MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Amanda Cunningham,
Appellant-Petitioner,

v.

David Cunningham,
Appellee-Respondent.

May 9, 2022

Court of Appeals Case No. 21A-DR-2390

Appeal from the St. Joseph Superior Court

The Honorable Jenny Pitts Manier, Judge

Trial Court Cause No. 71D05-1501-DR-49

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Amanda Cunningham (Mother), appeals the trial court's modification of custody in favor of Appellee-Respondent, David Cunningham (Father).

[2] We affirm.

ISSUES

[3] Mother presents this court with four issues, which we restate as:

> (1) Whether the trial court's order modifying custody to Father is clearly erroneous;
>
> (2) Whether the trial court violated the Indiana Trial Rules by allowing Father to present evidence at a hearing on Mother's motion to correct error based on newly discovered evidence;
>
> (3) Whether the trial court abused its discretion when it denied Mother's post-modification motions to reopen the evidence and for appointment of a guardian ad litem (GAL); and
>
> (4) Whether Mother was entitled to a change of judge after filing her motion to correct error based on newly discovered evidence.

FACTS AND PROCEDURAL HISTORY

[4] The parties were married on June 10, 2006, and are the parents of three minor children, daughter A.C. and sons T.C. and B.C., (collectively, Children).

Mother filed for dissolution on January 22, 2015. The parties engaged in mediation and agreed that they would share legal custody, while Mother would have primary physical custody of Children. On January 22, 2019, the trial court entered its Decree of Dissolution which incorporated the mediated custody terms.

[5] On January 31, 2019, Father filed a notice to relocate to Florida for his employment and because he has family there. Mother did not formally oppose Father's relocation, and on July 30, 2019, the trial court entered an order modifying Father's parenting time in accordance with the recommendations of the Indiana Parenting Time Guidelines for parenting time when distance is a major factor. Father relocated to Florida, married Jennifer Cunningham (Jennifer), and had an additional child with Jennifer.

[6] On March 11, 2021, Father filed a petition to modify custody, seeking to be awarded sole legal and primary physical custody of Children based on his allegations that Children were having serious issues with their schooling, Mother neglected to complete an authorization for T.C. to obtain in-school counseling, and Mother deprived Father of telephone communication and parenting time with Children, including make-up time and opportunities for additional parenting time when Father was in Indiana.

[7] On June 17, 2021, the trial court convened an evidentiary hearing on Father's petition to modify custody. By the time of the hearing, A.C. was eleven years old, T.C. was ten years old, and B.C. was six years old. The principal of

Children's school, four of Children's teachers, Children's tutor, Mother, and Father testified at the hearing. Evidence regarding Children's attendance and grades during the Coronavirus pandemic was received. Mother and Father testified regarding their profound difficulties in communicating and co-parenting. Father had some of Mother's more vitriolic texts to him admitted into evidence. Father also introduced evidence that Mother's paramour, Shane Lindsley (Lindsley), had beaten her severely on at least one occasion and that Father became aware of this when he discovered photographs of Mother's injuries on A.C.'s cellphone, which was linked to Mother's cellphone. Children told Father that they did not feel safe in the house when Lindsley was there. Mother testified at the hearing that she stayed with Lindsley because she felt that he was a good father figure to Children and because they were attached to him. Mother had eventually ended the relationship because it was "unhealthy". (Transcript Vol. II, p. 170). Mother testified that both parties had engaged in angry and vulgar communications, but she did not have any of Father's texts or emails to her admitted. Mother did not request that the trial court leave the record open for the admission of evidence of Father's written communications.

[8] On June 30, 2021, the trial court entered its detailed findings of fact and conclusions thereon, granting Father sole legal custody and primary physical custody of Children. The trial court found that a substantial change had occurred in the family due to Mother's flouting of the trial court's orders and interference with Father's parenting time, Mother's failure to shield Children from her anger towards Father, and her treatment of Jennifer as a "pariah",

even though Children had a positive relationship with Jennifer. (Appellant's App. Vol. II, p. 44). Concerning Children's schooling, the trial court found that, although the pandemic had been difficult for everyone, Mother had failed to ensure that Children were properly logged in for virtual learning, she had failed to communicate with school officials to the extent that it became necessary for A.C. to be used as an intermediary for T.C.'s work, and that the tutor Mother had hired was himself lax in confirming that Children's work was completed. The trial court found that the stress between the parties had gravely impacted all three Children but had most demonstrably affected T.C. Lastly, the trial court found that Mother's facilitation of Children's relationship with Lindsley was problematic, especially considering the fact that Mother actively "attempted to minimize or interfere with the relationship between [C]hildren and their actual father." (Appellant's App. Vol. II, p. 45).

