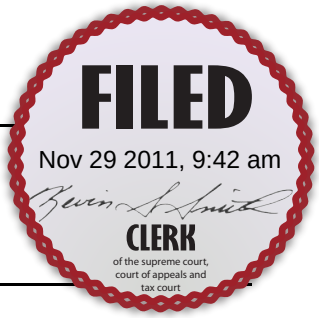
ATTORNEY FOR APPELLANT:

WILLIAM F. ZWICK
Noblesville, Indiana

ATTORNEYS FOR APPELLEE:

ERIC J. BENNER
LAURIE D. JOHNSON
Richards, Boje, Pickering, Benner & Becker
Noblesville, Indiana



IN THE COURT OF APPEALS OF INDIANA

A.W.S.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 29A04-1102-DR-142
	)	
C. S.-R.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
The Honorable David K. Najjar, Magistrate
Cause No. 29D01-0308-DR-670

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

A.W.S. (Father) appeals the denial of his petition to remove restrictions on parenting time. Father raises numerous issues, which we consolidate and restate as:

1. Whether the trial court abused its discretion when granted C.S.-R.'s (Mother) request for Father's mental health records;

2. Whether the trial court abused its discretion when it denied Father's petition to remove restrictions on parenting time; and

3. Whether the trial court erred when ordering Father to pay a portion of Mother's attorney's fees.

We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father divorced on June 29, 2006. There was one child of the marriage, K.S., born in 2000. The divorce decree incorporated the parties' Settlement Agreement that awarded Mother primary physical custody of K.S. and granted Father unsupervised parenting time "contingent upon the fact that he continues to reside with [Father's mother] or as otherwise ordered by the Court." (App. at 19.)[1]

Thereafter, Father filed an emergency petition to modify parenting time. On May 2, 2007, the trial court affirmed the restrictions on Father's parenting time, ordering his parenting time "shall occur under the supervision of [Father]'s mother" and "when transporting the minor child [Father] shall be accompanied by an adult." (*Id.* at 27.)

[1] Father has been diagnosed with a variety of mental and physical disorders, including bipolar disorder, diabetes, and congestive heart failure, and he receives social security disability compensation because he is unable to work. There is no dispute that the restrictions on his parenting time were put in place because of these health problems.

On June 1, 2009, Father filed a petition to remove the restrictions on his parenting time in which he asserted there had been "a substantial and continuing change in circumstances making the order [of] June 2007 unreasonable, to wit: The respondent poses no threat to the physical or emotional health of the minor child in this matter." (*Id*. at 29.) In response, Mother filed a motion for release of Father's mental health records. After a hearing on the motion, the trial court granted her request on September 15, 2009. The trial court then held a hearing on Father's petition on February 28, 2010, but the parties were unable to present all evidence due to time constraints, so the hearing was continued.

On July 15, 2010, Mother filed a supplemental motion for release of Father's mental health records. The trial court granted her request without a hearing. On August 12, the trial court finished hearing evidence regarding Father's petition. On January 28, 2011, the trial court denied Father's request to remove the restrictions on his parenting time and awarded Mother $1,750 in attorney's fees.

DISCUSSION AND DECISION

The trial court entered findings of fact and conclusions thereon. Therefore:

> we must determine whether the evidence supports the findings and whether the findings support the judgment. The judgment will be reversed only when clearly erroneous. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom.

Speaker v. Speaker, 759 N.E.2d 1174, 1179 (Ind. Ct. App. 2001) (citations and internal quotation marks omitted). We will not reweigh the evidence or reassess the credibility of the

witnesses before the court. *Speed v. Old Fort Supply Co., Inc*., 737 N.E.2d 1217, 1219 (Ind. Ct. App. 2000). Rather, we will affirm if there is sufficient evidence of probative value to support the decision, viewing the evidence most favorable to the judgment and the reasonable inferences drawn therefrom. *Id*.

