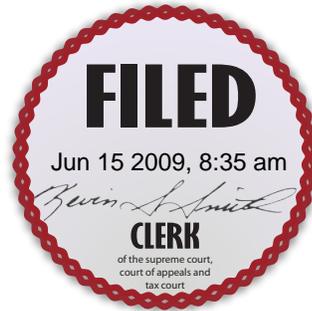


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

**ROBERT J. PALMER**  
May Oberfell Lorber  
Mishawaka, Indiana

**DEBRA VOLTZ-MILLER**  
Voltz-Miller & Panowicz, P.C.  
South Bend, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE PATERNITY OF N.S.S., )  
 )  
K.H., )  
 )  
Appellant-Respondent, )  
 )  
vs. )  
 )  
D.S., )  
 )  
Appellee-Petitioner. )

No. 71A03-0810-JV-491

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APPEAL FROM THE ST. JOSEPH PROBATE COURT  
The Honorable Peter J. Nemeth, Judge  
Cause No. 71J01-0101-JP-33

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**June 15, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issues

K.H. (“Mother”) appeals the trial court’s transfer of custody of N.S. to D.S. (“Father”). In a consolidated appeal, Mother also appeals the trial court’s denial of her petition for modification of the parenting time order, award of attorney fees to Father, and denial of a petition for grandparent visitation. For our review, Mother raises seven issues, which we consolidate and restate as: 1) whether the trial court abused its discretion when it transferred custody of N.S. to Father; 2) whether the trial court abused its discretion when it ordered that Mother have only supervised visits with D.S.; 3) whether Mother is entitled to attorney fees; 4) whether the trial court abused its discretion when it dismissed Mother’s petition for modification of the parenting time order for lack of jurisdiction; 5) whether the trial court abused its discretion when it found Mother’s petition to be frivolous and awarded attorney fees to Father; and 6) whether the trial court abused its discretion when it denied the petition for grandparent visitation. In addition, Mother invites us to remand this case to the trial court for an award of appellate attorney fees in her favor.

Concluding the trial court did not abuse its discretion when it transferred custody of N.S. to Father, ordered that Mother have supervised parenting time, and dismissed Mother’s petition for modification of the parenting time order for lack of jurisdiction, we affirm on issues one, two, and four. However, concluding Mother’s petition for modification of custody was not frivolous, we reverse on issue five. In addition, we dismiss Mother’s appeal of the denial of the petition for grandparent visitation for lack of standing. Finally, we conclude that Mother is not entitled to attorney fees and decline Mother’s invitation to

remand this case for an award of appellate attorney fees.

### Facts and Procedural History

N.S. was born out of wedlock on January 18, 2001. Three days before N.S.'s birth, Father filed a petition to establish paternity. Paternity was established on August 7, 2001, at which time the trial court ordered Father to pay child support and awarded Father parenting time according to the parenting time guidelines for infants and toddlers. In March of 2003, the trial court ordered the parties to mediation to establish a fixed parenting time schedule for Father. On January 4, 2006, after being refused holiday parenting time, Father filed a motion to hold Mother in contempt. After a hearing, the trial court ordered the parties back to mediation; however, Mother failed to cooperate in scheduling the mediation until Father filed a second contempt motion on May 10, 2006.

On June 20, 2007, N.S. fell into a plate glass window, causing severe lacerations to his arms that required multiple stitches. At the time, N.S. was spending time with his paternal grandfather and other family members while Father was at work. By all accounts, including that of N.S. on several occasions, one of N.S.'s cousins pushed him into the window while they chased each other.<sup>1</sup> Mother claims that N.S. told his therapist, Elaine Schertz, that Father pushed him into the window. However, Schertz did not testify about this statement at the hearing. Upon hearing of the accident, Mother went to the hospital to see N.S. and later took him home. Thereafter, Mother refused to allow Father to exercise parenting time and

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<sup>1</sup> For example, in a video interview included in the record, when asked how he obtained the scars on his arms, N.S. casually responds that his cousin pushed him into a window.

filed a petition to modify Father's parenting time on June 26, 2007. After a hearing on July 5, 2007, the trial court scheduled an in camera interview with N.S. and ordered Father to have parenting time beginning the same day – after N.S. had his stitches removed – until July 15, 2007.

