

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cynthia Worrell,
Appellant-Petitioner,

v.

Brian Worrell,
Appellee-Respondent

November 28, 2023

Court of Appeals Case No.
23A-DR-224

Appeal from the Boone Superior
Court

The Honorable Justin H. Hunter,
Special Judge

Trial Court Cause No.
06D01-0710-DR-512

Memorandum Decision by Chief Judge Altice
Judges Weissmann and Kenworthy concur.

Altice, Chief Judge.

Case Summary

- [1] Cynthia Worrell (Mother) appeals the trial court’s denial of her motion to modify custody, parenting time, and child support. She also challenges the trial court’s order awarding attorney’s fees to Brian Worrell (Father).
- [2] We affirm in part and reverse in part.

Facts & Procedural History

- [3] As this court has previously summarized:

When the parties divorced in 2011, they agreed to joint legal custody of their five children, with Father having primary physical custody of the parties’ two oldest children (“the girls”) and Mother having primary physical custody of the parties’ three youngest children, C., P., and M. (“the boys”). They set a parenting time schedule and determined the child support obligation each owed to the other, resulting in a net payment from Father to Mother of \$174.00 per week. Soon after the dissolution decree was signed, the parties began to file numerous motions to modify custody and parenting time and motions for contempt based on parenting time issues. As described in one of the trial court’s post-dissolution orders, “Since the dissolution, the parties’ relationship has remained contentious and fraught with conflict.”

Worrell v. Worrell, No. 20A-DR-2106 (Ind. Ct. App. July 26, 2021) (footnote and record citation omitted) (*Worrell II*).

- [4] Here, we state the facts pertinent to this appeal, which we note is the parties’ third appeal. In June of 2015, the trial court ruled on various motions to modify parenting time and/or custody and motions for contempt filed by both

parties. The court determined that the two oldest children were emancipated and no longer subject to the orders regarding custody and parenting time. At that time, the trial court determined that a change in custody of the boys from Mother to Father was not in the boys' best interests. The court also found both parties in contempt of previous court orders. Mother was ordered to purge her contempt by changing her behavior; Father was ordered to pay \$10,000 toward Mother's attorney's fees. Father filed a motion to correct error and, while that motion was pending, the parties filed several additional motions for contempt and motions for modification of custody and parenting time.

[5] The trial court held a hearing on April 13, 2016, on these pending motions. In a May 27, 2016 order, the trial court granted Father's motion for modification, giving him primary physical custody of the boys. The trial court also found Mother in contempt and ordered that she pay a portion of Father's attorney's fees. The court did not provide an amount for the attorney's fees Mother owed. Rather, the court, noting that Father was previously ordered to pay a portion of Mother's attorney's fees under a prior court order, stated: "As of the date of this order [May 27, 2016], the parties shall no longer be indebted to one another resulting in a *zero sum* net to Mother or Father."¹ *Appellant's Appendix Vol. 2* at 95 (emphasis added).

¹ In a subsequent brief in support of a request for attorney's fees and appellate fees, Father stated that he proposed the language, which we will refer to as the Zero Sum Provision, to create "a clean slate and end the antagonistic process." *Appellant's Appendix Vol. 2* at 117. Father further elaborated that the Zero Sum

- [6] Both parties appealed. This court remanded for the trial court to calculate and order Father to reimburse Mother for her overpayment of child support. On remand, the trial court was also directed to “clarify” its order with regard to its Zero Sum Provision. *Worrell v. Worrell*, 06A01-1606-DR-1456 (Ind. Ct. App. Aug. 9, 2017) (*Worrell I*).
- [7] Days after this court handed down *Worrell I*, Father filed another motion for rule to show cause requesting that Mother be found in contempt and ordered to pay his attorney’s fees associated therewith. The trial court held a hearing on Father’s new motion and on the matters remanded back to the trial court. On September 8, 2017, the trial court issued an order in which it found that Father had underpaid child support by \$4080 but that Mother owed Father \$1250 in attorney’s fees for various new instances of contempt. The court therefore ordered Father to pay the difference of \$2830 within twelve months. The trial court did not clarify the Zero Sum Provision. Father also requested an additional setoff from Mother’s child support overpayment to cover his appellate attorney’s fees. The trial court left Father’s request for a future date.
- [8] In July 2018, Father filed another petition for rule to show cause and requested a hearing on his request for appellate attorney’s fees. Before a hearing could be held, Father filed a petition seeking to terminate Mother’s parenting time with the two youngest boys. Mother subsequently filed a motion for rule to show

Provision was proposed “[a]s a compromise” because he wanted “a cleared slate so neither party would continue to bring the other before the Court for non-payment.” *Id.* at 118.

cause alleging that Father was interfering with her communication with the boys, was not forthcoming with educational and medical information about the boys, and had obligated the boys to activities that interfered with her parenting time.

