MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Judith Anne Marie Beck,
Appellant-Respondent,

v.

Joel Elliott Storm,
Appellee-Petitioner

April 19, 2022

Court of Appeals Case No. 21A-JP-2180

Appeal from the Jefferson Circuit Court

The Honorable Nancy C. Jacobs, Magistrate

Trial Court Cause No. 39C01-2004-JP-7

Crone, Judge.

Case Summary

[1] Judith Anne Marie Beck (Mother) appeals the trial court's order granting the petition of Joel Elliott Storm (Father) to modify custody of their son, L.S. We affirm.

Facts and Procedural History

[2] The relevant facts most favorable to the trial court's order are as follows. In March 2017, Mother and Father met in California, where she was working at Starbucks and he was stationed in the Marine Corps. Father was deployed later that year, and Mother moved to Barnstead, New Hampshire, where her parents and brother reside. The parties kept in touch, resumed their relationship when Father returned from his deployment in early 2018, and moved to Father's hometown of Madison, Indiana, where his family resides. Mother worked part time at a bank. Father was honorably discharged from the Marine Corps, enrolled in college, worked in construction, and started a military contracting consulting business.

[3] Mother gave birth to L.S. in November 2018, and Father executed a paternity affidavit. L.S. spent a month in the neonatal intensive care unit with double pneumonia and was diagnosed with herpes simplex, which developed into herpes meningitis. Since that time, L.S. has received suppressive medication three times a day, which both Mother and Father have administered. Mother stayed home with L.S. for several months after he was discharged from the hospital, then worked two days a week at the bank, during which time either

Father or L.S.'s paternal grandfather would care for L.S. After two months, Mother decided to stay at home with L.S. full time.

[4] At some point, Father enlisted in the Indiana National Guard. In September 2019, the parties and L.S. moved to Fayetteville, North Carolina, where Father was deployed for Special Forces training. The parties' relationship became contentious that November, and Mother took L.S. to live with her parents in January 2020. Father visited L.S. for several days in both February and March, but Mother would not allow overnight visitation. In March, Mother traveled to North Carolina with L.S. and attempted to reconcile with Father, but an argument ensued, and Mother and L.S. returned to New Hampshire.

[5] In April 2020, Father filed a petition to establish custody, parenting time, and support. In May 2020, Mother and L.S. moved in with her brother. In August 2020, the trial court held a hearing on Father's petition, at which Father was represented by counsel and Mother appeared pro se, and the court took the matter under advisement. On October 9, 2020, the court issued an order that reads in pertinent part as follows:[1]

> 22. Father has been an active co-parent with regard to children from a previous relationship and desires to be an active co-parent with regard to L.S.
>
> 23. Father expressed willingness to adjust his professional

[1] Here, and elsewhere, we have replaced "Petitioner" and "Respondent" with "Father" and "Mother" and L.S.'s name with his initials.

goals/responsibilities in order to parent L.S.

24. Mother has not accommodated Father's relationship with L.S. and has not kept Father apprised with regard to significant matters in L.S.'s life since the parties' separation in March, 2020.

25. While the parties have not agreed to joint legal custody, both Father and Mother are fit and suitable as custodial parents and it is in L.S.'s best interest to have both parents actively engaged in his life.

26. Despite recent lack of communication between the parties, both parties appear to be of above-average intelligence and appear to possess the emotional capacity to communicate for the benefit of L.S.; in an effort to foster that communication both Father and Mother shall, within six months of the date of this order, complete an on-line or in-person parent educational course such as "Transparenting" and shall provide the other party and the Court with proof of completion of said course.[2]

27. Despite the geographic distance involved, modern communication affords the parties the ability to co-parent with regard to the major decisions in L.S.'s life.

28. [T]he Court finds that it is in L.S.'s best interest that the parties share joint legal custody of L.S.; to that end Mother shall keep Father apprised of all aspects of L.S.'s development, shall include Father in all major decisions regarding L.S.'s upbringing, and shall sign any releases necessary to allow Father to communicate directly with doctors, teachers, daycare or any other service provider providing services to L.S.

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[2] Father filed his certification of completion on January 29, 2021. Mother did not file her certification of completion until July 12, 2021.