Because the court's entry of findings was *sua sponte*, we review any issue on which the court has not made findings under a general judgment standard. *Myers v. Leedy*, 915 N.E.2d 133, 140 (Ind. 2009). We affirm a general judgment on any legal theory supported by the evidence. *Id*.

1. Requests for Mental Health Records

"A trial court is accorded broad discretion in ruling on issues of discovery." *State v. Pelly*, 828 N.E.2d 915, 923 (Ind. 2005). Consequently, our review is limited to determining whether the trial court abused its discretion. *In re Witham Memorial Hospital*, 706 N.E.2d 1087, 1090 (Ind. Ct. App. 1999). An abuse of discretion occurs when the trial court reaches a conclusion that is against the logical inferences to be drawn from the facts of the case. *Id*. We presume the trial court decided correctly, and the party challenging its decision has the burden on appeal of demonstrating error. *Pelly*, 828 N.E.2d at 923.

Mother twice requested the court order the release of Father's mental health records pursuant to Ind. Code Chapter 16-39-3, which provides a mechanism by which one party may obtain mental health records not disclosed by the opposing party, but requires the requesting party to file a petition and the court to hold a hearing prior to granting the request. Ind. Code §§ 16-39-3-3 & -4. The trial court may order the release of the records if it finds by a

preponderance of the evidence that "(1) other reasonable methods of obtaining the information are not available or would not be effective; and (2) the need for the disclosure outweighs the potential harm to the patient." Ind. Code § 16-39-3-7. In weighing the potential harm to the patient, the court is to consider the impact of disclosure on the provider-patient privilege and on the patient's rehabilitative process. Ind. Code § 16-39-3-7(2).

a. Mother's First Request

Mother first requested the release of Father's mental health records on September 1, 2009. She stated Father "received mental health services that directly relate to his ability to care for the minor child" and he "refused to consent to the release of the records." (App. at 31.) On September 15, after a hearing, the trial court issued an order compelling disclosure of Father's mental health records, finding:

> Other reasonable methods of obtaining the information are not available or would not be effective. The mental health records of [Father] are needed for all purposes relevant to the resolution of this action. The best interests of the child require disclosure of the records. The best interests of the children outweigh any potential harm to the parent in release of the mental health records. All portions of the mental health records may be relevant to the issues before the Court and thus release of the entire records is necessary to fulfill the objectives of this Order.

(*Id*. at 34-35.)

Father argues the order to release his mental health records was an abuse of discretion because the trial court's findings were not supported by the evidence presented at the hearing. He argues the trial court relied on Mother's testimony regarding "only her feelings" about K.S.'s best interests and her "generic" statements, produced through "leading questions," that

she was unable to obtain Father's medical records without a court order. (Br. of Appellant at 20.) His arguments are an invitation for us to reweigh the evidence, which we cannot do. *See Speed*, 737 N.E.2d at 1219 (court on appeal may not reweigh evidence when determining whether facts support findings). Mother's testimony supports the findings allowing her to obtain Father's medical records.

He also claims the order allows Mother to go on a "fishing expedition." (Br. of Appellant at 21.) It does not. Father's petition for removal of the restrictions on his parenting time was based on his ability to properly care for his child, which may be impacted by his mental health. *See* Ind. Code § 31-17-2-8 (mental and physical health of all parties is one factor to be considered by trial court in determining what custody arrangement would be in the best interests of child). We cannot say the court erred by finding those records were relevant to the custody decision that was to be made.

b. Mother's Second Request

Father initially sought removal of the restrictions on his parenting time June 1, 2009, and the trial court granted Mother's first request for release of Father's mental health records on September 15, 2009. On July 15, 2009, about one month before the second portion of the hearing on Father's petition to modify, Mother filed a supplemental petition for release of Father's mental health records, requesting records created after the trial court's earlier order. She asserted the same grounds for release as in her prior request and indicated:

> All of the arguments that the respective parties would make with regard to the release of these mental health records have previously been made in open court at the hearing regarding the Court's previous Order of September 15, 2009. It is unnecessary that there be any hearing set on this matter without any further

argument be presented to the Court as that has already been done with regard to this very issue.

