MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Paternity of H.D.

Melissa Stevens,

Appellant-Respondent,

v.

Robert Dashiell,

Appellee-Petitioner.

May 22, 2023

Court of Appeals Case No. 22A-JP-2258

Appeal from the Boone Circuit Court

The Honorable Lori N. Schein, Judge

Trial Court Cause No. 06C01-1604-JP-143

Memorandum Decision by Judge Robb
Judges Crone and Kenworthy concur.

Robb, Judge.

Case Summary and Issues

[1] Robert Dashiell ("Father") and Melissa Stevens ("Mother") have one child, H., who was born in 2008. In 2016, Father sought to establish paternity. The trial court entered judgment of paternity, granted Mother primary physical custody of H., and ordered that Father have parenting time pursuant to the Indiana Parenting Time Guidelines.

[2] After paternity was established, the parties returned to court several times to settle parenting time and other disputes, culminating in a 2022 petition by Father to modify custody. After a hearing but without interviewing H. *in camera* as requested by Mother, the trial court found a substantial change in one or more of the statutory factors bearing on custody and modified primary physical custody to Father.

[3] Mother appeals, raising several issues that we consolidate and restate as whether the trial court erred by 1) denying Mother's request to interview H. *in camera*; and 2) finding there was a substantial change in the statutory factors supporting modification of custody.[1] Concluding the trial court did not err in either respect, we affirm.

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[1] The trial court also found Mother in contempt for "willfully disobey[ing] the Court's previous orders related to communication with Father" and as a sanction for her contempt, ordered her to pay $500.00 of Father's attorney's fees and awarded Father parenting time with H. during her 2023 spring break. Appealed Order at 9-10. In the conclusion to her brief, Mother asks that we not only reverse the modification of custody, but also reverse the finding of contempt and rescind the sanctions imposed against her as a result of her contempt. *See* Appellant's Brief Amended at 26. The contempt finding and sanctions are separate issues

Facts and Procedural History

[4] After Mother and H. moved to North Carolina in 2016, Father filed a petition to establish paternity, custody, and parenting time. Father sought sole custody of H. Pursuant to the parties' agreement, the trial court entered a judgment establishing Father's paternity but held resolution of the other issues for a later time. Following a hearing, the trial court denied Father's request for custody[2] and entered an order regarding Father's parenting time.

[5] Over the next several years, parenting time issues arose that prompted Father to seek the court's intervention on multiple occasions.[3] In 2020, Father's parenting time was expanded in light of COVID-19 pandemic-related changes to H.'s schooling, which the court found "provide[d] a unique opportunity for Father to spend time" with H. Appellant's Appendix Amended, Volume 3 at 33. The expanded parenting time was to continue until H. returned to school in person. In February 2022, Father filed a Petition to Modify Custody and Related Matters and Motion for Rule to Show Cause, alleging Mother had not

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from the modification of custody, but Mother has made no independent argument regarding contempt or sanctions. Therefore, any issue related to these orders is waived. *See* Ind. Appellate Rule 46(A)(8); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding failure to present a cogent argument waives the issue for appellate review), *trans. denied*.

[2] For several reasons, the custody situation after this initial order is less than clear from the record, but the parties seem to agree that prior to the most recent hearing, they shared joint legal custody of H. with Mother having primary physical custody. *See* Transcript, Volume 2 at 165 (Mother answering in the affirmative when the trial court asks if she and Father have joint legal custody of H.); *id.* at 166 (Father affirming he is not asking for a change in legal custody).

[3] The trial court noted that Father filed motions in July 2017, June 2018, March and May 2019, and July 2020 "all requesting Court assistance in having parenting time . . . or in forcing Mother to follow previous court orders relating to his parenting time." Appealed Order at 1.

complied with the 2020 order, "consistently interfered with parenting time[,]" and lacked attention to H.'s educational and health needs. *Id.* at 40. Father also alleged communication between the parties was poor.

[6] In August 2022, the trial court held a hearing on Father's motion. Testimony at the hearing showed H.'s school settlement changed numerous times in the preceding two and one-half years. H. attended public school in person prior to the COVID-19 pandemic. She, like many children, then participated in remote learning for the remainder of that school year. She had not returned to public school as of the hearing.