[9] On July 6, 2021, Mother filed her Motion to Stay Enforcement of Order Modifying Custody pending reconsideration of the trial court's order and/or Mother's appeal. On July 6, 2021, the trial court issued an order clarifying that it had awarded sole legal custody to Father based on Mother's inability to communicate in a civil manner with Father. The trial court also observed that in violation of its orders, Mother had unilaterally made decisions that impacted Father's contact with Children, which also worked against the exercise of joint legal custody. Father objected to the stay of the modification order.

[10] On July 28, 2021, Mother filed her Motion to Correct Error Due to Newly Discovered Evidence, Motion to Reopen Evidence to Amend Findings, and

Motion to Appoint [GAL], in which Mother sought, among other things, to (1) litigate "newly discovered evidence" that after the June 17, 2021, hearing Father had allegedly repeatedly exposed himself to Children, had physically abused T.C., and had neglected Children by failing to recognize they had head lice; (2) reopen the evidence so that the trial court could reassess its findings that Mother was "the only hostile party between her and Father, as well as Father's spouse" and that Mother had failed to complete T.C.'s counselor paperwork which she contended were issues that "were not raised in the pleadings"; and (3) appoint a GAL to investigate whether it was in Children's best interests that physical custody be modified to Father, Mother's facilitation of Children's feelings of abandonment by Father, Mother's new allegations of misconduct by Father, Children's trauma concerning their impending relocation to Florida, and Children's wishes concerning custody. (Appellant's App. Vol. II, pp. 123, 124). In support of her motion, Mother submitted an affidavit averring that Father had twice instructed T.C. to shower with him and B.C. against T.C.'s wishes, Father had conversations on multiple occasions with Children while Father was unclothed, Father had twice struck T.C. on the face as punishment, and that Father had failed to observe that Children had contracted headlice during their time with Father. Mother also attached to her motion copies of numerous texts to her from Father and Jennifer as well as an email in support of her claim that she had completed T.C.'s school counselor paperwork in a timely manner. Father responded to Mother's motion but did not submit any affidavits or exhibits in support of his response. On August 4,

2021, the trial court set the matter for a hearing on August 25, 2021, and ordered the parties to appear.

[11] On July 29, 2021, the trial court denied Mother's motion to stay enforcement of its modification order. On August 19, 2021, Mother filed a motion objecting to the trial court's setting of a hearing and seeking to prevent Father from presenting evidence at the August 25, 2021, hearing based on her argument that he had failed to file an affidavit in response to her motion to correct error, as contemplated by Indiana Trial Rule 59(H), thus waiving his opportunity to present additional evidence. On August 24, 2021, the trial court issued an order that the hearing, which was to be rescheduled, would be a hearing on Mother's allegations of newly discovered evidence, "as distinct from evidence outside the record". (Appellant's App. Vol. II, p. 51). On August 31, 2021, Mother filed her First Motion for Change of Judge based on her contention that the trial court's order that Father would be allowed to present evidence at the hearing on her motion converted the matter into a new trial which entitled her to a new judge.

[12] On September 7, 2021, the trial court denied Mother's motion for change of judge. On October 4, 2021, the trial court held a hearing on Mother's pending motions. Subject to Mother's continuing objection that Father should not be permitted to present evidence, Father testified that, while he had spanked Children in the past, he had never struck T.C. or the other Children on the face. Father related that Children may have inadvertently seen him unclothed but that he had never showered with the boys or conducted conversations in front

of Children while nude. Father also related that Mother had filed reports with child protective authorities in Indiana and Florida in connection with the allegations contained in her post-modification motion, that the Florida authorities had investigated, including interviewing him and Jennifer, and that Mother's report had not been substantiated. According to Father, Children had not exhibited any symptoms of head lice while in his care.

