MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Christopher McMullin,
Appellant / Cross-Appellee / Petitioner,

v.

Dorothy McMullin,
Appellee / Cross-Appellant / Respondent.

August 30, 2022

Court of Appeals Case No. 22A-DC-392

Appeal from the Warrick Circuit Court

The Honorable Greg A. Granger, Judge

Trial Court Cause No. 87C01-1909-DC-1552

Bradford, Chief Judge.

Case Summary

[1] Chris McMullin ("Father") and Dorothy McMullin ("Mother") (collectively, "Parents") are the parents of two minor children. Parents' marriage was dissolved on September 17, 2020, after which Mother was granted primary physical custody and Parents shared joint legal custody of the Children. On January 29, 2021, Father filed a petition to modify custody alleging a change in circumstances. Mother responded with her own petition to modify custody. Following an evidentiary hearing, the trial court declined the parties' requests to change physical custody, modified the terms of the prior award of joint legal custody, and increased Father's support obligation. Father appeals, arguing that (1) the trial court's findings are not supported by the evidence, (2) the trial court erred by modifying legal custody despite failing to find a change in circumstances, and (3) the trial court erred when it increased his support obligations. Mother filed a cross-appeal, arguing that she is entitled to recover both trial and appellate attorney's fees. We affirm.

Facts and Procedural History

[2] Parents are the parents of two minor children, T.M. and A.M. (collectively, "the Children"). Their marriage was dissolved by way of a Mediated Summary Dissolution of Marriage Decree ("the Decree") on September 17, 2020. Pursuant to the Decree, Mother was granted primary physical custody and Parents shared joint legal custody of the Children. The Decree also outlined Father's visitation with the Children and set Father's support obligation.

[3] Approximately four months later, on January 29, 2021, Father filed a petition to modify custody, alleging a change in circumstances. Mother responded with her own petition to modify custody. In response to these petitions, the trial court appointed Katherine Workman to serve as the Children's guardian ad litem ("GAL"), whose report was filed on June 7, 2021.

[4] The trial court conducted a three-part evidentiary hearing on August 10, September 30, and November 18, 2021. On January 26, 2022, the trial court issued an order in which it declined the parties' requests to change physical custody and modified the terms of the prior award of joint legal custody, awarding Father final decision-making authority in the event of a disagreement as to medical care and Mother with final decision-making authority in the event of a disagreement as to all other decisions. In setting forth this arrangement, the trial court provided that "[e]ither parent may petition the court in the event he/she believes a final decision made by the parent with final authority is against the best interests of the children." Appellant's App. Vol. II pp. 28–29. The trial court also increased Father's support obligation from $675.00 per week to $832.00 per week.

Discussion and Decision

I. Issues Presented on Direct Appeal

A. Challenged Findings

[5] Father contends that the trial court "erred when it made findings of fact that were not supported by the evidence presented and in considering the hearsay statements of [T.M.] and the statements of [T.M.]'s counselor as testified to through the GAL." Appellant's Br. pp. 10–11.

> Where, as here, a trial court has entered findings of fact and conclusions thereon pursuant to a party's request, we engage in a two-tiered standard of review: we determine whether the evidence supports the findings and then determine whether the findings support the judgment. *Henry v. Henry*, 758 N.E.2d 991, 992 (Ind. Ct. App. 2001). "The court's findings and judgment will not be reversed unless clearly erroneous." *Id.* "Findings of fact are clearly erroneous when the record lacks any facts or reasonable inferences from the evidence to support them. The judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings." *Id.* at 992–93 (citation omitted). We neither reweigh evidence nor judge witness credibility, but "consider only the evidence favorable to the judgment and all reasonable inferences therefrom." *Id.* at 993.

Faulk v. Faulk, 166 N.E.3d 939, 944 (Ind. Ct. App. 2021), *trans. denied*. "When, as here, the court has made special findings pursuant to a party's request under [Indiana] Trial Rule 52(A), this court may affirm the judgment on any legal theory supported by the findings." *Henry*, 758 N.E.2d at 993. However, "[b]efore affirming on a legal theory supported by the findings but not espoused by the trial court, we should be confident that its affirmance is consistent with

all of the trial court's findings of fact and the inferences drawn from the findings." *Id.*

[6] Father argues that the trial court erred in finding that T.M.