When Father arrived to pick up N.S., Mother and N.S. were not at home. Being unaware that Mother and N.S. had been delayed at the doctor's office, Father filed a police report. Later, Mother and N.S. arrived and Father waited outside until Mother could pack N.S.'s things for his visit with Father. Mother claims that inside the house, N.S. disclosed to her that Father showered with N.S. and had touched N.S. sexually. Mother, nonetheless allowed N.S. to go with Father and called the CASIE Center in South Bend to report the allegations.<sup>2</sup>

A therapist from St. Joseph County Department of Child Services ("DCS"), Sarah Tezich, investigated the allegations by observing an interview of N.S. at CASIE Center. Tezich concluded that the allegations were unsubstantiated because N.S. "changed his story a couple of times. And I remember he had embellished some stories quite a bit that we had already known about." Transcript of June 5, 2008, Hearing at 97. N.S.'s interview also left Tezich with an impression, but not a conclusion, that N.S. had possibly been coached because "he would make comments but didn't have any details," and he responded affirmatively when asked if Mother told him he was supposed to talk about something at the interview. Id.

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<sup>2</sup> See <http://www.casiecenter.org>.

at 100. DCS ultimately determined the allegations were not substantiated and closed the case.

In the Spring of 2007, Mother began taking N.S. to see a therapist, Mary Roemer. Roemer testified that Mother was “extremely emotionally distraught on every occasion that I saw her.” Id. at 141. During one telephone conversation after N.S.’s injury, Roemer testified that Mother “was determined that [Father] was not going to have his weekend parenting time.” Id. at 143. Mother wept copiously during the conversation and Roemer could hear N.S. screaming and crying in the background. Roemer heard Mother say “the police are coming ... he [referring to Father] was going to kill you [referring to N.S.]. I can’t let you go with him, he will kill you. Don’t you see that he’s not good for you. Don’t you see that he is going to be dangerous.” Id. at 143-44. Mother stopped seeing Roemer with N.S. after Roemer expressed her opinion that it was normal for a father to help a six- or seven-year-old boy in the shower.

On August 9, 2007, the trial court held an in camera interview with N.S. On September 21, 2007, and November 2, 2007, Mother refused to allow Father to exercise parenting time with N.S., claiming on the latter date that N.S. had grabbed a butter knife and threatened to kill himself if he had to go with Father. After the alleged threat, Mother took N.S. to CASIE Center for treatment. Around this same time, N.S. began to see Schertz as his primary therapist. In his first session with Schertz, N.S. disclosed that Father locked him in a basement or crawl space at Father’s house and left him there. Schertz reported the allegations to DCS who instigated a police investigation. N.S. also disclosed to Schertz that

Father had bought two guns and showed them to N.S. telling him that the two of them were going to kill Mother and N.S.'s maternal grandparents.

Officer James Nielson executed a search warrant at Father's house and examined a crawl space entry in the house. Nielson found no signs that anyone had been down in the crawlspace for quite some time as evidenced by the significant presence of cobwebs. Nielson also conducted a personal interview with N.S. to investigate the allegations of sexual touching. As a result of the interview, Nielson found no evidence to either substantiate or unsubstantiate N.S.'s allegations of abuse against Father. During the interview – a video of which was part of the record – N.S. told Nielson on several occasions that Mother and his maternal grandmother sometimes had to remind him about what to say. Although these comments raised Nielson's suspicions, he could not conclusively say whether N.S. had been coached prior to his interview. Following Nielson's investigation, neither the State nor DCS pursued the allegations any further.

