

Robert J. Egierski (“Father”) appeals the denial of his motion to modify the joint legal custody of his twelve-year-old son, N.E., to sole legal custody in Father. Father asserts the court abused its discretion by failing to consider the required statutory factors and by declining to modify custody even “after acknowledging the discord between the parties.” (Appellant’s Br. at 1.) We affirm.

FACTS AND PROCEDURAL HISTORY

In 2002, the trial court dissolved Father’s marriage to Caterina Sergio-Sniadecki (“Mother”). Incorporated into the dissolution decree was the parties’ agreement to joint legal custody of their son, N.E., who was born in June 1997.

In 2008, Father petitioned to modify custody, parenting time and child support.¹ A hearing was held in December 2009. On January 29, 2010, the trial entered a twenty-nine page order that denied Father’s request for joint legal custody.

DISCUSSION AND DECISION

Mother has not filed an appellee’s brief. Under this circumstance, we do not develop arguments for Mother. *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). Rather, we review under a less stringent standard, which permits us to “reverse if the appellant establishes . . . error at first sight, on first appearance, or on the face of it.” *Id.*

¹ Between the filing of that petition and the hearing thereon, Father requested Mother show cause why she had prohibited Father from having telephonic parenting time on numerous occasions and petitioned for the court to clarify N.E.’s participation in extracurricular activities. Although the court’s rulings as to those motions are not at issue in this appeal, we note their filing as examples of the discord between Father and Mother.

When a party requests modification of custody, we review the court's decision for an abuse of discretion, because we give wide latitude to our trial court judges in family law matters. *Id.* at 1256. A petitioner seeking modification has the burden to demonstrate the existing custody arrangement needs to be altered. *Id.* As we undertake our review, we neither reweigh the evidence nor assess witness credibility. *Id.* Rather, we consider only the evidence and inferences most favorable to the trial court's judgment. *Id.*

Our legislature has defined the circumstances under which modification of a custody order is permissible:

- (a) The 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 section 8 and, if applicable, section 8.5 of this chapter.
- (b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.
- (c) The court shall not hear evidence on a matter occurring before the last custody proceeding between the parties unless the matter relates to a change in the factors relating to the best interests of the child as described by section 8 and, if applicable, section 8.5 of this chapter.

Ind. Code § 31-17-2-21. The factors the court should consider under section 8 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.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Ind. Code § 31-17-2-8.

Mother and Father originally agreed to joint legal custody of N.E. A trial court may award joint legal custody “if the court finds that an award of joint legal custody would be in the best interest of the child.” Ind. Code § 31-17-2-13. To determine whether joint legal custody would be in a child’s best interest,

the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:

- (1) the fitness and suitability of each of the persons awarded joint custody;
- (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare;
- (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
- (5) whether the persons awarded joint custody:
 - (A) live in close proximity to each other; and
 - (B) plan to continue to do so; and
- (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

Ind. Code § 31-17-2-15. When determining whether to modify an order of joint legal custody to sole legal custody, the trial court must consider these factors from Section 15. *Julie C.*, 924 N.E.2d at 1260.²

² We note there is conflict between *Julie C.* and *Carmichael v. Siegel*, 754 N.E.2d 619 (Ind. Ct. App. 2001). *Julie C.* indicates trial courts should consider the Section 15 factors *in addition* to the factors listed in Ind.

Father first argues remand is required because the court did not consider all the required statutory factors. Specifically, he asserts the court “did not fully consider” the factors in Section 15 and “did not consider any of the factors set forth in” Section 8. (Appellant’s Br. at 5.) We reject this allegation of error for multiple reasons: (A) the trial court was not required to enter a finding as to each factor it considered, *see Russell v. Russell*, 682 N.E.2d 513, 515 (Ind. 1997) (“Although a court is required to consider all relevant factors in making its determination, it is not required to make specific findings [when ruling on a motion to modify custody].”³); (B) the trial court’s findings suggest that, if the court failed to consider the factors in Section 8, Father invited any error by asserting the trial court should consider only the factors in Section 15, (*see App. at 36*) (Father “argues that the factors to be considered and that justify the award of joint legal custody no longer obtain”), and we do not reverse for invited error, *see C.T. v. Marion County Dept. of Child Servs.*, 896 N.E.2d 571, 588 (Ind. Ct. App. 2008), *trans. denied*; (C) although the trial court’s order does not specifically mention Section 8, we presume trial courts know and follow the law, *see Ramsey v. Ramsey*, 863 N.E.2d 1232, 1239 (Ind. Ct. App. 2007) (“we generally presume trial courts know and follow the applicable law”);⁴ (D) there is a great deal of overlap between the

Code § 31-17-2-8 when determining whether to modify legal custody. 924 N.E.2d at 1260. *Carmichael*, on the other hand, directs trial courts faced with a motion to modify legal custody to consider only the factors in Section 15. 754 N.E.2d at 635 n.7. As we can affirm the trial court’s denial of Father’s motion under either standard, we need not address which approach is correct.