[7] H. began the 2020-21 school year in a "book[] based" homeschool curriculum via a state program monitored by her grandmother. *Id.* at 32. She began the 2021-22 school year in an online school. According to records Father obtained, in the fall 2021 semester, H. had a grade of 60.91% in English, 61.06% in math, and 62.39% in science. *See* Index of Exhibits, Volume 3 at 15-16. There were days H. logged in to each class for only minutes and other days when she did not log in at all. Father testified even before the COVID-19 pandemic there were issues with H.'s attendance in public school, including tardiness. For the spring 2022 semester, H. attended Grace Family Learning Center ("Learning Center"), located in the same building as her gymnastics facility. The parent handbook for the Learning Center indicates it is a "hybrid homeschool program" providing faith-based "learning support" to families in "an athletic environment." *Id.* at 34-38. Parents are responsible for the child's learning

progress and all legal requirements.[4] Father was under the impression H. would be returning to the Learning Center to start the 2022-23 school year. Mother said that was her original intention, "but [she] felt like there was such a fight against her going to the co-op," she thought she could "appease" Father by enrolling H. in public school. Tr., Vol. 2 at 165.

[8] Father had no input into any of these schooling changes, and Mother did not regularly communicate with him about H.'s academic performance. Father had trouble accessing H.'s grades on his own or learning if she was even given any grades.[5] From what little Father was able to learn on his own, he did not believe the online or homeschooling options were meeting H.'s educational or social needs. Although he had been willing to be flexible because of the circumstances, his preference moving forward was for H. to go to public school. Father was concerned that H., a rising freshman, was not ready for high school because of the lack of accountability and socialization in her online and home school programs. "My hope is that I can get [H.] here and get her in school and have her go to school every day and provide the atmosphere and stability that she needs. . . . I just want her to have stability and I don't think she has that with her mom." *Id.* at 143. Father said even though Mother had enrolled H. in

[4] Mother described it as a "home school co-op, where they were to attend in person from nine to three and it could be used as a part-time or a full-time program." Tr., Vol. 2 at 163.

[5] Mother testified the Learning Center did not give grades: "There weren't like actual . . . oh you have a ninety-eight percent pass, . . . grades like that. You did the work, learned it all and you moved on to the next thing." Tr., Vol. 2 at 176.

public school for the coming school year, "any Order that's been ordered by this Court has never been followed by [Mother]," and he worried "a month later she would take her back out and home school again." *Id.* at 146.

[9] Father acknowledged H. has a closer bond with Mother "given the amount of time she spends with her mom," but asserted he and H. have a good bond, too. *Id.* at 147. He also acknowledged H. was close with her younger half-sister. He attributed that in part to their home schooling. He knew there would be a period of transition if H.'s physical custody was changed, but stated, "I think she would be fine." *Id.* at 156. Mother stated H. had a good bond with her, H.'s sister, and other family in North Carolina and she felt H. wanted to stay in North Carolina. She acknowledged the fall 2021 online school was "too unstructured[,]" but disagreed with Father's characterization of the Learning Center. *Id.* at 162. Nonetheless, she reiterated she had enrolled H. in public school for the coming semester.

[10] The trial court found Father proved there had been a substantial change in H.'s adjustment to school while in Mother's physical custody and that Father having primary physical custody of H. would be in H.'s best interests. Accordingly, the trial court granted Father's motion to modify custody. Mother now appeals the trial court's modification decision.

Discussion and Decision

I. *In Camera* Interview

[11] Mother argues the trial court abused its discretion by denying Mother's request to conduct an *in camera* interview with H., claiming the trial court "did not have the discretion to not ascertain and consider the wishes of the child[.]" Appellant's Br. at 25. We disagree. Indiana Code section 31-14-13-3(a) clearly states the court "*may* interview the child in chambers to ascertain the child's wishes" when making custody decisions following a determination of paternity. *See McClendon v. Triplett*, 184 N.E.3d 1202, 1211 (Ind. Ct. App. 2022) (stating, based on identical language in Indiana Code section 31-17-2-9, that whether to conduct an *in camera* interview is within the trial court's discretion), *trans. denied*.

[12] Here, Mother did not request the trial court interview H. until the conclusion of the hearing, after both she and Father had presented their testimony and made closing remarks. There was some degree of urgency to resolving the modification of custody issue because a primary concern was H.'s educational needs and the hearing was held in mid-August. The trial court noted in its order that Mother requested the court speak with H., but that it did not interview H. because she lives out-of-state.[6] *See* Appealed Order at 5-6. Under

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[6] It is not entirely clear Mother actually requested an *in camera* interview. Following Mother's closing remarks, the following conversation ensued:

> The Court: Anything else?
> [Mother]: I guess I just ask, is it possible for somebody to talk to [H.], that's what I request.

these circumstances, Mother has failed to convince us the trial court's denial of her request for an *in camera* interview amounted to an abuse of its discretion.

II. Modification of Custody

[13] Mother argues the trial court erred when it modified primary physical custody of H.

