

## MEMORANDUM DECISION

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.



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## IN THE COURT OF APPEALS OF INDIANA

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Heather (McClarney) Evans,  
*Appellant-Wife,*

v.

Travis McClarney,  
*Appellee-Husband.*

June 14, 2021

Court of Appeals Case No.  
20A-DC-2141

Appeal from the Vanderburgh  
Superior Court

The Honorable Leslie C. Shively,  
Judge

Trial Court Cause No.  
82D05-1905-DC-721

**Pyle, Judge.**

### Statement of the Case

- [1] Heather (McClarney) Evans (“Mother”) appeals the trial court’s order that: (1) modified her parenting time with the parties’ two children; and (2) ordered her

to pay \$75 per week in child support. Concluding that the trial court did not abuse its discretion when it modified Mother's parenting time and ordered Mother to pay \$75 per week in child support, we affirm the trial court's judgment.

[2] We affirm.

### **Issues**

1. Whether the trial court abused its discretion when it modified Mother's parenting time.
2. Whether the trial abused its discretion when it ordered Mother to pay \$75 per week in child support.

### **Facts**

[3] Mother and Travis McClarney ("Father") were married in June 2012. Their son, O.M. ("O.M."), was born in October 2015, and their daughter, G.M. ("G.M."), was born in September 2017. The parties separated in May 2019, and Mother filed a dissolution of marriage petition that same month.

[4] Mother and Father reached a settlement agreement ("the Agreement") on September 19, 2019. Mother and Father agreed that they should: (1) have joint legal custody of their two children; and (2) "openly discuss, communicate concerning, and attempt to agree upon major decisions in advance involving the Child[ren] including, without limitation, healthcare, religion, education, and participation of extracurricular activities." (App. Vol. 2 at 16-17). The Agreement further provided that the parties' joint legal custody should be

“modified, however, such that [Mother] sh[ould] be afforded an opportunity for meaningful input, but after due consideration by [Father], [Father] sh[ould] retain the right to make the ultimate decision and sh[ould] promptly inform [Mother] of his said decision.” (App. Vol. 2 at 17). The Agreement also provided that Mother “reserve[d] the right to request the Court’s intervention in the event she disagree[d] with [Father’s] determination.” (App. Vol. 2 at 17).

[5] The Agreement further provided that Mother and Father should share physical custody of the children on an equal basis. Regarding parenting time, Mother and Father further agreed that Father would have weekly overnight parenting time with the children on Monday and Tuesday nights and that Mother would have weekly overnight parenting time with the children on Wednesday and Thursday nights. In addition, the parties agreed that they would have alternating weekend overnight parenting time with the children on Friday, Saturday, and Sunday nights.

[6] Mother and Father also agreed that:

[N]either party shall have the children in the presence of significant others for six (6) months after the filing of this decree. In addition, the parties shall not speak with significant others on cell phones or other devices in the presence of the children during this time. The parties agree that this requirement is of the essence of this agreement and that a violation would support a contempt finding and/or a modification of the parenting time agreement. In the event that a Petition to Modify is filed on this basis, evidence of events taking place prior to the issuance of this order would be admissible.

(App. Vol. 2 at 17-18).

- [7] Regarding child support, Mother and Father attached a Child Support Obligation Worksheet (“the 2019 Worksheet”) to their agreement. According to the 2019 Worksheet, Father had a weekly gross income of \$1,538.46, which was 62% of the parties’ weekly adjusted income, and Mother had a weekly gross income of \$961.54, which was 38% of the parties’ weekly adjusted income. In addition, Mother was given a \$35 weekly credit for the children’s health insurance premiums, and Father was given a \$158.18 weekly parenting time credit for 182 overnight visits. Pursuant to the 2019 Worksheet calculations, Father’s recommended support obligation was \$128.70 per week.
- [8] Separately from the 2019 Worksheet calculations, Mother and Father agreed that they would each be responsible for 50% of the reasonable and necessary work-related childcare expenses. Mother and Father also agreed that Father would pay 65% of the children’s unreimbursed medical expenses and that Mother would pay 35% of these expenses.
- [9] Mother married Timothy Evans (“Stepfather”) on October 16, 2019. The trial court approved the Agreement, which was filed on October 22, 2019. Three weeks later, in November 2019, Father filed a petition to modify custody wherein he alleged that there had “been a material change in circumstances necessitating a change in the current custody order.” (App. Vol. 2 at 26). Father specifically explained that Mother had remarried “prior to the decree being issued[,]” and had “repeatedly violated the . . . divorce decree by having