On November 13, 2007, Father filed a motion to hold Mother in contempt for denying his parenting time. The trial court held a hearing on December 13, 2007, after which it found Mother in contempt and ordered parenting time for Father from noon on Christmas Day through January 1, 2008, as well as make-up time on the weekends of January 4 and 11, 2008. After the second make-up weekend, Mother again denied Father's parenting time. On February 14, 2008, Father filed a petition to modify custody, and on March 4, 2008, Father filed a motion to hold Mother in contempt. The trial court held a hearing on March 26, 2008, at which Mother showed a cell phone video of an hysterical N.S. purportedly refusing to go

with Father. That same day, the trial court ordered Mother, Father, and N.S. to undergo psychiatric evaluations, found Mother not in contempt, and limited Father's parenting time to supervised visitation.

On June 6, 2008, the trial court held a hearing on the motion to modify custody. The trial court issued its order on August 18, 2008, awarding custody to Father. The trial court concluded:

1. The planting and/or persistent [sic] pursuit of the false allegations against father by mother are having a negative and traumatizing effect on the child.
2. Mother is more concerned with her self-serving needs (to keep the child away from his father) than to actually tend to the needs of her child.
3. The modification of custody so that the child is placed with his father is in the best interests of the child.
4. There has been a substantial change in the following factors which may be considered under I.C. 31-14-13-2:
  - a. The interaction and interrelationship of the child with his parents.
  - b. The mental and physical health of all individuals involved of the mother and child [sic].

Appellant's Appendix at 25. The trial court then ordered N.S. placed in the custody of Father, and allowed Mother supervised visitation once per week. The trial court also ordered Mother to "obtain counseling to improve her parenting skills and to assist her in understanding what is in the best interests of the child." *Id.* at 26. Mother filed a notice of appeal on September 4, 2008 under cause number 71A03-0810-JV-491. This court acquired jurisdiction over the case upon the trial court clerk's filing of the notice of completion of clerk's record on October 3, 2008.

On November 14, 2008, Mother filed a petition for modification of the parenting time order in the trial court. That same day, the maternal grandparents, who were not parties to

the case, filed a petition for grandparent visitation. The trial court denied both the petition for grandparent visitation and the petition for modification of the parenting time order on November 24, 2008. With respect to Mother's petition, the trial court stated:

This Court concludes that it has no jurisdiction to alter or modify an order which is on appeal to the Appellate Court and, therefore, denies the Petition due to lack of jurisdiction. The law is so clear in this matter that this Court believes the Petition to have been frivolous and awards attorney fees to Father's counsel in the sum of \$500.00.

Response to Indiana Court of Appeals' Order at Exh. C, Order Denying Modification of Parenting Time Order.

Subsequently, Mother filed a second notice of appeal regarding the November 24th order under cause number 71A05-0901-JV-43 on December 23, 2008. We consolidated the two appeals under cause number 71A03-0810-JV-491 and proceed to address all issues raised by Mother in this decision.

### Discussion and Decision

#### I. Standard of Review

Where, as here, the trial judge enters findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), we employ a two-step review process. First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). We will not set aside the findings or judgment unless they are clearly erroneous, which occurs when there is no evidence to support the findings or the findings do not support the judgment. Id.

#### II. Transfer of Custody from Mother to Father

The decision to modify custody is committed to the sound discretion of the trial court, and we neither reweigh the evidence nor judge the credibility of witnesses. Joe v. Lebow, 670 N.E.2d 9, 23 (Ind. Ct. App. 1996). We review custody modifications for an abuse of discretion with a “preference for granting latitude and deference to the trial judge in family law matters.” K.I., 903 N.E.2d at 457 (quoting Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002)). In addition, we must consider only the evidence which supports the trial court’s judgment. Joe, 670 N.E.2d at 23.

A trial court may not modify a custody order following a determination of paternity unless the modification is in the best interests of the child, and there has been a substantial change in one or more of the factors for custody determination. Ind. Code § 31-14-13-6. Those factors include, inter alia: the interaction and interrelationship of the child with the child’s parents and any other person who may significantly affect the child’s best interest; the child’s adjustment to home, school, and community; the mental or physical health of all individuals involved; and any evidence of a pattern of domestic or family violence by either parent. Ind. Code § 31-14-13-2.

