

on a number of matters, including Christopher B. Clark's (Father) 2019 petition to modify custody and restrict Mother's parenting time. Specifically, Mother presents the following restated issues on appeal:

1. Did the trial court abuse its discretion in modifying physical custody of the parties' minor children?
2. Was the trial court's calculation of Father's income for child support purposes clearly erroneous?
3. Did the trial court err in awarding Father \$25,000 in attorney fees?

[2] We affirm.

Facts & Procedural History

[3] Mother and Father were married in 1998 and have two children together: C.C., born in June 2006, and E.C., born in June 2010. Mother filed for dissolution of marriage in January 2016, and the marriage was dissolved later that year pursuant to a mediated settlement agreement. Per the dissolution decree, Mother and Father shared joint legal and physical custody of the children, and Father's child support obligation was \$32 per week. The property divided in the decree included fifteen parcels of real estate – several of which were rental properties in Bloomington – with Mother receiving seven and Father receiving eight parcels. The debt associated with the parcels, which in most cases was substantial, was also divided between the parties.

- [4] By the fall of 2018, Mother and Father were experiencing disagreements regarding parenting time and custody, which had risen to the unfortunate level of police involvement. Per the dissolution decree, they scheduled mediation to try to resolve their issues. Prior to the mediation, they filed a joint motion for the appointment of a guardian ad litem (GAL) for the children and agreed that Melissa Richardson should be appointed as GAL. GAL Richardson was appointed by the trial court on October 8, 2018.
- [5] On June 16, 2019, Mother's boyfriend, now fiancé, Curt Doyle, was filmed, from a distance by his approximately thirteen-year-old daughter, at Mother's residence inhaling a substance off a small plate with some type of device. The manner of use was consistent with snorting an illegal substance, though Mother and Doyle later claimed the plate contained snuff. Doyle then passed the plate to Mother. Doyle's daughter sent the video to her mother and then the video made its way to Father and GAL Richardson.
- [6] On June 17, 2019, GAL Richardson requested that Mother and Doyle submit to a drug screen. The next day, Father filed a motion for emergency hearing regarding custody and for an order for hair follicle testing. The trial court scheduled an attorney conference for June 27, 2019.
- [7] Mother submitted to hair follicle testing on June 20, 2019, and to an oral drug screen on June 27, 2019. Her oral screen came back positive for THC only, while her hair follicle test was positive for THC, cocaine, MDMA (commonly known as ecstasy), and methamphetamine. Doyle had similar results from his

hair follicle test, but his oral screen from June 27, unlike Mother's, was also positive for cocaine.

[8] Mother and Doyle acknowledged using ecstasy and cocaine together while on an adult-only vacation in Costa Rica in May 2019 but claimed to have not used drugs again after their return, except for marijuana. They attributed the positive methamphetamine results on the hair follicle tests to the drugs in Costa Rica possibly being laced with that substance. Doyle could not explain the positive cocaine result on his oral screen from June 27, 2019, but later suggested that it may have been somehow related to his contact lenses, an explanation the trial court did not find credible.

[9] After learning of the positive drug test results, Father filed, on July 1, 2019, a petition to modify custody and to restrict Mother's parenting time. Father sought primary custody of the children and for Mother's parenting time to be supervised and to occur outside the presence of Doyle.

[10] On August 21, 2019, Mother and Father entered into a Temporary Agreed Entry Regarding Custody and Parenting Time (the Agreed Entry). Pursuant to the Agreed Entry: Father was granted primary physical custody of the children; Mother received parenting time on Monday and Tuesday afternoons until 7:30 p.m. and alternating weekends from 10:00 a.m. to 7:00 p.m. on Saturday and Sunday; and Mother was ordered to pay child support to Father in the amount of \$185 per week. Mother's parenting time was further restricted as follows:

