MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brittany Anderson,
Appellant-Petitioner,

v.

Jan Michael Anderson,
Appellee-Respondent

June 30, 2023

Court of Appeals Case No. 22A-DC-3021

Appeal from the Henry Circuit Court

The Honorable Bob A. Witham, Judge

Trial Court Cause No. 33C01-2012-DC-240

Memorandum Decision by Judge Crone
Judge Brown and Senior Judge Robb concur.

Crone, Judge.

Case Summary

[1] Brittany Anderson (Mother) appeals the trial court's order modifying custody, parenting time, and child support. She asserts that the trial court abused its discretion in modifying custody. Finding no abuse of discretion, we affirm.

Facts and Procedural History

[2] Mother and Jan Michael Anderson (Father) were married and are the parents of twin sons, L.A. and D.A (the Children), born September 9, 2009. On May 20, 2021, the parties' marriage was dissolved pursuant to the terms of their agreed mediated settlement, which granted Mother and Father joint legal custody of the Children and Mother primary physical custody. In addition, the settlement granted Father parenting time according to the Indiana Parenting Time Guidelines (IPTG), and required Father to provide Mother with at least seven days' advance notice if he was unavailable to care for the Children during his parenting time to allow Mother additional parenting time. Also in May, Mother, with Father's agreement, moved with the Children from the family's prior home in New Castle to Brownsburg. Father remained in New Castle.

[3] On March 7, 2022, Father filed a motion for clarification on opportunity for additional parenting time and advance child tax credit. On March 22, 2022, Mother filed a rule to show cause, motion for modification of custody, and motion for reappointment of court appointed special advocate (CASA), in which she alleged that Father had failed to provide her with the opportunity for additional parenting time when he was at work and refused to provide her with

his work schedule or advance notice when he expected a change in parenting time. In addition, Mother alleged that Father disparaged her in text messages and in conversations with the Children and spoke to them regarding "adult or custody matters." Appellant's App. Vol. 2 at 40. Mother also alleged that Father contacted the Hendricks County Department of Children Services (DCS) to complain about her but that DCS found his complaints were unsubstantiated, and she informed the trial court that DCS workers would testify on her behalf. Mother requested that the court grant her sole legal custody of the children.

[4] Also on March 7, the trial court issued an order reappointing the CASA, Susan Stamper, who had acted as CASA during the parties' initial dissolution proceedings. During March, the CASA conducted a phone interview with Mother, visited Mother's home, and spoke with the Children for five to ten minutes at Mother's home.

[5] On April 1, 2022, Mother filed another petition for rule to show cause, alleging that Father had unilaterally cancelled the Children's counseling sessions without consulting with her because "he [did] not believe that the appointments should be by zoom" and that the cancellations were not in the Children's best interest. *Id.* at 46. Mother requested that the court order Father to cease causing delay or interruption in the Children's counseling. On April 4, Father filed a motion to modify custody and parenting time, in which he requested that the court grant him sole legal custody and primary physical custody of the Children.

[6] In April and May 2022, the CASA conducted two phone interviews with Father. On June 27, the CASA spoke with Mother by phone. In July, the CASA visited Mother's home and met with the Children for approximately thirty minutes. The CASA also visited Father's home and met with the Children. The CASA spent a total of about two hours with the Children.

[7] On July 27, 2022, the CASA submitted her report to the trial court. In her opinion, both Mother's and Father's "home[s] were appropriate and no safety concerns were noted[,]" and the Children had sufficient clothing and personal items available. *Id*. at 53. The CASA stated that the Children presented as healthy and were up to date on checkups and immunizations. She stated that the Children told her "about the difficulties in adapting to the Brownsburg School and not knowing anyone despite attending school there last year, [and that] the [Children's] friend base remains much smaller then [sic] while living in New Castle." *Id*. at 54. The CASA opined that the Children's counseling "ha[d] not gone well," explaining that the Children "were very averse" to virtual therapy and "complained to their father." *Id*. In addition, the CASA stated that the Children had "only been seen on two occasion[s] due to the fact that [L.A.'s] assigned therapist left the practice and [L.A.] was supposed to be transitioned to [D.A.'s] therapist." *Id*.

[8] The CASA related that she was "concerned with the boys' emotional well-being." *Id*. She explained that the Children "are intelligent and present their needs and desires very clearly" and that they want to live with their Father, and that Mother was "not listening to them or providing them with applicable

reasons that she will not agree to let them go live with their father." *Id*. The CASA recommended that custody be modified so that Father had primary legal and physical custody and that Mother exercise parenting time in accordance with the IPTG.