In transferring custody of N.S. from Mother to Father, the trial court made the following relevant findings of fact:

6. Mother violated the court order of December 13, 2007, by refusing parenting time for father which had been ordered by the Court.
7. Mother also refused visitation for father on January 25, 2008 and February 8, 2008.
8. Father had no visitation with the child from January 2008 to May 2008.  
\* \* \*
10. The following allegations have been lodged by mother against father:

- a. The Glass Door/Stitches Incident ...
- b. The Sexual Abuse Allegations ... were found to be unsubstantiated and the DCS caseworker indicated that it appeared the child had been coached.
- c. The “Trap Door” Incident ... this allegation was not substantiated.
- d. While on the telephone with mother, therapist Mary Roemer reported that she hear mother yelling at the child statements to the effect of “you can’t go to your father ... he’s going to kill you.”
- e. The Gun Allegation ... can only be a figment of the child’s imagination or something that was planted there.

Appellant’s App. at 24-25. The trial court concluded: the “planting and/or persistent pursuit of the false allegations against father by mother are having a negative and traumatizing effect on the child,” *id.* at 25; modification is in the best interests of N.S.; and there has been a substantial change in the interaction and interrelationship of the child with his parents and the mental and physical health of Mother and N.S.

The evidence is clear that Mother has launched a string of accusations against Father from sexual abuse to physical abuse to imprisoning N.S. in a crawl space. The evidence is equally clear that none of these allegations has been substantiated despite extensive investigation by DCS and the police department. The testimony of N.S.’s counselors, DCS case workers, and police officers supports the trial court’s findings. Many of these witnesses expressed their suspicion that N.S. was being coached by Mother to report the abuse. None of the investigations revealed any evidence to substantiate Mother’s charges. Therefore, the evidence supports the trial court’s findings.

As the trial court noted, either N.S. is telling lies about Father and Mother is encouraging and entertaining the lies, or Mother is coercing N.S. into making the allegations.

In either event, the result has been a serious deterioration in the relationship between N.S. and Father and a corresponding deterioration in N.S.'s mental health to the extent that his counselors testified that N.S. actually believes the abuse has been occurring. Therefore, the trial court's findings support its conclusions. As a result, the trial court did not abuse its discretion when it transferred custody of N.S. from Mother to Father.

## II. Supervised Parenting Time

Generally, child visitation decisions are committed to the sound discretion of the trial court, and we will reverse the trial court's decision only upon a showing of manifest abuse of that discretion. In re Paternity of V.A.M.C., 768 N.E.2d 990, 1000 (Ind. Ct. App. 2002).

When reviewing the trial court's decision, we neither reweigh the evidence nor reexamine the credibility of the witnesses. Rather, we view the record in the light most favorable to the trial court's decision to determine whether the evidence and reasonable inferences therefrom support the trial court's decision. An abuse of discretion has occurred if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. In addition, in custody and visitation cases, the trial court's discretion is limited because it must be exercised in furtherance of the best interests of the child at issue.

Id. (citations and footnote omitted).

A trial court may modify parenting time rights whenever modification would serve the best interests of the child. Ind. Code § 31-14-14-2. However, Indiana Code section 31-14-14-1 provides that "[a] noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might: (1) endanger the child's physical health and well-being; or (2) significantly impair the child's emotional development." "Even though section 31-14-14-1 uses the term 'might,' this court interprets

the statute to mean that a court may not restrict visitation unless that visitation would endanger the child's physical health or well-being or significantly impair the child's emotional development." Farrell v. Littell, 790 N.E.2d 612, 616 (Ind. Ct. App. 2003) (emphasis original).

The trial court concluded that "[t]he planting and/or persistent [sic] pursuit of the false allegations against father by mother are having a negative and traumatizing effect on the child," and "Mother is more concerned with her self-serving needs (to keep the child away from his father) than to actually tend to the needs of her child." Appellant's App. at 24. Thus, the trial court found that unsupervised parenting time would significantly impair the child's emotional development. As discussed above, the evidence supports the trial court's findings of fact, and its findings of fact support its conclusions of law.<sup>3</sup> As a result, the trial court did not abuse its discretion when it ordered Mother to have only supervised parenting time with N.S.

