MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lisa Haynes Whorley,
Appellant,

v.

John F. Whorley, Jr.,
Appellee

July 19, 2022

Court of Appeals Case No. 21A-DR-2670

Appeal from the Hamilton Superior Court

The Honorable David K. Najjar, Special Judge

Trial Court Cause No. 29D05-1406-DR-5652

May, Judge.

[1] Lisa Haynes Whorley ("Mother") appeals the trial court's order granting John F. Whorley, Jr., ("Father") sole legal custody of H.W. and E.W. (collectively, "Children"). Mother challenges one of the trial court's findings and argues the trial court's findings do not support its conclusion that modification of legal custody of Children was in Children's best interests. We affirm.

Facts and Procedural History

[2] Mother and Father (collectively, "Parents") divorced in 2016. Children were born of the marriage. Pursuant to the trial court's order in Parents' dissolution matter, Parents were awarded joint legal custody of Children, though Father had ultimate decision-making authority if there was a conflict between Parents. Parents shared joint physical custody of Children.

[3] On August 23, 2019, Mother filed a "verified consolidated petition to modify custody, parenting time, request for expedited hearing and appointment of guardian ad litem[.]" (App. Vol. II at 62.) She alleged there was a substantial change in circumstances that would warrant modification because:

> 4. The parties' daughter, [E.W.,] has disclosed to Mother, and subsequent professionals, incidents that have occurred at Father's home during his parenting time. [E.W] threatened to harm herself if she were required to return to Father's house on two separate occasions.
>
> 5. After the [E.W.'s] second threat, Mother took [E.W.] to St. Vincent's Stress Center for evaluation. St. Vincent's referred this matter to the Marion County Department of Child Services.

> There is now an on-going investigation by the Department of Child Services. To the best of Mother's knowledge, no report has been issued by the Department of Child Services as to the time of this filing, nor has a CHINS [Child in Need of Services] action been filed.
>
> 6. Mother believes that on-going parenting time with Father would cause harm to the child's physical well-being and/or emotional development.

(*Id*. at 62-3.) Father's response to Mother's petition stated:

> (4) On August 21, 2019, Mother emailed Father concerning [E.W.]. Mother states that "[E.W.] needs a therapist. I believe it's urgent." Mother suggested two therapists to Father and indicated that she would like to schedule something within the week. Mother gave no indication to Father of the nature of her concerns.
>
> (5) Father notified Mother that he had been working on arranging family therapy centered on [E.W.], with Dr. Janine Miller ("Dr. Miller"), and that he in response to Mother's note had arranged an appointment for [E.W.] to meet with Dr. Miller the same day, August 21, 2019, at 3:30 p.m. Father further offered that if Mother wanted to consider other therapists for [E.W.], or to supplement Dr. Miller's treatment, then they could discuss this together at a later time.
>
> (6) Mother then wrote Father that she believed that [E.W.] "needs someone for herself personally, separate and apart from any family counselor" and that [E.W.] "needs to see someone starting immediately." Mother further notified Father that she objected to Dr. Miller, but did not provide a reason for the objection. Father responded to Mother's concern directly,

stating, "The emphasis of the therapy can be shaped to meeting [E.W.'s] needs. We can make changes later if needed."

(7) Father therefore recognized and addressed Mother's objection, but again informed Mother that his decision was for [E.W.] to meet with Dr. Miller on August 21, 2019, at 3:30 p.m. and that [E.W.'s] need to see a therapist that day was more important than her previously scheduled orthodontist appointment.

(8) Father took immediate action and arranged for [E.W] to meet with Dr. Miller on August 21, 2019. Despite Mother's message to Father that [E.W.] "needed to see someone immediately" Mother refused to and failed to take [E.W.] to the appointment with Dr. Miller that Father had immediately scheduled the same day. This action by Mother points to the possibility that Mother was pursing [sic] the creation of involvement of the Department of Child Services ("DCS") and embarrassment of Father rather that the wellbeing of [E.W.].