³ Such findings are required if requested in writing pursuant to Ind. Trial Rule 52(A). *Russell*, 682 N.E.2d at 515 n.2. Father has not asserted any such request was made, nor did we find any indication thereof in the record before us.

⁴ We may overlook this presumption “if the court’s findings lead us to conclude that an unjustifiable risk exists that the trial court did not follow the applicable law.” *Ramsey*, 863 N.E.2d at 1239. Here, however, the trial court’s copious findings and conclusions do not permit us to reach such a conclusion.

factors in Section 8 and in Section 15, such that considering the factors in Section 15 would cause the court to consider most of the factors in Section 8;⁵ and (E) contrary to Father's assertion, the trial court's lengthy order denying Father's motion includes findings that address many of the factors in Section 8.

Next, Father notes a number of findings he characterizes as suggesting the level of discord between these parties makes continuation of joint legal custody an abuse of discretion. We acknowledge the findings to which Father points do suggest these parties are incapable of reasonable cooperation without court intervention. However, the court addressed that problem by deciding for the parties the issues on which the parties could not cooperate and entering a very specific order to control those issues. (*See App. at 37-39*) (setting out a specific plan for deciding N.E.'s extra-curricular activities, giving specific instructions regarding religious involvement, and making clear how N.E.'s health issues should be handled).

The court provided the following explanation for denying Father's request for sole legal custody:

The parties' relationship and their willingness to use, to the point of abuse, the Court system to advance their individual wills, certainly calls into question the wisdom of the continuation of the joint custodial arrangement.

However, the award to Father of sole legal custody is not in the best interest of [N.E.]. It would be the means by which Mother's ability to have any meaningful input into important decisions in [N.E.]'s life would be

⁵ Both statutes are concerned with the wishes of the parents, the wishes of the child, the relationship between the parents and the child, the mental health of other persons in any possible home environment, and an absence of domestic violence (which we find in Section 15's reference to "physical and emotional environment in the home). Thus, Section 15 includes all the factors from Section 8 except: the age and sex of the child, the existence of a de facto custodian, and the child's adjustment to home, school, and community.

eliminated. Father's actions – most significantly, enlisting [N.E.] in conspiracies to deceive Mother, coopting the integrity he should be attempting to develop in his child – show the extent to which he will go to get his way. The Court has no reason to believe that if Father were fully in control, a status the Court believes he would understand the award of sole legal custody to confer, he would invite, consider and respect Mother's wishes.

The Court has considered the factors of I.C. 31-17-2-15 in arriving at this decision, including what profess to be the wishes of [N.E.]. Although lately the parties have been engaged in many disagreements about what is best for [N.E.], they have shown the ability in the past to focus on what [N.E.] needs and not what the parties want. Each party is a suitable custodial parent and it is not in the best interest of [N.E.] that Father be placed in a position to exert the kind of full and exclusive parental authority he seeks.

There are, however, limits on what are not essential features of parental control but which, because of the inability of the parties to give and take, have taken on a kind of inordinate and disruptive significance in [N.E.]'s life. [N.E.]'s healthy development, including his ability to know and feel comfortable articulating his own reasonable desires, rather than always checking to see what the parent on the scene wants him to feel or say, are at risk without the imposition of limitations on the authority of each parent [to determine extra-curricular activities, religious activities, and healthcare].

(*Id.* at 37.)

The order contains additional findings that support the conclusion modification of legal custody to Father alone was not in N.E.'s best interest: N.E. is not "as interested in sports as Father suggests," (*id.* at 35); N.E. "acts and presents himself so as to earn Father's approval or to meet Father's desires," (*id.*); N.E.'s *in camera* discussion with the court suggested N.E. had "practiced" or "heard" what he was to tell the court, (*id.* at 34); Father has a "desire to exercise control [over N.E.] beyond appropriate boundaries," (*id.* at 25); and "Father's actions, in engaging [N.E.] in various schemes to deceive Mother, thereby seriously undermining the ability of this fractured family to heal and move forward in a healthy fashion in what should be its united goal of raising [N.E.] to healthy maturity, have contributed

significantly to the circumstances that have led to repeated trips to Court.” (*Id.* at 42.) Father has not challenged the specific findings that support the trial court’s decision to deny Father’s request for sole legal custody of N.E.

For all these reasons, we affirm the denial of Father’s motion for sole legal custody of N.E.

Affirmed.

ROBB, J., and VAIDIK, J., concur.