### III. Attorney Fees Regarding Initial Appeal

Mother did not ask the trial court for an award of attorney fees; thus, there is no decision for us to review. Rather, Mother asks us to remand this case with instructions for the trial court to determine an award of attorney fees regarding Mother's defense of Father's petition to modify custody and the prosecution of her initial appeal. The trial court may

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<sup>3</sup> In addition, the trial court required Mother to seek counseling "to improve her parenting skills and ... assist her in understanding what is in the best interests of the child." Appellant's App. at 26. Presumably, Mother's ongoing participation in such counseling would remove the danger that unsupervised visitation would significantly impair N.S.'s emotional development and the trial court would allow visitation according to the parenting time guidelines. However, we leave that decision to the discretion of the trial court.

award reasonable attorney fees and costs to a party in paternity proceedings. Ind. Code § 31-14-18-2. The trial court has broad discretion to award attorney fees in modification of custody proceedings. Meade v. Levett, 671 N.E.2d 1172, 1179 (Ind. Ct. App. 1996). However, “[w]hen 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.” In re Paternity of McGuire-Byers, 892 N.E.2d 187, 193 (Ind. Ct. App. 2008) (citation omitted), trans. denied.

Mother provides no argument that she is entitled to an award of attorney fees. Initially, we note that Mother’s misconduct in lodging false accusations and preventing Father from exercising parenting time precipitated Father’s motion to modify custody. In addition, Father was successful in his petition. Mother has also not demonstrated any gross disparity of income or economic condition or resources. Therefore, Mother has not demonstrated any basis for an award of attorney fees, and we decline her invitation to remand the issue to the trial court.

#### IV. Jurisdiction of the Trial Court

Jurisdiction is a question of law that we review de novo. In re T.B., 895 N.E.2d 321, 329 (Ind. Ct. App. 2008). This court acquires jurisdiction over an appealed case on the date the trial court clerk issues its Notice of Completion of Clerk’s Record. Ind. Appellate Rule 8. Generally, once an appeal is perfected, the trial court loses jurisdiction over the case. In re N.H., 866 N.E.2d 314, 317 n.3 (Ind. Ct. App. 2007). Thereafter, the trial court has no

jurisdiction to modify the judgment. O'Malley v. Hankins, 207 Ind. 589, 598, 194 N.E. 168, 172 (1935). “This rule facilitates the orderly presentation and disposition of appeals and prevents the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment.” Southwood v. Carlson, 704 N.E.2d 163, 165 (Ind. Ct. App. 1999).

However, “we have held that the trial court can still rule on issues that could not have been raised on appeal.” N.H., 866 N.E.2d at 317 n.3. A trial court also retains jurisdiction over issues entirely independent from the issues on appeal. In re Guardianship of Hickman, 811 N.E.2d 843, 848 (Ind. Ct. App. 2004). For example, “a trial court retains jurisdiction to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment.” City of New Haven v. Allen County Bd. of Zoning Appeals, 694 N.E.2d 306, 310 (Ind. Ct. App. 1998), trans. denied. In addition, in family law cases, there are often issues unrelated to a pending appeal that the trial court may still decide. See, e.g., Meade v. Levett, 671 N.E.2d 1172, 1180 (Ind. Ct. App. 1996) (trial court had authority to hold a contempt hearing and punish the mother for failing to return child to the father even though issue of modification of custody was pending on appeal).

Thus, in many circumstances, the trial court could retain jurisdiction over a petition to modify a custody, visitation, or child support order – even when that order is the subject of an appeal – where the petition alleges a substantial and continuing change in circumstances, which occurred after the filing of the appeal, and which necessitate an immediate change in the order. This is especially true where waiting for this court to resolve the appeal before

taking action would be against the best interests of the child. However, we cannot conclude that Mother's petition falls into this category.

On August 18, 2008, the trial court ordered the following:

4. Mother is to refrain from speaking negatively about father in the presence of the child.
5. Mother shall have supervised visitation with the child once per week.
6. Mother shall obtain counseling to improve her parenting skills and to assist her in understanding what is in the best interests of the child.