(9) Mother instead replaced Father's decision making authority with her own and took [E.W.] to the emergency environment of a hospital stress center, rather than the appointment Father scheduled with Dr. Miller. Father finds it ironic that Mother claims to be so concerned about [E.W.'s] wellbeing that she believed she needed to go to a hospital stress center but not concerned enough to take her to a private counseling appointment that same day with a well-respected psychologist.

(10) Mother has not apparently created a complaint with DCS against Father related to [E.W.].

(11) DCS investigated this matter and advised Father that they believe him to be a good father. Father believes that Mother's allegations will be unsubstantiated.

> (12) The timing of Mother's Petition is suspect, as the Court already held a hearing on June 7, 2019, just eleven (11) weeks ago, on Mother's prior petition to modify. The Court found no reason to modify the Court's Order, indicated that [Children] were doing well, and appeared to base its decision to deny Mother's petition to modify because of how well [Children] were doing. Mother now suddenly alleges that [Children] are doing poorly.

(*Id*. at 66-7.) Father also objected to the appointment of a guardian ad litem ("GAL").

[4] On September 11, 2019, Mother filed a renewed request for a GAL; Father filed his objection thereto the same day. On September 12, 2019, the trial court issued its order granting Mother's request for appointment of a GAL. On October 10, 2019, the trial court issued its order approving the appointment of Jessie Cobb-Dennard as the GAL. On July 1, 2020, Father filed his petition to modify custody, parenting time, and child support and argued, in relevant part:

> 15. Dr. Lawrence Lennon ("Dr. Lennon") conducted a psychological evaluation of [Parents]. In his psychological evaluation for Mother he stated "she has lived a life of lies, and more significantly, endangered the physical, emotional, and psychological well-being of her children."
>
> 16. Mother has a long and inconsistent history of alleging abuse that provides critically important context for her more recent behavior. When Dr. Lennon was asked about his evaluation for Mother during the final dissolution hearing, he said that Mother told him about being adopted and she "commented that there were some questions to whether or not she had been abused by her adoptive parents [. . .] those are things that stand out –

adoption, abuse, her perception of abuse by her parents." Mother has previously plainly and repeatedly stated that she suffered years of sexual abuse by her own adoptive father as a child.

17. Dr. Lennon further commented regarding Mother's *perception* of abuse, stating:

> "It hasn't been validated that she suffered abuse. There was nobody arrested. There was no investigation to my knowledge. A lot of times, and we have studies that show that false memories – false memories depending on the therapist and your own vulnerability, a therapist can sometimes plant seeds. [. . .] so I just don't know if she was abused as a child."

18. Despite clear evidence to the contrary, Mother continues to insist that the allegations against Father occurred and that she has the right to "tell others." The damage to Father and [Children] is considerable. Mother now appears to be projecting "false memories" on to [E.W.]. Father believes [E.W.] is especially susceptible to suggestion and the type of "seeds" Dr. Lennon references.

19. Father submitted to a polygraph examination on October 1, 2019, and the result was that Father was not deceptive when asked questions about inappropriate behavior with [E.W.]. The polygraph results also indicated that Father was not deceptive when giving answers that refuted other specific assertions made to DCS.

20. Despite having been presented with this evidence and DCS's determination, Mother still insists that Father displayed inappropriate behavior with [E.W.] and refuses to withdraw her emergency petition even though no emergency exists.

> Additionally, Mother refuses to stop "telling people" that Father has done something wrong, further perpetuating the malicious harm to Father and ultimately [Children].
>
> 21. False accusations toward a parent, along with the enlistment of DCS services should not be the tools for an angry parent to convince the Court to reconsider its ruling. Mother's prior Petition to Modify was denied. Mother has used this false allegation, with [E.W.] at the center, paired with DCS involvement to further convince the Court that she should now be awarded sole custody of [Children].

(*Id*. at 89-90.)

