MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Carl Paul Lamb
Matthew Fox
Bloomington, Indiana

IN THE COURT OF APPEALS OF INDIANA

Abigail L. Parkes,

Appellant-Respondent,

v.

Daniel S. Borter,

Appellee-Petitioner.

September 14, 2021

Court of Appeals Case No. 21A-JP-221

Appeal from the Greene Circuit Court

The Honorable Erik Allen, Judge

The Honorable Kelsey Blake Hanlon, Special Judge

Trial Court Cause No. 28C01-1509-JP-61

Altice, Judge.

Case Summary

[1] Abigail Parkes (Mother) and Daniel S. Borter (Father) (collectively, Parents) are the divorced parents of their five-year-old daughter, M.B., who was born on June 15, 2015. Mother appeals the trial court's order finding her in contempt for failing to comply with the directive regarding M.B.'s placement at a preschool. Mother also claims that the trial court abused its discretion in ordering her to pay Father's attorneys' fees.

[2] We affirm.

Facts and Procedural History

[3] Parents were divorced in 2016, and currently share joint physical and legal custody of M.B. At the time of dissolution, Parents maintained separate residences in Odon and rotated M.B. between their respective homes on a "2-2-3 schedule." *Appendix Vol. II* at 24.

[4] M.B. began attending daycare at Odon Christian Church (OCC), shortly after her birth. In March 2019, Mother filed a petition to relocate to Boonville with her fiancé, along with a request that M.B. be permitted to attend a different

preschool in that town.[1] The trial court denied the petition on September 17, 2019, and determined that

> [M.B.] has a strong bond with both of her parents. A relocation would significantly reduce the time shared between Father and [M.B.], which is not in her best interest. Father and [M.B.] have a well-developed parent-child relationship and the same could not be feasibly maintained should Mother be allowed to relocate with the Child.
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> The relocation would also remove [M.B.] from the daycare that she has attended since shortly after her birth. [M.B.] appears to be a Child who has a strong desire for a predictable routine and allowing her to continue in the daycare that she has grown accustomed to attending is in her best interest.

Id.

[5] Following the denial of the petition, Mother provided notice to her landlord on October 1, 2019, that she did not intend to renew her lease for her Odon residence. Three days later, Mother signed an agreement to purchase a home in Bloomfield.[2] Thereafter, in November 2019, Mother filed a verified notice of intent to relocate to Bloomfield, indicating that she was moving because she desired to be closer to other family members and her job. Mother also submitted a letter to the trial court regarding her new address. While Mother

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[1] Boonville is approximately eighty miles from Odon.

[2] Bloomfield is approximately fifteen miles from Odon.

intended for M.B. to attend a daycare in Bloomfield, Father objected to the relocation because of Mother's intent to change M.B.'s preschool location.

[6] Mother filed a verified petition for an order regarding M.B.'s summer daycare and preschool on February 10, 2020. Mother asserted that M.B.'s daycare at OCC must be changed because OCC's employees "were not responding to her." *Id.* at 26. Mother also alleged that the preschool in Bloomfield had more qualified teachers and a better curriculum than did OCC.

[7] During a hearing, the evidence established that OCC staff members frequently spoke with Mother about M.B. and that Mother was trying to "paint [Father] in a negative light." *Id.* A Guardian ad Litem (GAL) appointed for M.B. supported M.B.'s continued attendance at OCC because [M.B.] "has been in that program for years and it provides her with stability." *Id.* at 28.

[8] When the COVID-19 pandemic struck, Parents worked remotely from their respective residences beginning in March 2020, which permitted them to be at home during the normal workday. M.B. stayed with each parent on their respective parenting time days and did not attend OCC.

[9] When Mother learned of the GAL's recommendations, she decided not to seek any changes to custody and parenting time for M.B. Although Parents were still working from home when the trial court conducted a hearing in August 2020, Mother requested that M.B. be placed at a preschool and kindergarten in Bloomfield. On August 19, 2020, the trial court granted Mother's intent to

relocate but denied her request for M.B.'s placement at the Bloomfield preschool.

