MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Kelsey McManus,
Appellant-Petitioner,

v.

Ryan Montgomery,
Appellee-Respondent

August 18, 2021

Court of Appeals Case No. 21A-DC-337

Appeal from the Vanderburgh Superior Court

The Honorable Leslie C. Shively, Judge

Trial Court Cause No. 82D01-1801-DC-000043

May, Judge.

[1] Kelsey McManus ("Mother") appeals the trial court's order addressing, among other things, Mother's multiple contempt petitions against Ryan Montgomery ("Father") and Father's petition to modify custody of the couple's child, C.M. ("Child"). Mother presents three issues for our review, which we consolidate and restate as:

> 1. Whether the trial court abused its discretion when it determined Father was not in contempt for failing to pay the $10,000 settlement payment ordered as part of the original dissolution order; and
>
> 2. Whether the trial court abused its discretion when it modified Child's physical custody from Mother to Father.

We affirm and remand.

Facts and Procedural History

[2] Child was born to Mother and Father on September 2, 2014. Mother and Father were married on October 10, 2015. Father filed a petition for dissolution of marriage on January 11, 2018. The parties agreed on the terms of dissolution, and the trial court entered its order dissolving the marriage and adopting the parties' agreement on September 28, 2018. The trial court's dissolution order granted Mother primary physical custody of Child with Father entitled to parenting time as provided by the Indiana Parenting Time Guidelines. The parties agreed to share legal custody of Child and to split medical and daycare costs such that Father paid 68% and Mother paid 32% of

those costs. The trial court ordered Father to pay $51.00 per week in child support. In addition, as is relevant to our review, the parties agreed:

> In exchange for [Mother's] release of any and all claim to additional property of [Father], including [Father's] race car, [Father] shall pay [Mother] the sum of Ten Thousand Dollars ($10,000.00), which shall bear the statutory interest rate of 8% beginning when the Court approves this agreement. [Father] shall pay said amount as follows: One Hundred Dollars ($100.00) per month of the settlement payment shall be paid directly to [Mother's] attorney beginning on or before September 1, 2018, and paid the first of each month until the amount of Three Thousand Dollars ($3,000) has been paid after which the payments shall be made directly to [Mother]. [Father] shall apply any extra income he should receive, if any, towards payment of the remaining settlement payment, including but not limited to bonus checks and tax refunds until such settlement sum is fully paid. Payments shall be made via personal check placed in the mail by the FIRST of each month to [Mother].

(App. Vol. II at 42) (emphasis in original). The parties also agreed to "work together" to schedule a time for Mother to retrieve certain personal items from the martial residence. (*Id.*) The trial court also ordered Father to pay a portion of Mother's attorney fees.

[3] On December 20, 2018, Mother filed a "Complaint in Proceedings Supplemental to Execution" alleging Father had not complied with the terms of the dissolution order, specifically, the payment of the $10,000 settlement amount and attorney fees. (*Id.* at 53.) On March 22, 2019, the parties entered an agreed entry, wherein Father acknowledged he had not complied with the terms of the dissolution order and was in contempt of court. He agreed to

apply his 2018 tax refund toward the equalization amount and $20.00 per week toward the attorney fees arrearage.

[4] On July 15, 2019, Mother filed an "Amended Complaint in Proceedings Supplemental to Execution" alleging Father had not paid Mother's attorney fees as agreed in the March 22, 2019, order. (*Id*. at 73.) On August 20, 2019, the parties entered into an agreement that required Father to pay $50.00 per week to Mother's attorney through an income withholding order. On September 18, 2019, Mother filed a petition to modify custody arguing that Father's parenting time should be modified to comport with the Indiana Parenting Time Guidelines with distance as a major factor because Father had relocated to Lexington, Kentucky, without filing a notice of relocation and "Father does not routinely exercise his full parenting time schedule and reduces his parenting time with [Child]. The Father also communicates with Mother in an offensive and uncivil manner." (*Id*. at 94.) In the same petition, Mother alleged Father had committed contempt because:

> a. The Father is behind on his payment for the [Child's] daycare expenses;
>
> b. The Father does not reasonably agree and pay his portion for [Child's] extracurricular activities;
>
> c. The Father has failed to pay the $10,000 settlement payment to the Mother and her prior counsel. To date, the Father has not made a single payment towards this;

> d. The Father has failed to pay his portion of the marital debts, as previously ordered;
>
> e. The Father has failed to return the Mother's personal property; and
>
> f. The Father is not complying with his obligation to maintain life insurance for [Child].