30. The geographic distance between the parties' homes is a significant factor with regard to parenting time.

31. There has been a significant period of separation for Father and L.S.; it is therefore in L.S.'s best interest that parenting time be implemented gradually and in a manner that results in the least trauma to L.S.

32. During the month of October, 2020, Father shall be entitled to no fewer than forty (48) [sic] hours parenting time with zero (0) overnights; parenting time shall occur in segments not to exceed eight hours in length.

33. During the month of November, 2020, Father shall be entitled to no fewer than two periods of parenting time with each period of parenting time to include forty (40) hours daytime visits consisting of five (5) eight hour segments and one overnight visit, not to exceed twenty-four hours in length for a total of sixty-four (64) hours parenting time within each period of parenting time; Father shall be entitled to parenting time on Thanksgiving day if desired.

34. During the month of December, 2020, Father shall be entitled to no fewer than two periods of parenting time per month with each period of parenting time to include thirty-two (32) hours daytime visits consisting of four (4) eight hour segments and two overnight visits, not to exceed forty-eight (48) hours in length for a total of eighty (80) hours parenting time within each period of parenting time; Father shall be entitled to parenting time on Christmas eve if desired.

35. October, 2020, and November, 2020, parenting time shall occur in Barnstead, New Hampshire; **December, 2020, shall occur in Barnstead, New Hampshire, but the overnights may be exercised in a location other than Barnstead.**

> **36. The Court recognizes that Father's professional obligations and the significant costs associated with the exercise of parenting time may result in a need for adjustment to the 2020 parenting time schedule set forth in paragraphs 32-35 above and directs the parties to attempt to resolve any need for adjustment in a manner that accommodates and gives priority to [Father's] exercise of parenting time.**
>
> **37. Beginning in January, 2021, Father shall be entitled to seven (7) one week segments of parenting time annually.**

Appellant's App. Vol. 2 at 18-19 (emphases added). Neither party appealed this order.

[6] Father asked Mother for her address, but she refused to give it to him. Father did not exercise parenting time in October 2020 because he was unable to schedule it around his training on such short notice. On October 27, Father attempted to call Mother to schedule a FaceTime call with L.S., but Mother did not answer her phone. In a November 1 email, Father informed Mother,

> [T]he court order may have issued time to travel up there [New Hampshire] before the new year. However, that isn't tenable. In an effort to reestablish a relationship with L.S., I would like to have a consistent set of facetimes throughout every week. This will allow L.S. time to see me until we can do overnights beginning next year.

Ex. Vol. at 50.

[7] Two days later, Father emailed Mother, "You never replied back about establishing consistent FaceTime communication with L.S. Please let me know

a day and time of the week that we can consistently do." *Id*. at 51. Mother replied, "We can plan FaceTime out a few days in advance, but having a set day and time doesn't work for me since I'm a single parent and have a busy schedule.[…] We can discuss your potential visit in 2021 after I receive clarification from the judge." *Id*. Father asked, "What clarification do you need? The order is spelled out[.]" *Id*. Mother replied, "It's not spelled out at all lol. It doesn't say whether or not you can take L.S. out of the state for visits. I need it absolutely black and white. I have the right to request more information from her." *Id*. Father responded,

> Given that overnights in December can be exercised out of New Hampshire and then in 2021 I have 7 overnights at a time, the order is not restrictive.[…] I want to set a time in January to have L.S. for the first seven day period. Let me know what works for you by the end of this week so that I can plan.

Id. Mother replied, "We will plan when I receive clarification. In the meantime let me know when you'd like to FaceTime L.S. Thank you!" *Id*. Father responded,

> Planning doesn't need to wait until you feel like it. You can plan tentatively. I am stating that I need to plan now in order to make it happen in January. See line 36 [i.e., paragraph 36 of the trial court's order]. FaceTime Thursday. The court isn't there to provide legal advice nor can they.

Id. at 52. Mother sent an ex parte letter to the trial court, which was file-stamped November 16, "ask[ing] for clarification and options related to" its

October 2020 order. Appellant's App. Vol. 2 at 25.[3] On December 28, the trial court mailed a copy of the order to Mother.

