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IN THE
COURT OF APPEALS OF INDIANA

In Re the Matter of: Paternity of W.M.T.,

Elizabeth Jackson,

Appellant-Respondent,

v.

Sharon Thomas,

Appellee-Intervenor

November 16, 2021

Court of Appeals Case No. 21A-JP-57

Appeal from the Hancock County Superior Court

The Honorable Scott Sirk, Presiding Judge

Trial Court Cause No. 30D01-0902-JP-000020

May, Judge.

[1] Elizabeth Jackson ("Mother") appeals the trial court's orders regarding custody of and child support for W.M.T. ("Child"). Mother makes multiple arguments, which we consolidate and restate as:

> 1. Whether the trial court abused its discretion in admitting certain testimony and exhibits;
>
> 2. Whether the trial court erred when it determined Sharon Thomas ("Paternal Grandmother") was Child's de facto custodian;
>
> 3. Whether the trial court erred when it found it was in Child's best interest for Paternal Grandmother to have custody of him;
>
> 4. Whether the trial court abused its discretion when it excluded Child's Social Security Survivor's Benefits ("Survivor's Benefits") from its child support calculation; and
>
> 5. Whether the trial court abused its discretion when it denied Mother's motion for attorney's fees.

We affirm.

Facts and Procedural History

[2] Mother gave birth to Child on September 11, 2008. Mother and Matthew Thomas ("Father") were never married. Father filed a paternity action in 2009. At the conclusion thereof, Father was awarded primary physical custody of

Child and Mother was awarded parenting time.[1] Father passed away on October 19, 2019.

[3] Child has resided with Paternal Grandmother for the majority, if not all, of his life. Paternal Grandmother has been Child's primary caregiver. She has made medical, educational, and religious choices for Child and engaged in "any other type of care that a parent would ordinarily give to their child." (App. Vol. II at 96.) While Mother and Father both exercised parenting time with Child, "it was the Paternal Grandmother who was the stable, primary caretaker of the minor child." (*Id.* at 95.)

[4] On December 3, 2019, Paternal Grandmother filed a verified ex parte emergency petition for custody of Child. The trial court held a hearing on the matter on December 5, 2019, without Mother present. The trial court received testimony from Paternal Grandmother and issued an ex parte custody order on December 6, 2019, granting Paternal Grandmother custody of Child. On January 7, 2020, Paternal Grandmother filed a motion to intervene in the paternity case.

[5] On March 6, 2020, Mother filed a motion for relief from judgment pursuant to Indiana Trial Rule 60(B), arguing she was not given notice of Paternal Grandmother's petition for emergency custody, the filing violated several

[1] The trial court's precise ruling in the initial paternity matter, including any child support ordered, is unknown, as a copy of the order was not included in the record.

Indiana Trial Rules, and the order granting Paternal Grandmother emergency custody of Child was an impermissible ex parte order. On March 11, 2020, the trial court held a hearing on Mother's motion, and Paternal Grandmother filed an amended verified petition for emergency custody of Child.

[6] On March 27, 2020, the trial court issued its order granting Mother's motion for relief of judgment. In that order, the trial court declared void "[a]ll Orders issued in this matter (30D01-0902-JP-000020) prior to the date of this Order" including the "December 6, 2019 Order Granting Ex Parte temporary custody to [Paternal Grandmother]." (App. Vol. II at 81.) Further, the trial court ordered:

> 3. [Paternal Grandmother] shall return [Child], born September 11, 2008 to his Mother's (Elizabeth Jackson) care and custody on June 1, 2020. And until said date, Mother is to have parenting for weekends beginning Saturday, April 4, 2020 from 10:00 A.M. to 6:00 P.M. and every other Saturday until June 1, 2020.
>
> 4. [Paternal Grandmother's] Verified Amended Petition to Establish Non-Party Custody shall be heard on June 1, 2020 at 1:00pm for three (3) hours in the Hancock Circuit Court.

(*Id*.) (errors in original). On March 31, 2020, Paternal Grandmother filed a renewed motion to intervene, which the trial court granted on April 1, 2020. On April 28, 2020, Mother filed a motion for attorney's fees.