- a. Mother will refrain from consuming alcohol, illegal and non-prescribed drugs 2 hours prior to and at all times during her parenting time.
- b. Mother and all her household members shall cooperate with random drug screens as requested by the [GAL] or the Court. Drug Screens shall be completed within six (6) hours of the request. In the event a drug screen is not completed by Mother as requested, Mother's parenting time shall be supervised by any person agreed to in writing by the parties, until a screen as requested by the [GAL] is completed by Mother and is returned negative for all substances other than marijuana
- c. All drug screens shall be completed with the Monroe County Community Corrections and shall be observed urine drug screens.
- d.
- e. Mother and her household member, Curt Doyle, shall complete a 5 panel hair follicle drug screen in October 2019.
- f. Curt Doyle shall not transport the children.

Appellant's Appendix at 92. The Agreed Entry further provided that the parties would mediate the custody dispute within six months and that the GAL would provide a written report no less than ten days before mediation.

[11] On October 24, 2019, Mother submitted to a hair follicle test, and the results were negative for all substances tested.¹ Similarly, her random drugs screens

¹ Doyle's hair follicle test, taken on October 25, 2019, was positive for the same substances as in June.

between July 2019 and February 2020 had all negative results, except for marijuana. The last random drug screen Mother submitted to was on February 20, 2020.

[12] On March 10, 2020, Mother fell asleep and missed picking up C.C. from therapy that afternoon. As a result, GAL Richardson requested that Mother submit to a random drug screen the next day. Mother, however, indicated that she could not screen because she and Doyle had to travel to Cincinnati to visit a critically ill family member. Unbeknownst to GAL Richardson, Mother and Doyle flew to Costa Rica on March 12, 2020.

[13] Father traveled with the children to Florida for a couple weeks in March 2020. Upon their return, Father and Mother agreed to forgo Mother's scheduled parenting time due to COVID-19 concerns. Thereafter, in May and June, Mother failed to respond to GAL Richardson's requests for random drug screens or GAL Richardson's offer to supervise visits.² This resulted in Mother having no parenting time between May 19 and July 17, 2020.

[14] GAL Richardson eventually persuaded Father to allow supervision by Mother's mother beginning in July 2020, though the resulting parenting time was substantially limited in scope through the first of March 2021. According to

² At some point during this time, GAL Richardson came to understand that Mother was "dr[awing] a line in the sand" and "just wasn't going to screen." *Transcript Vol. 2* at 20. Because the Agreed Entry was still in place, GAL Richardson believed it was her duty to continue to request screens, but she was no longer concerned that Mother had a substance abuse issue.

GAL Richardson's January 2021 report, Mother saw the children only twenty days between July 8, 2020, and January 21, 2021, which was about one quarter of the parenting time she would have had if she had been in compliance with the Agreed Entry. Mother continued to rebuff requests for drug screens, and she did not reply to a December 2020 email in which GAL Richardson "attempt[ed] to open communication about a consistent parenting time plan until the matter could be heard in court." *Appellee's Appendix* at 62.

[15] Following a hearing on an emergency motion for modification of parenting time, filed by Father, the trial court issued an order on March 8, 2021, in which it found that the Agreed Entry from 2019 was no longer in the children's best interests. The court noted the lengthy delay in the case after the Agreed Entry, the motions for rule to show cause that followed, the "extremely high conflict co-parenting situation," and the resulting "free-for-all" in terms of compliance with the Agreed Entry. *Appellant's Appendix* at 135, 136. The court continued:

12. Mother has not exercised parenting time on [a] consistent basis with the Children for quite some time and has not seen the Children at all since sometime in January of 2021. Mother characterizes not participating in chemical testing as essentially ceasing participation in a provision of the [Agreed Entry] that was no longer necessary. If this is true, Mother has in essence placed the importance of no longer complying with an Order that was unnecessary ... over having regular contact with her Children. The Court finds this logic to be in total contravention of the Children's best interests. It is difficult to conceive of why a parent would allow their relationship with their children to be sacrificed in vindication of that position.

