MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael J. Stolla,
Appellant-Petitioner,

v.

Megan Gould,
Appellee-Respondent

May 9, 2023

Court of Appeals Case No. 22A-JP-1740

Appeal from the Dearborn Circuit Court

The Honorable James D. Humphrey, Senior Judge

The Honorable Kimberly A. Schmaltz, Magistrate

Trial Court Cause No. 15C01-2003-JP-16

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

[1] Michael J. Stolla ("Father") appeals the Dearborn Circuit Court's judgment modifying legal and physical custody over his minor son, M.J.S. ("the Child"), in favor of Megan Gould ("Mother"). Father raises two issues for our review, which we restate as follows:

> 1. Whether Father had adequate notice and an opportunity to be heard on Mother's request to change the Child's legal and physical custody.
>
> 2. Whether Mother presented sufficient evidence to support the trial court's judgment.

[2] We affirm.

Facts and Procedural History

[3] In 2013, Mother gave birth to the Child, and Father executed and filed a paternity affidavit. In March 2020, Father initiated a paternity action, and, in August and October, Mother and Father entered into agreed entries regarding custody, parenting time, child support, and other matters. Those entries provided that Mother and Father would have joint legal and physical custody over the Child.

[4] The August 2020 Agreed Entry further stated in relevant part as follows:

> The parties agree that the [C]hild will attend school in the public school located in the district of Mother's primary residence unless both parties agree otherwise. Currently, the parties are in agreement that [the Child] will attend school at North Dearborn Elementary even though Mother lives in the district of Sunman

> Elementary. Despite this provision, Mother has no intention of changing [the Child's] school from North Dearborn Elementary *unless transporting [the Child] to and from school there become[s] unreasonably burdensome to her[,] which is not expected to occur as long as Father continues to equally assist with that transportation*.

Appellant's App. Vol. 2, p. 19 (emphasis added). And the October 2020 Agreed Entry reaffirmed the first Agreed Entry but also directed Mother and Father "to utilize the co-parenting counseling" to resolve their differences. *Id.* at 22.

[5] In December, Mother filed a motion for the appointment of a guardian ad litem ("GAL") over the Child. Among other reasons for that request, Mother asked for the appointment of a GAL "to formulate an opinion as to what custody and parenting time arrangement will be in the best interest" of the Child. *Id.* at 24. Father did not object to Mother's motion, and, in January 2021, the trial court granted it.

[6] In July, Mother filed a notice with the court of her intent to transfer the Child to Sunman Elementary School. In her notice, Mother stated:

> Since the [August 2020 Agreed Entry], the transportation of [the Child] to and from the elementary school outside of Mother's district has become unreasonably burdensome in that it has made it impossible for her to accept renewed employment at her former job due to the necessity that she take[the Child] to a school outside of her district rather than him being able to ride the bus from Mother's home. Additionally, the transportation requirements necessitated by having the [C]hild attend school out of district have made it impossible for her to register for post-secondary education classes this fall.

Id. at 28-29. Father objected to Mother's notice, and the trial court set the matter for an emergency hearing.

[7] At the emergency hearing, Mother's counsel represented to the court—and Mother affirmed under oath—that she had attempted to resolve with Father through co-parenting counseling "the school . . . and the transportation issue[s]," but Father was not cooperative in participating in that counseling. Tr. Vol. 2, p. 19. Mother also affirmed that, after the October 2020 Agreed Entry, she was furloughed from her employment due to the COVID-19 pandemic, and when she was offered the opportunity to return to work, "she was unable to . . . because she was unable to arrange for [the Child's] transportation from the school outside of her district." *Id.* Mother added that Father's responsibilities in transporting the Child included bringing the Child to Mother's house by 3:50 pm. on the days he was responsible for picking the Child up from school, but that "on not one occasion" had Father done so. *Id.* Because of those transportation issues, Mother "had to forego re-employment" and she instead decided to take college classes, but, again, "she was unable to commit to a college schedule because of . . . her transportation obligations . . . outside the district." *Id.* at 19-20.

[8] In response, Father's counsel argued that the two Agreed Entries spoke for themselves and that there had been "no substantial change in circumstance[s]" since the parties entered into the Agreed Entries. *Id.* at 23. Father's counsel also represented to the court—which Father affirmed under oath—that Mother's employment had always been "off and on," that Mother "never provided

[F]ather any type of transportation schedule," and that "Father has always been there" and "equally agreed to assist in the transportation." *Id.* at 24.