> is dealing in therapy with an intolerance to change, and the therapist is considering various diagnoses to rule out, with an original diagnosis of Adjustment Disorder and Anxiety. [T.M.] requires a regular routine as a result of his resistance to change. The therapist reported that [T.M.] was "thriving right now" when the GAL spoke to him on June 1, 2021 (when the parties were exercising their original parenting time order, and not long into the summer 50/50 parenting time schedule.

Appellant's App. Vol. II p. 17. In challenging this finding, Father asserts that the record is devoid of any evidence that T.M. suffers from any medical or mental health disorder and that the court erred in relying on the therapist's statement that T.M. was "thriving right now" because the statement constituted inadmissible hearsay.

[7] Indiana Code section 31-17-2-12(b) states that

> In preparing a report concerning a child, the investigator may consult any person who may have information about the child and the child's potential custodian arrangements.… The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian.… If the requirements of subsection (c) are fulfilled, the investigator's report:

> (1) may be received in evidence at the hearing; and
> (2) may not be excluded on the grounds that the report is hearsay or otherwise incompetent.

Subsection (c) indicates that "[t]he court shall mail the investigator's report to counsel … at least ten (10) days before the hearing." Ind. Code § 31-17-2-12(c). Nothing in the record indicates that GAL Workman's report was not filed or provided to the parties in a timely fashion. As such, GAL Workman's report "may not be excluded on the grounds that the report is hearsay." *See* Ind. Code § 31-17-2-12(b)(2).

[8] Father does not challenge any statements contained within GAL Workman's report but argues that the trial court abused its discretion by allowing GAL Workman to refer to statements attributed to T.M.'s counselor in her testimony at the evidentiary hearing.

> Our standard of review of a trial court's admission of evidence is an abuse of discretion. *In re Des.B.*, 2 N.E.3d 828, 834 (Ind. Ct. App. 2014). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* However, it is well established that errors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *Id.* "To determine whether the admission of evidence affected a party's substantial rights, we assess the probable impact of the evidence upon the finder of fact." *Id.*

M.R. v. B.C., 120 N.E.3d 220, 224–25 (Ind. Ct. App. 2019).

[9] Father objected to the challenged statements, which were admitted over his objection, arguing that the statements constituted inadmissible hearsay. However, to the extent that GAL Workman's testimony regarding her conversation with T.M.'s counselor may have included inadmissible hearsay, the admission of this evidence was harmless because it was cumulative of GAL Workman's testimony relating to her personal observations and opinions. GAL Workman testified that

> In speaking with [T.M.'s counselor] my conversation was extremely limited because of the release and her concerns of impacting [T.M.]'s relationship with her as a Counselor and a therapeutic relationship. Um, but in the conversation I was able to have um the concerns that came to light for me *are the same that I observed during the rest of my interview*. Um in that [T.M.] likes a very set schedule and that he struggles with um change um and he seems to struggle with making friends although there's some improvement there. Um and there continues to be this struggle between the parents um and his relationship with both of them.

Tr. Vol. II p. 17 (emphasis added). GAL Workman separately testified that T.M. "is very set in schedules, he likes to know what to expect." Tr. Vol. II p. 12. GAL Workman further testified that T.M.

> is a very scheduled driven child um he wants to know where he's going to be, what is going to happen. Um there is some, I don't want to say intolerance because that's a strong word, but some intolerance to change. And that appears to be one of the focuses of his counseling um and I think we're seeing some progress um because at the beginning of summer he was very hesitant to do a week on, week off over the summer um and when I spoke with

him at the end of summer he was happy and had a good time and enjoyed spending time with both parents.

Tr. Vol. II p. 25.