significant others around the minor child[ren].” (App. Vol. 2 at 26). Father further alleged that Mother had physically assaulted him in the presence of the children and had missed therapy appointments with the children. Father also asked the trial court to award him “all other relief just and proper in the premises.” (App. Vol. 2 at 26).

[10] One week after Father had filed his petition to modify custody, Mother filed a motion seeking to hold Father in contempt. In this motion, Mother alleged, in relevant part, that Father had failed and/or refused to: (1) follow the Parenting Time Guidelines (“the Guidelines”) regarding holiday visitation; and (2) return the children at the agreed upon time of 7:15 a.m.

[11] In December 2019, Mother filed a petition to modify custody, parenting time, and child support. She asked the trial court to award her “sole physical custody and control of the parties’ children” and to modify the provisions of the Agreement “regarding exposure of Mother’s significant other to her children.” (App. Vol. 2 at 30). Mother’s petition contained no specific allegations in support of her requests.

[12] The trial court held a hearing on the parties’ petitions in October 2020. Father and Mother were the only witnesses. Father testified that he had had “difficulty communicating with [Mother] with regard to the upbringing of the children.” (Tr. Vol. 2 at 10). According to Father, when he tried to communicate with Mother, he received a response from Stepfather. In addition, both Mother and Stepfather had told Father that Stepfather had to be included in all

communication between Mother and Father about the children. According to Father, Mother and Stepfather had further told him that if Stepfather were not included in a communication, such as a text or email, Mother would not respond to it. Mother also created a group text for Mother, Father, and Stepfather to communicate about the children.

[13] In addition, Father testified that he had attempted to FaceTime his children every night. However, if Stepfather was at work, Mother did not answer Father's call. According to Father, because Stepfather worked most Wednesday nights, Father was typically unable to reach the children on Wednesday nights. Father also testified that, when he was able to reach the children by telephone, Stepfather was "the one that [was] actually conducting the call." (Tr. Vol. 2 at 18). Father further explained that, when Stepfather conducted the call, Stepfather "talk[ed] over [Father] whenever [Father] [tried] to speak with [his] children." (Tr. Vol. 2 at 18).

[14] Father also testified that Stepfather had access to the children's medical and daycare records and had often emailed or texted Father with information about the children's medical or daycare issues. For example, in July 2020, Stepfather sent Father the following email message:

[G.M.] has had some real troubles with biting lately. She did it three times Thursday at daycare. We were warned if it continues she will be asked to not come for a couple weeks. This obviously is a hard no and we have addressed it accordingly. She has been in timeout for attempting to bite five times over the weekend. She seems to bite when she doesn't get her way. She has done it not only to other people but also her toys and blankets.

(Father's Ex. B). In addition, Stepfather's email distribution list identified Mother as "My Beautiful Wife," and Father as "Jack." (Father's Ex. B).

[15] Father further testified that Stepfather had forwarded him a text message from three-year-old G.M.'s doctor regarding G.M.'s infected pierced-ear holes. The doctor had recommended cleaning the infected holes and allowing them to close. Mother, however, had continued to allow G.M. to wear earrings, and, when Father had expressed his concern about Mother's failure to follow the doctor's recommendation, Mother had "ignored [him] and walked off." (Tr. Vol. 2 at 13).

[16] In addition, Father testified that Mother had registered O.M. for a soccer league in a area where Mother and Stepfather had been considering moving. Mother, who had not discussed the soccer league with Father before registering O.M., had told Father that this was the only soccer league that she could find. However, Father had "quickly found there were multiple leagues that [O.M.] could've been signed up for." (Tr. Vol. 2 at 15).