[7] The trial court held hearings on Paternal Grandmother's petition for non-party custody on June 1 and June 16, 2020. On July 7, 2020, the trial court issued its

order granting Paternal Grandmother sole legal and primary physical custody of Child. The trial court granted Mother parenting time pursuant to the Indiana Parenting Time Guidelines. The trial court ordered Mother to submit income information for the determination of child support within seven days of the order and the trial court took the matter of attorney's fees under advisement pending Mother's submission of her income information.

[8] On July 27, 2020, Mother filed an appeal of the July 7, 2020, order. On August 4, 2020, the trial court issued an order that stated:

> 1. Any order of child support must be pled at this time due to the fact that issue was not fully litigated prior to the Court's ruling in the matter July 7, 2020.
>
> 2. The Court, having taken the matter of attorney fees under advisement, herby DENIES said motion based on the evidence presented at subsequent hearings held. The Court views that there was no indication of any behavior on the part of [Paternal Grandmother] that would warrant attorney fees despite the Court's concerns stated in its March 27, 2020 Order.

(*Id*. at 109.) On August 10, 2020, Paternal Grandmother filed a motion to establish child support. On October 22, 2020, our court dismissed Mother's appeal of the July 7, 2020, order because it was not a final judgment pursuant to Indiana Appellate Rule 2(A) based on the remaining issue of child support. On December 29, 2020, the trial court held a hearing on Paternal Grandmother's motion to establish child support. On December 30, 2020, the trial court

ordered Mother to pay Paternal Grandmother $46.00 per week in child support, retroactive to August 10, 2020.

Discussion and Decision

1. Modification of Custody

[9] When a party requests modification of custody, we review the court's decision for an abuse of discretion, because we give wide latitude to our trial court judges in family law matters. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010). When, as is the case here, a trial court makes findings of fact and conclusions of law sua sponte, our standard of review is well-settled:

> [T]he specific findings control our review and the judgment only as to the issues those specific findings cover. Where there are no specific findings, a general judgment standard applies and we may affirm on any legal theory supported by the evidence adduced at trial.
>
> We apply the following two-tier standard of review to sua sponte findings and conclusions: whether the evidence supports the findings, and whether the findings support the judgment. Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility.

Trust No. 6011, Lake Cnty. Trust Co. v. Hell's Haven Condominiums Homeowners Ass'n, 967 N.E.2d 6, 14 (Ind. Ct. App. 2012), *trans. denied*. Mother does not challenge the trial court's findings, so they must be accepted as true. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (unchallenged findings must be accepted as correct).

[10] When a party besides the child's natural parent seeks custody of the child,

> before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. A generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.

In re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) (internal citations omitted). In cases where a third party seeks custody, that "the burden of proof is always on the third party." *In re Custody of McGuire*, 487 N.E.2d 457, 461 (Ind. Ct. App. 1985).

[11] A trial court may not modify a child custody order unless modification is in the child's best interests and there is a substantial change in one or more of the factors set forth in Indiana Code section 31-14-13-2, and if applicable, Indiana Code section 31-14-13-2.5. Ind. Code § 31-14-13-6. Indiana Code section 31-14-13-2 states:

> The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (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

(C) any other person who may significantly affect the child's best interest.

(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, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

In its order, the trial court deemed Paternal Grandmother a de facto custodian, and thus the trial court was also required to consider:

(1) The wishes of the child's de facto custodian.

(2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.

(3) The intent of the child's parent in placing the child with the de facto custodian.

(4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:

(A) seek employment;

(B) work; or

(C) attend school.

Ind. Code § 31-14-13-2.5(b).