[10] The challenged finding that T.M. exhibited an intolerance to change but was thriving under Parents' current custody arrangement is supported by GAL Workman's testimony regarding her observations and opinions. Furthermore, while nothing in the record indicates that there has a been a formal diagnosis that T.M. suffers from any health or mental-health condition, GAL Workman's testimony demonstrates that T.M. is uncomfortable with and has shown a resistance to change. As such, we conclude that the trial court did not abuse its discretion in considering the GAL's testimony concerning any potential diagnoses or T.M.'s statements.

B. Joint Custody

[11] Father also contends that the trial court abused its discretion in modifying the award of joint legal custody to Parents. "We review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)).

[12] "Pursuant to Indiana Code Section 31-17-2-21, a trial court may not modify a child custody order unless the modification is in the best interests of the child and there is a substantial change in one or more of the factors enumerated in Indiana Code Section 31-17-2-8." *M.G. v. S.K.*, 162 N.E.3d 544, 547 (Ind. Ct.

App. 2020). Section 8 provides that the court shall consider the following factors:

> the age and sex of the child; the wishes of the child's parent or 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 the child's parents, sibling, and any other person who may significantly affect their best interests; the child's adjustment to their home, school, and community; the mental and physical health of all individuals involved; evidence of a pattern of domestic or family violence by either parent; evidence that the child has been cared for a by de facto custodian; and a designation in a power of attorney of the child's parent or de facto custodian.

Id. (citing Ind. Code § 31-17-2-8).

[13] Father argues that the trial court erred when it modified joint legal custody, vesting final decision-making authority in Father for medical decisions and in Mother for all other disputed matters. We disagree. The trial court did not simply state that there was no basis for changing legal custody but said so in comparison to the trial court's decision to not alter physical custody. Specifically, the trial court stated

> While there is no basis for a change in the prior Order of joint legal custody with Mother to have primary physical custody, there is a basis for modification of the parenting time, given the conflicts and lack of co-parenting reflected. Father has not shown that a substantial change of circumstances would make a half-time year-round schedule in the best interests of the children. The GAL findings and Mother's evidence support a modification of Father's parenting time during the school week, however.

Appellant's App. Vol. II pp. 27–28. With regard to joint legal custody, the trial court further ordered that

> The parties shall continue to have joint legal custody as that term is defined by Indiana Law. Both parents should be involved and consulted and endeavor to make joint decisions regarding health care, education[,] and religious upbringing of the Children. Mother shall have final decision-making authority in the event of a dispute, except as to medical decisions for the children. Father shall have final decision-making authority as to medical decisions in the event of a dispute. Either parent may petition the court in the event he/she believes a final decision made by the parent with final authority is against the best interests of the children.

Appellant's App. Vol. II pp. 28–29.

[14] The trial court had substantial evidence to make this determination, as it discussed multiple instances of an inability to co-parent, noting that "[t]he parties have had numerous conflicts arise in the short time since the divorce had been finalized." Appellant's App. Vol. II p. 19. Given those frequent conflicts, the trial court acted within its discretion by finding that modification of the award of joint legal custody to Parents was warranted.

C. Child Support

[15] Father last contends that the trial court abused its discretion in modifying his support obligation. "The standard of review to determine whether a trial court has abused its discretion in modifying a support order is well settled." *Meehan v. Meehan*, 425 N.E.2d 157, 161 (Ind. 1981). "We do not weigh the evidence nor judge the credibility of witnesses, but rather consider only that evidence

most favorable to the judgment, together with the reasonable inferences which can be drawn therefrom." *Id.* "If, from that viewpoint, there is substantial evidence to support the finding of the trial court, it will not be disturbed[.]" *Id.*

[16] Father claims that the modification of his child support obligation was not supported by the record. That is not the case as the trial court heard argument from the parties and reviewed supporting documentation suggesting that Father's income was underreported at the time the parties entered into the Decree. After considering the parties' arguments and submitted documentation, the trial court concluded in its order that a modification of support was appropriate, explaining that "[d]uring Mediation Father signed a Support Worksheet indicating his affirmation of a gross wage which substantially lower than he knew to be his current earnings, having received a contract increase after producing the income information used in the worksheet." Appellant's App. Vol. II p. 33. Under the circumstances, we cannot say that the trial court abused its discretion in reaching this decision.

