MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Justin Mercer,
Appellant-Petitioner,

v.

Maribel Vega-Jimenez,
Appellee-Respondent

December 22, 2023

Court of Appeals Case No. 23A-DC-993

Appeal from the Newton Superior Court

The Honorable Daniel J. Molter, Judge

Trial Court Cause No. 56D01-2005-DC-405

Memorandum Decision by Judge May
Judges Bailey and Felix concur.

May, Judge.

[1] Justin Mercer ("Father") appeals the trial court's order granting a request to modify parenting time filed by Maribel Vega-Jimenez ("Mother"). Father argues the trial court abused its discretion when it modified the parenting time schedule because it did not make a finding that modification was in the best interests of Mother and Father's children, A.M., D.M., and K.M. (collectively, "Children"). We affirm.

Facts and Procedural History

[2] Mother and Father are the parents of A.M., born March 22, 2013; D.M., born April 5, 2016; and K.M., born January 18, 2019. Mother and Father divorced on March 21, 2021. In its dissolution order, the trial court awarded Father sole physical and legal custody of Children. Mother was given parenting time with Children "every other weekend from Friday at 6:00 p.m. to Sunday at 6:00 p.m." (App. Vol. II at 36.)

[3] On July 13, 2022, Mother filed a petition for modification of custody or parenting time. Therein, she alleged, in relevant part:

> 5. Since the entry of the Court's Decree in March of 2021, there has been a substantial and continuing change in circumstances and that change includes, but is not limited to, the fact that Mother is relocating to Lowell, Indiana, the fact that Father has consistently engaged in a pattern of alienating [Children] from Mother, including taking affirmative steps to make it more difficult for Mother to visit with [Children] by engaging in activities such as placing the school-aged children in school by Father's home but placing the youngest child in daycare in Highland, Indiana, which compelled Mother to drive literally for

> hours simply to effectuate her midweek parenting time,[1] as the Court compelled Mother to do all the driving associated with her parenting time, and Father chose to make it as difficult as possible, and custody of [Children] with Mother would be in [Children's] best interests.

(*Id*. at 56-7) (footnote added). On September 20, 2022, Mother filed a notice of intent to relocate stating that she had relocated to Lowell, Indiana, as indicated in her petition for modification of custody. On October 11, 2022, Father filed, as is relevant here, an Objection to Mother's intent to relocate and asserted he was concerned that the relocation notice was "unclear and vague." (*Id*. at 61.) On October 19, 2022, Mother filed her response to Father's Objection to her intent to relocate. Therein, she argued she was "not even obligated to give notice of relocation if she moves closer to Father and [Children's] school district does not change." (*Id*. at 63.)

[4] On December 14, 2022, the trial court held a hearing on Mother's petition for modification and motion to relocate. During that hearing, Guardian ad Litem Sandra Moreno Garcia ("GAL") recommended Mother and Father have a "shared parenting time plan" in which Mother would essentially have Children at the beginning of the week, Father would have Children at the end of the week, and the parties would alternate weekends. (Tr. Vol. II at 8.) Regarding the best interests of Children, she opined:

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[1] It is unclear from the record when midweek parenting time was added to the parenting time schedule as pronounced in the parties' dissolution decree.

> I think that the way that [Mother's] parenting time is currently . . . they spend a lot of time in the vehicle. They spend a lot of time, you know, driving around travelling and I think that they would do well to have that extended time with [Mother] to, you know, do the bedtime routines, to get up, to have her get them ready, take them to school. And it would also limit the interaction between [Mother] and [Father] which I think is beneficial because [Mother] would pick-up from school and take to school. The only time that they would have to interact would be on alternating weekends and currently I think [Mother] picks up at the, at the end of the drive, or they, she doesn't really go on the property. And I would hope they would do some co-parenting to help improve their communications and lessen any contention between the two of them.

(*Id*. at 11.) Father testified he believed modification of parenting time was not in Children's best interests because:

> I think co-parenting between us needs, needs, is, is paramount. I think there's a much too much secrecy in what she does with the kids while they're with her. She takes them to babysitters and, and people that I don't know who they are and won't disclose like the address or, or where they're at and who's caring for them and it gives me concern that frankly strangers are watching the children. And I don't know if there's an uncle around or teenage boys or, like, my, my oldest daughter is nine. So, I, I just want to know where they are and that they're safe and–
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> * * * * *
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> I don't think necessarily that she, I'm not saying she would do something to harm them. I'm saying that I don't know what un-background checked people, where I have no idea of what the familial makeup of their home is. I have no idea what would be happening with/to my children while they're there. Neighbors

> coming in and out; I, I just, anytime I place the children in someone else's care, sir, it's a, either a licensed facility or background checked individuals.