[13] On October 8, 2021, the trial court entered its order denying Mother's motion to reopen the evidence and to appoint a GAL, ruling that Mother sought to raise issues that were available to her at the time of the June 17, 2021, modification hearing and that she could have requested that the record remain open but did not. The trial court declined to appoint a GAL, also noting that Mother could have previously requested the appointment but did not.

[14] As to Mother's claims based on newly discovered evidence, the trial court found Father's testimony to be credible, ruling that the newly discovered evidence did not show misconduct on Father's part, and that, considered in light of all of the evidence, the newly discovered evidence did not lead the trial court to conclude that it was in Children's best interests that Mother have legal and primary physical custody.

[15] Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Custody Modification*

A. *Standard of Review*

[16] Mother challenges the trial court's modification of legal and physical custody to Father. There is a well-established preference in Indiana to accord latitude and deference to trial courts in family law matters. *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016). As such, we review child custody modifications only for an abuse of the trial court's discretion. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). In conducting our review, we will set aside the trial court's judgment only if it is clearly erroneous. *Id*. A finding is 'clearly erroneous' when there are no facts or inferences drawn therefrom to support it. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Our supreme court has recognized that "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." *D.C. v. J.A.C.*, 977 N.E.2d 951, 956-57 (Ind. 2012) (quotation omitted). Accordingly, in conducting our review, this court neither reweighs the evidence nor judges the credibility of the witnesses, and we will consider only the evidence most favorable to the judgment. *Steele-Giri*, 51 N.E.3d at 124. "On appeal 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." *Id*.

B. *Custody Modification Statutes*

[17] Indiana Code section 31-17-2-21 provides that a trial court may only modify a child custody order if "(1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Indiana Code section 31-17-2-8.]" In turn, section 31-17-2-8 provides that the trial court is to consider "all relevant factors", including:

> (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.
>
> (8) Evidence that the child has been cared for by a de facto custodian[.]

The determination that custody should be modified is "very fact-sensitive." *Steele-Giri*, 51 N.E.3d at 125. In its order modifying custody, the trial court considered and entered detailed findings as each of the section 31-17-2-8 factors in support of its conclusion that a significant change had occurred in this family that merited modification.

C. *Mother's Contentions*

[18] Mother's first challenge to the trial court's modification order is that, because the parties have had a contentious relationship since divorcing and the entry of the initial custody order, their inability to communicate, Mother's anger at Father, and the impact of their rift on Children did not represent a substantial change in any relevant factor, as required by section 31-17-2-21 to modify custody. However, there is evidence before us that since the trial court last modified parenting time when Father relocated to Florida, the ability of the parties to communicate civilly had broken down to the point that, as Mother testified at the hearing, "[they] just don't really communicate[,]" and "[they] do not know how to coparent, and that's a two-way street." (Tr. Vol. III, pp. 158, 190). Mother has acknowledged her deep anger at Father for relocating, and the evidence showed that she sent Father multiple vitriolic texts after his relocation to Florida. Mother also made a concerted effort to interfere with Children's relationship with Jennifer, with whom they have a bond, by blocking Jennifer's calls and not permitting Children to speak to Jennifer when Father

called Children. In addition, in December 2019, just before Father was to receive Children for parenting time, Mother called Father at 1:00 a.m. and left a message reporting that T.C. was having a panic attack for which Mother blamed Father, attributing T.C.'s anxiety to having to spend time with Father. When Father immediately returned the call, Mother would not allow him to speak to T.C. During this episode, Mother swore at and vulgarly berated Father. These are but a few of the many circumstances which had occurred in this family since Father had relocated to Florida and which supported the trial court's determination that the parties' relationship and ability to communicate had further deteriorated, negatively impacting Children. In light of this evidence, we cannot conclude that the trial court's findings and conclusions on these issues were clearly erroneous. *See Best*, 941 N.E.2d at 502.

