MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Sean P. Schembra,

Appellant-Petitioner

v.

Delanie B. Schembra,

Appellee-Respondent

March 13, 2024

Court of Appeals Case No.
23A-DC-631

Appeal from the Marion Superior County

The Honorable Geoffrey A. Gaither, Special Judge

Trial Court Cause No.
49D09-1705-DC-019401

Memorandum Decision by Judge Felix
Judges Bailey and May concur.

Felix, Judge.

Statement of the Case

[1] In 2018, Sean ("Father") and Delanie ("Mother") Schembra dissolved their marriage after having four children together—M.S., C.S., A.S., and O.S. (collectively, the "Children"). At the time of dissolution, the trial court awarded Mother and Father joint legal custody and Mother sole physical custody subject to Father's parenting time. Since the divorce, Father's relationship with the Children has been strained. In 2020, the trial court modified Father's parenting time by removing overnights, and it prohibited any person from using physical force upon any of the Children to compel them to visit Father. In 2022, after a series of filings by each party, an evidentiary hearing, and in-camera interviews with the Children, the trial court refused to modify its prior parenting time order. Father now appeals and presents two issues for our review, which we restate as follows:

1. Whether the trial court abused its discretion by not admitting an audio recording into evidence; and
2. Whether the trial court clearly erred by not lifting the prohibition against using physical force to make the Children attend Father's parenting time.

[2] We affirm.

Facts and Procedural History

[3] Mother and Father were married in 2004 and had M.S. in 2005, C.S. in 2007, A.S. in 2009, and O.S. in 2013. Mother and Father divorced in 2018. The trial court awarded Mother sole physical custody of the Children subject to Father's

parenting time. At that time, Father had parenting time on a three-week rotation due to his work schedule, and his parenting time included overnights with the Children. Since the divorce, Father's relationship with the Children has been strained, and he has faulted Mother for this strain, frequently accusing Mother of parental alienation. The trial court has repeatedly made specific findings rejecting Father's claims of parental alienation.

[4] Initially after the divorce, due to their anxiety about Father's parenting time, the older three Children and Father participated in reunification therapy with Logan Everett. By early November 2019, M.S. was refusing to participate in parenting time with Father, C.S. was occasionally refusing to participate in parenting time with Father, and A.S. was expressing a desire to spend less time with Father.

[5] In early 2020, Father requested the trial court appoint a new reunification therapist because Father believed "that he and the children were not making significant progress in their relationship" while working with Everett. Appellant's Suppl. App. Vol. II at 47. Mother opposed this request because she believed the three older Children had a good relationship with Everett and had made progress in their relationships with Father. Nonetheless, the trial court granted Father's request, gave Father two options for a new therapist, and ordered Father to be solely responsible for the cost thereof. After a dispute about costs, Father eventually chose one of the two therapists proposed by the trial court: Dr. William Steele. Also in early 2020, the trial court granted

Mother and Father's agreed request to appoint Judy Hester as their Parenting Coordinator.

[6] Father fired Dr. Steele after only two months "because Father did not agree with Dr. Steele's process and recommendations." Appellant's Suppl. App. Vol. II at 50. Thereafter, Father's relationship with C.S., A.S., and O.S. continued to deteriorate. By early September 2020, C.S. was also refusing to participate in parenting time with Father. Around this same time, there was at least one instance in which O.S. resisted participating in parenting time with Father, and, upon Hester's instruction, Mother physically carried O.S. to that parenting time. Additionally, Hester filed her Fifth Interim Report with the trial court in September 2020 in which she observed "that the instances of Father's inability or refusal to be emotionally or physically present for the Children are rampant." Parenting Coordinator's Fifth Interim Report to Court at 4. For instance, A.S., C.S., and O.S. reported to Hester that Father is often unresponsive to O.S.'s requests for help when she is crying scared in the middle of the night at Father's house, resulting in A.S. or C.S. calming down O.S. so she can sleep. Based on these reports and other factors, Hester recommended the trial court "immediately restrict Father's parenting time," noting that "the Children's physical and emotional well-being [was] being negatively impacted at the current time by the status quo parenting time arrangement and unproductive and harmful behavior patterns." *Id.* at 10.