[10] The trial court's order provided that M.B. was to continue attending preschool at OCC during the 2020-2021 school year. In support of its ruling, the trial court determined, among other things, that OCC offered M.B. the stability she required. The trial court reasoned that Mother's plan for M.B. to attend preschool in Bloomfield "would expose [M.B.] to two changes, as she would have to attend a new preschool for half the day, then a new daycare for half of the day." *Id.* at 32. The trial court further noted that M.B. could continue to attend OCC until she was ten years old—"a place that is familiar and comfortable." *Id.* Moreover, the trial court pointed out that the OCC staff is familiar with Parents, and the teachers "have institutional knowledge regarding the family and the co-parenting issues." *Id.* The trial court expressed concern that even though Parents had joint custody of M.B., "Mother has seemingly made plans for [M.B.] without having any discussion about that with Father." *Id.*

[11] The trial court further noted that Mother chose to move only seventeen days after her first request to relocate was denied and observed that "[M.B.] appears to be a Child who has a strong desire for a predictable routine and allowing her to continue [at OCC] that she has grown accustomed to attending is in her best interest." *Appellant's Appendix Vol. II* at 32. The trial court also observed that "communication continues to be a struggle between the parties and Mother must start to treat Father as an equal parent to [M.B.] and she is not currently

doing that." *Id.* at 33. Additionally, the trial court ordered M.B. and Parents to undergo counseling.

[12] Notwithstanding this ruling, Mother told Father sometime in September 2020 that she was going to homeschool M.B. rather than send her to OCC on her parenting time days. Father repeatedly objected to Mother's proposal and expressed his desire to have M.B. continue at OCC pursuant to the trial court's order. Nonetheless, Mother did not take M.B. to OCC on any of her parenting days, yet Father continued to take M.B. there on his days.

[13] On October 6, 2020, Father filed a petition for rule to show cause, alleging that Mother should be found in contempt because she failed to take M.B. to OCC in violation of the trial court's order. Father also requested that the trial court order Mother to pay his attorneys' fees associated with the contempt action.

[14] At the hearing on December 2, 2020, Father testified, among other things, that he had incurred $900 in attorneys' fees. Father explained that those fees were the result of court filings, counsel's preparation for the contempt hearing, and billings for email exchanges that he had with his counsel. Following the hearing, the trial court issued an order finding Mother in contempt and directing her to pay Father's attorneys' fees. The order provided in part that

> 15. [M.B.] is missing . . . education and social opportunities by missing preschool two days each week.
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> 16. [M.B.] was eligible, based on her age, to begin kindergarten in August, 2020. However, prior to that, the parties had agreed

that it was in [M.B.'s] best interest to continue with another year of preschool, mainly due [to] her emotional maturity.

. . .

18. On December 2, 2020, Mother filed a Verified Response to Father 's Motion for Rule to Show Cause and Request for Costs and Attorney 's Fees. In her response, Mother acknowledges that she had not been taking [M.B.] to preschool at OCC, but rather she was working with her at home. In the response, Mother cited COVID-l9 as the primary reason that she was not taking [M.K.] to preschool.

19. The Court finds that Mother's response, citing COVID-19 as the primary reason that she is not taking [M.B.] to preschool, is not sincere.

20. Father submitted eighteen (18) pages of text messages between the parties that included on-going discussions between the parties in late September and October about [M.B.'s] attendance at preschool. Mother never once mentioned concerns with COVID-l9 as a reason that she did not wish to send [M.B.] to preschool at OCC.

21. During the hearing, Mother asserted that she wanted to keep [M.B.] home with her for preschool since Mother was not working and Mother had the ability to work with her during the day.

22. However, Mother also acknowledged that [M.B.] could go to preschool on her parenting time, and Mother [could] still offer her additional educational support in the evenings.

23. The Court's Order of August 19, 2020, was clear, and provided that '[M.B.] shall attend preschool at Odon Christian Church Preschool for the 2020-2021 school year.'

24. While the Order did not specify how many days per week she should attend, both parties had testified at that hearing of their wish for [M.B.] to attend preschool four days per week. The Court did not anticipate needing to specifically Order that (absent an agreement to the contrary) neither Party was authorized to homeschool the Child in lieu of preschool.