A. Admission of Evidence

[12] Mother argues a significant amount of the evidence and testimony before the trial court should not have been admitted for a variety of reasons. We review decisions concerning the admissibility of evidence for an abuse of discretion. *Walker v. Cuppett*, 808 N.E.2d 85, 92 (Ind. Ct. App. 2004). An abuse of discretion occurs if the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.* A trial court may also abuse its discretion if its decision is without reason or is based upon impermissible considerations. *Id.*

[13] First, Mother contends the trial court abused its discretion when it admitted the testimony of Cynthia Willyard, a teacher at Child's school because Willyard had not had any contact with any of the parties for at least two years, and Willyard's testimony regarding Mother's other child, L.H., was irrelevant. Similarly, Mother argues the trial court abused its discretion when it admitted testimony regarding her older daughter, E.J. Finally, Mother asserts the trial court abused its discretion when it admitted the portion of Exhibit 2 containing letters from Mother's family in which those family members enumerated reasons Child should not be placed with Mother; Exhibit 3, a series of text messages between Mother and Paternal Grandmother; Exhibit 4, a series of text

messages between Mother and Paternal Grandmother; Exhibit 5, a poem written by Child; Exhibit 8, photographs of Child; Exhibit 9, screenshots of Child at various places with Paternal Grandmother; Exhibits 10, 11, and 12, photographs of Child and Paternal Grandmother at various times and in various settings; Exhibit 13, a writing by Child; Exhibits 14, 15, 16, 17, and 18, all text message exchanges between Mother and Paternal Grandmother; and Exhibit 19, a Chronological Case Summary from Father's original paternity action.[2]

[14] At trial, Mother objected to each piece of evidence and testimony that she now appeals. However, on appeal, Mother cites no case law, statute, or rule to support why any of these pieces of evidence should not have been admitted. Thus, she has waived this issue for review by failing to make a cogent argument. *See* Indiana Appellate Rule 46(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to authorities, statutes, and the Appendix and parts of the Record of Appeal relied on[.]"); *and see Maggert v. Call*, 817 N.E.2d 649, 650 n.1 (Ind. Ct. App. 2004) (Maggert's constitutional argument waived for failure to cite to the portion of the Indiana Constitution allegedly violated). Waiver notwithstanding, we note this matter

[2] Mother's choice to object to the admission of Exhibit 19 is curious, as Exhibits 20, 22, and 23 are also uncertified Chronological Case Summaries detailing other legal matters in which Mother has been involved. What makes her objection even more perplexing is that she included an uncertified copy of the Chronological Case Summary for the case before us in her Appendix.

was heard before the bench, and we assume the trial court knows the evidence rules and properly disregards evidence admitted erroneously. *See Roser v. Silvers*, 698 N.E.2d 860, 864 (Ind. Ct. App. 1998) ("In bench trials, we presume that the court disregarded inadmissible evidence and rendered its decision solely on the basis of relevant and probative evidence. Any harm from evidentiary error is lessened, if not completely annulled, when the trial is by the court sitting without a jury.") (internal citations omitted). Thus, we conclude the trial court did not abuse its discretion in the admission of any of the challenged evidence. *See A.S. v. Indiana Univ. Health Bloomington Hosp.*, 148 N.E.3d 1135, 1140 (Ind. Ct. App. 2020) (no abuse of discretion when admitting evidence in a bench trial because we presume that "a judge considers only the properly-admitted evidence when rendering a judgment").

B. Paternal Grandmother as De Facto Custodian

[15] In its order, the trial court determined Paternal Grandmother was Child's de facto custodian for the purposes of Child's custody modification. A de facto custodian is "a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least: . . . one (1) year if the child is at least three (3) years of age." Ind. Code § 31-9-2-35.5. Mother contends the trial court erred when it found Paternal Grandmother to be Child's de facto custodian because Paternal Grandmother was not Child's primary caregiver and financial support for one year preceding Paternal Grandmother's petition for non-party custody.

[16] Paternal Grandmother presented evidence that Child has lived in her home for the majority of his life. During this time, Paternal Grandmother took Child to school and to his athletic practices and competitions, and she provided him with food and shelter. Willyard, one of Child's teachers, testified she "didn't know [Child and Mother] were related at all[.]" (Tr. Vol. II at 70.) Willyard also testified that she thought Paternal Grandmother and Father had joint custody of Child because Mother was not listed on Child's emergency contact list and Mother never attended school functions for Child. Mother contends she was Child's "custodian" following Father's death, but the evidence indicates Child never lived with her and she was not Child's primary caregiver during the relevant time. Thus, Mother's arguments are invitations for us to reweigh the evidence, which we cannot do. *See Trust No. 6011,* 967 N.E.2d at 14 (appellate court cannot reweigh evidence or judge the credibility of witnesses). We therefore conclude the trial court did not err when it found Paternal Grandmother to be a de facto custodian. *See A.J.L. v. D.A.L.*, 912 N.E.2d 866, 870 (Ind. Ct. App. 2009) (trial court's determination that aunt and uncle were de facto custodians of child was supported by evidence that children had lived with aunt and uncle for over a year preceding the petition for modification of custody).[3]