[7] On September 22, 2020, Father filed a motion seeking in part for the trial court to enjoin Mother from violating the trial court's parenting time orders; that is,

Father requested the trial court prohibit Mother from allowing the Children to refuse to participate in parenting time with Father. On November 6, 2020, after a hearing on Hester's recommendation, Father's injunction requests, and other pending matters, the trial court issued its order thereon (the "November 2020 Order") and entered the following relevant findings and conclusions:

> 2. . . .
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> > d. Parenting time for Father *shall not include overnight parenting time for the children* but shall include Thursdays after school until 8:00 p.m. and every other weekend Friday from after school to 8:00 p.m. and from 9:00 a.m. to 5:00 p.m. on Saturdays and Sundays of Father's weekends. Exchanges of the children shall be pursuant to Parenting Time Guideline B(l). Mother SHALL continue to encourage the children to visit their Father. *Mother is not required to physically force a child to visit Father. No person may use physical force upon a child to compel them to visitation.*
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> * * *
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> 11. What Mother would like would be for the children to visit their dad, be happy, want to go back and not call her in the middle of the night, when the youngest is crying and her dad won't respond. The Court in its previous orders encouraging Mother to be a half step slow, to use a figure of speech, in responding to communications from the children while with Dad, never anticipated that the distressed children would not be being responded to by their Father. If Mother has been, in the past, a bit too quick to be "comforter-in-chief" when the children were with Father. Father though appears to be way slower than a half-step in supplying emotional comfort. It appears he sometimes just expects his children to tough it out.

> 12. This just puts the task on [A.S.], [O.S.]'s sister. Parents are supposed to take steps to make anxious children less so. Ordinarily it is a source of pride for a parent to have done or said something to a child who is crying to get them to stop. Children are supposed to look forward to overnights. *With overnights like these, the kids are better off not having them.* Mother doesn't deserve an injunction. She deserves to not be blamed for Father's estrangement.
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> 14. Court now MODIFIES the current parenting time order as discussed in paragraph 2(d) above.
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> 15. Court FINDS the Parenting Coordinator's Fifth Report extremely instructive. *The report describes a pattern of parenting behavior and decision-making by Father which is suboptimal for the children's well-being* and self-sabotaging to his expressed wishes for a return to a more positive Father/Children relationship. . . .

Appellant's Suppl. App. Vol. II at 68–71 (emphases added).

[8] By the fall of 2021, none of the Children were exercising parenting time with Father. On September 7, 2021, Father filed a petition requesting the trial court to (1) modify its November 2020 Order to allow Father to have overnight parenting time with the Children and (2) order the Children to participate in reunification therapy with Father. On January 7, 2022, Father filed a motion requesting the trial court order the Children to participate in intensive reunification therapy with Father. After several continuances and a change of judge, Father's requests and all other pending matters came before the trial

court for a trifurcated evidentiary hearing on April 25, April 26, and August 10, 2022. On August 8, 2022, the trial court conducted in-camera interviews with the Children.

[9] During the evidentiary hearing, Father offered into evidence Exhibit 3-3, which is a compilation of recordings Father made of phone calls between himself and Mother that occurred when the Children were present. Father had previously provided these recorded conversations to the Guardian ad Litem, Beth Cox, and she had considered them in a prior report and recommendations to the trial court in the initial dissolution matter. Mother objected to the admission of Exhibit 3-3 because it contained hearsay, lacked foundation, lacked authenticity, and was irrelevant to the pending issues. As to Mother's hearsay objection, Father argued that he was not offering Exhibit 3-3 to prove the truth of what anyone in the recordings said but rather to demonstrate the nature of the conflict between Mother and Father. The trial court ultimately sustained Mother's objection because (1) Exhibit 3-3 "may raise more questions . . . th[a]n it would answer" and Father "could still find other ways to present the nature of the conflict" between himself and Mother, Tr. Vol. II at 30; and (2) Exhibit 3-3 "had been previously considered by both the GAL and the Court and did not contain any new information," Appellant's Suppl. App. Vol. II at 55.