(App. at 74-75.) The trial court granted Mother's request without a hearing.

The trial court should not have ordered the release of the records without the hearing required by Ind. Code § 16-39-3-4. However, none of Father's medical records were admitted at trial, and Father has not asserted he would have provided any evidence or arguments different from those he presented at the hearing on the first petition. Thus, he has not demonstrated he was harmed by the court's failure to hold a hearing before granting Mother's second petition for release, and we do not reverse for harmless error. *See* Ind. Trial Rule 61 (error is harmless if it does not affect the substantial rights of the party).[2]

2. Petition to Remove Parenting Time Restrictions

"The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child." Ind. Code § 31-17-4-2. In determining if modification is appropriate, the trial court considers the "mental and physical health of all individuals involved." Ind. Code § 31-17-2-8.

We review[3] the trial court's denial of Father's request as follows:

[2] Father also asserts the trial court abused its discretion when it admitted testimony from various witnesses regarding his medical diagnoses. However, he concedes the error "may have been harmless." (Br. of Appellant at 25 n.3.) Furthermore, Father does not cite the specific testimony he claims should not have been admitted, and that allegation of error is therefore waived for failure to support his argument with proper citations to the record. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . .").

[3] Father asserts our standard of review should be based on court's placement of restrictions on his parenting time, which would impose on Mother a burden to prove Father's parenting time should be restricted. We disagree. While a party requesting a restriction on parenting time initially has the burden to prove the endangerment or impairment required by the statute, *In re Paternity of P.B.*, 932 N.E.2d 712, 719 (Ind. Ct.

> We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered. When reviewing a trial court's decision modifying custody, we may not reweigh the evidence or judge the credibility of the witnesses. Instead, we consider only the evidence most favorable to the judgment and any reasonable inferences therefrom.

Julie C. v. Andrew C., 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010) (citations omitted).

In denying Father's petition, the trial court found:

> 6. The evidence shows that [Father] is certainly able to take care of himself and others appropriately. The Court does not have great concerns that [Father] is a danger to himself or others, or that he presents a credible threat to the health, safety, emotional stability, mental health or environment of the minor child.
> 7. The evidence also shows that [Father] suffers from a variety of health concerns, takes a number of medications which are prescribed to him, that he has been admitted several times in recent months to a hospital for various ailments – including at least one time during a period of his parenting time, and that he is generally unable to work and receives Social Security income for disability. The history of this case also has shown that [Father] has always had some restrictions or conditions on his parenting time to ensure that his mother or other responsible adults are nearby when he exercises parenting time.
> 8. The Court does not find that there is a substantial change of circumstances regarding parenting time that requires a modification. Furthermore, the Court does not find that removing the restrictions put in place by the Court's Order of May 2, 2007 would be in the best interests of the minor child. . . . Again, the Court does not find evidence that [Father] poses a threat or danger to the child, but rather that his mental and physical health is of such a state that it is not in the child's best interests that he be solely responsible for her care, custody or transportation. . . . Therefore, the Court finds that the Petitioner's motion should be DENIED.

(App. at 2-4.)

App 2010), Father agreed to a restriction as part of the Settlement Agreement. His petition to remove the restrictions is a request to modify that original custody agreement. Thus, we apply the standard of review for modification.

Father presented testimony he has lived in his own apartment since late 2007. That is a change in circumstances, as at the time of the previous custody order, he resided with his mother.[4] However, he did not testify his mental or physical health had improved since the trial court's last decision regarding parenting time. On appeal, he makes no argument that a change in circumstances warrants a modification in custody, and instead he argues Mother did not show restrictions on his parenting time were still warranted. However, Mother had no such burden. *See infra* n.3.