[3] Mother also argues that, if we conclude that the trial court did not err when it found Paternal Grandmother to be Child's de facto custodian, the trial court erred because it did not consider the factors for determining custody with regards to a de facto custodian as set forth in Indiana Code section 31-14-13-2.5(b). As we will discuss *infra*, the trial court considered these factors when it awarded custody of Child to Paternal Grandmother.

B. Child's Best Interests

[17] Regarding the best interests of Child, the trial court examined the factors set forth in Indiana Code section 31-14-13-2 and found, in relevant part:

> 97. The first factor to consider is the age and sex of the child. [Child] has lived in New Palestine, Brandywine school district, for at least nine (9) out of the eleven (11) years of his life. His age in this case is particularly relevant because of his point of development. [Child] has established roots in the community and relies upon the social structure and community support in his everyday life. An analysis of the facts presented in this case show [sic] that it is the [Child's] best interest to remain under the care and custody of [Paternal Grandmother].
>
> 98. The second factor to consider are [sic] the wishes of the child's parents. Unfortunately, in this case, [Child's] father is deceased. However, the court can clearly ascertain from Father's behavior while he was alive, that Father clearly intended for the [Child] to remain under the care and custody of [Paternal Grandmother].
>
> 99. The second factor also must take Mother's wishes in [sic] consideration. But even Mother, during her cross examination, could not state that it is in [Child's] best interest to be taken away from his social structure and established relationships, simply because now she has decided to ask for custody of [Child].
>
> 100. The third factor the court should consider are [sic] the wishes of the child. Although [Child] is not yet fourteen (14) years of age, the Court had the opportunity to meet with [Child] in chambers and discuss his wishes in this case. He is an impressive young man. The court finds [Child] to be incredibly mature and well-spoken and it is [Child's] wishes [sic] that he remain with [Paternal Grandmother]. The Court cannot deny

that [Child] feels that it is in his own best interest to remain under the care and custody of [Paternal Grandmother]. Given [Child's] eloquence and demeanor during the *In Camera* interview, the Court is giving [Child's] wishes its due weight in this decision.

101. The fourth factor for consideration of the Court is the interaction of the child with his parents, siblings and any other person who may significantly affect the child's best interest. While both parties provided evidence that [Child] has an older half-sister, and both parties discussed the interaction [sic] between Mother and other individuals with [Child's] half-sister, Mother never provided any evidence that [Child] and his half-sister have a strong bond. [Paternal Grandmother], however, discussed the relationships between the minor child and his long-time baby-sitter, Anna McMillan, his teachers, his friend, his teammates, [Paternal Grandmother's] extended family, and Mother's family, Lori Taffe, Linda Jackson, and E.J. [Child] has a village to support him where he is currently living. The evidence clearly and convincingly demonstrates that [Child] is well adjusted, an excellent student, a well-liked and talented athlete, and that he thrives because of his village. There was no evidence presented to demonstrate that [Child] would have this type of support at Mother's residence. An analysis of the facts presented in this case show [sic] that it is in [Child's] best interest to remain under the care and custody of [Paternal Grandmother].

102. As to the fifth statutory factor, [Child] is clearly well adjusted to his home, school and community and Mother did not present any evidence to the contrary.

103. The sixth factor to be examined by the court are [sic] the mental and physical health of all individuals involved. It is apparent to the Court that both Mother and [Parental Grandmother] appear to be in fine physical health. The Court does have concerns about Mother's mental health and her nonchalant attitude toward those serious issues. This Court

firmly believes that every life is precious. Mother's admission that she has threatened to take her own life at least seven (7) times, that she has not undergone appropriate therapy, and that Mother has not looked into any medication to aid these issues. [sic] Furthermore, the evidence presented to the Court regarding Mother's child L.H., her self-mutilation, which Mother has not property addressed, caused tremendous concern to this Court about moving a well-adjusted happy child into her care and custody.