II. Issue Raised on Cross-Appeal

[17] Mother argues on cross-appeal that

> An appeal should be based on an allegation that the trial court made a mistake of law and the order entered was therefore wrong and should be corrected. Father seems to argue only that the order itself did not provide sufficient detail. Father continues to force Mother to expend significant funds defending herself in litigation. An award of attorney fees both at the trial level and now at the appellate level is appropriate under the facts of this case.

> Mother requests an order remanding the case only for an award of attorney fees both at the trial and appellate level.

Appellee's Br. p. 20.

A. Trial Attorney's Fees

[18] "Pursuant to Indiana Code section 31-15-10-1, a trial court may order a party in a dissolution proceeding to pay a reasonable amount of the other party's attorney's fees." *Eads v. Eads*, 114 N.E.3d 868, 879 (Ind. Ct. App. 2018). "The court has broad discretion in deciding whether to award attorney's fees." *Id.*

> In determining whether to award attorney's fees in a dissolution proceeding, trial courts should consider the parties' resources, their economic condition, their ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award. [*Barton v. Barton*, 47 N.E.3d 368, 377 (Ind. Ct. App. 2015)]. A party's misconduct that directly results in additional litigation expenses may also be considered. *Id.* Consideration of these factors promotes the legislative purpose behind the award of attorney's fees, which is to ensure that a party who would not otherwise be able to afford an attorney is able to retain representation. *Hartley v. Hartley*, 862 N.E.2d 274, 286–87 (Ind. Ct. App. 2007). When one party is in a superior position to pay fees over the other party, an award is proper. *Id.*

Id.

[19] Mother claims that Father's actions demonstrate a deliberate "war of financial attrition against Mother from the outset of the dissolution proceedings."

Appellee's/Cross-Appellant's Reply Br. p. 6. Mother claims that Father's income and earning ability far exceed hers. She also claims that "Father's refusal to comply with court orders and his excessively litigious conduct has caused Mother to incur far more attorney fees tha[n] she would have in the normal course of proceedings for dissolution and modification of parenting time and support." Appellee's/Cross-Appellant's Reply Br. p. 5. Mother also points to the fact that Father filed a petition to modify "the custody arrangement to which he had agreed only four months prior," Appellee's/Cross-Appellant's Reply Br. p. 5, causing Mother to incur attorney's fees for what Mother argues "could have been mere clarifications to avoid future conflict and modification of child support." Appellee's/Cross-Appellant's Reply Br. p. 6. However, it was well within the trial court's discretion to conclude that attorney's fees were unnecessary in this case.

B. Appellate Attorney's Fees

[20] Mother also seeks to recover attorney's fees for funds expended responding to what she characterizes as meritless appeal.

> Indiana Appellate Rule 66(E) provides, in pertinent part, "[t]he Court may assess damages if an appeal ... is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." Our discretion to award attorney fees under Indiana Appellate Rule 66(E) is limited, however, to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987). Additionally, while Indiana Appellate Rule 66(E) provides this Court with discretionary authority to award damages on appeal,

> we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. *Tioga Pines Living Ctr., Inc. v. [Ind.] Family and Social Svcs. Admin.*, 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), *trans. denied*.

Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

[21] Instead of requesting appellate attorney's fees under Appellate Rule 66(E), Mother argues that Indiana Code section 31-15-10-1 "authorizes attorney fees for proceedings occurring after the entry of final judgment, including appeal." Appellee's/Cross-Appellant's Reply Br. p. 7 (citing *Thompson v. Thompson*, 811 N.E.2d 888, 929 (Ind. Ct. App. 2004), *trans. denied*). However, regardless of whether we consider Mother's request for appellate attorney's fees under Indiana Appellate Rule 66(E) or Indiana Code section 31-15-10-1, our conclusion remains the same. While Father's appeal was not ultimately successful, we cannot say that it was "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Thacker*, 797 N.E.2d at 346. We therefore deny Mother's request for an award of appellate attorney's fees.

[22] The judgment of the trial court is affirmed.

Bailey, J., and Weissmann, J., concur.