[8] On November 9, the parties agreed that Father could exercise his parenting time from January 9 through January 16 and that they would meet in Philadelphia. On November 12, Father asked if it would be possible "to have a few overnights during the thanksgiving weekend[.]" Ex. Vol. at 55. Mother replied that would not be "feasible" due to a "mandatory 14 day quarantine" in New Hampshire. *Id.* Father questioned that statement, noting that "most states have decided to not disrupt co-parenting schedules." *Id.* at 56. On November 24, Mother cited the quarantine as a justification for requiring Father to visit L.S. in New Hampshire in January instead of in Philadelphia as previously discussed. That same day, Father emailed Mother,

> I'm not sure why you decided to block me on the phone. Your last text stated that you were not going to communicate with me until you have answers from the judge. We agreed to maintain a constant facetime period with L.S.[…] Be advised, you cannot restrict time with L.S. based on waiting for clarification.

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[3] The letter states in pertinent part,

> Father's interpretation of the order is that he may take L.S. out of state (to North Carolina or Indiana) for one week at a time, beginning in January of 2021, and that we will meet halfway in order to exchange L.S. He doesn't plan to visit for the remainder of 2020. This is not my understanding of the order and as stated in the guidelines would be severely traumatic for L.S.

Appellant's App. Vol. 2 at 25.

Id. at 58. Unable to spend time with L.S. in person, Father made seven FaceTime calls to L.S. in November, six of which Mother answered.

[9] In December, Father was able to make one FaceTime call to L.S. on Christmas Eve, which lasted only one minute because Mother ended the call when she realized that Father had remarried. When Father texted her to ask why she had hung up, Mother replied, "[L.S.] doesn't want to sit still and FaceTime you and his new step mother lmfao night." *Id.* at 45. On December 26, Mother sent Father an email stating,

> When you come visit in January, you will have to do a 14 day quarantine or a 10 day quarantine and have 1 negative covid test before spending anytime with [L.S.], per the governor of NH. I believe you can quarantine in your home state, and then get a negative test upon arriving to NH, but please do your due diligence and research before attempting to come visit. I will not put my child in harm by exposing him to germs, especially with his weakened immune system.

Id. at 74. Father replied that he had "an iPhone backup" of Mother engaging in intimate acts with

> several guys across NH to NC.[…] Please don't lecture me on health practices. You continue to fail to provide me time with L.S. Your failing to provide facetime during Christmas is inexcusable on a day I was granted to have him[.] If you don't meet as we discussed in January and set a proposed date in March, then I am done reaching out to you.

Id. at 74-75.

[10] On December 27, Mother responded, "My lawyer seemed to think that was a threat. All communication is done until further notice." *Id.* at 75. Father replied,

> You don't get to decide to withhold an actual court order. Neither does your lawyer.[…] You have refused to provide adequate communication up to this point. Your refusing to do it entirely changes nothing in effect. I will continue to call to FaceTime L.S. at 7 p.m. everyday of the week despite your unwillingness to allow contact.

Id.

[11] On January 8, 2021, Mother registered the trial court's October 2020 order in a New Hampshire court and filed a petition to change that order, requesting that Father be limited to "only short daytime parenting time only in New Hampshire." Appellant's App. Vol. 2 at 59. The New Hampshire court informed the trial court of Mother's actions, and the two courts communicated regarding jurisdictional issues. In March 2021, the trial court held a hearing and issued an order concluding that Indiana was not an improper forum and that the court would maintain jurisdiction over the case.

[12] Meanwhile, on February 1, 2021, Father filed a petition to modify custody, which requested primary physical custody of L.S., and a petition for a rule to show cause, which alleged that Mother had "failed, refused, and neglected to allow" Father to exercise his court-ordered parenting time. *Id.* at 32. On July 15, 2021, the trial court held a hearing on the petitions, at which both parties were represented by counsel. As of that date, Father had made 91 unanswered

FaceTime calls since December 24, 2020. Mother admitted that she did not give Father her address until June 5, 2021.