(*Id*.) The trial court held a hearing on Mother's motion to modify custody, but the record is unclear regarding what was discussed and the trial court did not issue an order on the matter.

[5] On February 21, 2020, Mother filed a second petition to modify custody, alleging:

> a. [Father] continually harasses [Mother] via text message and phone calls, so much so that Mother obtained a Protective Order against him on February 2, 2020.
>
> b. [Father] has advised Mother that he wishes she would die. This was due to Mother allowing the grandmother to watch their son.
>
> c. [Father] becomes aggressive toward [M]other during drop offs of their son.
>
> d. [Child] recently returned to Mother's with numerous bruises on his arms and shoulders and indicated to the Mother that said bruising occurred by the Father.

(*Id*. at 97-8.) On February 27, 2020, Father filed a petition to modify visitation, asking the trial court to modify the existing visitation order due to a substantial and continuing change in circumstances and because doing so would be in Child's best interests. The same day, Father filed an information for contempt, alleging:

> 1. That the Mother does not effectively communicate with the Father with regards to parenting time.
>
> 2. That the Mother will use inappropriate language in front of the [Child] during exchanges.
>
> 3. That when the Father tries to communicate with the Mother regarding talking to [Child] over the phone, the Mother will ignore the Father's text messages.
>
> 4. That the Mother has [Child] attending therapy without Father's consent or notifying him of when the appointments are.
>
> 5. That the Mother is allowing her boyfriend to punish [Child] in the form of spanking, and the Father has concerns with this action.

(*Id*. at 102.)

[6] On August 10, 2020, Mother filed a motion for rule to show cause and request for emergency telephonic hearing, asserting:

> 2. That pursuant to the terms of [the Dissolution Decree], the Father is entitled to midweek parenting time every Tuesday

> overnight until Wednesday at 8:00AM, as well as an overnight on alternating Fridays until 5:00PM on Sunday.
>
> 3. That Father did not return [Child] by 8:00AM on Wednesday, August 5th, 2020. That Father is refusing to return [Child] for the Mother's overnight parenting time beginning Friday, August 7th, 2020.
>
> 4. That the Father's actions have been done in willful and intentional disregard for the prior Orders of the Court.
>
> 5. That the Father is currently *pro se* and will not respond to inquiries from the Mother as to when she will be receiving [Child].
>
> 6. That the Father lives in Lexington, Kentucky, and Mother has fears that the Father intends to abscond from the jurisdiction of the State of Indiana with [Child] but for the immediate intervention of the trial court.
>
> 7. That [Child] is a resident of Posey County, and should have begun his fall semester at Marrs Elementary School today, but instead, was not present at the school.

(*Id*. at 104-5.) The trial court held an emergency telephonic hearing on August 12, 2020. The trial court issued an order the same day, but that order is not in the record before us. However, the Chronological Case Summary states, "Court orders Father to return [Child] to Mother by 2:00 p.m. today (8/12/2020). Mother's fiance [sic] is ordered to vacate the residence immediately." (*Id*. at 17.)

[7] On September 1, 2020, Father filed a petition to modify custody and information for indirect contempt, alleging:

> 3. On Friday, July 31, 2020, the Father picked up [Child] from Mother for his weekend parenting time and observed redness and bruising on [Child's] left cheek that appeared to be a handprint. The Father reasonably believes that the Mother's live-in fiance, [sic] Kyle Mosley, struck [Child] in the face when [Child] was left in his care by the Mother. The Mother denied any knowledge of [Child's] injury, despite personally delivering [Child] to the [Father] for his weekend parenting time.[1]
>
> 4. The Mother has neglected the basic needs of [Child] by failing to protect him from harm and injury inflicted by other persons who have been entrusted with the care of [Child] by the Mother and who the Mother has chosen to bring into [Child's] life.
>
> 5. On August 11, 2020, the said Kyle Mosley was charged in the Posey Circuit Court with the criminal offense of Battery Resulting in Bodily Injury to a Person Less than Fourteen (14) years of age, a Level 5 felony, in Cause No. 65C01-2008-F5-000325.[2] [Child] is the victim of the offense charged in that case.
>
> 6. On September 16, 2019, the said Kyle Mosley was charged in the Vanderburgh Superior Court with the criminal offense of