[9] On January 29, 2020, Mother filed a verified petition seeking physical custody of the parties' youngest child. At that time, Father's July 2018 motion to terminate Mother's parenting time was still pending. The trial court held Mother's most-recent petition until after Father's motion to terminate was resolved. The parties appeared in February and June 2020 for hearings on Father's motion to terminate Mother's parenting time. On October 13, 2020, the trial court denied Father's motion to terminate Mother's parenting time and the parties' pending motions for contempt. Regarding the lingering issue of attorney's fees, the trial court determined that Father owed Mother \$10,000 for the award of attorney's fees entered in June 2015. The trial court also determined that Father still owed Mother \$2830 for overpayment of child support.

[10] Father appealed this order. With regard to Father's challenge regarding amounts he owed Mother, this court stated:

Turning to the merits of Father's argument regarding the trial court's resuscitation of the June 2015 order that he pay \$10,000 of Mother's attorney fees, we agree with him that the trial court has yet to clarify its May 2016 order as instructed by the Court of Appeals [in *Worrell I*] by explaining how it reached the conclusion that the attorney fees each party owed to the other

resulted in a “zero sum” balance. In June 2015, the trial court ordered Father to pay \$10,000 of Mother’s attorney fees for his contempt. Based on the record before us, Father still owed that sum in May 2016, when the trial court found that Mother now owed Father some amount of his attorney fees for recent instances of contempt on her part. But we do not know, and the trial court neither stated in the May 2016 order nor has yet clarified, whether the amount of Father’s attorney fees Mother was found to owe is \$0.01 or \$10,000 or something in between. However, we do know, by virtue of the trial court finding a setoff, that it is not \$0.00. Therefore, Father may owe as much as \$9,999.99 when Mother’s obligation is subtracted, but he cannot still owe the full \$10,000. Accordingly, we must remand to the trial court to do as the Court of Appeals [in *Worrell I*] instructed on remand in 2017: determine the amount of Father’s attorney fees Mother was required to pay for instances of contempt between the June 2015 and May 2016 orders and modify its October 2020 order as necessary to reflect the amount of Mother’s attorney fees from June 2015 that Father still owes after subtracting Mother’s obligation.

Worrell II, slip op. at 12.

[11] The trial court held a brief hearing on August 26, 2022, during which Mother objected to the court’s consideration of a new affidavit filed by Father’s attorney outlining legal services related to pursuing numerous contempt motions in 2015-2016.² The trial court did not rule on Mother’s objection. With the

² This affidavit was filed on February 9, 2022.

parties' agreement, the court also scheduled an *in camera* interview of the parties' youngest child that was held on September 27, 2022.

[12] On January 2, 2023, the trial court issued its order denying Mother's petition to modify custody. Although finding that there was a "substantial change in some of the factors" the court is to consider, including [the child's] age, the wishes of the parents, and the wishes of the [child] to have more independence," the trial court nevertheless concluded that a change of custody was not "presently in the best interest" of the youngest child. *Order Denying Motion to Modify Custody, Parenting Time and Child Support* at 1, 2. The court noted that child is "not unhappy" in Father's home and that child "presently prospers with the support of his friends," which would change because a change in custody would require child to attend a different school. *Id.* at 1.

[13] Also on January 2, 2023, the court issued an order awarding attorney's fees to Father. Over Mother's objection, the trial court considered the affidavit submitted by Father's counsel and concluded that \$23,250 in attorney's fees and \$10,080 in paralegal fees was reasonable for preparation and pursuit of several petitions for rule to show cause and for defending Father against Mother's various petitions in 2015 and 2016. Due to an earlier finding that Mother's conduct in 2015 and 2016 was in part the result of mental health issues, the trial court ordered that she pay only a portion of these fees. Specifically, the court ordered Mother to pay Father \$16,665 in attorney's fees. Mother appeals both orders.

Discussion & Decision

1. *Change of Custody*

- [14] We recognize the well-established preference in Indiana courts “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) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). “It is not impossible to reverse a trial court’s decision regarding child custody on appeal, but given our deferential standard of review, it is relatively rare.” *Hecht v. Hecht*, 142 N.E.3d 1022, 1029 (Ind. Ct. App. 2020). “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.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). “Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.” *Best v. Best*, 941 N.E.2d 499, 502 (Ind.2011) (citations omitted).
- [15] Further, “a 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 (citations and quotation marks omitted). The party seeking to modify custody bears the burden of demonstrating the existing custody should be altered. *Id.*
- [16] Modification of child custody is governed by Ind. Code § 31-17-2-21(a), which provides that a trial court “may not modify a child custody order unless: (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 [I.C. § 31-17-2-8].” Such factors include:

- (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.

[17] Mother argues that Father’s refusal to provide her with information about their youngest child while in Father’s care and his refusal to allow the youngest child to have a relationship with his maternal grandparents and paternal grandmother is “so egregious” that it is not in child’s best interests to remain in Father’s custody. *Appellant’s Brief* at 18. Here, the trial court was well aware of the ongoing strife between Mother and Father, especially as it pertained to the children over the years. Since their divorce in 2011, both parties have filed countless contempt petitions and several requests for change in custody and/or parenting time. Indeed, this is the third appeal to this court.