25. While Mother may now assert that she did not understand that she was required to take [M.B.] to preschool on her parenting time days, the fact that the parties share joint legal custody prohibits Mother from switching [M.B.] to part time preschool without the agreement of Father.

26. The parties share joint legal custody of [M.B.]. Pursuant to Indiana Code 31-9-2-67, joint legal custody means 'the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training.'

27. Therefore, Mother did not have the right to alter the preschool arrangement for [M.B.], from full time (as she has done each year in the past) to part time, without the agreement of Father.

28. Whether joint legal custody continues to be appropriate is in serious question.

29. Therefore, the Court finds that Mother is in contempt of the Court's prior Orders.

> 30. As a result of Mother's contempt, the Court finds that Mother shall pay Father's attorney fees in the amount of $900.00.
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> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:
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> > 1. Father's Motion for Rule to Show Cause is GRANTED.
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> > 2. Mother is in contempt of Court for violati[ng] the Court's prior Orders regarding [M.B.'s] preschool attendance at OCC.
> >
> > 3. [M.B.] shall attend preschool at Odon Christian Church four days per week during the 2020-2021 school year unless the school is closed. Each party shall ensure that [M.B.] is transported to school during his/her parenting time.

Id. at 45-48. Mother now appeals.

Discussion and Decision

[15] We initially observe that Father has not filed an appellee's brief. When an appellee fails to file a brief, we do not develop an argument on the appellee's behalf. *Romero v. McVey*, 167 N.E.3d 361, 365 (Ind. Ct. App. 2021). Instead, we may reverse the trial court's judgment if the appellant's brief establishes prima facie error. *Riggen v. Riggen,* 71 N.E.3d 420, 422 (Ind. Ct. App. 2017). Prima facie error is error "at first sight, on first appearance, or on the face of it." *Id.* With this standard in mind, we turn to Mother's contentions.

I. Contempt

[16] Mother argues that the contempt ruling cannot stand because the trial court's order was ambiguous, in that it failed to specify the exact number of days that M.B. was to attend preschool and it did not specifically prohibit homeschooling. Mother also argues that the contempt finding must be reversed because Indiana law does not require a five-year-old to attend preschool, and Mother was able to provide homeschooling consistent with the instruction that M.B. received at OCC.

[17] Contempt of court generally involves disobedience of a court that undermines the court's authority, justice, and dignity. *City of Gary v. Major*, 822 N.E.2d 165, 169 (Ind. 2005). Indirect contempt—as is the allegation here—arises from conduct that does not occur in the presence of the trial court, such as the failure to obey a court order. *Riggin v. Rea Riggin & Sons, Inc.,* 738 N.E.2d 292, 310 (Ind. Ct. App. 2000). More particularly, indirect contempt is the willful disobedience of any lawfully entered court order of which the offender had notice. *J.B. v. R.C.,* 51 N.E.3d 380, 385 (Ind. Ct. App. 2016), *trans. denied*; *see also* Ind. Code § 34-47-3-1. As our Supreme Court observed in *City of Gary*:

> In order to be held in contempt for failure to follow the court's order, a party must have willfully disobeyed the court order. . . . The order must have been so clear and certain that there could be no question as to what the party must do, or not do, and so there could be no question regarding whether the order is violated. *Id.* A party may not be held in contempt for failing to comply with an ambiguous or indefinite order.

822 N.E.2d at 170.

[18] The determination of whether a party is in contempt of court is left to the trial court's discretion. *Deel v. Deel*, 909 N.E.2d 1028, 1032 (Ind. Ct. App. 2009). Our review of a contempt finding is limited to considering the evidence and the reasonable inferences that support the trial court's judgment. *Dawson v. Dawson*, 800 N.E.2d 1000, 1005 (Ind. Ct. App. 2003). This court will not reweigh the evidence or judge the credibility of the witnesses. *Id.* A trial court's ruling regarding a contempt finding will only be reversed if this court believes the lower court abused its discretion. *Id.* An abuse of discretion occurs when the trial court's ruling is against the logic and effect of the facts and circumstances before the court or is contrary to law. *Id*.