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[1] Based on this incident, the Department of Child Services ("DCS") filed a petition to adjudicate Child as a Child in Need of Services ("CHINS"). Child was adjudicated a CHINS, but it is not clear from the record when that occurred. It is also not clear what services Mother and Mosley were ordered to complete.

[2] As part of the proceedings, the trial court entered a no contact order between Mosley and Child. Mosley's bond in this case was subsequently revoked for committing Class A Misdemeanor invasion of privacy for violating that no contact order on October 20, 2020, when he was discovered at Mother's aunt's house while Child was present.

Battery Resulting in Bodily Injury, a Class A Misdemeanor, in Cause No. 82D01-1909-CM-006315.[3] [Father] is the victim of the offense charged in that cause, which remains pending before the Court.

7. [Mother] has failed to provide a safe, clean, stable home environment for [Child]. The Mother has relocated her place of residence numerous times within a relatively short period of time. She has resided with [Child] in apartments, trailers and home which are not sanitary or otherwise appropriate for [Child]. [Child] has been required to share a bedroom with the Mother's fiance's [sic] three (3) daughters and the Mother has most recently resided in a home where there is no bedroom or bed at all for [Child], resulting in him sleeping on a chair. The Mother has not provided the Father with information with respect to all of her relocations such that the Father does not always know where [Child] is residing.

8. The Mother consistently makes unilateral decisions affecting [Child] without discussion or consultation with the Father.

9. The Mother failed to include the Father's information on [Child's] school enrollment forms, emergency notification forms, pick up lists and similar documents for use by [Child's] school.

10. The Mother has failed to provide the Father with notification and information regarding [Child's] healthcare and appointments, has failed and refused to discuss healthcare

[3] A trial court subsequently found Mosley guilty of this offense and sentenced him to ninety days in jail, which the court suspended on the condition that Mosley pay Father's medical bills related to the incident and certain other fines and costs.

> decisions with the Father, and has arranged for counseling for [Child] without the Father's knowledge, input or involvement.
>
> 11. The Mother has exposed [Child] to potentially dangerous situations in her home by keeping an alligator as a pet in the bathtub, until forced to remove the alligator from the home because of the landlord's objections.

(*Id*. at 107-9.)

[8] The trial court held hearings on all pending matters on November 19, 2020, December 8, 2020, January 7, 2021, and January 29, 2021. On January 29, 2021, the trial court entered its order, which stated in relevant part:

> 1. The Mother's Petition for an Order of Protection against the Father, originally filed under Cause No.82D01-2002-PO-000478, is hereby dismissed.
>
> 2. The Petition for an Order of Protection filed by the Father on behalf of [Child] against Kyle Mosley, originally filed in the Posey Superior Court under Cause No.65D01-2008-PO-00020, is hereby granted and the said Kyle Mosley is restrained and enjoined from having any direct or indirect contact of any kind with [Child] for a period of two (2) years from this date.
>
> 3. The Court finds that the Father is not in contempt of Court. [Order regarding an issue not relevant to our review.]
>
> 4. The items of personal property belonging to the Mother which remain at the former marital residence shall be returned to and obtained by the Mother within thirty (30) days of this date. The Father shall make a good faith effort to locate all such items which have been identified by Mother. The parties shall make

> mutually agreeable arrangements for the transfer of possession of said items to the Mother.
>
> 5. The Court finds that there has been a substantial change of circumstances such that the present Order for custody of [Child] is no longer in the best interests of [Child]. The Court hereby Orders that the Father shall have primary physical custody of [Child], commencing Sunday, February 7, 2021 at 5:00 p.m. CST. The parties shall continue to share joint legal custody of [Child].