[9] Meanwhile, the Child's GAL, Michelle Fentress, prepared a report for and testified at the emergency hearing. In both her written report and her testimony, GAL Fentress recommended the Child attend Sunman Elementary. She further made clear that her assessments were "limited solely to the issue of this change of school." *Id.* at 6; *see* Appellant's Conf'l App., p. 2. In her written report, GAL Fentress added that "additional concerns/issues" between the parties were not considered for her emergency-hearing report. Appellant's Conf'l App., p. 3. Following the emergency hearing, the trial court approved the Child's attendance at Sunman Elementary and set all "[r]emaining contested issues" between the parties for a later hearing. Appellant's App. Vol. 2, p. 36.

[10] On December 13, two days before the court commenced its hearing on the remaining contested issues, GAL Fentress filed her second report with the court. In that report, GAL Fentress recited numerous issues between Mother and Father and recommended that "custody be modified such that [M]other have sole legal and physical custody of the . . . [C]hild" and that Father exercise parenting time. Appellant's Conf'l App., p. 20. And, at the beginning of the hearing on December 15, GAL Fentress testified to the factual basis underlying her report and recommendations.

[11] At that time, Father objected to "any reference to a modification of custody." Tr. Vol. 2, p. 45. In support of his objection, Father asserted that "there ha[ve]

been no substantial pleadings filed requesting a modification of custody," and, as such, he had had no "notice" that Mother would seek a modification of custody or her reason for such a request. *Id.* at 45-46. In response, Mother stated that the October 2020 Agreed Entry directed the parties to engage in co-parenting counseling, that Father had refused to participate in any such counseling, and that, "out of desperation," Mother had sought and received, without objection, the appointment of the GAL "specifically . . . [to] render an opinion on what custody and parenting time arrangement was in the [C]hild's best interest." *Id.* at 48-49. Mother also noted that the GAL made clear at the emergency hearing that she was continuing to assess pending issues between the parties. The court overruled Father's objection based on the plain language of Mother's request for the appointment of the GAL. *Id.* at 51.

[12] Following GAL Fentress's testimony, the court continued the fact-finding hearing. Father then filed a motion for a custody evaluation, which the trial court denied. The court held the second day of the fact-finding hearing in mid-April 2022 and a third day at the end of May. On the third day of the hearing, Father renewed his objection to considering a modification of custody based on an alleged lack of "proper notice." *Id.* at 238.

[13] Like GAL Fentress, Mother and Father both testified to the court. In particular, Mother testified that Father is "unable to . . . work with things with [the Child]"; that the Child has weekly therapy appointments that "[F]ather refuses to take him to . . . because . . . he is too busy and it doesn't fit into his schedule"; that she is the one who always takes the Child to medical and

special-needs appointments because Father did not have the "willingness" to "deal with medical things with [the Child]"; that Father refused to take the Child to tutoring on Father's days and also refused to switch days with Mother to accommodate the tutoring; that Father would not permit the Child to speak with Mother on Father's days with the Child; and that, when the Child was supposed to be in Father's care, the Child was often in fact in the care of his paternal grandmother while Father was at work. *Id.* at 84-85, 87, 89, 116, 143.

[14] Following the fact-finding hearing, the trial court entered its order on all pending motions. In relevant part, the court found:

> 11. The parties have previously agreed to joint legal and physical custody but they have such a high level of conflict and inability to work together and communicate effectively to advance the welfare of the [C]hild that joint legal and physical custody *is no longer feasible*. Their conflict is having a negative effect on the [C]hild.
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> 12. The Court gives considerable weight to the recommendations of [GAL Fentress]. She has recommended that Mother receive sole legal and physical custody of the [C]hild subject to parenting time with the Father.
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> 13. . . The [Child] has a half-sibling . . . at Mother's home. . . . The [C]hild is bonded with his half-sibling. The [C]hild is also bonded with the paternal grandmother. The [C]hild loves both parents and needs to have parenting time with both of them. . . . The [C]hild is happy at [Sunman Elementary] . . . and he is receiving services through his IEP, counseling[,] and other appropriate therapies to adequately . . . meet his needs. He is receiving good grades and has made friends. The [C]hild is