13. Mother's relationship with the Children has been impacted by this interruption and is somewhat strained. It was particularly distressing for [E.C.] not to see Mother. The Court anticipates that it would be potentially devastating to [E.C.] to restart parenting time and then have another lengthy separation from Mother. Both Parents should keep this in mind and make good faith efforts to work together for the benefit of both of the Children.

14. At present, the minimum parenting time contemplated by the Indiana Parenting Time Guidelines [(the Guidelines)] represents a credible threat to the emotional health of the Children. It is the Court's hope to get to a more normalized parenting time schedule so long as the same can safely occur.

15. Because of this lapse in parenting time and other issues with communication between the Children and Mother, a phased-in parenting time schedule is in the Children's best interest, and will hopefully allow the Children to get back into a schedule that includes regular, meaningful time with Mother.

16. It would benefit Mother and the Children to participate in family therapy to focus on strengthening and repairing some of the aspects of their relationships that have gotten off track in the past year and half....

Id. at 136-37.

[16] In the March 2021 order, the trial court removed the drug testing requirement and granted Mother parenting time to be phased-in, with her ultimately receiving in April 2021 unsupervised parenting time on Tuesdays from after school until 7:30 p.m. and alternating weekends on Saturday and Sunday from 10:00 a.m. to 7:00 p.m. The court ordered that Doyle not be present during

parenting time and that both parents be sober when caring for the children.³

Mother was also ordered to enroll in individual therapy and to participate in family therapy with the children, as recommended by their therapist.

[17] The trial court held a three-day evidentiary hearing on all pending motions in August 2021. The hearing addressed, among other things, modification of custody, various motions for rule to show cause, modification of child support, and each party's request for attorney fees. On December 13, 2021, the trial court issued a lengthy order with findings of fact and conclusions.

[18] With respect to custody, in addition to many of the facts set out above, the trial court found that both Mother and Father had behaved inappropriately at times, escalating and/or creating contentious situations and unnecessarily involving the police. Further, Mother had wrongly blamed the children for incidents that were, in fact, caused by her. The court also noted that the children's therapist did not believe Mother was ready for family therapy because Mother had trouble putting their needs first and continued to delegitimize their concerns as being the product of undue influence from Father and the GAL. The court noted the children's expressed preference for being primarily with Father, as they felt safe, prioritized, and cared for in his home, and it found that the children had not been unduly influenced by Father. Additionally, "Mother's

³ The children are particularly sensitive to substance use, including alcohol, because Father is a recovering alcoholic – sober since 2015 – and because substance use and testing had played such a big role throughout this case.

repeated and persistent refusal to cooperate with the GAL’s investigation was not in the children’s best interest.” *Appellant’s Appendix* at 57.

[19] Ultimately, the court concluded that modification of physical custody was in the children’s best interests and that there had been a substantial and ongoing change in circumstances. The trial court awarded primary physical custody to Father with Mother exercising phased-in parenting time increasing to parenting time pursuant to the Guidelines.

[20] In addition, the trial court ordered Mother’s child support to remain the same as provided for in the Agreed Entry. That is, Mother was ordered to pay weekly child support of \$185. In addition to a child support arrearage of \$740, the trial court concluded that Mother had failed to pay \$1900 in other child-related expenses. The court found Mother in contempt for failing to pay child support and her share of uninsured medical expenses and for her noncompliance with discovery and willful violation of a related court order. For Mother’s contempt and other misconduct during the underlying litigation, the trial court ordered Mother to pay attorney fees of \$25,000 to Father.

[21] Mother now appeals. Additional information will be provided below as needed.

