

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kailey Hughes,
Appellant-Respondent,

v.

Joseph Martin,
Appellee-Petitioner.

February 9, 2022

Court of Appeals Case No.
21A-DC-2088

Appeal from the Jackson Superior
Court

The Honorable Larry W. Medlock,
Special Judge

Trial Court Cause No.
36D02-1703-DC-91

Bradford, Chief Judge.

Case Summary

[1] Joseph Martin (“Father”) and Kailey Hughes (“Mother”) (collectively, “Parents”) were married and are the parents of two children, Ri.M. and Re.M. (collectively, “Children”). Parents divorced in 2018, after which time Mother retained primary physical custody of Children and Father exercised parenting time with Children, including two overnight visits per week. On February 8, 2021, Father filed a petition to modify the parties’ established parenting time order. On August 10, 2021, the trial court issued an order increasing Father’s overnight visits with Children from two nights per week to five nights per week, effectively flip-flopping Parents’ previous custody and visitation arrangement. Mother appeals, arguing that the trial court abused its discretion by making a de facto custody modification without making any findings relating to the factors set forth in Indiana Code section 31-17-2-8, as required by Indiana Code section 31-17-2-21. Because we agree with Mother, we reverse the trial court’s order and remand the matter to the trial court for further proceedings.

Facts and Procedural History

[2] Parents were married and are the biological parents of Children. Father initiated divorce proceedings on March 27, 2017. Parents’ divorce was finalized on June 14, 2018. Pursuant to Parents’ divorce decree, Mother retained primary physical custody of Children and Father exercised parenting time with Children, including two overnight visits per week, certain holidays, and half of the summer.

[3] On February 8, 2021, Father filed a petition to modify Parents' established parenting time order. The trial court conducted a hearing on Father's petition on August 6, 2021. Prior to and at the time of the hearing, Mother lived in Scottsburg and worked as a nurse, specializing in oncology. Father lived in Seymour and worked at the Lowe's Distribution Center in North Vernon. Mother's employment schedule was flexible but required her to work some weekends. Father's employment schedule required him to work Friday, Saturday, and Sunday of each week. Up to that point, Parents' oldest child had attended school at Henryville Elementary School. The younger child was not yet attending school.

[4] On August 10, 2021, the trial court issued an order granting Father's petition to modify his parenting time with Children. With respect to parenting time and custody, the trial court found the following:

1. That the Court GRANTS the Petition to Modify based on the fact that the Mother, just Wednesday before, entered into a contract for a new position and said position will last approximately eight (8) weeks with the possibility of renewal and the fact that the Father works weekends. The minor child^[1] currently lives in Scott County but goes to School in Clark County and the Court finds that this order will remain in place until the Mother's work situation is confirmed to be stabilized at which time the Court will hold further hearing upon request. However, the Court would not be inclined to change schools

¹ It is undisputed that Parents have two children and that Father's petition to modify related to both children. Although both parties seem to assume (as do we) that the trial court intended for its order to apply to both children, the order only refers to the word "child" in the singular.

during the academic year.

2. The Court feels it to be in the best interest of the minor child to be enrolled in Seymour school district.

3. The Father shall have the minor child on Sundays after work until Friday morning before school. That the Father will be responsible from [sic] retrieving the child from Mother's residence on Sundays.

4. The Mother or grandparents shall retrieve the minor child on Fridays from school and the Mother shall have the child until Sunday evening.

5. That should the Mother work or be unavailable on her weekend with the child and the Father is available, the Mother shall first offer the Father time with his child. If Father is available, he shall transport child to and from Mother's residence.

6. That should the Father work or be unavailable during his time with child, then the Mother shall be given first opportunity to have child so long as it does not interfere with her schooling. Mother would be responsible to transport to and from Father's residence.

7. That the parties are to follow Indiana Parenting Time Guidelines for Holiday visitation with the Father being the custodial parent for that purpose alone.

8. It is the Court's intention to divide the parenting time equally between the parties with that being said the Court did not count the times child should be asleep or her time at school.

Appellant’s App. Volo. II pp. 125–27. On August 13, 2021, Mother filed a motion to reconsider and correct error. The trial court denied Mother’s motion to reconsider on August 17, 2021.