104. The seventh factor to be examined by the Court is whether there is a pattern of domestic or family abuse by either parent. By Mother's own admission, she struck her child, L.H., so hard on the ear that she had to take the child to an ear nose and throat specialist. The Court also concludes that Mother's lack of concern for L.H.'s mental health is highly concerning. [Paternal Grandmother], however, is a stable person who presented herself to the Court in a manner that the Court finds to be calm, and she introduced an abundance of evidence to show that her decisions are based upon the best interest of [Child]. If fact, the [Paternal Grandmother] provided testimony that she tried, as much as she could, to protect [Child] from his Father's mental health illness in order to preserve the relationship. The Court finds this involvement by [Paternal Grandmother] and her clear thought about the best interest of [Child] to be commendable.

105. The final factor the Court should examine is whether the child have been cared for by a de facto custodian, and if so, the Court should then take into account the wishes of the de facto custodian, the extent to which the child has been cared for, nurtured, and supported by the de facto custodian, [and] the intent and circumstances under which the child was placed under the care and custody of the de facto custodian.

106. The Court finds that [Paternal Grandmother] has demonstrated by clear and convincing evidence that she is the de facto custodian of [Child].

107. [Paternal Grandmother] has demonstrated she [is] the primary care given for [Child], that she is the financial provider for [Child], and that [Child] has resided with her for at least one (1) year.

108. . . . During these proceedings spanning over two (2) days, this Court examined evidence and heard testimony that clearly and convincingly demonstrates [Child's] best interest is served by remaining with [Paternal Grandmother].

109. [Paternal Grandmother] has been the main, stable, care giver for [Child] since his birth. [Child] relies upon [Paternal Grandmother] for the safety, stability, love and nurturing that children crave. This was evident not only in [Child's] *In Camera* interview, but also in the witnesses presented to the Court in this case.

* * * * *

111. There is no doubt that the evidence in this matter clearly and convincingly supports the [Paternal Grandmother's] position that it is [Child's] best interest to remain under her care and custody.

(App. Vol. II at 101-4) (internal citations omitted) (emphasis in original).

[18] Our Indiana Supreme Court held in *In re B.H.*, that, when awarding custody of a child to a third-party, "the trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial

court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child." 770 N.E.2d at 287. Relying on that statement, Mother argues that "the trial court incorrectly applied the 'best interest' standard, without specifically finding that placement with a third-party substantially and significantly served the best interest of the child." (Br. of Appellant at 12.) While *In re B.H.* states that the standard of proof regarding "best interests" is higher for a third party than a natural parent, there is no requirement that the trial court make a special finding using specific language to that affect. Further, we hold the trial court made multiple findings and conclusions that indicate Paternal Grandmother's custody of Child gave Child a "substantial and significant advantage." *See Allen v. Proksch*, 832 N.E.2d 1080, 1100-1 (Ind. Ct. App. 2005) (affirming grant of custody in favor of grandmother from father based on trial court's findings that grandmother provided stability and consistent care for child compared to father's sporadic contact with child).[4]

2. Child Support

[19] We will disturb a trial court's child support order only when it is clearly erroneous. *Macher v. Macher*, 746 N.E.2d 120, 127 (Ind. Ct. App. 2001). Factual findings are not clearly erroneous unless the evidence contains no facts or

[4] Mother also argues the trial court should not have relied upon certain testimony and evidence presented. However, Mother's argument is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Trust No. 6011,* 967 N.E.2d at 14 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

reasonable inferences therefrom to support them. *Id*. We neither reweigh the evidence nor assess the credibility of the witnesses. *Glover v. Torrence*, 723 N.E.2d 924, 936 (Ind. Ct. App. 2000). Moreover, we consider only the facts and inferences favorable to the trial court's decision. *Id*.