> receiving counseling and his counselor reports that the [C]hild's level of anxiety has decreased and he is doing much better this year [at Sunman]. . . .
>
> 14. The Court considers the considerable conflict between the parties and their inability to co-parent. For example, when Mother broke her foot and was unable to drive, Father refused to pick up the [C]hild and told her it was on her time and her problem.
>
> 15. The Court considers that Father has refused to take the [C]hild for tutoring, therapy[,] or counseling during his parenting time and for medical or dental appointments.
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> 16. The Court considers that Father has not always allowed contact between the [C]hild and Mother during Father's parenting time. For example, on the [C]hild's birthday[,] Father would not answer the phone so Mother could talk to the [C]hild.
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> 17. The Court considers Father's rotating work schedule[,] which makes shared parenting time impractical. A significant portion of Father's parenting time is with the paternal grandmother rather than with Father.
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> 18. The Court considers that Mother has had to modify her work and [school] schedule to allow her to meet the [C]hild's educational, psychological, medical, speech therapy[,] and transportation needs.

Appellant's App. Vol. 2, pp. 41-42 (emphasis added; citations omitted). The court then concluded that "there has been a substantial change" in the statutory factors relating to the modification of custody and that it "is in the [C]hild's best interest that custody and parenting time be modified" with Mother "awarded

sole legal and physical custody" of the Child and with Father exercising parenting time. *Id.* at 43. This appeal ensued.

Issue One: Alleged Lack of Notice

[15] On appeal, Father first asserts that the trial court erred when it overruled his objection to hearing Mother's request to modify custody. Father frames his argument in various ways, but we conclude that his argument is best reviewed under the framework of the trial court's discretion to overrule his initial objection based on the facts and circumstances before the court. Under that standard of review, we will reverse only if the trial court's decision was clearly against the logic and effect of those facts and circumstances. *E.g.*, *McCallister v. State*, 91 N.E.3d 554, 561 (Ind. 2018).

[16] Father's essential argument on this issue is that Mother did not file a petition informing him that she sought the modification of custody.[1] As we have explained:

> Longstanding Indiana law has prohibited trial courts from sua sponte ordering a change of custody. *See In re Marriage of Henderson*, 453 N.E.2d 310, 315 (Ind. Ct. App. 1983) (quoting *State ex rel. Davis v. Achor*, 225 Ind. 319, 327, 75 N.E.2d 154, 157 (1947)). Rather, when such an important issue as the custody of children is involved, a modification generally can be ordered only after a party has filed a petition requesting such a modification,

[1] Although Father makes a passing reference to his federal and state constitutional rights, he does not present an independent constitutional argument supported by citations to authority and cogent reasoning. *See* Ind. Appellate Rule 46(A)(8)(a). We therefore do not consider any such argument.

> the other party has notice of the filing, and a proper evidentiary hearing is held at which both parties may be heard and the trial court fully apprised of all necessary information regarding change of circumstances and a child's best interests before deciding whether a modification should be ordered. *Id.* "An opportunity to be heard is essential before a parent can be deprived of custody." *Alexander v. Cole*, 697 N.E.2d 80, 83 (Ind. Ct. App. 1998), *superseded by statute on other grounds*.
>
> There may be limited instances in which a trial court could order a modification of custody in favor of one parent in the absence of a petition requesting modification. For example, if one parent files a custody modification request, a trial court may instead modify custody in favor of the other parent, even if he or she did not file a cross-petition to modify custody, where it is clear during the modification hearing that the other parent desired custody. *See Meneou v. Meneou*, 503 N.E.2d 902, 904-05 (Ind. Ct. App. 1987).
>
> It also is true, pursuant to Indiana Trial Rule 15(B), that issues raised by the pleadings can be altered by the evidence adduced at trial where the parties have impliedly or expressly consented to new issues being tried. *Glover v. Torrence*, 723 N.E.2d 924, 934 (Ind. Ct. App. 2000). Still, *a party is entitled to some notice that an issue is before the court before it will be determined to have been tried by consent*. *Id.* at 935. Both parties must actually litigate the new issue, and a new issue may not be interjected under the pretense that the evidence was relevant to some properly pleaded matter. *Id.*

Bailey v. Bailey, 7 N.E.3d 340, 344 (Ind. Ct. App. 2014) (emphasis added).