(*Id*. at 112-3.) The trial court's order also outlined the arrangements and schedule for Mother's parenting time, ordered the parties to use "Our Family Wizard for the purpose of scheduling and communicating with one another regarding matters pertaining to [Child,]" (*id*. at 114), and ordered the parties to complete a cooperative parenting class. The trial court relieved Father of his child support obligation and ordered, "[e]ach party shall provide for the needs of [Child] during his or her parenting time with [Child]." (*Id*. at 115.)

Discussion and Decision

[9] We first note Father did not file an appellee's brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id*. Prima facie error is "error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006).

[10] The trial court sua sponte made findings of fact and conclusions of law. In this situation,

> the 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. Heil's Haven Condo. Homeowners Ass'n, 967 N.E.2d 6, 14 (Ind. Ct. App. 2012).

1. Contempt

[11] Contempt of court "involves disobedience of a court which undermines the court's authority, justice, and dignity." *Srivastava v. Indianapolis Hebrew Congregation, Inc.*, 779 N.E.2d 52, 60 (Ind. Ct. App. 2002), *trans. denied*. "Willful disobedience of any lawfully entered court order of which the offender had notice is indirect contempt." *Francies v. Francies*, 759 N.E.2d 1106, 1118 (Ind.

Ct. App. 2001), *reh'g denied*, *trans. denied*. Indirect contempt proceedings are "for the benefit of the party who has been injured or damaged by the failure of another to conform to a court order issued for the private benefit of the aggrieved party." *Cowart v. White*, 711 N.E.2d 523, 530 (Ind. 1999), *reh'g granted on other grounds*, 716 N.E.2d 401 (Ind. 1999).

[12] "Whether a person is in contempt of a court order is a matter left to the trial court's discretion." *Mitchell v. Mitchell*, 785 N.E.2d 1194, 1198 (Ind. Ct. App. 2003). We will reverse only where an abuse of discretion has been shown. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. When we review a ruling on a petition for contempt, we neither reweigh the evidence nor judge the credibility of witnesses. *Id*. Mother argues the trial court abused its discretion when it did not find Father in contempt for failing to pay the $10,000 settlement payment ordered in the Dissolution Decree.

[13] In her brief, Mother contends the "evidence is uncontroverted" that Father has not paid any money to her as part of the settlement payment. (Br. of Appellant at 13.) During the hearing, Father admitted he did not have the money to pay the settlement at the time the dissolution decree was entered, and thus he did not pay. However, Father provided a copy of his most recent paystub which indicated his wages had been garnished $100.00 per paycheck, for a total of $1,900.00 paid "year to date as of October 31[.]" (Tr. Vol. II at 38.) Father testified this money was, to his knowledge, sent to Mother's attorney.

[14] Mother's contention that she has never received money from Father as part of the settlement is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Mitchell*, 785 N.E.2d at 1198 (appellate court cannot reweigh evidence or judge the credibility of witnesses). However, considering the number of times the issue of Father's financial responsibilities under the dissolution decree has been before the trial court, we feel it is necessary for the trial court to clarify the destination of these funds. As noted supra, the trial court ordered Father to send money to Mother's attorney for two purposes: (1) to pay Mother "the sum of Ten Thousand Dollars ($10,000.00), which shall bear the statutory interest rate beginning when the Court approves this agreement" and (2) "[Mother's] attorney fees incurred in the litigation of this Dissolution of Marriage which resulted in this Agreed Decree of Dissolution of Marriage." (App. Vol. II at 42, 44.) There is nothing in the record indicating the amount Father has paid toward either debt, nor the amount of attorney fees due under the trial court's order. Thus, while we conclude the trial court did not abuse its discretion when it denied Mother's request to find Father in contempt for failure to pay the settlement amount, we remand for an accounting of the amount due to Mother's attorney and Father's payment towards both the settlement agreement and Mother's attorney fees.

2. Modification of Custody

[15] 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). A petitioner seeking modification has the burden to demonstrate the existing custody arrangement needs to be altered. *Id*. As we undertake our review, we neither reweigh the evidence nor assess witness credibility. *Id*. Rather, we consider only the evidence and inferences most favorable to the trial court's judgment. *Id*.