A. Standard of Review

[14] The trial court entered findings of fact and conclusions thereon in its order modifying custody. Pursuant to Indiana Trial Rule 52(A), we will "not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Where a trial court enters findings *sua sponte*, as the trial court did here, we review issues covered by the findings by first asking whether the evidence supports the findings, and then whether the findings support the judgment. *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014). We review any issue

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> The Court: You're making a belated Motion for In Camera Interview, is that correct ma'am?
> [Mother]: I don't know if it's that or through a guardian-ad-litem . . .
> * * *
> The Court: [I]s . . . your request the Court either speak to her privately as a Judge speaking to the [f]ourteen year old or that the Court appoint a guardian-ad-litem . . . ?
> [Mother]: A guardian-ad-litem.

Tr., Vol. 2 at 192.

not covered by the findings under the general judgment standard, meaning we will affirm based on any legal theory supported by the evidence. *Id*.

[15] A finding will not be set aside unless it is clearly erroneous; that is, when there are no facts or inferences to be drawn therefrom that support it. *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). We neither reweigh the evidence nor judge the credibility of the witnesses, *id.*, and "[w]e will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment[,]" *Baxendale v. Raich*, 878 N.E.2d 1252, 1257-58 (Ind. 2008). In order to reverse a trial court's ruling modifying custody, it is not enough that the evidence *might* have supported a different conclusion; rather, the evidence must "*positively require* the conclusion contended for by appellant[.]" *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016) (emphasis added) (quoting *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)).

[16] Additionally, we acknowledge the "well-established preference in Indiana 'for granting latitude and deference to our trial judges in family law matters.'" *Id*. at 124 (Ind. 2016) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, (Ind. 1993)). "Appellate deference to the determinations of our trial court judges, especially in domestic relations matters, is warranted because of their unique, direct interactions with the parties face-to-face, often over an extended period of time." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). "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." *Id*.

B. Substantial Change in Custody Factors

[17] The trial court may not modify a child custody order unless "(1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 2 . . . of this chapter." Ind. Code § 31-14-13-6.[7] The factors in Indiana Code section 31-14-13-2 are:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's 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

[7] The trial court referenced Indiana Code sections 31-17-2-8 and -21 in its order. Chapter 31-17-2 is applicable in dissolution actions; it is chapter 31-14-13 that is applicable in paternity proceedings. Nonetheless, the language of the relevant sections in each chapter is virtually identical, as is the standard for modification in the two contexts, and the trial court considered the correct factors under the correct standard regardless of which statutes it cited.

> (C) any other person who may significantly affect the child's best interests.
>
> (5) The child's adjustment to home, school, and 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 . . . .

[18] In a thorough and thoughtful order, the trial court made findings as to each factor relevant to a custody modification decision. It found H.'s age/sex and the parents' wishes as to her custody did "not favor either parent"; H.'s wishes were not considered because the court did not speak to H.; and the mental and physical health of the individuals involved, evidence of domestic violence, and evidence of a de facto custodian factors were not applicable. Appealed Order at 6-7. As to H.'s interaction and interrelationship with relevant individuals, the trial court found:

> At Mother's house, [H.] has a half-sister[.] [H.] is close to [her sister]. At Father's house, [H.] has a positive relationship with Father's wife and her son[.] [H.] also has extended family on both sides in Indiana and if Father is given primary physical custody, [H.] would be able to see those relatives more regularly. The Court finds that this factor favors Mother slightly.

Id. at 6. And as to H.'s adjustment to her home, school, and community, the trial court found:

> [H.] has not done well academically in school in North Carolina. Mother has not included Father in decisions related to [H.'s] education. [H.] attends school in a hybrid homeschool program with other children who are significantly younger[.] [H.] does not currently receive any grades. Father wishes to enroll [H.] in "in-person" schooling where [H.] can be assessed for any deficiencies. This factor favors Father.

Id. at 6-7.

[19] Ultimately, the trial court determined that Father had shown a substantial change in one or more of the relevant factors, "namely the child's adjustment to the child's school[.]" *Id.* at 6. The court also concluded, "[a]fter a consideration of all of the evidence, . . . a modification of physical custody is in [H.'s] best interests and . . . it is in [H.'s] best interests that Father have primary physical custody[.]" *Id.* at 7.

> In so ordering, the Court notes the following evidence:
> a. [H.'s] academic performance during the fall of 2021 was not acceptable.
> b. [H.'s] lack of attending online school for several days, even weeks, is evidence that Mother is not willing to supervise [H.'s] school attendance; is not able to ensure that [H.] attends school or that Mother does not care about [H.'s] educational achievement.
> c. [H.] currently attends a homeschooling "co-op" wherein Mother remains responsible for [H.'s] education . . ., yet [H.] receives no grades at the "co-op."
> d. [H.'s] current educational situation is not the same as "in

person" school.
e. Mother has not sought Father's assistance in improving [H.'s] educational achievement and completely fails to communicate with Father on [H.'s] education.
f. Mother's actions in changing [H.'s] educational program/schools appear to be her latest attempt to thwart Father's parenting time with [H.] rather than Mother's attempts to improve [H.'s] educational opportunities.
g. [H.] is entering high school and needs a structured program monitored by a parent who will make [H.'s] education a priority.
h. Mother has not made [H.'s] education a priority.
i. [H.'s] future success will be negatively impacted if her education is not made a priority as soon as possible.

