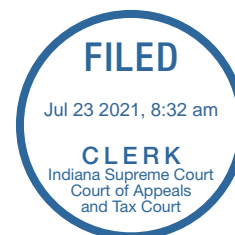


## MEMORANDUM DECISION

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

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B.L. (Mother),  
*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,  
*Appellee-Petitioner.*

July 23, 2021

Court of Appeals Case No.  
21A-JC-53

Appeal from the Allen Superior  
Court

The Honorable James R. Heuer,  
Judge.

Trial Court Cause Nos.  
02D08-1904-JC-231  
02D08-1904-JC-232  
02D08-1810-DC-1281

**Bailey, Judge.**

## Case Summary

- [1] B.L. (“Mother”) and C.L. (“Father”) were divorced and the dissolution decree provided that Mother had legal and physical custody of the parties’ two minor children, J.B. and D.B. (collectively, “Children”). During a subsequent Children in Need of Services (“CHINS”) proceeding involving Children, the Indiana Department of Child Services (“DCS”) filed a motion for a permanency order modifying custody of Children to Father, per Indiana Code Sections 31-17-2-8 and 31-30-1-12. The trial court granted that motion and ordered that Father was granted sole custody of Children, Mother was granted supervised visitation, and DCS’s wardship of Children was terminated.
- [2] Mother now appeals that order, raising the restated issues of whether the trial court abused its discretion in its custody and parenting time orders.
- [3] We affirm.

## Facts and Procedural History

- [4] Mother and Father were married on February 22, 2017. Their marriage was dissolved on February 27, 2019, in an agreed order under which Mother had sole legal and physical custody of Children and Father had parenting time.
- [5] In January 2019, while Children were living with Mother, Mother’s boyfriend, Cody Womble, was arrested for, and subsequently found guilty of, committing domestic violence against Mother. A No-Contact order was issued prohibiting Womble from contact with Mother from January 2019 to January 2020.

[6] On April 18, 2019, DCS investigated allegations of domestic violence by Womble against D.B. and Mother, in the presence of Children, and drug use by Womble in the presence of Children. On April 26, the allegations were substantiated, Children were removed from Mother's home and placed in relative care, and DCS subsequently filed a CHINS petition as to Children. On May 20, DCS filed an amended CHINS petition in which it alleged that, despite the No Contact order, Womble visited Mother's home on April 25, 2019, and stayed there overnight. The petition further alleged that, while visiting on April 25, Womble physically abused Mother in front of D.B., hit D.B., and smoked marijuana in the presence of Children. The petition alleged that Womble had also smoked marijuana in Children's presence on multiple previous occasions.

[7] Following a May 30 initial hearing, the juvenile court found that the CHINS allegations were true and it entered a dispositional order. Mother was ordered, and agreed, to participate in services, including supervised visitation. Father, who had relocated to California, moved back to Indiana after the CHINS proceedings began in order to be available to take custody of Children. Children were placed in Father's home in Indiana in January 2020, where they remained throughout the duration of the CHINS action.

[8] In an April 27, 2020, detention order, the juvenile court found that “[c]oncerns [had been] voiced that the mother is permitting the children to have access [to] her boyfriend,” who “reportedly abused the children.” Ex. at 53. The court ordered placement to remain with Father. In a May 28, 2020, permanency

order, the juvenile court changed the permanency plan to granting custody of Children to Father, with a “concurrent plan” to reunify Children with Mother. *Id.* at 45.

[9] On October 1, 2020, DCS filed a motion for a permanency order in which it stated that there had been a “substantial change in circumstances” such that the dissolution order granting custody of Children to Mother should be changed to grant custody of Children to Father, pursuant to Indiana Code Sections 31-17-2-8 and 31-30-1-12. *Id.* at 34. On November 5, 10, and 17 of 2020, the juvenile court held a hearing on DCS’s motion to change custody. At that hearing, DCS presented the following evidence.