Appellant's App. (Appeal 491) at 26. Mother appealed the trial court's order specifically raising the issue of "[w]hether the probate court erred in restricting mother to supervised visitation once a week without making the findings required by statute to restrict visitation."

Appellant's Brief (Cause No. 71A03-0810-JV-491) at 1.

After this court acquired jurisdiction, Mother filed a petition for modification of the parenting time order in the trial court alleging that she had complied with the trial court's orders to seek counseling and refrain from speaking negatively about Father in the presence of the child and requesting the trial court to allow unsupervised parenting time according to the parenting time guidelines. Because Mother specifically appealed the issue of supervised visitation, we acquired jurisdiction over that issue on appeal. Mother then argued for a modification of parenting time based on her compliance with the terms of the appealed order.

Under these circumstances, Mother's petition, although it alleges a change in circumstances occurring after the appeal was filed, is too entwined with the appealed order for the trial court to retain jurisdiction. Therefore, the trial court did not abuse its discretion when it

determined it lacked jurisdiction over the issue and we affirm the denial of Mother's petition for modification of the parenting time order.

However, the trial court need not have dismissed Mother's petition. In Harris v. Harris, 800 N.E.2d 930 (Ind. Ct. App. 2003), this court addressed a similar issue. There, the father appealed a trial court's child support order. Id. at 933. While the appeal was pending before our supreme court on a petition to transfer, the father filed a petition to modify child support in the trial court. Id. The trial court took no action on the father's petition until after our supreme court denied transfer, and then modified the original support order. Id. at 933-34. The mother appealed the subsequent modification, arguing that the father's petition to modify child support was void because the trial court lacked jurisdiction over the issue at the time it was filed. Id. at 935.

This court held "the defect of premature filing was cured because the trial court took no action and only considered the evidence after certification by our Supreme Court." Id. at 937. The court reasoned that the premature filing "was a procedural irregularity, capable of being cured." Id. at 936. The court further reasoned that "allowing a premature filing ... ensures a speedy review of the Petition to Modify child support" and, thus, "reinforces the public policy supporting child support obligations." Id. at 937. In addition, the court reasoned the premature filing did not adversely affect the interests of the mother; rather, it merely put her on notice that the father intended to pursue a modification of child support. Id. at 936.

The same reasoning can be applied here. The trial court could have viewed Mother's

premature filing of her petition to modify the parenting time order as a procedural irregularity. The trial court could have cured the defect by taking no action on the petition until this court certified the case back to the trial court.

Had Mother prevailed on her appeal, the petition would have become moot. However, this court having affirmed the trial court's original parenting time order, the trial court could have subsequently addressed the change in circumstances and determined whether a modification is in the best interests of the child after certification of the case back to the trial court. In addition, the premature filing does not adversely affect Father's interests, because it merely puts him on notice of Mother's intention to seek a modification based on her compliance with the trial court's orders.

#### V. Frivolousness of Mother's Petition

Indiana Code section 31-17-4-4 allows a trial court to award attorney fees to a prevailing respondent if it finds the petitioner brought a frivolous or vexatious petition. A claim is frivolous when it is taken primarily for the purpose of harassment, the attorney is unable to make a good faith and rational argument on the merits of the action, or the attorney is unable to support the action taken by good faith and rational argument for an extension, modification, or reversal of existing law. Fackler v. Powell, 891 N.E.2d 1091, 1098 n.3 (Ind. Ct. App. 2008), trans. denied.

We afford a multi-step review to an award of attorney fees under Indiana Code section 34-52-1-1. "First, we review the trial court's findings of fact under the clearly erroneous standard, and second we review de novo the trial court's legal conclusions." Williamson v.

Williamson, 714 N.E.2d 1270, 1276 (Ind. Ct. App. 1999). Finally, we review the trial court's decision to award attorney fees and the amount of the fees under an abuse of discretion standard. Id.