(*Id*. at 34.) Mother testified, regarding Children's best interests, that she "always make[s] [her] changes in [employment] thinking of the best interests of [Children]." (*Id*. at 72.)

[5] At the end of the hearing, the parties agreed Mother could exercise her parenting time from Monday evening to Thursday morning. However, the trial court indicated it would not be changing custody or parenting time at the time because "until we get our act together and start communicating I don't want to do this." (*Id*. at 117.) The trial court reiterated the parenting time schedule recommended by the GAL and stated:

> For the time being we'll leave the visitation the way it is but I want to agree on a counselor, and as soon as the counselor indicates . . . that it's acceptable or in [Children's] bests interest - let's put it that way, that they be allowed to visit [Mother] Monday night through Thursday morning. And then I want to go to change it to that. And that's not changing custody, that's simply increasing parenting time.

(*Id*. at 119.)

[6] On April 5, 2023, the trial court held a status hearing on the issues. During that hearing, the GAL testified about her recommendation that the parties engage in a "shared parenting time plan." (*Id*. at 126.) The GAL also testified that Mother and Father had not yet engaged in counseling to address "high-conflict

parenting" and that communication between the parties had not improved since the December 14 hearing. (*Id*. at 128.) After the hearing, the trial court issued an order granting Mother's motion for modification of parenting time. That order stated, in relevant part:

> THE COURT FURTHER FINDS that Mother has met her burden for an immediate change of parenting time and will modify as follows:
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> The Court will modify the parenting schedule to allow Mother to have every Monday night after school until Wednesday morning with [Children]. Father shall be entitled to every Wednesday night through Friday morning. They shall rotate every other weekend, which includes Sunday night. The parties will take [Children] to school on their Monday morning. This schedule is subject to Mother's work schedule. Mother shall be permitted to pick up [Children] from school when she is exercising her visitation that night. The parties shall follow the additional parenting time section of the Indiana Parenting Time Guidelines.

(App. Vol. II at 65-6.)

Discussion and Decision

[7] As an initial matter, we note Mother did not file an appellee's brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id*. Prima facie error is

"error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006).

[8] When reviewing cases involving family law matters,

> [w]e acknowledge the well-established preference in Indiana "'for granting latitude and deference to our trial judges in family law matters.'" *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178 (Ind. 1993)). "Appellate courts 'are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence.'" *Id*. (quoting *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)). In order to reverse a trial court's ruling, it is not enough that the evidence might have supported a different conclusion. *Id*. Rather, the evidence must positively require the conclusion contended for by appellant [before] we may reverse. *Id*. We may not reweigh the evidence or reassess witness credibility, and the evidence should be viewed in a light most favorable to the judgment. *Id*. (quoting *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011)). Still, although we must be highly deferential to trial courts in cases such as this, that deference is not absolute. *See Kirk*, 770 N.E.2d at 307 n.5 ("This is not to say that the circumstances of a custody or visitation case will never warrant reversal.").

Montgomery v. Montgomery, 59 N.E.3d 343, 349-50 (Ind. Ct. App. 2016), *trans. denied.*

[9] A decision about parenting time requires us to "give foremost consideration to the best interests of the child." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013) (quoting *Marlow v. Marlow*, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998),

trans. denied); *see also* Ind. Code § 31-17-4-2 ("The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child."). Parenting time decisions are reviewed for an abuse of discretion. *Perkinson*, 989 N.E.2d at 761.

[10] Father argues the trial court failed to find a modification of parenting time would be in Children's best interests. A trial court's finding that modification is in a child's best interest must be either explicit or implicit in its order. *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 458 (Ind. 2009). Here, the trial court made only one statement regarding its analysis of the matter prior to modifying the parties' parenting time schedule: "Mother has met her burden for an immediate change of parenting time." (App. Vol. II at 65.) Indiana Code section 31-17-4-2 requires that Mother prove "modification would serve the best interests of the child." As the trial court stated Mother "met her burden" it implicitly stated modification was in Children's best interests. Therefore, we conclude the trial court did not abuse its discretion when it granted Mother's motion to modify parenting time.

Conclusion

[11] The trial court did not abuse its discretion because it implicitly found modification was in Children's best interests when it indicated Mother had met her burden to modify the parenting time schedule. Therefore, we affirm the trial court's decision.

[12] Affirmed.

Bailey, J., and Felix, J., concur.