[10] On December 1, 2022, the trial court issued its order on all pending matters (the "December 2022 Order") and entered the following relevant findings and conclusions:

B. Findings of Fact

* * *

19. Dr. Steele testified regarding his efforts to work with Father and the children and Father's unwillingness to follow Dr. Steele's advice. Dr. Steele found Father to be rigid and controlling. He was focused on his quantity of time with the children as opposed to the quality of time. A review of the email communication between Father and Dr. Steele[] supports Dr. Steel[e]'s view of Father. . . .

20. Dr. Steele found Mother to be cooperative in the therapeutic process and she was hopeful that the children and Father would be able to repair their relationship. Mother followed Dr. Steele's advice regarding the children and reunification therapy. Dr. Steele also noted that the children were beginning to lose trust in Mother because she was forcing them to spend time with Father despite their significant angst regarding parenting time.

21. Dr. Steele . . . opined that the estrangement in the relationship between Father and the children was because of Father's actions. He explained that Father was not as engaged and interactive with the children and he didn't understand how difficult it was for the children to adjust to the changes in Father's life after the divorce. . . .

22. Dr. Steele found the children's rejection of Father to be justified as they were not receiving the nurturing, support and understanding that they needed. This lack of emotional support is documented in the Court's prior orders and formed the basis of the Court's prior restriction on Father's parenting time.

* * *

25. . . . Father also fails to see the emotional trauma he caused to the children in asking the Court to cease having them see Mr. Everett, having them begin to engage with Dr. Steele, and then terminating Dr. Steele's services after the children had started to work with him as their new therapist. The older three children have lost all faith in Father and joint therapy.

* * *

55. . . . The only witness in the current litigation who supported Father's claim of parental alienation was his current wife. Logan Everett, Dr. Steele, Judy Hester, Beth Cox, and Dr. Joseph Kow[a]low all testified that they did not believe that Mother had alienated the children from Father.

* * *

57. The Court agrees with Mother's assessment that five years after the parties' initial divorce, Father and the children are in a worse place, despite the involvement of several professionals, including numerous therapists, psychiatrists, psychologists, a Guardian ad Litem and Parenting Coordinator.

* * *

62. The evidence presented to the Court in the present litigation confirms the Court's prior findings in this matter. Mother has not alienated the children from Father. The children are not alienated from Father. Rather, the children are estranged from Father based on Father's inability or unwillingness to provide the emotional support needed by his children.

63. Mother has followed the recommendations of the Court and professionals involved in this case and has worked to promote

and repair the relationship between Father and the children, even to the detriment to Mother's relationship with the children.

64. Father continues to refuse to acknowledge how his own actions and choices have negatively impacted his relationship with his children. At no time during two full days of evidence in this case did Father recognize any possible fault or error in the way he refused to work with Dr. Steele and [Hester] or in how he has presented himself to Mother and the children. Rather, Father accused both Dr. Steele and [Hester] of acting inappropriately, and Father continued to malign Mother.

* * *

66. Father clearly lacks insight into how his vilification of Mother has only deepened the chasm in his relationship with his children. The more Father focuses his anger and venom at Mother, the more his children pull away and reject Father. . . .

* * *

69. The children are doing very well at this time, despite not spending time with Father. Their anxiety has greatly improved and while there is an underlying sadness regarding their relationship with Father, there also is a sense of peace with the status quo. . . .

* * *

73. The Court finds that it is in the children's best interests for Father to participate in intensive, individual therapy with a doctorate level provider who has experience with child and parent estrangement. Father needs to gain insight and understanding as to how his own actions have caused the

children to be estranged from him, to help him understand how to properly provide for the children's emotional needs and be willing and able to listen to the recommendations of mental health professionals on these issues.

* * *

Conclusions of Law and Order

* * *

4. Father's request to modify Father's parenting time is hereby denied. Father has failed to show that it is in the Children's best interests to modify the Court's prior parenting time order. The issues that existed at the time of the Court's last parenting time order have not been rectified. . . .

Appellant's Suppl. App. Vol. II at 46–65.