[16] To modify a child custody order, the court must find modification is in the best interest of the child and there is "a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter." Ind. Code § 31-17-2-21. The factors to be considered by the trial court are:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or 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 parent or parents;
> >
> > (B) the child's sibling; and
> >
> > (C) any other person who may significantly affect the child's best interests.
>
> (5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

Ind. Code § 31-17-2-8. Mother argues the trial court abused its discretion when it modified physical custody of Child to Father because modification was not in Child's best interest.

[17] Mother points to the testimony of the DCS family case manager, who answered in the affirmative when asked if it "would be traumatic if [Child] was moved three hours away[.]" (Tr. Vol. II at 93.) When asked why she answered in the affirmative, the family case manager testified, "[b[ecause he's been primarily raised by his Mother and his whole life has been here. So he would be starting over at square one not knowing anyone. And he struggles with anxiety and hyperactivity and that would be detrimental to his well being." (*Id*. at 93-4.) Mother also notes that she and Father are unable to "act civilly towards one another," making modification of custody not in Child's best interests. (Br. of Appellant at 12.) Mother also contends that modification is not in Child's best interest because the "parties were participating in both individual as well as

family counseling, and the family case manager wanted to pursue the ultimate goal in a CHINS case, reunification of the family unit." (*Id*.)

[18] However, Mother's argument ignores the reason for the CHINS adjudication in the first place – a substantiated allegation that Mosley physically abused Child. Charges of Level 5 felony battery with bodily injury with Child as the victim were pending against Mosley at the time of the trial court's order, and Mosley had already been convicted of violating the no contact order put in place to protect Child as part of the Level 5 felony proceedings. Mother is pregnant with Mosley's child and did not indicate she intends to end her relationship with Mosley despite the charges against him involving Child and the no contact order in place to protect Child from Mosley. Father testified Child has his own room at Father's house and Father had researched school and daycare possibilities near his home. Regarding the parties' inability to communicate, the trial court ordered they only communicate through Our Family Wizard, which is designed to facilitate communication and is admissible as a record before the Court. Mother's argument is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *Julie C.,* 924 N.E.2d at 1256 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Therefore, we conclude the trial court did not abuse its discretion when it modified Child's primary physical custody to Father.[4] *See*

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[4] Mother also argues that the trial court impermissibly modified the parties' agreement regarding the retrieval of Mother's property from the marital residence. In the trial court's dissolution order, regarding personal property, the trial court stated: "Attached as Exhibit B is the list of items currently located in the marital

Bettencourt v. Ford, 822 N.E.2d 989, 1000 (Ind. Ct. App. 2005) (affirming modification of custody based on child's best interests).

Conclusion

[19] The trial court did not abuse its discretion when it denied Mother's request to find Father in contempt for failing to pay the $10,000 settlement as ordered in the dissolution decree because Father presented evidence he had been paying monthly installments. However, because it is not clear which debt, the settlement amount or attorney fees, Father paid with those monthly installments, we remand for clarification of that issue as explained supra. Additionally, the trial court did not abuse its discretion when it modified primary physical custody to Father because modification was in Child's best interests. Accordingly, we affirm and remand.

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resident [sic] awarded to Mother. The parties shall work together to agree upon a date and time for Mother to retrieve such items as soon as possible." (App. Vol. II at 42.) The trial court's modification order states, regarding personal property:

> The items of personal property belonging to the Mother which remain at the former marital residence shall be returned to and obtained by the Mother within thirty (30) days of this date. The Father shall make a good faith effort to locate all such items which have been identified by Mother. The parties shall make mutually agreeable arrangements for the transfer of possession of said items to the Mother.

(*Id*. at 113.) Mother contends the language indicating Father should "make a good faith effort to locate such items" is "clearly an Order modifying the prior property division entered by the court." (Br. of Appellant at 15.) However, Mother does not cite appropriate authority to support her argument that the language indicated modifies the original personal property agreement in any way, and thus it is waived. *See Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003) (failure to present a cogent argument supported by relevant authority waives issue from appellate review).

[20] Affirmed and remanded.

Kirsch, J., and Vaidik, J., concur.