[13] On September 16, 2021, the trial court issued an order with sua sponte findings and conclusions that reads in relevant part as follows:

> 1. Mother has knowingly and willfully violated this Court's Order of October 9, 2021, […] in that she has thwarted Father's efforts to arrange the Court ordered parenting time by refusing to commit to periods of parenting time, blocking Father's phone number so that contact could not be made and/or refusing to communicate with Father.
>
> 2. Since the entry of the Court's Order dated October 9, 2021 [sic], the following changes in circumstances have occurred:
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> > a. Mother has changed her residence and returned to live in her [parents'] home.
> >
> > b. Father has completed his deployment in North Carolina and, at the time of the hearing in this cause, was preparing to return to his home in Madison, Indiana, where L.S. was born and lived with the parties until Father was deployed to Fort Bragg with the Indiana National Guard.
> >
> > c. Father's return to Madison places him in close proximity to a support network of family, extended family and friends.
> >
> > d. Father has married.
> >
> > e. Mother has refused to allow Father access and information to L.S. and has shown no willingness to co-parent L.S. in the fashion anticipated by an award of joint legal custody.

3. Continuing the award of joint legal custody is not in L.S.'s best interest[.]

4. Since the entry of the Court's Order of October 9, 2020, Father has attempted by varied means to communicate effectively with Mother and, in so doing, he has shown a continuing commitment to L.S.

5. Father has effectively co-parented two children by a previous marriage and has shown a commitment to effectively co-parenting L.S.

6. It is in L.S.'s best interest that legal custody be modified and that Father be awarded sole legal custody of L.S.

7. As set forth in the Indiana Parenting Time Guidelines, a child's basic needs include, among other things, the following:

> a. To develop and maintain an independent relationship with each parent and to have care and guidance from each parent.
>
> b. To be free from conflict between the parents.
>
> c. To enjoy regular and consistent time with each parent.

8. As primary physical custodian, Mother has failed to meet the above basic needs with regard to L.S. in that she has been unwilling or unable to communicate and cooperate with Father in order to allow him to develop a relationship with L.S. and she has not allowed L.S. to have regular and consistent time with his father.

9. Based on the evidence presented, the Court does not believe Mother is presently capable of meeting those specific basic needs set forth in paragraph seven (7) above.

> 10. It is in L.S.'s best interest that primary physical custody be modified and that Father have primary physical custody of L.S. subject to Mother's right to reasonable parenting time.
>
> ….
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> 16. Given L.S.'s age, modification of physical custody shall be implemented gradually over time and an implementation plan shall be set forth in a subsequent order of the Court after receipt of proposed plans from the parties.
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> ….
>
> IT IS THEREFORE ORDERED that Father shall have sole legal and primary physical custody of L.S. ….
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> ….
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> IT IS FURTHER ORDERED that no disposition shall be entered upon the finding of contempt as the modifications of custody and parenting time contained herein obviate the need for further coercive action by the Court.

Appealed Order at 1-4. Mother now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion in granting Father's petition to modify custody.

[14] Mother asserts that the trial court erred in granting Father's petition to modify custody. "We review custody modifications for an abuse of discretion with a

preference for granting latitude and deference to our trial judges in family law matters." *Hecht v. Hecht*, 142 N.E.3d 1022, 1028 (Ind. Ct. App. 2020) (citation and quotation marks omitted).

> This is because it is the trial court that observes the parties' conduct and demeanor and hears their testimony firsthand. We will not reweigh the evidence or judge the credibility of the witnesses. Rather, we will reverse the trial court's custody determination only if the decision is clearly against the logic and effect of the facts and circumstances or the reasonable inferences drawn therefrom. 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. It is not impossible to reverse a trial court's decision regarding child custody on appeal, but given our deferential standard of review, it is relatively rare.

Id. at 1029 (citations, quotation marks, and brackets omitted).

[15] When a trial court enters findings of fact and conclusions thereon sua sponte, those findings control only with respect to the issues they cover, and the general judgment standard applies to issues on which no findings were entered. *Madden v. Phelps*, 152 N.E.3d 602, 611 (Ind. Ct. App. 2020). "Where the trial court entered findings, we consider whether the findings are supported by the evidence and whether the findings support the judgment." *Id*. We will disregard a finding only if it is clearly erroneous, meaning that no facts or inferences in the record support it. *Id*. "Matters falling under the general judgment standard are reviewed without reweighing evidence or considering witness credibility and may be affirmed upon any theory consistent with the evidence." *Id*.

[16] Indiana Code Section 31-14-13-6 provides in pertinent part that after a trial court issues a child custody order in a paternity proceeding, the court may not modify the order unless modification is in the child's best interests and there is a substantial change in one or more of the factors that the court may consider in Indiana Code Section 31-14-13-2. Those factors, which are not exclusive, include the child's age and sex, the parents' wishes, the child's wishes (which are entitled to more consideration if the child is at least fourteen years of age), the interaction and interrelationship of the child with the child's parents, siblings, and any other person who may significantly affect the child's best interests, the child's adjustment to home, school, and community, and the mental and physical health of all individuals involved. Ind. Code § 31-14-13-2.