[17] Father, who became self-employed in 2019, also testified that, after he deducts his business expenses, he earns \$77,000 per year, which is \$1,480.77 per week. In addition, according to Father, Mother and Stepfather provide the children's health insurance. When asked about the children's work-related childcare expenses, Father explained that he and Mother had previously agreed that each parent would pay 50% of these expenses and that was "where it should stay." (Tr. Vol. 2 at 31).

[18] Father asked the trial court to award him physical custody of the children and to award Mother parenting time consistent with the Parenting Time Guidelines. According to Father, although he and Mother had previously agreed to joint physical custody and “50/50 . . . in terms of parenting time[,]” Father no longer agreed to this arrangement because “[a] lot [had] changed since then.” (Tr. Vol. 2 at 31-32). Father further explained that the children needed to be “put first” and “the decisions need[ed] to be made between [Mother] and [Father], not a third party.” (Tr. Vol. 2 at 32). In addition, Father explained that he just wanted his children to “have the best possible way of having some bit of a normal life.” (Tr. Vol. 2 at 21).

[19] Mother testified that, although she and Stepfather had gotten married before the trial court had approved the Agreement, Stepfather had “not [been] around the children for [the] six months” following the filing of the Agreement. (Tr. Vol. 2 at 39). However, she admitted that she had introduced the children to Stepfather’s family immediately after the Agreement had been filed.

[20] Mother also testified that she and Stepfather had identified Father as “Jack” in their email distribution lists. (Tr. Vol. 2 at 41). Mother admitted that “Jack” was a shortened version of “Jackass.” (Tr. Vol. 2 at 41).

[21] Mother further testified that she had submitted a child support worksheet to the trial court that included a fair representation of her income. She also testified that she had not “put anything in the child support worksheet for health insurance [because] health insurance [was] provided through [Stepfather].” (Tr.



Vol. 2 at 46). In her testimony, Mother did not mention the children's work-related childcare expenses or request a credit for overnight visits.

[22] During the hearing, the trial court noted that Mother and Father were "incapable of co-parenting at this point." (Tr. Vol. 2 at 27). At the end of the hearing, the trial court issued a verbal partial order concerning the children. Specifically, the trial court ordered Mother and Father to sign up for Our Family Wizard, which would "be the exclusive communication device between the parents, and parents only, concerning the children." (Tr. Vol. 2 at 48).

[23] In October 2020, the trial court issued a written order wherein it awarded Father primary physical custody of the children. The trial court also modified Mother's parenting time by eliminating her Sunday overnight parenting time and changing her midweek overnight parenting time from Wednesdays and Thursdays to Tuesdays and Thursdays.

[24] In addition, the trial court completed and attached a Child Support Obligation Worksheet ("the 2020 Worksheet") to its order. According to the 2020 Worksheet, Father had a weekly gross income of \$1,480.77, which was 61% of the parties' weekly adjusted income, and Mother had a weekly gross income of \$962, which was 39% of the parties' weekly adjusted income. In addition, Mother was given a \$93.18 weekly credit for 104 overnight visits. Neither party received a weekly credit for the children's health insurance premiums. Pursuant to the 2020 Worksheet calculations, Mother's recommended support obligation was \$75 per week, which is what the trial court ordered her to pay.

[25] Mother now appeals.

## Decision

[26] Mother argues that the trial court abused its discretion when it: (1) modified her parenting time; and (2) ordered her to pay \$75 per week in child support. We address each of Mother's contentions in turn.

### 1. Modification of Parenting Time

[27] Mother first argues that the trial court abused its discretion when it modified her parenting time. Specifically, Mother contends that the trial court abused its discretion when it "changed Mother's parenting time from each week on Wednesdays and Thursdays and every other weekend from Friday through Sunday overnight to Tuesdays and Thursdays each week and every other Friday and Saturday overnight." (Mother's Br. 14).

[28] Before addressing Mother's argument, we note that the trial court awarded Father primary physical custody of the children. Mother does not appeal this modification of custody. Rather, she appeals only the modification of parenting time. We now turn to that issue.

[29] We review modifications of parenting time for an abuse of discretion. *Miller v. Carpenter*, 965 N.E.2d 104, 108 (Ind. Ct. App. 2012). An abuse of discretion occurs only when the decision is clearly against the logic and effect of the facts and circumstances before the court, including any reasonable inferences to be drawn therefrom. *Barber v. Henry*, 55 N.E.3d 844, 850 (Ind. Ct. App. 2016).