[19] Although Mother claims that the trial court's order was ambiguous because it did not state the precise number of days that M.B. was to attend preschool and it did not expressly prevent homeschooling, the evidence established that Parents specifically agreed that M.B. should attend daycare four days per week during the 2020-2021 school year. It was also shown that M.B. had always been enrolled in the full-time, four-day-per-week program in all of the years that she had attended OCC.

[20] In our view, the order before us is "decidedly unambiguous." *See City of Gary,* 822 N.E.2d at 171. There are no conflicting or confusing terms or provisions in the August 2020 order, and Mother made no assertion at the contempt hearing that she did not understand or know what the order required her to do. In fact, the sole issue before the trial court was whether M.B. was to attend fulltime

daycare at OCC or at a different facility in Bloomfield. Thus, we are not persuaded by Mother's claim that the August 2020 order was "unclear," as it was specifically stated that M.B. was to attend OCC during the 2020-2021 school year. *Appellant's Brief* at 18.

[21] We further note that our joint custody statute, Ind. Code § 31-9-2-67, provides that "the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training." Hence, Mother was precluded from making a unilateral decision to alter M.B.'s preschool arrangement without Father's agreement. And it is clear that Father continuously opposed Mother's intention to homeschool after the trial court had ordered M.B.'s attendance on a fulltime basis at OCC during the 2020-2021 school year.

[22] For these reasons, we conclude that the trial court acted well within its discretion in finding Mother in contempt for willfully disobeying the August 2020 order that directed M.B. "to attend preschool at [OCC] . . . for the 2021-2022 school year." *Appendix Vol. II* at 34.

[23] In the alternative, Mother asserts for the first time on appeal that the finding of contempt must be set aside because that determination is "inconsistent with Indiana's compulsory school attendance statute that only mandates school attendance for age seven to sixteen." *Appellant's Brief* at 21. As Mother did not raise this challenge at the trial court level, the issue is waived. *See, e.g., Matter of C.G.,* 157 N.E.3d 543, 547-548 (Ind. Ct. App. 2020) (holding that an appellant

who presents an issue for the first time on appeal waives the issue for purposes of appellate review).

[24] Waiver notwithstanding, we note that Mother directs us to Ind. Code § 20-33-2-6 in support of her argument:

> A student is bound by the requirements of this chapter from the earlier of the date on which the student officially enrolls in a school or, except as provided in section 8 of this chapter, the beginning of the fall school term for the school year in which the student *becomes seven (7) years of age* until the date on which the student:
>
> (1) graduates;
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> (2) becomes eighteen (18) years of age; or (3) becomes sixteen (16) years of age but is less than eighteen (18) years of age and the requirements under section 9 of this chapter concerning an exit interview are met enabling the student to withdraw from school before graduation; whichever occurs first.

(Emphasis added).

[25] Even assuming that OCC qualifies as a "school" under Indiana law, *see, e.g.,* Ind. Code § 35-31.5-2-285,[3] thereby establishing that there is no requirement

[3] This statute defines "school property" as "(D) a federal, state, local, or nonprofit program or service operated to serve, assist, or otherwise benefit children who are at least three (3) years of age and not yet enrolled in kindergarten, including the following: . . . (iii) A developmental child care program for preschool children." Additionally, this court observed in *Pridgeon v. State,* 569 N.E.2d 722, 724 (Ind. Ct. App. 1991),

that M.B. be *compelled* to attend OCC based upon her age, nothing prevents those who have joint custody of a minor child from agreeing to send the child to preschool. And nothing prohibits a trial court from ordering the same.

[26] As discussed above, Parents agreed that M.B. should continue to attend preschool on a fulltime basis during the 2021-2022 school year, just as she had since shortly after birth. The trial court decided that attending OCC was in M.B.'s interest and entered an order to that effect. We reject Mother's contention that the trial court's order in some way violated Indiana's school attendance law.