[10] Dr. David Lombard (“Dr. Lombard”), who had conducted Mother’s psychological evaluation, testified that Children’s return to Mother’s custody could pose significant risks to Children. Dr. Lombard further testified that Mother was diagnosed with mental health disorders, including major depressive disorder, anxiety disorder with panic attacks, and borderline personality disorder, which could lead her to “engage in high risk relationships at times.” *Tr. v. II* at 25. Dr. Lombard’s “Psychological Assessment” of Mother, admitted as State’s Exhibit 22, stated that, to treat Mother’s mental health disorders, she needed a combination of psychiatric medication management, cognitive behavioral therapy, and dialectical behavior therapy. *Ex.* at 113.

[11] Dr. Lombard also evaluated Children, and their psychological assessments were admitted into evidence as Exhibits 23 and 24. Dr. Lombard testified that

Children reported abuse by Womble and were scared to be around him. Children were diagnosed with adjustment disorder with anxiety and depressed affect. Dr. Lombard testified that there would be a “heightened risk” that Children’s mental health would worsen if they were permitted to be around CW and/or if Mother’s mental health issues were not addressed. Tr. v. II at 33. Dr. Lombard evaluated Father and found no “diagnostic criteria for any mental health diagnosis” of him. *Id.* He testified Father did not pose a risk to children “at his home in his care.” *Id.* at 34.

[12] The Court Appointed Special Advocate (“CASA”) testified that Children consistently reported that Womble was present during Mother’s unsupervised visits and “were being told not to tell that he was there.” *Id.* at 112. The CASA testified it was in Children’s best interest that Father have custody of them because he provided a more stable home than Mother.

[13] DCS Family Case Manager Joshua Meyer (“FCM Meyer”) testified Mother had been ordered to participate in services at the Center for Nonviolence and in individual therapy but had not been successfully discharged from those services yet and still had a “significant amount of time” before her participation would be complete. *Id.* at 60. FCM Meyer also testified Mother had failed to abide by the No Contact order that was in effect as to Womble from January 2019 to January 2020. Specifically, Mother co-signed an apartment lease agreement with Womble in August of 2019. FCM Meyer further testified that it was in Children’s best interests to be placed in Father’s custody because Father could

provide a stable environment, while Mother still had unresolved mental health issues, domestic violence issues, and instability.

- [14] Mother’s therapist, Lesley Sammons of Dockside Services (“Sammons”), testified that Mother had made some progress in therapy but Mother had “struggled with being honest about” the domestic violence perpetrated by Womble *Id.* at 197. Sammons testified that Mother had failed to inform Sammons that Mother had entered into an apartment lease with Womble in August of 2019.
- [15] Veronica Engle (“Engle”), a family coach with Stop Child Abuse and Neglect (SCAN), supervised Mother’s visits with Children starting in August of 2019. Engle testified that, at the time of the CHINS/custody hearing, Mother’s weekly visits totaled twelve hours and were partly supervised. Specifically, Mother’s schedule was four three-hour visits per week, with four of those hours unsupervised and the remaining eight hours supervised.
- [16] In an order dated November 30, 2020, the juvenile court modified custody<sup>1</sup> of Children to grant sole legal and physical custody to Father and supervised visitation to Mother. Although neither party requested findings pursuant to

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<sup>1</sup> The trial court order mistakenly cited Indiana Code Section 31-30-1-13(c), which relates to paternity actions; however, its custody order was actually issued pursuant to Indiana Code Section 31-30-1-12 because the underlying custody order was within the context of a dissolution proceeding. The relevant portions of each statute are identical such that the mistaken citation was harmless error. *See, e.g., Taylor v. State*, 515 N.E.2d 1095, 1099 (Ind. 1987) (noting the trial court’s use of the incorrect statute was harmless because the language of the correct and incorrect statutes was identical).

Indiana Trial Rule 52, the juvenile court entered such findings *sua sponte*. Those findings stated, in relevant part:

6. The children are 10 and 9 years of age and have been residing in the care of the [F]ather since January 28, 2020. The children are doing well in that placement.

7. Since the placement with Father the behaviors of the children have improved. They have appropriate medication management and their therapy has continued as recommended.

8. The children were adjudicated to be children in need of services on May 30, 2019. Mother has not satisfactorily completed services. Her visits remain supervised through SCAN. While her situation is improving, the Court finds that unsupervised parenting time by the Mother with the children might endanger the children's physical health or impair the children's emotional development. Restriction of the parenting time is in the best interests of the children. Accordingly, the Mother's parenting time shall remain supervised by SCAN consistent with the current schedule.