The trial court concluded it lacked jurisdiction to address Mother's petition to modify parenting time while the issue was pending on appeal and found: "The law is so clear in this matter that this Court believes the Petition to have been frivolous and awards attorney fees to Father's counsel in the sum of \$500.00." Order Denying Modification of Parenting Time Order, Response to Indiana Court of Appeals' Order at Tab C.

As discussed above, Mother's premature filing was not prohibited; rather, it was a procedural defect which could have been cured by the trial court's refusal to take action on the petition pending the outcome of this appeal. In addition, Mother's petition did not seek to relitigate the merits of the original parenting time order; it requested that the trial court consider Mother's compliance with the trial court's order and award her greater parenting time on that basis. In light of this, we cannot say that Mother's petition was frivolous to the extent warranting the sanction of attorney fees. Therefore, the trial court abused its discretion and we reverse the award of attorney fees to Father.

#### VI. Petition for Grandparent Visitation

The maternal Grandparents filed a petition for grandparent visitation in the trial court after this court had assumed jurisdiction over the appeal. Mother attempts to appeal the trial court's denial of the petition for grandparent visitation on Grandparents' behalf. The law is well settled that a party may not appeal a judgment that does not affect her even if the

judgment might be prejudicial to another party who has not appealed. See Umbstead v. Preachers' Aid Soc. Of Nw. Ind. Conference of Methodist Episcopal Church, 223 Ind. 96, 101, 58 N.E.2d 441, 442 (1944) (“[A]ppellants cannot complain of an adverse action affecting another party.”); Carr v. Douglas, 88 Ind. App. 409, 164 N.E. 312, 312 (1928) (“Appellant could not have been harmed by the refusal to permit her husband to intervene and litigate a contract between him and the appellee. ... Whether appellant’s husband suffered injury by the court’s ruling is not presented, he not having appealed from the judgment denying his petition.”); Rich v. Fry, 196 Ind. 303, 146 N.E. 393, 397 (1925) (“No judgment on the note having been rendered against Rich, he is not in a position to question the verdict and finding so far as the note is concerned.”). As a result, we dismiss Mother’s appeal of the trial court’s denial of the petition for grandparent visitation for lack of standing.

#### VII. Appellate Attorney Fees Regarding Subsequent Appeal

Mother argues she should be entitled to appellate attorney fees “because of [Father’s] unjustified position that the [trial] court lacked jurisdiction to hear the [petition].” Appellant’s Brief (Appeal 43) at 18. Because we hold above that the trial court did, in fact, lack jurisdiction to hear Mother’s petition for modification of the parenting time order, Mother’s request for appellate attorney fees has no merit. Therefore we decline Mother’s invitation to remand this issue to the trial court for an award of appellate attorney fees.

#### Conclusion

The evidence supports the trial court’s findings of fact, and those findings support its judgment with respect to the modification of custody and the order of supervised parenting

time. Therefore, the trial court did not abuse its discretion when it transferred custody of N.S. to Father and ordered that Mother have only supervised parenting time. In addition, the trial court did not abuse its discretion when it dismissed Mother's petition for modification of the parenting time order for lack of jurisdiction because the issue was pending on appeal. As a result, we affirm the trial court's grant of custody of N.S. to Father, its order that Mother have supervised visitation, and its dismissal of Mother's petition for modification of the parenting time order.

Although the trial court lacked jurisdiction over Mother's petition for modification of the parenting time order, it could have cured Mother's premature filing by waiting to address the issue until after the appeal had been resolved. Therefore, the trial court abused its discretion when it found Mother's petition for modification of the parenting time order frivolous. As a result, we reverse the trial court's award of attorney fees to Father.

Mother does not have standing to appeal the trial court's denial of the maternal grandparents' petition for grandparent visitation. Therefore, Mother's appeal of that issue is dismissed.

Finally, Mother has not shown that she is entitled to attorney fees regarding either Father's petition to modify custody or her subsequent appeal. Therefore, we decline Mother's requests to remand to the trial court for a determination and award of attorney fees.

Affirmed in part, reversed in part, and dismissed in part.

DARDEN, J., and BAILEY, J., concur.