[20] Child support orders should comply with the Indiana Child Support Rules and Guidelines. *Macher*, 746 N.E.2d at 127. "One purpose of child support is to provide regular and uninterrupted support for the children." *Carpenter v. Carpenter*, 891 N.E.2d 587, 600 (Ind. Ct. App. 2008). A calculation of child support made under the Guidelines is presumptively valid. *Id*. A trial court may deviate from the Guidelines only if it provides written findings to justify the deviation. *Clark v. Madden*, 725 N.E.2d 100, 107 (Ind. Ct. App. 2000). Nevertheless, "[j]udges are advised to avoid the pitfall of blind adherence to the computation of support without giving careful consideration to the variables that require changing the result in order to do justice." *Glover*, 723 N.E.2d at 936. Mother argues the trial court's order requiring her to pay Paternal Grandmother $46.00 per week in child support was erroneous because the trial court's calculation did not take into account the survivor benefits Child receives as a result of his Father's death.

[21] Our court addressed a similar set of facts in *Martinez v. Deeter*, 968 N.E.2d 799 (Ind. Ct. App. 2012). In *Martinez*, the mother ("Deeter") and father ("Martinez") divorced, and Deeter was awarded custody of the couples' three children. *Id*. at 802. Deeter subsequently remarried and about five years later, her new husband ("Stepfather") died. *Id*. As a result of Stepfather's death,

Deeter and two of the parties' children qualified for Survivor Benefits. *Id*. Martinez filed a petition for modification of custody of the parties' oldest child, and as part of that action, the trial court adjusted Martinez's child support obligation. *Id*. at 803-4. When calculating Martinez's child support obligation, the trial court imputed as income to Deeter the amount of the two children's Survivor Benefits. *Id*. at 803. Martinez appealed regarding other issues, and Deeter cross-appealed, arguing the trial court erred when it imputed the two younger children's Survivor's Benefits as her income. *Id*. at 808.

[22] In analyzing Deeter's argument, our court noted the discrepancies between the language of Indiana Child Support Guideline 3(A)(1) and the Commentary to Guideline 3(A). Guideline 3(A)(1) (2020)[5] states, in relevant part:

> Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, structured settlements, capital gains, social security benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received.
>
> Social Security disability benefits paid for the benefit of the child must be included in the disabled parent's gross income. The

[5] *Martinez* analyzes the language of the 2007 version of Guideline 3(A)(1). The only difference between the two versions is the inclusion of "structured settlement" in the 2020 version of the Guideline. *Compare* Guideline 3(A)(1) (2007) *with* Guideline 3(A)(1) (2020).

> disabled parent is entitled to a credit for the amount of Social Security disability benefits paid for the benefit of the child.
>
> Certain Exclusions from Income. Specifically excluded are benefits from means-tested public assistance programs, including, but not limited to, Temporary Aid to Needy Families (TANF), Supplemental Security Income, and Food Stamps. *Also excluded are survivor benefits received by or for other children residing in either parent's home.*

(emphasis added). However, the Commentary[6] to Guideline 3(A) states:

> In calculating Weekly Gross Income, it is helpful to begin with total income from all sources. This figure may not be the same as gross income for tax purposes. Internal Revenue Code of 1986, § 61. Means-tested public assistance programs (those based on income) are excluded from the computation of Weekly Gross Income, but other government payments, such as Social Security benefits and veterans pensions/retired pay, should be included. *However, survivor benefits paid to or for the benefit of their children are not included.*

(emphasis added). The *Martinez* court stated:

> The Child Support Guidelines and Commentary do not address the exact situation here - whether survivor benefits paid to children due to the death of a custodial parent's subsequent spouse are/or should be included in the custodial parent's weekly gross income - and no Indiana cases address this situation. Father argues that the Guideline conflicts with the Commentary, i.e., the Guideline excludes "survivor benefits received by or for

[6] The Commentary for the two versions of the relevant Guideline is identical.