[11] Father subsequently filed a motion to correct error and to modify parenting time, and the trial court denied Father's motion after hearing. This appeal ensued.[1]

[1] After this case was fully briefed, we granted Father's motion seeking to file an amended brief to add citations to the record. Yet in his Amended Brief, Father still fails to provide citations for several statements of fact, Appellant's Am. Br. at 5, 8, 12, 14, 17, 20, in violation of Appellate Rules 46(A)(5), 46(A)(6)(a) and 46(A)(8)(a), and for several statements of law, Appellant's Am. Br. at 14, 16–19, in violation of Appellate Rule 46(A)(8)(a). Also in his Amended Brief, Father cites to several "exhibits" without reference to where these "exhibits" are located in the record, Appellant's Am. Br. at 6–8, 20–22, which is a violation of Appellate Rule 46(A)(6)(a). We also note that many pertinent records were not included in the Appendix; to permit a review of the issues on the merits, we took judicial notice of the relevant records pursuant to Appellate Rule 27.

Discussion and Decision

1. The Trial Court Did Not Abuse Its Discretion When It Refused to Admit Exhibit 3-3

[12] Father first argues that the trial court abused its discretion by not admitting Exhibit 3-3 into evidence. "The trial court has broad discretion to rule on the admissibility of evidence." *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017). We review evidentiary rulings for an abuse of discretion, which occurs when the ruling is "clearly against the logic and effect of the facts and circumstances." *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014) (citing *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011)). Moreover, we may affirm an evidentiary ruling on any theory supported by the evidence. *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015).

[13] Father contends only that the trial court ruled Exhibit 3-3 was inadmissible because it contained inadmissible hearsay. **(Appellant's Am. Br. at 10–19.)** Contrary to Father's assertion, the trial court did not make any ruling regarding whether Exhibit 3-3 contained hearsay. *See* Tr. Vol. II at 28–32. Rather, the trial court did not admit Exhibit 3-3 because it was more confusing and

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Mother also fails to provide citations for several statements of fact in her brief, Appellee's Br. at 4, 7, 13–14, 16, 18, in violation of Appellate Rules 46(A)(5), 46(A)(6)(a), 46(A)(8)(a), and 46(B). We remind counsel to include citations as it improves our ability to review the case and focus on the issues presented. Because the issues in this case concern Father's relationship with the Children and because his and Mother's noncompliance with Appellate Rule 46 does not substantially impede our review of the claims, we choose to address the merits of all arguments made by the parties herein. *See Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015); *In re M.I.*, 127 N.E.3d 1168, 1171 (Ind. 2019) (quoting *Neal v. DeKalb Cnty. Div. of Fam. & Child.*, 796 N.E.2d 280, 285 (Ind. 2003)). Finally, counsel should comply with the signature requirement of Appellate Rule 68(H).

cumulative than it was probative. *Id.* at 30, 31; Appellant's Suppl. App. Vol. II at 55 ¶ 39. Furthermore, it was evidence that had been presented to the trial court at previous hearings. Because Father does not challenge the grounds on which the trial court denied admission of Exhibit 3-3, we conclude that the trial court did not abuse its discretion by declining to admit Exhibit 3-3.

2. The Trial Court Did Not Clearly Err by Denying Father's Motion to Modify Parenting Time

[14] Father next challenges the trial court's decision to not modify its parenting time order as set forth in the November 2020 Order. Because the trial court entered findings and conclusions sua sponte in the December 2022 Order, we review the issues covered thereby "with a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment." *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind 2016) (citing *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014)). "Any issue not covered by the findings is reviewed under the general judgment standard, meaning a reviewing court should affirm based on any legal theory supported by the evidence." *Id.* at 123–24 (citing *S.D.*, 2 N.E.3d at 1287).

[15] Parenting time decisions require us to "give foremost consideration to the best interests of the child." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013) (quoting *Marlow v. Marlow*, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998), *trans. denied*). "[T]here is a well-established preference in Indiana 'for granting latitude and deference to our trial judges in family law matters.'" *Steele-Giri*, 51

N.E.3d at 124 (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 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." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "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.* "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).

Steele-Giri, 51 N.E.3d at 124.