Father agreed to the initial restrictions on his parenting time and did not appeal the 2007 order continuing those restrictions. He has not demonstrated the findings were unsupported by evidence; in fact, he testified to his continuing health problems. His argument is an invitation for us to reweigh the evidence, which we cannot do. *See Speed*, 737 N.E.2d at 1219 (court on appeal cannot reweigh the evidence supporting the trial court's findings). Accordingly, we affirm the denial of Father's petition for removal of restrictions on his parenting time.

3. Mother's Attorney's Fees

Father asserts the trial court abused its discretion when it ordered him to pay $1,750 in Mother's attorney's fees. Indiana Code § 31-17-4-3 permits the award of attorney's fees in an action to modify parenting time, and states in relevant part:

> (a) In any action filed to enforce or modify an order granting or denying parenting time rights, a court may award:
>
> (1) reasonable attorney's fees;

[4] Father has not indicated his change in residence affected his ability to exercise his parenting time as previously restricted by the trial court.

(2) court costs; and
(3) other reasonable expenses of litigation.

(b) In determining whether to award reasonable attorney's fees, court costs, and other reasonable expenses of litigation, the court may consider among other factors:

(1) whether the petitioner substantially prevailed and whether the court found that the respondent knowingly or intentionally violated an order granting or denying rights; and
(2) whether the respondent substantially prevailed and the court found that the action was frivolous or vexatious.

"When making an award of attorney's fees, the trial court must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such factors that bear on the reasonableness of the award." *A.G.R. ex rel. Conflenti v. Huff*, 815 N.E.2d 120, 127 (Ind. Ct. App. 2004), *reh'g denied, trans. denied*. Misconduct on the part of one party that causes the other party to directly incur additional fees may be taken into consideration. *Id*. "When one party is in a superior position to pay fees over the other party, an award of attorney fees is proper." *Id*. at 127-28. We review an attorney fee award for an abuse of discretion. *In re Paternity of A.J.R.*, 702 N.E.2d 355, 364 (Ind. Ct. App. 1998).

Mother requested the trial court order Father to pay her attorney's fees of $12,661.56. The trial court ordered Father to pay $1,750:

16. The Court finds that [Father] presented little evidence regarding a change in circumstances or the best interests of the child that would support his request that a modification of parenting time should occur. Both parties, however, took a great deal of time and effort, not to mention expense, to litigate this cause, primarily concerning the issues of a modification of parenting time. In light of all the evidence received, [Father]'s requests for modification are found to be without merit and [Father] is ordered to pay a portion of [Mother]'s attorney fees.
17. Due to [Father]'s limited income, and due to [Mother]'s own

> contemptuous actions, the Court does not find that it would be appropriate to hold [Father] responsible for all of [Mother]'s fees. The Court will reduce the award to [Mother] to the sum of $2,500.00 which will be reduced further by an offsetting of [Mother]'s sanction of attorney fees in the amount of $750.00. Therefore, the sanction against [Father] shall be in the sum of $1,750.00, which shall be entered as a judgment against him and in favor of counsel for [Mother].

(App. at 84.)

Father argues his modification request was not "without merit" as the trial court found, but offers no authority to support his apparent premise that a request for modification must be granted as long as there is a showing the children have not been harmed, and we decline to so hold. Accordingly, we affirm the award to Mother of attorney's fees.

CONCLUSION

The trial court did not abuse its discretion when it granted Mother's request for the release of Father's mental health records on September 15, 2009, because the request and hearing complied with the applicable statutes. While the trial court may have abused its discretion by granting Mother's supplemental request for release of Father's mental health records on July 28, 2010, without first holding the hearing required by statute, this error was harmless because it did not affect Father's substantial rights. The trial court did not abuse its discretion when it denied Father's petition for removal of parenting time restrictions, because Father did not demonstrate a change in circumstances that would warrant modification of

parenting time or the best interests of K.S. required a parenting time modification. Finally, we cannot say the trial court abused its discretion when it ordered Father to pay a portion of Mother's attorney's fees. Accordingly, we affirm the trial court.

Affirmed.

NAJAM, J., and RILEY, J., concur.