[17] Mother first contends that the trial court's custody determination is improperly based on the allegedly false premise that she violated its October 2020 order. Essentially, Mother claims that because Father was unable to exercise the phased-in parenting time schedule for October through December 2020, she could unilaterally impose that schedule starting in January 2021. Mother is sorely mistaken. Only the trial court had the legal authority to modify its order, and Mother failed to take the proper steps to effect such a modification.[4] *See D.G. v. W.M.*, 118 N.E.3d 26, 31 (Ind. Ct. App. 2019) (noting that "[e]ven an erroneous order must still be obeyed" and that "disobedience of the order is contempt"), *trans. denied*; *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014)

[4] Mother's suggestion that the order is ambiguous is not well taken.

(noting that "a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented").

[18] Mother also asserts that findings 1, 2(e), 4, 8, and 9 are not supported by the evidence. With respect to finding 1, we note that Mother does *not* challenge the trial court's finding that she "thwarted Father's efforts to arrange the Court ordered parenting time by refusing to commit to periods of parenting time[,]" which is perhaps the most negative finding of all. Appealed Order at 1. She admits that she blocked Father's phone number, but claims that she did so "temporarily" because Father "sent her harassing texts." Appellant's Br. at 32. We observe that Mother could have either ignored those texts or reported them to law enforcement if she deemed them sufficiently abusive. Mother also points to the numerous texts and emails in the record that establish that she did in fact communicate with Father, but she disregards the ninety-one FaceTime calls that went unanswered between December 2020 and July 2021 and the one-minute FaceTime call that she terminated abruptly on Christmas Eve.

[19] Regarding finding 2(e), although Mother did share some information about L.S. with Father shortly after the trial court issued the October 2020 order, she refused to give him their address until shortly before the July 2021 hearing and repeatedly thwarted Father's efforts to coordinate in-person parenting time and FaceTime calls. As for finding 4, Mother focuses on Father's December 26 email regarding his possession of the unflattering "iPhone backup"; although we do not condone the crudeness of the email, we note that it illustrates

Mother's double standard regarding her COVID-related concerns that she used to justify her restriction of Father's parenting time. The foregoing observations, as well as the facts set forth above, establish that findings 8 and 9 are amply supported by the evidence.

[20] Finally, Mother argues that findings 6 and 10 regarding L.S.'s best interests are not supported by the evidence, lamenting that "L.S. has not been in the presence of [his] Father for approximately half of his life." Appellant's Br. at 37.[5] This argument is primarily based on her erroneous assumption that she did not violate the trial court's October 2020 order by unilaterally limiting Father's parenting time and repeatedly thwarting his attempts to contact L.S. via FaceTime, which created the very condition about which she now complains. Mother has demonstrated that she is unwilling to co-parent L.S. in a manner consistent with an award of joint legal and primary physical custody, and we cannot conclude that the trial court clearly erred in finding that modifying custody is in L.S.'s best interests. In sum, Mother has failed to establish that the trial court abused its discretion in granting Father's petition to modify custody.

Section 2 – The trial court did not use custody modification as a substitute for contempt.

[21] In the alternative, Mother argues that the trial court improperly used custody modification as a substitute for contempt, citing *In re Paternity of B.Y.*, 159

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[5] Mother also expresses concern about L.S.'s health issues, but at the hearing she admitted that Father "is able to properly care for him in that regard[.]" Tr. Vol. 2 at 156.

N.E.3d 575 (Ind. 2020). In that case, the trial court in a paternity and custody proceeding found the mother of a breastfeeding child (B.Y.) in contempt of a court order not to relocate B.Y. from Indiana, and awarded sole legal and physical custody to B.Y.'s father, based on the mother's relocation with B.Y. to Florida so that she could keep her job as a flight attendant. The mother appealed, arguing that the trial court "erred by conflating her contempt of court with the best interest of [the child] in making its custody determination." *Id.* at 579.