Standard of Review

[22] It is well-established in Indiana that we grant latitude and deference to our trial courts in family law matters. *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016). This is because “[a]ppellate courts ‘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.” *Id.* (quoting *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)). On appeal, it is not enough that the evidence might support some other conclusion; it must positively require the conclusion advanced by the appellant before there is a basis for reversal. *Id.* Accordingly, on appeal, we must view the evidence most favorably to the judgment without reweighing the evidence or assessing witness credibility. *Id.*

[23] Where, as in this case, a trial court enters special findings and conclusions, we apply a two-tiered standard of review. *G. S. v. H. L.*, 181 N.E.3d 1040, 1043 (Ind. Ct. App. 2022). That is, we consider whether the evidence supports the findings and whether the findings support the judgment. *Id.* A trial court’s findings will be found to be clearly erroneous only when the record contains no facts to support them either directly or by inference; a judgment will be found to be clearly erroneous if it applies the wrong legal standard to properly found facts. *Id.* “Ultimately, we will reverse only upon a showing of clear error: ‘that which leaves us with a definite and firm conviction that a mistake has been made.’” *Id.* (quoting *Egley v. Blackford Cnty. Dep’t of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)).

Discussion & Decision

1. Modification of Physical Custody

[24] Mother argues that the trial court erred in modifying physical custody of the children from joint custody to Father having primary custody. She contends that the trial court's findings failed to establish a substantial change in circumstances such that modification was in the children's best interests. In the alternative, she argues that to the extent there has been a substantial change in circumstances, Father was the cause of these changes.

[25] Pursuant to Ind. Code § 31-17-2-21, a court may not modify custody unless modification is in the best interests of the children and there has been a substantial change in one or more of the factors set out in I.C. § 31-17-2-8. These statutory factors include, as relevant here: the wishes of the parents; the wishes of the child, with more consideration given if the child is at least fourteen years of age; the interaction and interrelationship of the child with their parents, siblings, and any other person who may significantly affect the child's best interests; and the child's adjustment to their home, school, and community.

[26] In making its conclusion that a substantial change in circumstances had occurred, the trial court observed in relevant part:

123. The wishes of the Parents are in opposition....

124. The wishes of the Children, as determined through the trial testimony and exhibits, most critically through Ms. Richardson's GAL reports and testimony, are for Father to have primary

custody and Mother to have some type of parenting time. The Children have been enmeshed in litigation for over two (2) years and need peace, predictability, and stability.

125. [T]he Children's interaction and interrelationship with the Children's parents, siblings, and other people who may significantly affect the Children's best interests have changed substantially since the litigation resumed in this case in 2019. The Children have not had overnight parenting time with Mother since 2019. Mother has unnecessarily gone lengthy periods without seeing the Children. The Children need an opportunity to rebuild their relationship with Mother after two (2) difficult years. The Children do not presently have a positive relationship with [Doyle]. The Children are comfortable with Father and have done well in his care. Both Mother and Father have demonstrated a desire for the Children to have meaningful time with other extended family members.

126. The Children's adjustment to home, school, and community has materially changed since the Decree of Dissolution of Marriage ... and Settlement Agreement of August 10, 2016. The Children have resided in Father's home on an ongoing basis now for two (2) years. [E.C.'s] performance at school has improved in Father's care.

Appellant's Appendix at 65-66.

[27] On appeal, Mother does not directly attack any of the trial court's bases set out above for modifying custody. Rather, she focuses her argument on whether there is evidence in the record that she had/has a substance abuse problem. She asserts that there was no such evidence presented and that, therefore, "any findings relating to Mother having a substance abuse problem are clearly erroneous." *Appellant's Brief* at 17.

[28] Notably, Mother does not direct us to any specific findings that she claims to be clearly erroneous, and it is apparent to us that the trial court did not modify custody based on any finding that Mother has a substance abuse problem. To be sure, Mother’s (and Doyle’s) use of cocaine and ecstasy in the spring of 2019 lead to legitimate concerns of substance abuse and to the temporary modification of custody and parenting time pursuant to the Agreed Entry, which Mother agreed to in August 2019. But the change in circumstances leading to modification resulted from Mother’s decision, starting in early 2020, to no longer comply with the Agreed Entry or cooperate with GAL Richardson - thus, forgoing parenting time with the children and hurting them in the process.⁴ One significant and foreseeable consequence of her decision was further estrangement from the children, who were becoming cemented in their desires to live with Father.