[19] Mother also contends that the trial court failed to consider the fact that Father's relocation to Florida had traumatized Children or how Children's move away from Mother and their known home environment would affect them. In addressing this argument, we first observe that the same trial court judge presided over the parties' dissolution proceedings, multiple rule to show cause motions, the relocation litigation, and the instant modification proceedings and, therefore, had long-term exposure to this family. In its order modifying custody, the trial court made findings about Children's school, their bond with their maternal and paternal grandparents, and the parties' respective home environments. In addition, the trial court heard Mother's testimony that Children felt abandoned by Father, she often had to comfort them individually

and as a group, and that T.C. had sought out his school counselor due to his sadness at Father leaving. The trial court found that Mother's testimony indicated that she had essentially fostered Children's sadness and that, in light of Mother's anger at Father, it concluded that Mother was "explicitly or tacitly supporting [Children's] concerns that Father has abandoned [C]hildren and/or that they are at fault for his relocation." (Appellant's App. Vol. II, p. 43 n.8). This is an assessment of Mother's credibility and demeanor that we do not second-guess as part of our review. *See Steele-Giri*, 51 N.E.3d at 124. Mother's argument on these points is essentially a request that we reweigh the evidence, reassess her credibility, and consider evidence which does not support the trial court's determination, all of which is contrary to our standard of review. *See id*.

[20] Mother further argues the trial court's findings and conclusions regarding her failure to attend to Children's education and failure to abide by the trial court's parenting time orders did not support a modification of custody. Yet there is evidence in the record supporting the trial court's findings that Mother failed to ensure that Children were properly logged in for virtual learning, Mother did not respond to T.C.'s teacher both times he was quarantined resulting in A.C. being enlisted by his teachers to shuttling his work to and from school, Mother did not complete T.C.'s counselor consent, and that, even after hiring a tutor for Children, their work was not always completed. There is also evidence in the record before us that Mother consistently interfered with Father's parenting time by failing to have Children at the South Bend airport for exchange, as per the trial court's order, and that she withheld Children from Father in April

2019, during Spring break 2020, and on several occasions that Father was in the area and could have had extra parenting time with Children. Mother is correct that a parent's failure to abide by parenting time orders is generally not an appropriate basis for modifying custody. *Montgomery v. Montgomery*, 59 N.E.3d 343, 350 (Ind. Ct. App. 2016), *trans. denied*. However, "a change in circumstances must be judged in the context of the whole environment, 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). The trial court properly considered Mother's pattern of interference with Father's parenting time as part of Children's entire environment that impacted them. Mother's argument on these issues is another unpersuasive attempt to have us reweigh the evidence before the trial court, which we will not do. *See Steele-Giri*, 51 N.E.3d at 124.

[21] Apart from the other findings and conclusions that we have determined were supported by the record, the trial court found that Mother's conduct in staying with Lindsley and continuing to foster a relationship between him and Children, while simultaneously interfering with Children's relationship with Father, to be a substantial change in circumstance that supported modification. On appeal, Mother does not address the trial court's findings and conclusions regarding her choices relating to Lindsley. As the trial court's findings and conclusion were supported by the record, we cannot conclude that all the evidence positively requires reversal, as necessary for Mother to prevail. *See id*.

Accordingly, we find that the trial court did not abuse its discretion in granting Father's request to modify custody. *See Kirk*, 770 N.E.2d at 307.

II. *Admission of Father's Evidence at Hearing on Motion to Correct Error*

[22] Mother contends that the trial court erred when it allowed Father to present evidence at the hearing on her Motion to Correct Error based on newly discovered evidence after he had failed to file an affidavit in opposition. Resolution of this issue entails the interpretation of the Indiana Trial Rules, which is a question of law which we review de novo. *Morrison v. Vasquez*, 124 N.E.3d 1217, 1219 (Ind. 2019). When interpreting the Trial Rules, our objective is to ascertain and give effect to the intent underlying the rule. *Lutheran Health Network of Ind., LLC v. Bauer*, 139 N.E.3d 269, 281 (Ind. Ct. App. 2019). "If the language of a rule is clear and unambiguous, it is not subject to judicial interpretation. Moreover, in construing a rule, it is just as important to recognize what it does not say as it is to recognize what it does say." *Id*. (citations omitted).

[23] Mother filed a motion to correct error pursuant to Indiana Trial Rule 59, which provides in relevant part as follows:

> (A) Motion to Correct Error--When Mandatory. A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:
>
> (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final

> judgment which, with reasonable diligence, could not have been discovered and produced at trial[.]
>
> * * *
>
> (H) Motion to Correct Error Based on Evidence Outside the Record.
>
> (1) When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.
>
> (2) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file opposing affidavits.