[22] Our supreme court agreed:

> While we do think Mother was punished here by losing legal and physical custody of her dependent infant, it is more concerning that her alleged contempt appeared to be the catalyst for the trial court's order granting Father sole legal and physical custody. When it comes to the best interest of the child, we cannot accept this result. Not only was Mother causing no harm to [the child], she was also breastfeeding the child. Her act of returning to Florida with B.Y. was born out of the reality that she would lose her job as a flight attendant—her means of supporting the child—if she did not do so. Additionally, the court-appointed guardian ad litem in this case had no opportunity for involvement before the court entered its findings. In sum, Mother's alleged contempt of the [trial] court's order was not so severe as to remove B.Y. from her care.

Id. The *B.Y.* court reversed the custody ruling and remanded, urging "the trial court to decouple its finding of contempt from the best interests of the child and determine whether a modification of custody is warranted with these principles in mind." *Id.*

[23] In this case, although the trial court found Mother in contempt, it did not conflate her multiple violations of its October 2020 order with L.S.'s best interests in making its custody determination. Here, unlike in *B.Y.*, Mother did not violate the trial court's order out of economic necessity or any other exigency, and she caused harm to L.S. by depriving him of an opportunity to develop a meaningful relationship with Father, which was contrary to L.S.'s best interests. *See Johnson v. Nation*, 615 N.E.2d 141, 146 (Ind. Ct. App. 1993) ("Fostering a child's relationship with the noncustodial parent is an important factor bearing on the child's best interest and, ideally, a child should have a well founded relationship with each parent."). As our supreme court acknowledged in *B.Y.*, it is possible for a parent's conduct to be both contemptuous and sufficient to warrant a change of custody, and Mother's conduct met that threshold in this case. Consequently, we affirm the trial court's order granting Father's petition to modify custody.

[24] Affirmed.

Bradford, C.J., concurs.

Tavitas, J., dissents with opinion.

IN THE
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In the Matter of the Paternity of L.S.:

Judith Anne Marie Beck,

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v.

Joel Elliott Storm,

Appellee-Petitioner.

Court of Appeals Case No. 21A-JP-2180

Tavitas, Judge, dissenting.

[25] I believe that the trial court improperly conflated the issue of the modification of custody with that of Mother's contempt. Therefore, I respectfully dissent.

[26] As discussed by the majority, in the case of *In re Paternity of B.Y.*, 159 N.E.3d 575 (Ind. 2020), *reh'g denied*, the mother was held in contempt for violating a previous custody order. On appeal, the mother argued that she should not have

been held in contempt and that the trial court abused its discretion by awarding sole physical and legal custody to the father. *Id*. at 578.

[27] On transfer,[6] our Supreme Court wrote: "We do not see this case as two separate issues. Rather, the issue in this case is that the trial court appears to have conflated Mother's contempt of court with B.Y.'s best interests when it established legal and physical custody." *Id*. The Court noted that:

> [T]he purpose of civil contempt is to coerce action by the contemnor for the benefit of the aggrieved party; civil contempt is not meant to punish the contemnor. And, generally speaking, *only the most egregious violations of court orders that put the child's welfare at stake should play a critical role in a custody order*.

Id. at 579 (emphasis added) (citations and internal quotation marks omitted). Applying this to the facts of the case before it, the Court concluded:

> While we do think Mother was punished here by losing legal and physical custody of her dependent infant, *it is more concerning that her alleged contempt appeared to be the catalyst for the trial court's order granting Father sole legal and physical custody*. When it comes to the best interest of the child, we cannot accept this result. In sum, Mother's alleged contempt of the [trial] court's order was not so severe as to remove B.Y. from her care.

Id. (emphasis added). The Court, therefore, reversed the judgment of the trial court and remanded with instructions that the trial court "decouple" its finding

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[6] A panel of this Court affirmed in an unpublished memorandum decision. *In re Paternity of B.Y.*, No. 19A-JP-1645 (Ind. Ct. App. Mar. 30, 2020), *trans. granted*.

of contempt from the best interest determination regarding a change of custody. *Id*.