[29] Mother suggests that to the extent there are changed circumstances, the changes are “due to the misconduct of Father.” *Appellant’s Brief* at 18. In this regard, she directs us to findings by the trial court regarding certain incidents in which Father behaved improperly over the years. Mother asserts that there was evidence of “parental manipulation/alienation” and that the court’s various findings “demonstrate that *any issue* between the Mother’s relationship with

⁴ The record establishes that the children were aware of the Agreed Entry’s drug testing requirement and that Mother’s noncompliance was affecting the availability of parenting time. That is, they were provided with “age-appropriate explanations” to explain the substantial lapses in parenting time. *Appellant’s Appendix* at 54. GAL Richardson opined that this was in the children’s best interests under the circumstances.

Minor Children are a result of Father’s improper actions and allegations against Mother while placing Children in the middle.” *Id.* at 18, 19 (emphasis supplied). While recognizing Father’s faults and that his feelings about Mother’s parenting “likely made some impression on the Children,” the trial court expressly found that “the Children have not been unduly influenced by Father and are capable of relaying their own experiences and making their wishes known.” *Appellant’s Appendix* at 56. We reject Mother’s invitation to reweigh the evidence. There is ample evidence in the record that she caused much of the turmoil in the relationship with her children.

[30] Mother has failed to establish that the trial court’s judgment regarding custody was clearly erroneous. The modification was supported by substantial changes in multiple statutory factors, and the trial court’s best interest determination is supported by the evidence.⁵

2. Child Support

[31] Mother argues that the trial court determined child support based on an improper calculation of Father’s weekly gross income. Specifically, she claims that the trial court failed to include rental income from Father’s various rental homes.

⁵ Mother also challenges the phased-in portion of her parenting time. That part of the custody order, however, ended last spring, and she is now receiving parenting time pursuant to the Guidelines. Thus, the issue is moot because we cannot provide Mother with effective relief. *See In re Adoption of A.A.*, 51 N.E.3d 380, 383 n.1 (Ind. Ct. App. 2016), *trans. denied*.

[32] The evidence presented below regarding each party's income was sparse. At trial, Father testified that he earned approximately \$50,000 to \$60,000 annually as a real estate agent. He explained regarding this income, "That's it, really. That's what I'm living off of." *Transcript Vol. 2* at 166. When asked about rental income, Father testified that while the properties bring in money, they have expenses (repairs, management fees, and taxes), and that they are "just investments." *Id.* Similarly, Mother has multiple rental properties that she testified were "just an investment." *Transcript Vol. 3* at 158.

[33] On the record before us, we cannot say that the trial court erred by considering only the specific income figures to which each party testified. Indeed, it would have been impossible for the court to include rental income because there was absolutely no evidence presented by either party regarding such amounts. Both had rental properties, and both testified that their respective properties were investments rather than regular income. The trial court's finding that Father's weekly gross income was \$1163⁶ was supported by the evidence and, thus, not clearly erroneous.

3. Attorney Fees

[34] Finally, Mother challenges the trial court's award of \$25,000 in attorney fees to Father. The trial court based the award on Mother's civil contempt for her failure to pay child support and uninsured medical expenses and, most notably,

⁶ This equates to an annual income of \$60,476 for Father.

her lengthy period of noncompliance with discovery and willful violation of the court's discovery order.⁷ As an additional basis, the trial court found that Mother had litigated in such a way as to justify an award of attorney fees to Father: "Mother's conduct of the litigation while representing herself and through [Attorney Poer] resulted in delays and a lengthy disqualification hearing that should have never been necessary."⁸ *Id.* The remaining basis for the award of attorney fees was Mother's noncompliance with the Agreed Entry's drug testing requirement in the later part of 2020, when the community corrections testing site was reopened, and her "fail[ure] for a substantial period to cooperate and communicate with the GAL."⁹ *Id.* at 70.