[5] On October 26, 2020, the GAL filed her report with the court. On October 27, 2020, Father filed a petition for rule to show cause why Mother should not be held in contempt, and argued, in relevant part:

> 2. Father has learned the Mother has taken [E.W.] to Legacy House, a center that provides free counseling and support services for children affected by violence, without his knowledge.
>
> 3. At no time did Mother advise Father that she was obtaining therapy for [E.W.] at another provider. Mother also did not advise Dr. Janine Miller, [E.W.]'s therapist since August 2020, and at the time of the Legacy House appointments, that [E.W.] was participating in alternate counseling. Mother's action was contrary to the Licensed Professional Clinical Counselor (LPCC) code and jeopardized the efficacy of [E.W.]'s therapy with Dr. Miller.
>
> 4. Father was only made aware of the Legacy House counseling when he received a copy of the GAL's file in mid-2020.

5. Although Mother met with the Legacy House counselor, she provided no information that would have facilitated Father being able to participate in this counseling or to know what has been addressed. Father was not informed of any Legacy House counseling. Father can only assume from Mother's therapist notes from session with Mother that were contained in the GAL's file that Mother has been using this counseling attempt to further her false narrative regarding Father generally and his relationship with [E.W.], in particular. Consistent with prior behavior with other therapists, Mother omitted critical facts in her communication with and made explicitly untrue statements to the Legacy House counselor who was preparing to counsel [E.W.]. Father had no opportunity to talk with the counselor or provide court testimony, deposition testimony, or other documents such as polygraph results to the Legacy House counselor. Because the Legacy House counselor was not provided with complete information and was explicitly misinformed regarding important facts related to Mother, Father and [E.W.], any counseling of [E.W.] was negatively biased toward Father.

6. Mother knowingly misinformed a third-party who she secretly set up to treat [E.W.].

7. The Court was previously made aware of Mother's prior actions of unilaterally making medical decisions for [E.W.] that were detrimental to [E.W.] and without Father's input. This pattern of behavior by Mother is consistent with:

> a. Mother's failure to fill out admission forms accurately and honestly at St. Vincent's hospital at the time of [E.W.]'s birth;

b. Mother's failure to inform health providers or Father of critical information regarding [E.W.]'s medical history at the time [E.W.] was diagnosed with Nystagmus; and

c. Mother's historic and ongoing failure to inform health care or mental health professional of critical information regarding [E.W.]'s medical history, including during the admission process at the St. Vincent's Stress Center in 2019.

* * * * *

11. Although it is common practice for DCS to offer Legacy House as counseling options for children involved in DCS cases, there was no need to put [E.W.] in Legacy House therapy based on her circumstances. [E.W.] had multiple sessions with Dr. Miller by the date of her first Legacy House appointment. Also, by that date, DCS had indicated that it was not opening an investigation. Taking [E.W.] to Legacy House without notifying Father or Dr. Miller added to the drama, but not [E.W.]'s best interests.

12. Mother continuously refuses to abide by the orders of this Court, replacing the authority of the Court with her own.

13. Mother's ongoing attempts to precipitate drama, disruption and alienation needlessly damaging both children, most especially [E.W.], and to [sic] Father. Father believes Mother's legal actions that necessitated the June 7, 2019 hearing and the upcoming hearing are a misuse of the Court's time. More specifically, Mother's actions are contumacious and contemptuous of the Orders of this Court, and Father has no reason to believe that Mother will abide by the Court's orders until she has been adequately punished by the Court.

(*Id*. at 94-7.) On October 28, 2020, the trial court issued an order requiring Mother to appear before the court to show why she should not be held in contempt of the trial court's orders.

[6] On February 19, 2021, the trial court held a telephonic attorney conference and set a final hearing on all pending matters in the case for October 18-20, 2021. On October 11, 2021, Mother filed a consolidated motion to enforce and motion to show cause, asking the court to "enforce its property settlement division Order; enforce and/or modify its child support Order, in part, and order Father to appear and show cause why he should not be found in contempt of the Court's prior Order[.]" (*Id*. at 102.) Mother alleged Father had not sold and divided certain stock as ordered by the trial court in the amended order concerning Parents' dissolution action and Father's inaction had resulted in the loss of tax refunds "in excess of over $100,000.00 over the course of tax years 2017, 2018, 2019 and 2020." (*Id*. at 103.) On October 13, 2021, the trial court issued an order indicating it had received Mother's October 11 motion and would "consider this motion with all other issues at the hearing on October 18, 2021." (*Id*. at 107.)