Id. at 7-8 (footnote omitted).

1. Interference with Parenting Time

[20] One of the trial court's findings was that "Mother's actions in changing [H.'s] educational program/schools appear to be her latest attempt to thwart Father's parenting time with [H.] rather than Mother's attempts to improve [H.'s] educational opportunities." Appealed Order at 7, ¶ 71.f. The trial court included a footnote to this finding stating, "A review of the case reveals that Mother has a history of non-compliance of Court's orders as to Father's parenting time – which is clear from the continuous on-going litigation in this case." *Id*. Pointing to this finding and footnote, Mother contends the trial court erred "when it found that Mother interfered with Fathers [sic] parenting time to such an extent as to require a modification of custody[.]" Appellant's Br. at 18.

[21] We reject Mother's premise that the trial court's modification decision was based on Mother's interference with Father's parenting time. The order is clear that the modification is based on a substantial change in H.'s adjustment to school while in the physical custody of Mother. Even if Mother's interference with Father's parenting time was a consideration, it was but one of many considerations leading to the trial court's decision and should not be viewed in isolation.[8]

2. Substantial Change in H.'s Adjustment to School

[22] Mother contends she "addressed the main cause of the substantial change" when she removed H. from the program at the Learning Center and enrolled her in public school. Appellant's Br. at 23.[9] Mother argues that because H. is no longer in that program, the change is not ongoing and "cannot be called substantial enough to modify custody[.]" *Id.* at 14.

[23] H.'s time at the Learning Center was a concern. However, it was not the only concern. H.'s initial exit from public school was caused by the COVID-19 pandemic, which prompted unusual school choices for many. But the trial

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[8] Because this finding is not a substantial basis for the trial court's ultimate decision regarding modification, even if Mother is correct that the finding and footnote are erroneous, they are superfluous and do not amount to reversible error. *See Lasater v. Lasater*, 809 N.E.2d 380, 398 (Ind. Ct. App. 2004) ("Findings, even if erroneous, do not warrant reversal if they amount to mere surplusage and add nothing to the trial court's decision.").

[9] Mother begins her argument by claiming the trial court "addressed the [custody] factors as in an initial custody determination . . . and did not address the question of whether there was a substantial change in any of the factors[.]" Appellant's Br. at 22. As the trial court did find a substantial change in one of the factors, we do not address this argument.

court noted H. changed curriculum three times in two years, her academic performance and attendance were poor, and Mother did not seem to make H.'s education a priority. *See*, *e.g.*, Appealed Order at 4, ¶ 46 (stating Mother "had no adequate explanation for [H.] failing to login to school for several days in October 2021"). Moreover, we note Mother did not consult Father about or keep him apprised of these changes. The trial court found H. is entering high school and needs "a structured program monitored by a parent who will make [H.'s] education a priority." *Id.* at 8. Mother's answer to H.'s poor grades in what she acknowledged was an unstructured online program in which H. largely failed to participate was to enroll her in a co-op program that did not offer instruction or give grades – at the Learning Center Mother was responsible as a "homeschool parent[]" for being "fully engaged with" and "manag[ing] [H.'s] learning." Ex., Vol. 3 at 35-36. There was no evidence regarding how Mother was "managing H.'s learning" while she was at the co-op.

[24] The mere fact of H. being enrolled in public school does not "cure" the change the trial court identified as to H.'s adjustment to school – Mother must also prioritize and assist in H.'s education where needed. Yet Mother testified she enrolled H. in public school for the coming school year to "appease" Father, not because she thought public school and the accountability engendered by consistent attendance and evaluation would be a more appropriate forum for H.'s education. *See*, *e.g.*, *Haley v. Haley*, 771 N.E.2d 743, 749 (Ind. Ct. App. 2002) (trial court did not abuse its discretion when it modified custody of child

in favor of father based, in part, on mother's lack of commitment to assisting the child in making academic progress while in her care).

[25] In summary, Mother has not established that the evidence positively requires Father's motion to modify custody to be denied. *See Steele-Giri*, 51 N.E.3d at 124. The trial court did not err when it modified custody of H. in an effort to improve her academic performance.

Conclusion

[26] We conclude the trial court properly modified physical custody of H. to Father. The judgment of the trial court is affirmed.

[27] Affirmed.

Crone, J., and Kenworthy, J., concur.