[17] Mother's lack of a petition seeking the modification of custody was not ideal, but neither, on this record, was it fatal. In December 2020, Mother sought the

appointment of a GAL for the express purpose, among others, of determining what custody and parenting time arrangement would be in the Child's best interests. Father did not object to the appointment of a GAL to address that concern. At the end of the emergency fact-finding hearing on the Child's school placement, GAL Fentress made clear that she was continuing to assess the parties' issues aside from the Child's school placement. On December 13, 2021, GAL Fentress filed her second written report, which included a recommendation on modified custody and parenting time. Father did not object to the submission of the written report. At the commencement of the ensuing fact-finding hearing two days later, GAL Fentress testified, again, without objection, as to the factual basis for her written recommendations. Only once GAL Fentress began testifying to her final recommendations did Father first object to a consideration of the modification of custody. And, in doing so, Father did not request a continuance—likely because the court had already made clear that the fact-finding hearing would continue on a day several months later. Indeed, the fact-finding hearing covered three days over nearly six months. During that time, Father moved for a custody evaluation, and during the April and May hearing dates, Father litigated the issue of modifying custody both through his testimony and through his cross-examination of Mother.

[18] In light of the facts and circumstances before the trial court, we cannot say that the court abused its discretion when it overruled Father's objection to considering a modification of custody based only on Mother's failure to file a

modification petition. Father had some notice by way of Mother's GAL request, and the parties actually litigated, over the course of a nearly six-month hearing, the issue of modification of custody and parenting time. Accordingly, we affirm the trial court's decision to overrule Father's objection on this issue.

Issue Two: Sufficiency of the Evidence

[19] Father also asserts that the trial court's judgment modifying legal and physical custody is not supported by the evidence. As our Supreme Court has made clear:

> The trial court entered findings of fact and conclusion of law in its order denying modification of custody. Pursuant to Indiana Trial Rule 52(A), the reviewing court 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." *D.C. v. J.A.C.*, 977 N.E.2d 951, 953 (Ind. 2012) (internal quotation and citations omitted). . . .
>
> Additionally, there is a well-established preference in Indiana "for granting latitude and deference to our trial judges in family law matters." *In re Marriage of Richardson*, 622 N.E.2d 178 (Ind. 1993). Appellate 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." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." *Id.* "Appellate judges are not to reweigh the evidence nor reassess witness

> credibility, and the evidence should be viewed most favorably to the judgment." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011) (citations omitted).

Steele-Giri v. Steele, 51 N.E.3d 119, 123-24 (Ind. 2016).

[20] Father argues that the October 2020 Agreed Entry affirmed the prior custody arrangement, and it is not plausible that Mother's December 2020 request for the appointment of a GAL could have been based on new evidence or a substantial change in circumstances. Instead, according to Father, all the testimony presented to the trial court was based on circumstances that existed prior to the October 2020 Agreed Entry, which, Father continues, should control the parties' custody arrangement. Likewise, Father asserts that the trial court erred in ordering the Child to attend Sunman Elementary.

[21] First, Father's arguments on appeal are merely requests for this Court to reweigh the evidence, which we will not do, and, in any event, his understanding of the record is mistaken. The October 2020 Agreed Entry directed the parties to participate in co-parenting counseling to resolve their differences. GAL Fentress and Mother both testified that, following that entry, Father refused to do so. And his refusal to work with Mother to resolve differences was an express basis for the court's modification of custody—the court found that the parties' joint custody arrangement was "no longer feasible" given their unresolved conflicts. Appellant's App. Vol. 2, p. 41-42.

[22] Second, the trial court's decision to modify the parties' legal and physical custody over the Child is well-supported by the record. Again, the testimony of

both GAL Fentress and Mother made clear that the parents were unable to work or communicate effectively together for the Child's best interests. Mother's testimony in particular demonstrated that Father was "too busy" to take the Child to his therapy appointments; that Father did not have the "willingness" to assist with taking Child to medical, dental, or tutoring appointments; and that Father would not permit the Child to speak with Mother on Father's days with the Child, including the Child's birthday. *See* Tr. Vol. 2, pp. 84-85, 87, 89, 116, 143. As Father was repeatedly unable or unwilling to assist in the Child's care, Mother bore most, if not all, of the burden of that care. Accordingly, the trial court acted within its discretion when it modified legal and physical custody over the Child to be with Mother.

[23] Finally, Father asserts that the trial court contravened the parties' August 2020 Agreed Entry when, in its emergency order, it permitted the Child to attend Sunman Elementary. But this argument is moot. As the court acknowledged in its order modifying legal and physical custody, the decision on the Child's school attendance is now with Mother based on the custody modification. We affirm the trial court's order modifying the parties' legal and physical custody over the Child.

Conclusion

[24] For all of the above-stated reasons, the trial court's judgment is affirmed.

[25] Affirmed.

May, J., and Bradford, J., concur.