[7] On October 18, 2021, Parents appeared before the trial court to present evidence on all remaining matters. Mother presented her case-in-chief in support of her petition for modification, during which she did not present evidence or argument regarding her motion to show cause filed October 11, 2021. After Mother's case concluded, Father orally moved for "judgment on the evidence for failure to meet [Mother's] burden that a modification should

occur." (Tr. Vol. II at 173.) The trial court asked Father if he intended to present evidence to support his request for modification of physical custody, and Father indicated he would like to withdraw that request. Instead, Father asked the trial court to clarify in its order that Father had sole legal custody of Children, even though "the way that the court order is worded [Father] does in effect have sole legal custody of [Children]." (*Id*. at 174.)

[8] The trial court granted Father's motion for judgment on the evidence and denied Mother's request to modify physical and legal custody. The trial court then asked Father if he wanted to present evidence or argument regarding his request for sole legal custody of Children. Father chose to offer argument outlining the times Mother had unilaterally made medical decisions for E.W. without his consent. After arguments from both parties, the trial court awarded sole legal custody of Children to Father.[1]

Discussion and Decision

1. Modification of Custody

[9] When reviewing cases challenging a trial court's ruling on a motion to modify a child custody arrangement

> [w]e acknowledge the well-established preference in Indiana "'for granting latitude and deference to our trial judges in family law matters.'" *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016)

[1] The trial court did not rule on any other pending motions.

> (quoting *In re Marriage of Richardson*, 622 N.E.2d 178 (Ind. 1993)). "Appellate courts 'are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence.'" *Id*. (quoting *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)). In order to reverse a trial court's ruling, it is not enough that the evidence might have supported a different conclusion. *Id*. Rather, the evidence must positively require the conclusion contended for by appellant [before] we may reverse. *Id*. We may not reweigh the evidence or reassess witness credibility, and the evidence should be viewed in a light most favorable to the judgment. *Id*. (quoting *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011)). Still, although we must be highly deferential to trial courts in cases such as this, that deference is not absolute. *See Kirk*, 770 N.E.2d at 307 n.5 ("This is not to say that the circumstances of a custody or visitation case will never warrant reversal.").

Montgomery v. Montgomery, 59 N.E.3d 343, 349-50 (Ind. Ct. App. 2016), *trans. denied*.

[10] 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.

[11] The party requesting the custody modification bears the burden of proving the existing custody order should be changed. *Montgomery*, 59 N.E.3d at 350. "Indeed, this 'more stringent standard' is required to support a change in

custody, as opposed to an initial custody determination where there is no presumption for either parent because 'permanence and stability are considered best for the welfare and happiness of the child.'" *Steele-Giri*, 51 N.E.3d at 124 (quoting *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992)).

> When evaluating whether a change of circumstances has occurred that is substantial enough to warrant a modification of custody, the context of the whole environment must be judged, "'and the effect on the child is what renders a change substantial or inconsequential.'" [*In re Marriage of*] *Sutton*, 16 N.E.3d [481,] 485 [(Ind. Ct. App. 2014)] (quoting *Jarrell v. Jarrell*, 5 N.E.3d 1186, 1193 (Ind. Ct. App. 2014), *trans. denied*). Generally, cooperation or lack thereof with custody and parenting time orders is not an appropriate basis for modifying custody. It is improper to utilize a custody modification to punish a parent for noncompliance with a custody order. *In re Paternity of M.P.M. W.*, 908 N.E.2d 1205, 1208 (Ind. Ct. App. 2009). "However, '[i]f one parent can demonstrate that the other has committed misconduct so egregious that it places a child's mental and physical welfare at stake, the trial court may modify the custody order.'" *Maddux v. Maddux*, 40 N.E.3d 971, 979 (Ind. Ct. App. 2015) (quoting *Hanson v. Spolnik*, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997), *trans. denied*).

Montgomery, 59 N.E.3d at 350-1.

[12] Mother challenges the trial court's decision to modify the trial court's original order of joint legal custody and grant Father sole legal custody of Children. In the initial proceedings, the trial court ordered Parents to share legal custody of Children, "with Father having the ultimate decision-making authority on joint legal custody issues in the case of a disagreement." (App. Vol. II at 58.)