“Therefore, 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.” *Moorman v. Andrews*, 114 N.E.3d 859, 864 (Ind. Ct. App. 2018) (emphasis added).

[30] We grant latitude and deference to the trial court in family law matters. *Miller*, 865 N.E.2d at 108. We consider only the evidence favorable to the judgment and the inferences flowing therefrom. *Id.* We do not reweigh the evidence or assess witness credibility, and “[w]e will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment.” *Moorman*, 114 N.E.3d at 864.

[31] A trial court may modify parenting time “whenever modification would serve the best interests of the child.” INDIANA CODE § 31-17-4-2. Thus, unlike a modification of physical custody, a modification of parenting time does not require a showing of substantial change. *Moorman*, 114 N.E.3d at 864.

[32] Here, Mother first argues that the trial abused its discretion when it modified her overnight parenting time from Wednesday and Thursday nights to Tuesday and Thursday nights. However, our review of the record reveals that Father was unable to reach his children on Wednesday nights because Stepfather was at work, and Mother refused to answer the telephone when Stepfather was not at home. Mother’s interference with Father’s communication with their young children negatively impacted the children. The trial court’s determination that it was in the best interests of the children to spend Wednesday nights with

Father is not clearly against the logic and effect of the facts and circumstances before the court. We find no abuse of the trial court's discretion.

[33] Mother also argues that the trial court abused its discretion when it “eliminat[ed] Mother’s Sunday overnight[]” parenting time. (Mother’s Br. 12). Our review of the evidence reveals that Mother refused to communicate about the children directly with Father and insisted that Stepfather be involved in all communication. Mother refused to answer the telephone when Father called the children and Stepfather was not at home. When Stepfather was home, Stepfather conducted any calls that the children had with Father and talked over Father when Father attempted to speak with the children. Stepfather also had access to the children’s medical and daycare records and he, rather than Mother, frequently contacted Father with messages from the children’s daycare and medical providers. In addition, Mother violated the terms of the Agreement when she registered O.M. for a soccer league without discussing the registration with Father. Further, Mother and Stepfather identified Father by the shortened version of a derogatory term in their email distribution list. Based upon these facts and circumstances, and Mother’s interference with Father’s relationship with his children, the trial court determined that it was in the best interests of the children for Father to have an additional night of parenting time. Father’s additional night of parenting time results in Mother having one less night of parenting time. The trial court’s decision is not clearly against the logic and effect of the facts and circumstances before the court, and we find no abuse of the trial court’s decision.

## 2. Child Support

[34] Mother also argues that the trial court abused its discretion when it ordered her to pay \$75 per week in child support. Specifically, she argues that the trial court abused its discretion when it: (1) improperly calculated Father’s annual income; (2) failed to properly award her parenting time credit; (3) failed to award her a weekly credit for the children’s health insurance premiums; and (4) failed to adjust the parties’ work-related childcare and extracurricular activity expenses. We address each of her contentions in turn.

[35] A trial court’s calculation of child support is presumed valid, and we will review its decision only for an abuse of discretion. *Thompson v. Thompson*, 811 N.E.2d 888, 924 (Ind. Ct. App. 2004), *trans. denied*. An abuse of discretion occurs only when the decision is clearly against the logic and effect of the facts and circumstances before the court, including any reasonable inferences to be drawn therefrom. *Barber*, 55 N.E.3d at 850. The importance of the first-person observation and the prevention of disruption to the family setting justifies the deference given to the trial court in its child support determinations. *Id.*

[36] Here, Mother first argues that the trial court abused its discretion when it improperly calculated self-employed Father’s weekly gross income. Child Support Guideline 3(A)(2), which addresses the calculation of gross income for self-employed persons, provides, in relevant part, as follows: “Weekly Gross Income for self-employment [or] operation of a business . . . is defined as gross receipts minus ordinary and necessary expenses.” Here, Father testified that his

annual income, after deducting business expenses, is \$77,000 per year, which is \$1,480.77 per week. Mother did not object to Father's testimony. The trial court relied on Father's verbal testimony and found that Father's weekly gross income was \$1,480.77. The trial court's decision is not clearly against the logic and effect of the facts and circumstances before it. *See Page v. Page*, 849 N.E.2d 769, 772 (Ind. Ct. App. 2006) (holding that the trial court did not abuse its discretion when it relied on verbal testimony to support a modification of child support).<sup>1</sup>