Discussion and Decision

- [5] We initially note that Father did not file an appellee’s brief. “When an appellee fails to submit a brief, we do not undertake the burden of developing arguments for her and we apply a less stringent standard of review with respect to showings of reversible error.” *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). “That is, we may reverse if the appellant establishes *prima facie* error, which is an error at first sight, on first appearance, or on the face of it.” *Id.*
- [6] Modifications of child custody and parenting time are both reviewed for abuse of discretion. *Miller v. Carpenter*, 965 N.E.2d 104, 108 (Ind. Ct. App. 2012) (citing *Werner v. Werner*, 946 N.E.2d 1233, 1244 (Ind. Ct. App. 2011) (custody), *trans. denied*; *Tamasy v. Kovacs*, 929 N.E.2d 820, 837 (Ind. Ct. App. 2010) (parenting time)). “We grant latitude and deference to our trial judges in family law matters.” *Id.* “We consider the only the evidence favorable to the judgment and the inferences flowing therefrom.” *Id.* “We do not reweigh the evidence or assess witness credibility.” *Id.*
- [7] Mother contends that the trial court abused its discretion by increasing the number of overnight visits awarded to Father from two overnight visits per

week to five overnight visits per week, which she claims amounts to a de facto custody modification. In *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010), we held that a significant increase in the number of overnight visits awarded to one party can, based on the circumstances, amount to a de facto custody modification. We have also held that “the statute governing modification of parenting time should not be used as an end run around the statutory requirement of showing a substantial change in circumstances for a modification of physical custody.” *Miller*, 965 N.E.2d at 111.

[8] Indiana Code section 31-17-4-2 provides that a court may modify an order granting parenting time “whenever modification would serve the best interests of the child.” With respect to a modification of custody, a trial court must find both that the modification is in the best interests of the children involved and that there is a substantial change in one or more of the factors listed in Indiana Code section 31-17-2-8.² Ind. Code § 31-17-2-21. Thus, unlike a modification of parenting time, the trial court must make the additional finding of a substantial change in circumstances before granting a request to modify an established custody arrangement.

² These factors include (1) the age and sex of the child; (2) the wishes of the child’s parents; (3) the wishes of the child, with more consideration given if the child is at least fourteen years of age; (4) the interaction and interrelationship of the child with the child’s parents, sibling, or any other person who may significantly affect the child’s best interests; (5) the child’s adjustment to the child’s home, school, and 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 (9) a designation in a power of attorney of the child’s parent or a person found to be the child’s de facto custodian. Ind. Code § 31-17-2-8.

[9] In requesting that the trial court modify the parties' previous parenting time arrangement, Father stated as follows:

1. The parties' settlement agreement and decree of dissolution of marriage were entered on June 14, 2018 providing in part that [Father] shall have parenting time every week as follows: Every Tuesday from 10:00 a.m. with a Tuesday overnight until 10:00 a.m. Wednesday; and Thursday from 10:00 a.m. with a Thursday overnight until 7:00 p.m. Friday. Husband shall have in addition to the above holidays and one-half of the summer.

2. Since the parties' Decree of Dissolution, they have come to a verbal agreement that [Father] shall have parenting time from 10:00 a.m. Tuesday through 7:00 p.m. Thursday of each week.

3. There has been a substantial change in the circumstances of the parties and their children since the Decree of June 2018, which justifies a modification of the parenting time.

Appellant's App. Vol. II p. 89. Father's motion effectively requested that the prior parenting time order be modified to award him one additional overnight visitation with Children per week. However, at the hearing on his motion, Father changed his request to "get *custody* Monday through Thursday at least." Tr. Vol. II p. 3 (emphasis added). Father's change in terminology from his initial request to his request at the hearing suggests that he was, in fact, seeking a de facto custody modification.

[10] In modifying the previous parenting time order, the trial court ordered that "Father shall have the minor child[ren] on Sundays after work until Friday

mornings before school,” awarding him five overnight visits with Children per week. Appellant’s App. Vol. II p. 126. The trial court’s order further stated that “the parties are to follow [the] Indiana Parenting Time Guidelines for Holiday visitation with the Father being the custodial parent for that purpose alone.” Appellant’s App. Vol. II p. 126.

[11] Upon review, we find the trial court’s order to be a de facto custody-modification order as it effectively switched the parties’ prior arrangement giving Father custody of Children and Mother two nights of visitation with Children each week. In issuing this order, the trial court, however, did not make any findings specifically relating to the factors listed in Indiana Code section 31-17-2-8. Again, as we stated in *Miller*, “the statute governing modification of parenting time should not be used as an end run around the statutory requirement of showing a substantial change in circumstances for a modification of physical custody.” *Miller*, 965 N.E.2d at 111. We conclude that the trial court abused its discretion in making a de facto custody modification without making findings relating to the factors listed in Indiana Code section 31-17-2-8.

[12] The judgment of the trial court is reversed, and the matter is remanded for further proceedings.

Crone, J., and Tavitas, J., concur.