Mother requested the trial court modify the legal custody order to award her sole legal custody of Children. Indiana Code section 31-17-2-15 provides the factors the trial court must consider when making an initial decision regarding the legal custody of a child:

> In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:
>
> (1) the fitness and suitability of each of the persons awarded joint custody;
>
> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
>
> (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
>
> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
>
> (B) plan to continue to do so; and

(6) the nature of the physical and emotional environment.

Pursuant to Indiana Code section 31-17-2-21, the trial court may not modify a child custody order unless "the modification is in the best interests of the child" and "there is a substantial change in one (1) of more of the factors that the court may consider under section 8 . . . of this chapter." In addition to the factors listed in 31-17-2-8, "a trial court must consider the factors listed in Section 31-17-2-15 when determining whether a joint legal custody arrangement should be modified." *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1260 (Ind. Ct. App. 2010). Additionally, it is well-established that

> Orders of joint custody will not be reversed unless the court is attempting to impose an intolerable situation upon the parties. If the parties demonstrate a willingness and ability to communicate concerning the child, then joint custody is appropriate even against the wishes of one parent. However, if the parties have made child-rearing a battleground, then joint custody is not appropriate.

Periquet-Febres v. Febres, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995), *trans. denied.*

[13] At Mother's request, the trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). Our standard for reviewing such findings is well-settled:

> The conclusions of law are reviewed de novo. But pursuant to Trial Rule 52(A), we shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Factual findings are only clearly erroneous where

> there is no support for them in the record, either directly or by inference; a judgment is only clearly erroneous when it applies an improper legal standard to proper facts. In either case, we must be left with the firm conviction that a mistake has been made.

Johnson v. Johnson, 999 N.E.2d 56, 59 (Ind. 2013) (internal citations and quotations omitted).

1.1 Challenged Finding

[14] Mother argues Finding 15[2] of the trial court's order is not supported by the evidence.[3] That finding states:

> 15. The Court also acknowledges that, while Mother has made unilateral decisions for [Children], such as taking [E.W.] to a counselor without either consulting Father or even making Father (or [E.W.'s] primary counselor Dr. Miller) aware of the same, Father has by all accounts always attempted to involve Mother in decision making for [Children], even when the parties have been unable to agree.

(App. Vol. II at 60-1.) Mother challenges both the trial court's statement about Mother and its statement about Father. We address each separately.

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[2] Mother does not challenge any of the other findings made by the trial court and thus they are presumed correct. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) ("Because Madlem does not challenge the findings of the trial court, they must be accepted as correct.").

[3] Mother also argues the trial court's findings are not supported by the evidence because Father did not offer evidence, only argument. It is true that counsel's arguments are not evidence, *Piatek v. Beale*, 999 N.E.2d 68, 69 (Ind. Ct. App. 2013), *trans. denied*. However, Father's arguments to support his request for sole legal custody of Children referenced the evidence and testimony presented to the trial court by Mother. Therefore, there was evidence from which the trial court could make its decision. The party presenting the evidence is of no consequence.

[15] First, as to the portion of the finding about Mother, Mother contends "one incident of failing to include Father in the decision making process for [E.W.,]" (Mother's Br. at 17-18), does not support the trial court's finding that Mother "has made unilateral decisions for [Children]." (App. Vol. II at 60). During the hearing, Mother testified on cross-examination about decisions she had made regarding E.W.'s healthcare without Father's input:

> [Father]: …you have taken [E.W.] to see a counselor without consulting my client first, correct?
>
> [Mother]: For her safety, yes.
>
> [Father]: Ma'am, is that a yes?
>
> [Mother]: Yes.
>
> [Father]: And you took [E.W.] to Legacy House, correct?
>
> [Mother]: According –
>
> [Father]: It's a yes or no question, ma'am.
>
> [Mother]: Yes.
>
> [Father]: And at no point did you tell my client you were taking [E.W.] there, correct?
>
> [Mother]: I did not.
>
> * * * * *

[Father]: And you also took [E.W.] to OrthoIndy, correct, and didn't tell Father?