[37] Mother next argues that the trial court abused its discretion when it failed to properly award her parenting time credit. The commentary to the Child Support Guidelines provides that, "[t]he computation of the parenting time credit will require a determination of the annual number of overnights of parenting time exercised by the parent who is to pay child support, the use of the standard Child Support Obligation Worksheet, a Parenting Time Table, and a Parenting Time Credit Worksheet." Ind. Child Support Guideline 6. Here, however, Mother failed to provide the trial court with a Parenting Time Credit Worksheet. She also failed to address this issue in her testimony. With the limited record before us, we cannot conclude that the trial court's determination

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<sup>1</sup> We further note that Mother has waived appellate review of her argument that the trial court "failed to properly assess what if any of Father's deductions were ordinary and necessary business expenses." (Mother's Br. 17). *See Reynolds v. Reynolds*, 64 N.E.3d 829, 834 (Ind. 2016) (explaining that a party "may not sit idly by and raise issues for the first time on appeal").

regarding overnights is clearly against the logic and effect of the facts and circumstances before it.

[38] Mother further argues that the trial court abused its discretion when it failed to award her a weekly credit for the children’s health insurance premiums. However, our review of Mother’s testimony reveals that she specifically testified that she had not “put anything in the child support worksheet for health insurance [because] health insurance [was] provided through [Stepfather].” (Tr. Vol. 2 at 46). Mother simply cannot now argue on appeal that the trial court erred in failing to award her a credit for the children’s health insurance premiums when she affirmatively indicated at the hearing that she was not seeking a credit for these premiums. *See Franklin Bank and Trust Co. v. Mithoefer*, 563 N.E.2d 551, 553 (Ind. 1990) (explaining that “[a] party cannot change its theory and on appeal argue an issue which was not properly presented to the trial court”).

[39] Lastly, Mother argues that the trial court abused its discretion when it failed to adjust the parties’ work-related childcare expenses. Our review of the record reveals that, pursuant to the Agreement, the parties agreed that they would each be responsible for 50% of the reasonable and necessary work-related childcare expenses. At the hearing, Father testified that he and Mother had previously agreed that each parent would pay 50% of these expenses and “that’s . . . where it should stay.” (Tr. Vol. 2 at 31). Also at the hearing, Mother did not mention these expenses or ask the trial court to adjust them. She has, therefore, waived appellate review of this issue. *See Reynolds*, 64 N.E.3d at 834.

[40] Affirmed.

Najam, J., concurs.

Tavitas, J., dissents with opinion.



## MEMORANDUM DECISION

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[Add Hand-down date]

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**Tavitas, Judge, dissenting.**

[41] I respectfully dissent. I am unable to find anything in the record that indicates that the modified custody and parenting time order is in the best interest of the children. The trial court's order does not contain findings of fact or conclusions

thereon, and my review of the record does not reveal any facts or testimony to satisfy the requirement that, before a court may modify custody or parenting time, the modification must be in the children's best interest.

[42] Both Father and Mother filed petitions to modify custody. Both requested sole physical custody and parenting time pursuant to the Indiana Parenting Time Guidelines for the other parent. Both parents cited communication issues between the parties as a reason to modify custody. The trial court itself commented during the bench trial that the parents are unable to co-parent.

[43] The trial court's order names Father as "the physical primary custodial parent." Mother was granted parenting time on alternating weekends and every Tuesday and Thursday overnight. Accordingly, the children are switching homes more frequently than the parents' agreed upon shared parenting time schedule. I fail to ascertain how these frequent exchanges are in the best interest of the children. Neither parent requested this schedule, and the trial court gave no explanation for how such a schedule serves the best interest of the children.

[44] Accordingly, I conclude the modified custody and parenting time order is not in the best interest of the children, and I would reverse the trial court. For these reasons, I respectfully dissent.