[9] The trial court held an evidentiary hearing on October 14 and November 2, 2022. Father and the CASA testified on his behalf. The CASA testified that she stood by the recommendations in her report. She testified that, according to the Children, there is conflict in Mother's home and that Mother frequently yells at the Children. The CASA admitted that she did not corroborate many of the Children's statements.

[10] Mother, the Children's therapist Jack Ennis, and DCS employee Lynette Kelly testified on Mother's behalf. Ennis testified that he had seen L.A. three times and that L.A. had indicated in all three of his sessions that "he's been getting along quite well with his mom and has been maintaining a positive attitude." Tr. Vol. 2 at 83. Ennis testified that he had been working with D.A. since mid February and had had between ten and twelve sessions with him. Ennis explained that D.A. does not feel like he needs counseling, has a very positive attitude toward Father, and looks forward to seeing Father, but has an "acrimonious relationship with mom," "doesn't like being at home with his mom," and "doesn't like mom yelling" at him. *Id*. at 85. Ennis testified that he had not received any phone calls from the CASA.

[11] On November 23, 2022, the trial court issued its order modifying custody, parenting time, and child support, in which it found that "continuing and substantial changes have occurred that make the current custodial arrangement to be no longer in the minor [C]hildren's best interest." Appealed Order at 1. Therefore, the court granted Father primary physical custody and sole legal custody of the Children and granted Mother parenting time as the parties agreed or, if they could not agree, then pursuant to the IPTG. In reaching its decision, the court explained that it "weigh[ed] heavily the CASA report [that] indicated that the minor [C]hildren wish to reside with [Father] and that the [C]hildren have had significant difficulty in adjusting to the custodial arrangement with [Mother] relocating to Brownsburg." *Id*. at 2. The court terminated Father's prior child support obligation, found that neither party shall pay child support to the other, and authorized Father to claim both Children for federal and state income tax purposes for fiscal year 2023 and all subsequent years. The court did not find Father in contempt for the March 2022 rule to show cause because he "could have care and custody of the minor [C]hildren at his employment and the [C]hildren were not in the care and custody of a third party." *Id*. at 3.[1] Further, the court did not find Father in contempt for the April 2022 rule to show cause because the court had subsequently issued an order "specifically addressing the issue raised" and Father had "abided by [it] during

[1] The Children were permitted to use a conference center while Father was working as a sales manager at a car dealership.

the pendency of [the] litigation." *Id*. at 2-3. We note that the order that the trial court refers to is not in the record before us. This appeal ensued.

Discussion and Decision

[12] Mother challenges the trial court's custody ruling and does not specifically challenge its contempt rulings. The trial court entered findings and conclusions sua sponte. In such a case, the specific findings control only with respect to issues they cover, and a general judgment standard applies to issues outside the findings. *In re Marriage of Sutton*, 16 N.E.3d 481, 484-85 (Ind. Ct. App. 2014). "The trial court's findings or judgment will be set aside only if they are clearly erroneous." *Id*. at 485. A finding is clearly erroneous only if there are no facts or inferences drawn therefrom to support it. *Id*.

[13] We recognize the well-established preference in Indiana courts "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, 178 (Ind. 1993)). "It is not impossible to reverse a trial court's decision regarding child custody on appeal, but given our deferential standard of review, it is relatively rare." *Hecht v. Hecht*, 142 N.E.3d 1022, 1029 (Ind. Ct. App. 2020).

[14] As our supreme court has explained,

> 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. 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. Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.
>
> The party seeking to modify custody bears the burden of demonstrating the existing custody should be altered. Indeed, this more stringent standard is required to support a change in custody, as opposed to an initial custody determination[] where there is no presumption for either parent because permanence and stability are considered best for the welfare and happiness of the child.

Steele-Giri, 51 N.E.3d at 124 (citations and quotation marks omitted).

[15] Our review in this case is also affected by the fact that Father has not filed an appellee's brief.

> When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf. Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it. Where an appellant is unable to meet this burden, we will affirm.

Fifth Third Bank v. PNC Bank, 885 N.E.2d 52, 54 (Ind. Ct. App. 2008) (citations and quotation marks omitted).

[16] Indiana Code Section 31-17-2-21(a) provides that a trial 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 [Indiana Code Section 31-17-2-8]." In making its determination, the trial court is required to "consider the factors" listed under Section 31-17-2-8. Ind. Code § 31-17-2-21(b). Section 31-17-2-8 provides that in determining the best interests of the child, the trial court "shall consider all relevant factors," including the following:

> (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.[2]

[17] Mother asserts that reversal is warranted because Father failed to provide proof of a substantial and continuing change in circumstances or that modification is in the Children's best interests. Mother maintains that "[i]n order to prove that a custody modification is warranted after the initial custody order is issued, one parent has to demonstrate that the other has committed misconduct so egregious that it places the child's mental and physical welfare at stake." Appellant's Br. at 21 (citing *Montgomery v. Montgomery*, 59 N.E.3d 343, 350 (Ind. Ct. App. 2016), *trans. denied* (2017)). Mother claims Father failed to prove that she committed misconduct so egregious that it placed the Children's mental and physical welfare at stake.