[Mother]: That was after the medical letter came out and she was complaining of wrist pain.

[Father]: Ma'am, my question to you –

[Mother]: Yes.

[Father]: --is did you take her to OrthoIndy and not tell Father?

[Mother]: We did disclose it, but not at the time.

[Father]: You disclosed it a year later in discovery, correct?

[Mother]: I don't recall the dates.

[Father]: And, again, Father didn't have any input into whether or not [E.W.] went to OrthoIndy, did he?

[Mother]: No.

(Tr. Vol. II at 134-6.) Additionally, Mother testified she changed H.W.'s doctor without consulting Father after his previous pediatrician retired. Mother also testified she chose H.W.'s piano teacher without Father's input, scheduled H.W.'s driving test for his driver's license without Father's knowledge, and did not tell Father she decided to take Children to a different church than the one the family had previously attended because "it's my parenting time." (*Id.* at

147.) Based on Mother's own testimony, she made multiple decisions regarding Children that she had previously agreed would be considered jointly, without first consulting Father, even though he had final decision-making authority as part of the trial court's dissolution order. Contrary to Mother's assertion, the trial court's finding is not based on one incident but instead multiple incidents during which Mother has disregarded the trial court's dissolution order. Mother's argument is an invitation for us to reweigh the evidence, which we cannot do. *See Johnson*, 999 N.E.2d at 59 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[16] As to the portion of the findings about Father, Mother asserts the evidence does not support the trial court's finding that "Father has by all accounts always attempted to involve Mother in decision making for [Children,]" (*id*. at 61), because "Father chose a therapist, Dr. Miller, for [E.W] without any input whatsoever from Mother" and the trial court is attempting to punish Mother "while overlooking the fact that Father did the exact same thing." (Mother's Br. at 18.) Regarding Father's decision to send E.W. to Dr. Miller, the GAL testified:

> [Mother]: You agree with me right now that [E.W.] is seeing a counselor in Dr. Miller that [Mother's] told you she's uncomfortable with?
>
> [GAL]: Yes. And the reason is –
>
> [Mother]: Thank you.

[GAL]: Is your next question going to be why?

[Mother]: No. And that was a counselor that Father chose of his own volition, correct?

[GAL]: Yes.

[Mother]: Without any input whatsoever from Mother?

[GAL]: Yes.

[Mother]: Do you know if Mother agreed that Dr. Greene would see [H.W.]?

[GAL]: I don't know. I don't believe there's been any issue considering she participates with both Dr. Miller and Dr. Greene as well so.

[Mother]: Because she participates, that doesn't mean she had any say in the original decision though, does it?

[GAL]: No, but it, I mean if she had an opinion about it I believe that she would have voiced it.

(Tr. Vol. II at 40.) Additionally, Mother testified Father consulted her, though sometimes made the final decision, regarding the Children's vaccinations, sports involvement, and medication changes. The evidence supports the trial court's finding that Father did abide by the joint legal custody agreement and always consulted Mother in making decisions that fall under joint legal custody. Mother's argument is an invitation for us to reweigh the evidence, which we

cannot do. *See Johnson*, 999 N.E.2d at 59 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Therefore, we conclude the evidence supports Finding 15.

1.2 Trial Court's Conclusions

[17] Mother argues the trial court did not make findings regarding the factors listed in Indiana Code section 31-17-2-15 when making its decision and therefore the findings do not support its conclusion that it was in Children's best interest to award Father sole legal custody. The trial court made the following findings[4] relevant to the change in legal custody:[5]

> 9. The Court in entering its judgment has considered all the evidence including the testimony of the Parties and any witnesses which appeared in open court and all exhibits and documentary evidence admitted into evidence by the Court and by stipulation of the Parties.
>
> 10. Father filed an oral motion for judgment on the evidence at the close of Mother's case in chief, alleging that Mother had failed to meet her burden that a modification in physical and/or legal custody of [Children] in her favor was warranted and requesting the court dismiss the same. Father further indicated that, should the Court grant the same, he would withdraw his request for modification of the joint physical custody

[4] As we have concluded that Finding 15 is supported by the evidence, we include it in this recitation of the trial court's findings for completeness.