[35] On appeal, Mother does not challenge the reasonableness of the amount of attorney fees awarded. Her argument, rather, is based entirely on her incorrect understanding of the law. That is, Mother suggests that the award of attorney

⁷ On July 8, 2020, the trial court ordered Mother to respond to discovery by 4:00 p.m. on July 17, 2020, and to cooperate with scheduling her deposition. Despite this order, Mother did not respond to written discovery requests until June and July 2021, and she failed to appear for two scheduled depositions. The trial court found that Father expended attorney fees in attempts to obtain Mother's compliance while she was self-represented and briefly represented by attorney and friend DL Poer (Attorney Poer), who was disqualified by the trial court. Mother did not obtain new counsel until March 2021, and this new counsel then worked diligently to comply with the discovery shortcomings.

⁸ In this regard, the court found that Attorney Poer should have known that she could not represent either party, yet she took Mother's case, resulting in a multi-hour hearing on Father's motion to disqualify her. The court characterized Mother's defense against Father's "clearly meritorious" motion to be "frivolous[] and vexatious[]." *Appellant's Appendix* at 70. Further, the court found that during her two-month representation of Mother, Attorney Poer filed "numerous voluminous and repetitive motions," which were "ultimately largely withdrawn by Mother's subsequent counsel." *Id.* at 62.

⁹ This is unrelated to the trial court's contempt discussion, which addressed only Mother's compliance with the Agreed Entry before July 21, 2020, the time period relevant to Father's first amended motion for rule to show cause.

fees in this case was based entirely on Ind. Code § 31-17-4-3, which she claims would only permit an award of fees to Father for her violation of a parenting time order, rather than for violation of discovery orders. The statute's reach is not so narrow.

[36] I.C. § 31-17-4-3 provides:

(a) In any action filed to enforce or modify an order granting or denying parenting time rights, a court may award:

- (1) reasonable attorney's fees;
- (2) court costs; and
- (3) other reasonable expenses of litigation.

(b) In determining whether to award reasonable attorney's fees, court costs, and other reasonable expenses of litigation, the court *may consider among other factors*:

- (1) whether the petitioner substantially prevailed and whether the court found that the respondent knowingly or intentionally violated an order granting or denying rights; and
- (2) whether the respondent substantially prevailed and the court found that the action was frivolous or vexatious.

(Emphasis supplied). A plain reading of the statute shows that subsection (b) does not limit the considerations of the trial court in awarding attorney fees. Moreover, we have affirmed awards under the statute for a party's misconduct that resulted in delays and additional litigation expenses. *See Kelly v. Kravec*, 999 N.E.2d 433, 441 (Ind. Ct. App. 2013).

[37] Here, the basis of the action was Father's filing, in July 2019, of a petition to modify custody and restrict mother's parenting time. In ruling on such, the trial court was permitted to consider whether to award attorney fees under the statute, and each party, in fact, filed a request for attorney fees. Additionally, as noted by the trial court, it is well established that courts have inherent authority to award attorney fees for civil contempt. *See Reynolds v. Reynolds*, 64 N.E.3d 829, 835 (Ind. 2016).

[38] As noted above, the trial court considered Mother's contemptuous behavior regarding discovery and payment of child support and medical expenses, certain misconduct by Mother and Attorney Poer that unnecessarily lengthened and complicated the litigation, and Mother's violations of the Agreed Entry after July 2020, when she refused to submit to random screens or cooperate with GAL Richardson. The trial court's ample findings are supported by the evidence, and the award of attorney fees is not clearly erroneous.

[39] Judgment affirmed.

Brown, J. and Tavitas, J., concur.