[18] Mother implies that the egregious misconduct standard articulated in *Montgomery* applies to all custody modifications, but that is incorrect. The *Montgomery* court stated,

> Generally, cooperation or lack thereof with custody and parenting time orders is not an appropriate basis for modifying custody. It is improper to utilize a custody modification to punish a parent for noncompliance with a custody order. However, if one parent can demonstrate that the other has committed

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[2] Factors (8) and (9) involve de facto custodians and designations in a power of attorney, which are irrelevant here.

> misconduct so egregious that it places a child's mental and physical welfare at stake, the trial court may modify the custody order.

59 N.E.3d at 350 (citations, quotation marks, and brackets omitted). The *Montgomery* court applied the egregious misconduct standard in the specific context of determining whether the custodial parent's interference with a noncustodial parent's visitation rights justified modification of child custody. *Id.* at 351-52.

[19] Here, the bases for the trial court's finding that there has been a continuing and substantial change in circumstances such that modification of custody is in the Children's best interests are that (1) the Children wish to reside with Father and (2) they have had significant difficulty in adjusting to the custodial arrangement with Mother relocating to Brownsburg.[3] Mother does not explain why the standard she relies on from *Montgomery* should apply here. Thus, we conclude that Father was not required to show that Mother's "misconduct was so

[3] Mother argues that "the trial court did not detail what the continuing and significant changes in circumstances were." Appellant's Br. at 26. We note that "in ordering a modification of child custody a trial court is not, absent a request by a party, required to make special findings regarding the continuing and substantial changes in the parties' circumstances." *In re Paternity of J.T.*, 988 N.E.2d 398, 400 (Ind. Ct. App. 2013). In addition, we disagree that the trial court did not indicate what the continuing and significant changes in circumstances were. The trial court found that the Children's desire to live with Father as well as the Children's difficulty in adjusting to the relocation to Brownsburg were the basis for its decision. Mother also argues that the trial court abused its discretion "by failing to consider the factors under Ind. Code § 31-17-2-21(b) as mandated by the statute." Appellant's Br. at 21. We note that a "trial court is not required to enter a finding as to each factor it considered." *M.G. v. S.K.*, 162 N.E.3d 544, 548 (Ind. Ct. App. 2020). Mother repeatedly emphasizes the trial court's lack of findings, but that is not a basis for reversal. Mother was free to request special findings under Indiana Trial Rule 52 and chose not to do so.

egregious that it place[d] [the Children's] mental and physical welfare at stake." *See id*. at 350.

[20] Regarding the evidence that supports the trial court's findings, Mother argues that the trial court abused its discretion by relying on the CASA's report where the CASA spent a mere two hours interacting with the Children[4] and admitted that she had not verified or corroborated any of the Children's statements, and also by ignoring the testimony of witnesses who had more contact with the Children than the CASA. We observe that the trial court heard the evidence regarding the amount of time that the CASA spent with the Children, the CASA's lack of verification and corroboration of the Children's statements, and the contrary evidence, and the trial court clearly found that the report was a credible basis for its decision. Mother's argument regarding the shortcomings of the report in light of the conflicting evidence is, in essence, a request for this Court to reweigh that evidence. This we cannot do.

[21] Finally, Mother claims that the trial court abused its discretion by relying on the wishes of twelve-year-old children who have been alienated from her and given everything they want from Father as the basis for its decision. Mother concedes that the trial court is required by Section 31-17-2-21(b) to consider the Children's wishes in determining whether modification of custody is warranted. *See also Richardson*, 622 N.E.2d at 180 ("[T]he desire of a young child to live

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[4] We observe that the CASA was already familiar with the family because she had been the appointed CASA in the dissolution proceeding.

with one parent has been held to be insufficient standing alone to constitute a substantial and continuing change.") (citing *Elbert v. Elbert*, 579 N.E.2d 102, 107 (Ind. Ct. App. 1991)). Her argument that the trial court should not have relied on the Children's wishes is an invitation for this Court to reweigh the evidence, which again, we must decline. We conclude that Mother has failed to show prima facie error regarding the trial court's decision to modify custody. Therefore, we affirm the trial court's order in all respects.

[22] Affirmed.

Brown, J., and Robb, Sr.J., concur.