9. Mother has exhibited dishonesty throughout the CHINS proceedings.

10. Mother has been involved in domestic violence from time to time during these proceedings.

11. The modification of the children's custody to Father serves the Children's best interests. CASA concurs with that modification.

12. The Court finds that there has been change of circumstances so substantial and continuing as to make the terms of the

custody, support and parenting time orders entered by the court in Case No. 02D08-1810-DC-1281 unreasonable. The Court finds that there has been substantial change in one or more of the factors which the Court may consider under I.C. 31-14-13-2 and LC. 31-14-[1]3-6<sup>[2]</sup> for purposes of modifying custody.

13. The best interests of the children are served by granting [Father] sole legal custody.

Appealed Order at 3-4.

[17] In addition to modifying custody, the juvenile court ordered that DCS's wardship of Children per the CHINS proceedings was terminated. However, the court noted that "before any future modification of this order is considered, an investigation by the [DCS] and/or the [CASA] program should be conducted to ensure the safety and well-being of the child[ren]." *Id.* at 4-5.

[18] Mother now appeals.

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<sup>2</sup> The juvenile court again mistakenly referred to the statutes related to the modification of custody within a paternity action—i.e., I.C. § 31-14-13-1 to -12—rather than modification of custody within a dissolution action—i.e., I.C. § 31-17-2-1 to -26. However, as the relevant modification statutes contain the same language, the error was harmless. *See, e.g., Taylor*, 515 N.E.2d at 1099.



# Discussion and Decision

## Standard of Review

[19] Mother challenges the trial court order modifying custody and parenting time.<sup>3</sup> Modifications of custody and parenting time are determinations that rest in the sound discretion of the trial court. *See, e.g., In re Marriage of Sutton*, 16 N.E.3d 481, 484 (Ind. Ct. App. 2014) (modification of custody); *E.W. v. J.W.*, 20 N.E.3d 889, 898 (Ind. Ct. App. 2014) (modification of parenting time), *trans. denied*. On review of those determinations, we may neither reweigh evidence nor judge witness credibility. *Id.* “We consider only the evidence favorable to the trial court’s judgment and all reasonable inferences derived” therefrom. *Sutton*, 16 N.E.3d at 484.

[20] Where, as here, the juvenile court *sua sponte* enters findings of fact and conclusions thereon, “the 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.” *Estate of Henry v. Woods*, 77 N.E.3d 1200, 1204 (Ind. Ct. App. 2017) (quotation and citation omitted).

We apply a two-tier standard of review to the *sua sponte* findings and conclusions. First, we determine whether the evidence

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<sup>3</sup> Pursuant to Indiana Code Section 31-30-1-12, the CHINS court had concurrent jurisdiction of the child custody and parenting time orders entered by the dissolution court. Neither party challenges the trial court’s jurisdiction.

supports the findings and second, whether the findings support the judgment. We will set aside findings and conclusions only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. In conducting our review, we ... do not reweigh the evidence nor do we assess witness credibility.

*Id.* (citations omitted).

## Modification of Custody

[21] Under Indiana Code Section 31-17-2-21(a), a court may not modify a child custody order unless modification is in the child's best interests and there has been a substantial change in one or more of the factors enumerated in Indiana Code Section 31-17-2-8. Under the latter statute, the court must 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.

\* \* \*

Ind. Code § 31-17-2-8.

[22] Here, the trial court concluded that there was a substantial change in circumstances such that modification of custody was in Children's best interests. That conclusion was based on the court's findings regarding domestic violence in Mother's home and the relative stability of Father's home. Mother challenges those findings, alleging the evidence fails to support them.