[28] In the present case, I believe that the trial court did precisely the same thing as did the trial court in *B.Y.*, i.e., it modified custody based on Mother's contempt. Although I agree that Mother's behavior was more egregious than that of the mother in *B.Y.,* I am unable to conclude that her behavior was, "so severe as to remove [the child] from her care." *B.Y.*, 159 N.E.3d at 579. I also believe that the trial court's findings regarding the best interest of the child are lacking. The trial court's order gives little indication of how the changed circumstances, other than Mother's contemptuous behavior, supported a conclusion that modification of custody was in L.S.'s best interests.

[29] There is also no indication that L.S.'s welfare was endangered in Mother's care. Indeed, any suggestion to the contrary is belied by the trial court's own order implementing a gradual change in custody, which indicates that the trial court did not believe that L.S. was in any danger while in Mother's custody.[7] Instead, when identifying the changes that had occurred since its prior custody order, the trial court here specifically listed Mother's refusal to cooperate with Father. Appellant's App. Vol. II p. 126. Other than Mother's refusal to abide by the October 2020 order and cooperate with Father, the trial court did not

[7] I recognize that denying a child of time with either one of his or her parents is detrimental to the child's welfare in a broad sense. But the child in *B.Y.* too had been denied time with his father, yet the Court did not consider this as endangering the child's welfare. 159 N.E.3d at 578-79.

explain why it is in the best interests of L.S., a child who was not yet three years old, to be removed from the parent to whom the trial court initially awarded primary physical custody and with whom L.S. has lived for most of his young life.

[30] This is not to suggest that Mother should benefit from her contemptuous behavior. I simply believe that the trial court should have attempted less drastic coercive measures before modifying custody based almost solely on Mother's recalcitrance. Indeed, I believe that trial courts, when faced with a recalcitrant parent, should, under most circumstances, first attempt less-drastic coercive measures before ordering a change of custody. Trial courts have many less-drastic options at their disposal when faced with a parent who is interfering with the parenting time of another parent. These options include, but are not limited to:

(1) Ordering the recalcitrant parent to pay a fine. *See* I.C. 34-47-3-6(c)(1) (authorizing trial courts to punish indirect contempt with a fine).

(2) Ordering the recalcitrant parent to pay the legal fees of the other parent caused by the former's non-compliance with the court's order. *See Reynolds v. Reynolds*, 64 N.E.3d 829, 835 (Ind. 2016) (noting that "'trial court[s have] inherent authority to award attorney's fees for civil contempt.'") (quoting *Crowl v. Berryhill*, 678 N.E.2d 828, 831 (Ind. Ct. App. 1997)).

(3) Ordering make-up time to the parent who has been denied parenting time. *See In re Paternity of A.S.*, 948 N.E.2d 380, 389 (Ind. Ct. App. 2011) (affirming trial court's order awarding make-up parenting time to father after mother had impermissibly withheld parenting time from father).

(4) Appointing a parenting-time coordinator. *See In re Paternity of C.H.*, 936 N.E.2d 1270, 1274 (Ind. Ct. App. 2010) (noting that trial courts have the authority to appoint a parenting time coordinator to ensure compliance with parenting time requirements).

(5) Ordering the recalcitrant parent to spend time in jail. *See* I.C. 34-47-3-6(c)(2) (authorizing trial courts to punish indirect contempt with jail time).

(6) As a last resort, and only in cases where the child's welfare is at stake, modifying custody in favor of the non-recalcitrant parent with specific findings supporting such a modification. *See B.Y.*, 159 N.E.3d at 579 ("[O]nly the most egregious violations of court orders that put the child's welfare at stake should play a critical role in a custody order.").

[31] All of this leads me to conclude that the trial court conflated the issue of contempt with the issue of whether a change in custody was in the best interest of L.S. In *B.Y.*, the mother's contempt "appeared to be the catalyst for the trial court's order granting Father sole legal and physical custody." 159 N.E.3d at 579. Here too, Mother's contemptuous behavior was, at the very least, the catalyst, if not the sole reason, for the trial court's modification of custody. Per the holding in *B.Y.*, this was improper.

[32] Had Mother continued to deny parenting time after usage of the other alternatives to modify custody, then I could agree with the majority. I would, therefore, reverse the trial court's order awarding sole physical and legal custody of L.S. to Father, thereby returning the parties to the *status quo ante* under the October 2020 order, and remand with instructions that the trial court "decouple its finding of contempt from the best interests of the child and

determine whether a modification of custody is warranted with these principles in mind." *Id*.

[33] Accordingly, I dissent.