> other children residing in either parent's home" but the Commentary excludes "survivor benefits paid to or for the benefit of their children," and that we should include the survivor benefits in Mother's weekly gross income.
>
> We acknowledge that the Guideline and the Commentary contain different language. Despite the differing language in the Guideline and Commentary, we conclude that the language of the Child Support Guidelines and Commentary indicate that survivor benefits received by or for children are not includable in a parent's weekly gross income. Further, we note that the Guidelines and Commentary specifically exclude income from a parent's spouse in the calculation of a parent's weekly gross income. The purpose of the children's survivor benefits here is to replace income lost by the death of Mother's husband. Inclusion of the children's survivor benefits in Mother's weekly gross income would result in a windfall to Father.

968 N.E.2d at 809.

[23] The same logic applies here when considering Paternal Grandmother as the custodial party. Child receives $729.00 per month in Survivor's Benefits as a result of Father's death. As in *Martinez*, the reason Child is receiving Survivor's Benefits, Father's death, is independent of either party - Mother or Paternal Grandmother - in the custody and child support matter. As in *Martinez*, the trial court imputed income to Paternal Grandmother based on the income sources listed in the Guidelines. As in *Martinez*, the inclusion of Child's Survivor's Benefits in Paternal Grandmother's weekly gross income would result in a windfall for Mother. Should the additional $729.00 be imputed to Paternal Grandmother as income, Mother would then essentially be deriving a benefit

from Father's Survivor's Benefits meant for Child in the form of a reduction of her child support obligation, and it is well-established law that "the right to support lies exclusively with the child[.]" *Bussert v. Bussert*, 677 N.E.2d 68, 71 (Ind. Ct. App. 1997), *trans. denied*. Based thereon, we conclude the trial court did not err when it excluded Child's Survivor's Benefits from the child support calculation.

3. Attorney's Fees

[24] Mother requested attorney's fees on April 28, 2020, after the trial court granted her relief from judgment under Indiana Trial Rule 60(B) and voided the orders the trial court entered starting in December 2019. Indiana Code section 34-52-1-1, provides:

> (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
>
> > (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> >
> > (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> >
> > (3) litigated the action in bad faith.

Mother had the burden of proving such fees were warranted. *Chrysler Motor Corp. v. Resheter*, 637 N.E.2d 837, 838 (Ind. Ct. App. 1994), *trans. denied*. An

award of attorney's fees lies within the trial court's discretion, and we will not reweigh the evidence or disturb the trial court's decision absent an abuse of discretion. *Posey v. Lafayette Bank & Trust Co.*, 583 N.E.2d 149, 152 (Ind. Ct. App. 1991), *trans. denied*. Mother contends the trial court abused its discretion when it denied her request for attorney's fees because Paternal Grandmother acted in bad faith when she sought ex parte custody of Child immediately following Father's death.

[25] "Bad faith is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will." *GEICO Gen. Ins. Co. v. Coyne*, 7 N.E.3d 300, 305 (Ind. Ct. App. 2014), *trans. denied*. Mother argues the trial court "highlighted the bad faith committed by [Paternal Grandmother]" in its order voiding the ex parte orders entered in the case after December 2019. (Br. of Appellant at 23.) However, the trial court's order did not admonish Paternal Grandmother's counsel, but instead stated, "*The Court* entered an Ex Parte custody order in violation of Indiana case law[.]" (App. Vol. II at 78) (emphasis added). Mother has not demonstrated that Paternal Grandmother acted in bad faith, and considering the ultimate outcome of this case, we cannot say that she did. Mother's argument is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Posey*, 583 N.E.2d at 152 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Therefore, we conclude the trial court did not abuse its discretion when it denied Mother's request for attorney's fees. *See Gilday v. Motsay*, 26 N.E.3d 123, 130 (Ind. Ct. App. 2015) (trial court did not abuse its

discretion when it denied request for attorney's fees when there was evidence in the record to support trial court's decision).

Conclusion

[26] The trial court did not abuse its discretion when it admitted certain challenged evidence, it did not err when it determined Paternal Grandmother was Child's de facto custodian, and it did not err when it found modification of Child's custody in favor of Paternal Grandmother was in Child's best interests. Further, the trial court did not err when it excluded Child's Survivor's Benefits from the child support calculation. Finally, the trial court did not abuse its discretion when it denied Mother's request for attorney's fees. Accordingly, we affirm the judgment of the trial court.

[27] Affirmed.

Vaidik, J., and Molter, J., concur.