[24] The trial court set a hearing and allowed Father to present evidence on Mother's Motion to Correct Error, reasoning that a motion to correct error based on newly discovered evidence did not fall within the strictures of Rule 59(H). Mother argues that this was error because motions based on newly discovered evidence are also based on evidence outside the record within the meaning of Rule 59(H); in the absence of an opposing affidavit by Father, the trial court was not permitted to hold an evidentiary hearing; and that to reject her proffered interpretation would render "meaningless the time and evidentiary limitations contained in T.R. 59(H), which is not permissible." (Appellant's Br. p. 41).

[25] This court has long applied Rule 59(H) to motions to correct error based on newly discovered evidence. *See*, *e.g.*, *Radio Distr. Co., Inc. v. Nat. Bank & Trust Co.*, 489 N.E.2d 642, 645 (Ind. Ct. App. 1986) (observing that one example of a Rule 59(H) motion to correct error based on facts outside the record is a motion based on newly discovered evidence); *Laudig v. Marion Cnty. Bd. of Voters Registration*, 585 N.E.2d 700, 709 (Ind. Ct. App. 1992) (observing that Laudig "based his motion to correct error on the ground of newly discovered evidence which was outside the record" and analyzing the conformity of his motion to the requirements of Rule 59(H)), *trans. denied*; *Scales v. Scales*, 891 N.E.2d 1116, 1120-21 (Ind. Ct. App. 2008) (determining that Husband's motion to correct error based on newly discovered evidence did not comport with the requirements of Rule 59(H)(1)). In light of this precedent, we agree with Mother that Rule 59(H) applied to her motion to correct error based on newly discovered evidence.

[26] However, we disagree with Mother that, in the absence of an opposing affidavit by Father, Rule 59(H) precluded the trial court from holding an evidentiary hearing. Neither party contends that Rule 59(H) is ambiguous, and we do not find it to be so. The clear and unambiguous language of Rule 59(H)(1) provides that a movant "shall" support her motion with an affidavit; Rule 59(H)(2) does not use the same mandatory language, only providing that a party opposing the motion has fifteen days after service of the moving party's motion and affidavit in which to file an opposing affidavit. There is nothing in the language of Rule 59(H) which obligates the opposing party to file an affidavit, nor does Rule

59(H) expressly forbid a trial court from holding an evidentiary hearing in the absence of an opposing affidavit. Absent some indication from our supreme court to the contrary, we decline to read either of these terms into the Rule.

[27] Contrary to Mother's assertions, *Abell v. Clark Cnty. Dep't of Pub. Welfare*, 407 N.E.2d 1209 (Ind. Ct. App. 1980), and *In re Marriage of Myers*, 387 N.E.2d 1360 (1979), do not support her proposition that the evidence was closed after Father failed to file an opposing affidavit. Those cases simply held that, as a court of review, we must accept the allegations contained in an unopposed Rule 59(H)(1) affidavit as true when reviewing the propriety of the denial or grant of a Rule 59(H)(1) motion.[1] *Abell*, 407 N.E.2d at 1210 (holding that when counter affidavits are not filed, "this court" must accept as true the facts averred in the moving party's affidavit upon reviewing the trial court's denial of Abell's motion to correct error); *Myers*, 387 N.E.2d at 1362 (concluding that since no opposing affidavits had been filed, "this court" was required to accept the facts averred in Husband/movant's affidavit as true upon review of the trial court's denial of Husband's motion to correct error). Mother provides us with no authority indicating that this appellate standard applied to the trial court's consideration of the merits of Mother's motion, and we are aware of none.

[28] We also reject Mother's contention that we must accept her interpretation or else gut Rule 59(H). This court has recognized that "[m]otions predicated upon newly discovered material evidence are viewed with disfavor." *Laudig*, 585

[1] Mother has not requested that we review the merits of the trial court's denial of her motion to correct error based on Father's alleged misconduct after the modification hearing.

N.E.2d at 712. Requiring a movant to support her motion with an affidavit permits a trial court to rule on such motions quickly and without a hearing if the motion is not meritorious. *See*, *e.g.*, *In re Estate of Wheat*, 858 N.E.2d 175, 185 (Ind. Ct. App. 2006) (noting that if the evidence before the trial court in a motion to correct error and supporting affidavit is sufficient to support its decision, the court could rule on the motion without a hearing). On the other hand, our reading of the Rule affords the trial court the discretion to hold an evidentiary hearing if it feels it does not have enough evidence before it to rule on the motion to correct error. The plain language of Rule 59(H)(2) simply sets forth a time limit for the opposing party to file an affidavit if it wishes, and nothing more. Accordingly, we affirm the trial court's decision to hold an evidentiary hearing on Mother's motion to correct error based on newly discovered evidence and to allow Father to present evidence at the hearing.