[18] In considering Mother’s most-recent request for change in custody of the parties’ youngest child, the trial court heard evidence from Mother and Father and conducted an *in camera* interview of the child. The court found that there had been a significant change in a couple circumstances the court was required to consider, but nonetheless concluded that a change in custody was not in child’s best interests. The court explained its decision, noting that child is “not unhappy” living with Father and that child “prosperes with the support of his friends” and “enjoys success” at the school he currently attends. *Appealed Order Denying Motion to Modify Custody* at 1. The court noted that a change in custody would require a change in schools; hence, a change in custody was not in Child’s best interests. We will not second-guess the trial court’s assessment of the best interests of child.

2. *Attorney's Fees*

[19] ““We review a trial court’s award of attorney’s fees for an abuse of discretion.”” *Minser v. DeKalb Cnty. Plan Comm’n*, 170 N.E.3d 1093, 1102 (Ind. Ct. App. 2021) (quoting *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020)). ““An abuse of discretion occurs when the court’s decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law.”” *Id.* ““To make this determination, we review any findings of fact for clear error and any legal conclusions de novo.”” *Id.*

[20] The matter of attorney’s fees has been ongoing since June 2015. At that time, the trial court found both Mother and Father in contempt for violating court orders relating to the children. Mother was permitted to purge her contempt through non-monetary efforts. Father was ordered to purge his contempt by paying \$10,000 of Mother’s nearly \$27,000 in legal fees. In 2016, the trial court found Mother in contempt and ordered her to pay part of Father’s attorney’s fees. The trial court did not set an amount for Father’s attorney’s fees, but stated in its order:

Due to Mother’s wanton and willful contempt of the Court’s order, she shall pay to Father attorney’s fees. Father was previously ordered to pay attorney fees for contempt. Father previously paid attorney fees under the Court’s last order. As of the date of this order, the parties shall no longer be indebted to one another *resulting in a zero sum net* to Mother or Father.

Appellant’s Appendix Vol. 2 at 95 (emphasis supplied).

[21] The convoluted history of this case is a direct result of ongoing battle between Mother and Father that has resulted in a multitude of filings for contempt and requests for modifications of custody and parenting time over the course of a decade or more. It is clear from the record that Mother and Father cannot and will not cooperate even for the sake of their children. The parties now find themselves before this court for a third time, arguing about an order issued in 2015.

[22] The history is set out in detail above. In sum, in 2015, Father was ordered to pay \$10,000 toward Mother's attorney's fees for contempt. Less than a year later, Mother was ordered to pay a portion of Father's attorney's fees for her contempt. Although the amount Mother was to pay was not specified, it is clear from the trial court's order, and this court's decision in *Worrell I*, that the amount was expected to be less than \$10,000. While the panel in *Worrell I* found the trial court's language in the Zero Sum Provision needed clarification, we read that provision as the trial court's statement that the amount Mother owed Father for attorney's fees was equal to the amount Father still owed Mother for attorney's fees. Hence, the trial court statement in that order that "the parties shall no longer be indebted to one another." *Appellant's Appendix Vol. 2* at 95. This was the end of the matter. Or at least it should have been.

[23] Instead, years after the trial court's handling of Mother's and Father's contempt in 2015 and 2016, the trial court, again at the behest of this court given the parties' arguments on appeal, sought to clarify the attorney's fee award that was resolved with the Zero Sum Provision. The trial court's order said nothing

about the \$10,000 Father owed to Mother on account of his contempt citation in 2015. The trial court then ordered that Mother pay Father more than \$16,000 in attorney's fees for her contemptuous actions in 2016.

[24] Given the language of the original order, the trial court clearly abused its discretion in 2023 by ordering Mother to pay Father's attorney's fees in an amount exceeding \$10,000. Undoubtedly, in 2016, the trial court found there was an offset between what the parties owed each other. As this court found in *Worrell II*, the clarification that was needed was what amount of attorney's fees "Father still owe[d] after subtracting Mother's obligation." *Slip. op.* at 30. At no time has there been any indication that the trial court contemplated an attorney's fee award in favor of Father exceeding \$10,000 when it issued its order in 2016. Indeed, we find the trial court's 2016 order to be quite clear – the attorney's fees completely offset each other resulting in a "zero sum net" to Mother or Father. *Appellant's Appendix Vol. 2* at 95. And this was the position Father took, in fact proposed to the trial court, back in 2016.

[25] We therefore conclude that the trial court abused its discretion in ordering Mother to pay \$16,665 and reverse that portion of the order. No monetary obligation with respect to attorney's fees relating to the contempt matters in 2015 and 2016 remain, and the parties are now on a clean slate.

[26] Judgment affirmed in part and reversed in part.

Weissmann, J. and Kenworthy, J., concur.