[16] We initially observe that, on appeal, Father does not challenge the trial court's refusal to allow Father to have overnight parenting time with any of the Children. Father challenges only the continued prohibition against using physical force to get the Children to attend Father's parenting time. Father essentially argues that the trial court erred by refusing to modify the November 2020 Order concerning parenting time because that order "allow[s] the children to have de facto sole discretion over their participation in parenting time." Appellant's Am. Br. at 19 (citing Appellant's Suppl. App. Vol. II at 69.) That is, Father contends the trial court should have lifted its prohibition on the use of physical force to make the Children attend parenting time with Father. In

particular, Father asserts that this restraint was a restriction on his parenting time for which the trial court should have made, but did not make, a finding pursuant to Indiana Code section 31-14-14-1 that "parenting time with [Father] *would* . . . affect the physical well-being of the child or the emotional development of the child," Appellant's Am. Br. at 20 (emphasis in original) (citing *Farrell v. Little*, 790 N.E.2d 612 (Ind. Ct. App. 2003); I.C. § 31-14-14-1).

[17] As we explained in *In re Paternity of J.K.*, Indiana Code section 31-14-14-1 concerns

> situations in which supervised parenting time should or must be ordered. Accordingly, supervised parenting time requires a finding that the supervision restriction be justified by a risk of harm to the child. *See* I.C. § 31-14-14-1(d)-(e). The contemplated factual finding is only required where parenting time rights are curtailed in an unreasonable manner. To require a factual finding of threat of harm to the child in order to justify *any* departure from our Parenting Time Guidelines would be to defy the fact-sensitive, nuanced nature of the trial court's endeavor.

In re Paternity of J.K., 184 N.E.3d 658, 666–67 (Ind. Ct. App. 2022) (emphasis in original). In fact, the Parenting Time Guidelines "contemplate deviations below the so-called minimum and require simply that such deviations be 'accompanied by a written explanation indicating why the deviation was necessary or appropriate in the case.'" *Id.* (quoting Ind. Parenting Time Guidelines Preamble (C)(3)).

[18] Parenting Time Guideline Section I.E.3 provides: "If a child is reluctant to participate in parenting time, each parent shall be responsible to ensure the

child complies with the scheduled parenting time. In no event shall a child be allowed to make the decision on whether scheduled parenting time takes place." The commentary to this section states in relevant part:

> In most cases, when a child hesitates to spend time with a parent, it is the result of naturally occurring changes in the life of a child. The child can be helped to overcome hesitation if the parents listen to the child, speak to each other and practically address the child's needs.

Ind. Parenting Time Guideline cmt. E.3.

[19] Father does not challenge any of the trial court's findings or conclusions, either in the December 2022 Order or in the underlying November 2020 Order, so we accept them all as true. *See R.M. v. Ind. Dep't of Child Servs.*, 203 N.E.3d 559, 564 (Ind. Ct. App. 2023) (citing *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992)), *trans. not sought*. The unchallenged findings and conclusions here reveal that physical force has previously been used to make at least one of the Children attend parenting time with Father, Mother's encouragement of the Children's attendance at and participation in parenting time with Father negatively impacted the Children's relationship with Mother, the Children all refuse to attend or participate in parenting time with Father, the Children are doing well despite not spending time with Father, Father's estrangement from the Children is his own doing, Father has yet to rectify the circumstances that led to the restrictions on his parenting time as set forth in the November 2020 Order, and a modification of that order is not in the Children's best interests.

[20] In light of the undisputed facts of this case, prohibiting a person from physically forcing any of the Children to attend parenting time with Father when that child refuses to do so is not an unreasonable restriction on Father's parenting time; rather, it is a necessary and appropriate deviation from Parenting Time Guideline Section I.E.3. that will likely prevent further trauma to the Children. Under these circumstances, we cannot say that the trial court clearly erred in refusing to modify the November 2020 Order concerning Father's parenting time.

Conclusion

[21] In sum, the trial court did not abuse its discretion when it refused to admit Father's Exhibit 3-3, and the trial court did not clearly err when it refused to modify Father's parenting time as set forth in the November 2020 Order. We therefore affirm the trial court on all issues raised.

[22] Affirmed.

Bailey, J., and May, J., concur.

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