III. *Motions to Reopen the Evidence and for Appointment of GAL*

[29] Mother also briefly challenges the trial court's denial of her motions to reopen the evidence and for appointment of a GAL.

A. *Motion to Reopen Evidence*

[30] "Evidence must be offered during the course of a trial, and it is a matter of discretion whether a trial court will permit a party to present additional evidence after the close of all evidence." *Paternity of M.S.*, 146 N.E.3d 951, 957 (Ind. Ct. App. 2020). We review a trial court's decision regarding a motion to reopen the evidence only for an abuse of discretion. *Id*.

[31] Mother's appellate argument centers on the trial court's denial of her request to reopen the record to admit evidence of Father's texts to her, a denial which she contends severely prejudiced her due to the importance the trial court placed upon her texts to Father which were admitted at the modification hearing. However, Mother acknowledged at the hearing on her post-modification motions that she possessed Father's texts in time for the modification hearing. Inasmuch as Mother now argues that the trial court should have reopened the evidence because issues relating to the parties' texts were not raised by Father's petition to modify custody, Mother interposed no objection at the modification hearing on that basis when Father offered her texts at the hearing. In addition, on appeal, Mother does not address the trial court's ruling that she could have requested at the modification hearing that the record remain open to receive her evidence but did not. Although Mother cites *Flynn v. State*, 497 N.E.2d 912, 914 (Ind. 1986), in which our supreme court set forth various factors which weigh in the exercise of a trial court's discretion to reopen the evidence, including prejudice to the opposing party, whether the party seeking to reopen the evidence rested inadvertently or not, the timing of the request, and whether confusion or inconvenience would result from the grant of the request, she makes no effort to apply the *Flynn* factors to the facts of her case. In sum, Mother has failed to persuade us that the trial court abused its discretion in denying her request to reopen the evidence.

B. *Motion for GAL*

[32] Mother also challenges the trial court's denial of her motion for appointment of a GAL for Children made in connection with her post-modification motions. Indiana Code section 31-17-6-1 provides in relevant part that, in a custody order modification proceeding, a trial court may appoint a GAL for a child "at any time." Whether to make such an appointment is a decision within the trial court's discretion. *Gilbert v. Gilbert*, 7 N.E.3d 316, 323 (Ind. Ct. App. 2014). The purpose of the appointment of a GAL is to represent and protect the best interests of the child. Ind. Code § 31-17-6-3.

[33] Here, the trial court ruled that Mother's request for a GAL, which she filed only after the modification hearing and an adverse custody ruling, was essentially too late. Mother contends that the trial court abused its discretion by failing to appoint a GAL to address the allegations raised by her newly discovered evidence, particularly those pertaining to Father's alleged physical abuse of Children. However, the trial court heard evidence from Mother and Father pertaining to the issues raised by Mother in her motion based on Father's alleged misconduct after the modification hearing. The trial court made a credibility assessment based on that evidence. In addition, Children were all under the age of fourteen, the age at which their wishes would be entitled to more consideration. *See* I.C. § 31-17-2-8(3). Mother does not support her argument with any relevant authority indicating that a trial court abuses its discretion in failing to appoint a GAL under such circumstances, nor does she explain how Children's bests interests were inadequately represented and

protected. Therefore, she has failed to persuade us that the trial court's denial of her motion for appointment of a GAL was an abuse of its discretion.

IV. *Motion for Change of Judge*

[34] Mother appeals the trial court's denial of her motion for change of judge. Indiana Trial Rule 76 governs such motions and provides that a party is only entitled to one change of judge in a civil matter and that, after a final decree is entered in a dissolution of marriage case, a party may take only one change of judge "in connection with petitions to modify that decree." T.R. 76(B). Rule 76(C) further provides as follows:

> In any action except criminal no change of judge . . . shall be granted except within the time herein provided. Any such application for change of judge . . . shall be filed not later than ten [10] days after the issues are first closed on the merits. Except:
>
> * * *
>
> (3) if the trial court or a court on appeal orders a new trial . . . the parties thereto shall have ten [10] days from the date the order of the trial court is entered[.]