II. Attorneys' Fees

[27] Mother claims that the trial court abused its discretion in ordering her to pay Father's attorneys' fee because no affidavits or billing statements were offered into evidence to support the reasonableness of those fees. Mother further contends that the award must be set aside because the trial court did not specifically address Parents' respective financial positions.

[28] Indiana generally follows the "American Rule" as to attorneys' fees, which provides that a party must pay his or her own attorneys' fees, absent an agreement between the parties, a statute, or other rule to the contrary. *R.L.*

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that "in the "ordinary accept[ance]of its meaning, a school is a place where instruction is imparted to the young. It is an institution of learning of a lower grade. . . . ." *See also French v. State,* 778 N.E.2d 816, 823 (Ind. 2002), where it was held that a preschool was "school property" for purposes of enhancing a drug dealing charge to a class A felony when the defendant dealt cocaine within 1000 feet of that facility.

Turner Corp. v. Town of Brownsburg, 963 N.E.2d 453, 458 (Ind. 2012). Ind. Code § 31-16-11-1 provides that the trial court may order one party to pay a reasonable amount for the other party's attorneys' fees in family law matters that include post-dissolution proceedings. A trial court may also impose sanctions to compensate a party for injuries incurred because of contempt that may include an award of attorneys' fees. *Witt v. Jay Petroleum Inc.,* 964 N.E.2d 198, 204 (Ind. 2012).

[29] When awarding attorneys' fees in post-dissolution proceedings, the amount must be reasonable. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1261 (Ind. Ct. App. 2010). The trial court has broad discretion in awarding attorneys' fees and reversal is appropriate only when the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. *Id.* In assessing attorneys' fees, the trial court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors bearing on the reasonableness of the award. *Id.* In addition, any misconduct on the part of a party that directly results in the other party incurring additional fees may be taken into consideration. *Id.* The trial court need not give its reasons for its decision to award attorneys' fees. *Thompson v. Thompson,* 811 N.E.2d 888, 928 (Ind. Ct. App. 2004), *trans. denied*.

[30] In this case, Father testified at the contempt hearing that he incurred $900 in attorneys' fees due to the various documents that were filed in this contempt action, counsel's preparation for the hearing, and an exchange of emails that he had with counsel. Because Father's attorney did not testify or offer an affidavit

or present billing statements at the hearing to establish the reasonableness of the fees that Father incurred, Mother claims that the award must be set aside.

[31] Although proof of attorneys' fees through counsel's testimony, affidavits, or billings would have been the preferred practice for the trial court to determine the reasonableness of fees, Mother did not object to Father's testimony, cross-examine him, or request a separate hearing relating to the fees. Similarly, even though the trial court did not specifically inquire about the parties' respective financial positions, Mother made no argument at the hearing that Father's attorneys' fees were not reasonable. As a result, Mother has waived the issue as to the appropriateness of Father's attorneys' fees. *See, e.g., Lee and Mayfield, Inc. v. Lykowski House Moving Eng'r, Inc.,* 489 N.E.2d 603, 611 (Ind. Ct. App. 1986) (holding that the failure to object to the admission at trial of evidence as to attorneys' fees constituted waiver of any contention on appeal with respect to the correctness and accuracy of that evidence), *trans. denied.*

[32] Waiver notwithstanding, a trial judge "is considered to be an expert on the question and may judicially know what constitutes a reasonable attorney's fee." *J.S. v. W.K.,* 62 N.E.3d 1, 9 (Ind. Ct. App. 2016). And the trial court did not have to explicitly weigh the financial factors that bore on the reasonableness of the award. *Bessolo v. Rosario,* 966 N.E.2d 725, 731 (Ind. Ct. App. 2012), *trans. denied.*

[33] Given Father's testimony that he expended $900 in attorneys' fees, along with his explanation as to how those fees were assessed, we will not second-guess the

trial court's decision to award those fees. Thus, Mother has failed to show that the trial court abused its discretion in ordering her to pay Father's attorneys' fees.

[34] We conclude that Mother has not established prima facie error that the trial court abused its discretion in finding her in contempt or in ordering her to pay Father's attorneys' fees in the amount of $900.

[35] Judgment affirmed.

Bradford, C.J. and Robb, J., concurs.