[5] The trial court's other findings concerned the procedural history of the case and identified the parties.

arrangement but would still request the Court grant his request for sole legal custody of [Children].

11. The Court found on the record that Mother had failed to meet her burden and that Father's motion should be granted for the following reasons:

> (a) The guardian ad litem recommended that no change to the physical custody or parenting time arrangement should occur;
>
> (b) Mother did not present any evidence that demonstrated that a change in physical custody or parenting time was warranted, or that the same would be in [Children's] best interests; and
>
> (c) While there was a change in some of the factors which would relate to a change in circumstances (ie the age of [Children] and the possible wishes of [Children]), these changes did not lead to the conclusion that a change in physical custody or parenting time should occur.

12. The Court then allowed each side to present their case regarding Father's request for sole legal custody by summary.

13. The Court hereby finds that it is the best interest of [Children] not to have conflict and to remove a potential source of conflict, that being the fact that while Father in essence has sole legal custody given his final decision-making authority, the title "joint legal custody" has been a source of conflict between the parties. Mother appealed this decision from the initial divorce hearing and has since filed two (2) motions to modify the same.

* * * * *

> 15. The Court also acknowledges that, while Mother has made unilateral decisions for [Children], such as taking [E.W.] to a counselor without either consulting Father or even making Father (or [E.W.'s] primary counselor Dr. Miller) aware of the same, Father has by all accounts always attempted to involve Mother in decision making for [Children], even when the parties have been unable to agree.

(App. Vol. II at 59-61.) One factor the trial court must consider when modifying legal custody is "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare[.]" Ind. Code § 31-17-2-15(2). The trial court's findings address the inability of Mother and Father to communicate and Mother's insistence on making unilateral decisions, primarily regarding Children's healthcare, without Father's knowledge, input, or ultimate approval. Based thereon, we cannot say the trial court abused its discretion when it modified custody so that Father would have sole legal custody of Children. *See Hecht v. Hecht*, 142 N.E.3d 1022, 1025-6 (Ind. Ct. App. 2020) (parents' inability to communicate regarding medical decision warranted a modification of joint legal custody to sole legal custody).

2. Mother's Petition for Rule to Show Cause

[18] Mother argues the trial court abused its discretion when it denied her request for hearing on her motion for rule to show cause and subsequently dismissed the motion because it did not allow a hearing as required by Indiana Trial Rule

41(E) and Mother had been diligent in her pursuit of the motion. As noted in the facts, on October 11, 2021, Mother filed petition for rule to show cause in which Mother alleged Father had not sold and divided certain stock as ordered by the trial court in the amended order concerning Parents' dissolution action and Father's inaction had resulted in Mother's alleged loss of certain tax refund revenue over a number of years. On October 13, 2021, the trial court issued an order indicating it had received Mother's October 11 motion and would "consider this motion with all other issues at the hearing on October 18, 2021." (App. Vol. II at 107.) Mother did not present evidence regarding her motion for rule to show cause at the October 18, 2021, hearing,[6] even though the hearing was set to address all pending motions. As Mother did not raise this issue before the trial court at the hearing, it is waived. *See In re K.S., D.S., B.G., & J.K.*, 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001) (issue presented for the first time on appeal is waived).

Conclusion

[19] The trial court's Finding 15 was supported by the evidence. Additionally, the trial court's findings supported its conclusion that it was in Children's best interests for Father to have sole legal custody of Children. Thus, the trial court did not abuse its discretion when it awarded Father sole legal custody of

[6] After Mother filed her appeal from the trial court's order regarding custody, she requested a hearing on her motion for rule to show cause. On January 4, 2022, the trial court denied her request for hearing and dismissed the motion. We granted her request to consolidate the trial court's orders.

Children. Finally, Mother has waived her argument regarding her motion for rule to show cause for failing to assert the issue at the hearing on all pending motions. Accordingly, we affirm.

[20] Affirmed.

Riley, J., and Tavitas, J., concur.