Inasmuch as resolution of this issue entails interpreting the Trial Rules, those are matters which we undertake de novo. *In re Paternity of V.A.*, 10 N.E.3d 61, 63 (Ind. Ct. App. 2014).

[35] On July 28, 2021, Mother filed her Motion to Correct Error based on her allegations of newly discovered evidence of Father's misconduct after the June

17, 2021, modification hearing. Mother filed an affidavit in support. Father filed a response, without a supporting affidavit, the next day. On August 4, 2021, the trial court set the matter for a hearing on August 25, 2021. On August 19, 2021, Mother filed her objection to the setting of the hearing and the reception of additional evidence, and on August 24, 2021, the trial court made an entry directing that the hearing, which was to be rescheduled, was to be an evidentiary hearing on Mother's claims of newly discovered evidence. On August 31, 2021, Mother moved for a change of judge.

[36] On September 7, 2021, the trial court denied Mother's motion, citing Trial Rule 76(B) and (C)(1) as well as Trial Rule 63(A), which provides that the

> Judge who presides at the trial of a cause or a hearing at which evidence is received shall, if available, hear motions and make all decisions and rulings required to be made by the court relating to the evidence and the conduct of the trial or hearing after the trial court hearing is concluded.

The trial court also cited *Turner v. Turner*, 785 N.E.2d 259, 262-63 (Ind. Ct. App. 2003), in which this court held that a party's Rule 76(B) motion for change of judge filed in connection with a petition to modify does not prevent a dissolution trial court from ruling on a pending motion to correct error.

[37] Mother contends that the trial court's reliance on Rule 76(B) and *Turner* was misplaced because she acknowledges that she did not file a petition to modify custody. Rather, Mother contends that her right to a change of judge flowed from Rule 76(C)(3) because the trial court's August 24, 2021, ruling that

evidence would be received at the hearing was an order for a new trial, and, thus, she timely filed her motion for change of judge seven days later on August 31, 2021. Mother relies on *Green v. Green*, 863 N.E.2d 473, 474-75 (Ind. Ct. App. 2007), in which, upon this court's remand to the trial court for consideration of the factors enumerated in Indiana Code section 31-17-2-8 in connection with Father's petition to modify custody, the trial court granted Mother's motion to supplement the evidence to litigate issues which had arisen after the trial court's denial of Father's petition. Father moved for a change of judge, which the trial court denied, and the trial court held an evidentiary hearing, after which it again denied Father's petition to modify custody. *Id*. at 475. Father appealed, and we held that, for purposes of Rule 76(C)(3), our remand to the trial court did not constitute a new trial entitling Father to a change of judge, but that by "setting a new hearing and allowing new evidence, the trial court was granting a new trial on [Father's] petition to modify custody" which did entitle him to a change of judge. *Id*. at 476-77.

[38] However, we need not reach the issue of whether *Green* applies to the set of facts before us, because even if we were to assume, without deciding, that the trial court granted a new trial by allowing evidence at the hearing on Mother's post-modification motion, Mother's request for a new judge was untimely. Rule 76(C)(3) provides that a party requesting a change of judge after the grant of a new trial has ten days "from the date the order of the trial court is entered" to make that request. On August 4, 2021, the trial court entered its order setting Mother's motions for a hearing and ordered the parties to appear. Mother did

not file her change of judge motion until August 31, 2021, or twenty-seven days after the entry of the trial court's order setting the hearing. Mother blithely asserts that the trial court's August 24, 2021, ruling on her objection was the date on which the new trial was granted. Mother does not provide us with any authority for her apparent proposition that the Rule 76(C)(3) deadline to move for a change of judge was somehow tolled by the filing of her objection, which she did not file until August 19, 2021, after the deadline for filing her change of judge motion had already expired. Accordingly, we do not disturb the trial court's denial of Mother's motion for a new judge.

CONCLUSION

[39] Based on the foregoing, we conclude that the trial court's custody modification order was not clearly erroneous. We also conclude that Father's presentation of evidence at a hearing on Mother's Motion to Correct Error comported with the Trial Rules and that the trial court properly denied Mother's post-modification motions.

[40] Affirmed.

[41] May, J. and Tavitas, J. concur