[23] Mother challenges finding 10, i.e., that she was "involved in domestic violence from time to time during these proceedings." Appealed Order at 3. She points out that she was a victim of domestic violence, rather than a perpetrator of such

violence, and that “there was no evidence presented that [Womble] was still in the picture.” Appellant’s Br. at 17. While it is true that Mother did not commit domestic violence herself, there was sufficient evidence that Mother had a pattern of allowing Womble, the undisputed perpetrator of the domestic violence against her and D.B., to be in her and Children’s presence during the CHINS proceedings, thus repeatedly putting Children at risk of physical and/or emotional harm. Specifically, Mother allowed Womble to be in Children’s presence on August 26, 2019, despite the existence of a No Contact order; the contact with Womble on that date resulted in Womble’s physical abuse of Mother, in Children’s presence, Womble’s physical abuse of D.B., and Womble’s use of drugs in Children’s presence.

[24] In addition, Children repeatedly reported that Womble was present during unsupervised visitations that took place during these proceedings. Moreover, Mother signed an apartment lease with Womble while the CHINS proceedings were pending and despite the No Contact order. Further, Mother’s mental health provider testified that her mental health issues may cause her to continue to engage in high risk relationships, such as her relationship with Womble. Although mental health treatment could guard against such relationships, the evidence was that Mother had not completed such treatment. The mental health provider also testified that Womble’s presence around Children was harmful to their mental health. Finally, both the CASA and the DCS FCM testified that they believed it was in Children’s best interests for Father, rather than Mother, to have custody.

[25] The finding that Mother allowed domestic violence to continue in her home during the proceedings is supported by the evidence and shows a change in circumstances so substantial and continuing as to make her custody of Children unreasonable. I.C. § 31-17-2-8. Furthermore, while the trial court did not make more detailed, specific factual findings that Womble was harmful to Children and Mother nevertheless allowed Womble to be in Children’s presence, the evidence adduced at trial supports such predicate findings, and those predicate findings support the trial court’s ultimate finding of a substantial and continuing change of circumstances.<sup>4</sup> While Mother points to conflicting evidence that she was not in a relationship with Womble and did not allow him in her home during the CHINS proceedings, that is merely a request that we reweigh the evidence and judge witness credibility, which we may not do. *Sutton*, 16 N.E.3d at 484.

## Modification of Parenting Time

[26] Indiana has recognized that a noncustodial parent’s right to visit her children is a “precious privilege.” *E.W.*, 20 N.E.3d at 897. Thus, pursuant to Indiana Code Section 31-17-4-2, a court may not restrict a parent’s parenting time rights unless modification is in the best interests of the child and unrestricted

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<sup>4</sup> Mother also challenges the trial court’s finding related to Children’s improved condition while in Father’s care on the grounds that such a finding will not by itself support a custody modification. Appellant’s Br. at 18 (citing *Wiggins v. Davis*, 737 N.E.2d 437, 442 (Ind. Ct. App. 2000)). However, Children’s improving condition in Father’s home was not the only factor considered but merely one permissible factor considered in determining Children’s best interests. *See, e.g., Collyear-Bell v. Bell*, 105 N.E.3d 176, 185 (Ind. Ct. App. 2018).

“parenting time might endanger the child’s physical health or significantly impair the child’s emotional development.” “Even though the statute uses the word ‘might,’ this Court has previously interpreted the language to mean that a court may not restrict parenting time unless that parenting time ‘would’ endanger the child’s physical health or emotional development.” *E. W.*, 20 N.E.3d at 898 (citation and internal quotation omitted).

[27] Mother challenges the trial court’s finding that unrestricted parenting time with her would not be in Children’s best interests and might endanger them. Mother also contends that the trial court erred by finding that her parenting time with Children “remain[ed] supervised through SCAN” at the time of the modification hearing. Appealed Order at 3.

[28] The latter finding was erroneous, as the evidence shows that Mother had partly *unsupervised* visitation at the time of the hearing. However, that erroneous factual finding was harmless error; even though Mother had some unsupervised visitation with Children, the evidence established that she exposed Children to potential danger during such unsupervised visitation by allowing Womble to be in their presence. And the latter fact supported the trial court’s conclusion that unsupervised parenting time with Mother “might endanger the children’s physical health or impair the children’s emotional development.” *Id.*

## Conclusion

[29] The trial court did not abuse its discretion or commit clear error when it ordered that custody be modified from Mother to Father, and that Mother's parenting time be supervised.

[30] Affirmed.

May, J., and Robb, J., concur.