ATTORNEY FOR APPELLANT

Alexander N. Moseley
Brian L. Ciyou
Ciyou and Dixon, P.C.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Matthew Fergason,
Appellant-Petitioner,

v.

Wendy Brooks,
Appellee-Respondent

and

Jennifer Mosier and Randall Mosier,
Appellees-Intervenors

May 5, 2022

Court of Appeals Case No. 21A-DR-2660

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause No. 03C01-1607-DR-3769

Vaidik, Judge.

Case Summary

[1] Matthew Fergason ("Father") appeals the trial court's modification of grandparent visitation between his son, K.F. ("Child"), and Child's maternal grandmother. Concluding Father has shown prima facie error, we reverse.

Facts and Procedural History

[2] Child is the biological son of Father and Wendy Brooks ("Mother"). In 2016, Mother left Child, then ten years old, with his maternal grandparents, Randall and Jennifer Mosier ("Grandmother") (collectively, "Grandparents"), and did not return. Mother's whereabouts remain unknown. Father petitioned for, and was granted, custody of Child. In the custody order, the trial court granted Grandparents visitation, which consisted of alternate weekends, a week in the summer, and time during Christmas and Grandparents' birthdays.

[3] In February 2021, Father's wife ("Stepmother") received her "dream job" offer. Tr. Vol. II p. 24. The job required a move to Oregon but offered a pay raise and benefits, which the family did not have, as well as opportunities for advancement. Father is legally blind, making it "difficult [for him] to earn an income." *Id.* at 30. Father told Grandmother[1] of the intended move, and she filed a motion objecting to the relocation of Child because it affected her "parenting time." Appellant's App. Vol. II p. 17. That same month, Father, Stepmother, and Child relocated to Oregon. Father then filed a belated notice of intent to relocate and a motion to modify grandparent visitation.

[4] A hearing was held in October. Father testified that Child, now fifteen, is doing "[p]retty good" with the relocation, has made friends, is enrolled in school,

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[1] While the record is unclear as to the exact date, it appears Randall died sometime in between the initial award of visitation and the motion for modification. Thus, only Grandmother participates in the modification proceedings.

participates in the school band, and is looking for a job. Tr. Vol. II p. 27. He also stated Child has a strong relationship with Stepmother and her family, who live nearby. Father testified that, given Child's age, he believes court intervention for visitation is unnecessary, and that Child and Grandmother should be responsible for maintaining the relationship on their own.

[5] Grandmother testified that, since Child moved to Oregon in February 2021, they had two visits—once in May when she went to visit him in Oregon and once in July when Child came to visit her for a week. She stated the travel from Oregon to Indiana is "difficult," including at least "twelve hours" of travel time, and expensive, totaling almost a $1,000 roundtrip. *Id.* at 17. She testified the parties planned for Child to visit her again, but Father could not afford to send him. Finally, Grandmother stated she and Child have a good relationship and he is generally happy to visit her, but "[Child] may not agree" to future extended visits because "as kids get older, they have other things that they want to do." *Id.* at 12.

[6] After the hearing, the trial court issued an order modifying grandparent visitation. The court found that Father's relocation "was for legitimate reasons." Appellant's App. Vol. II p. 11. The trial court made one finding relating to Child's interests—that he "has enjoyed a relationship with his grandmother for the past 15 years." *Id.* at 10. Most of the findings related to the difficulty the relocation imposed on Grandmother, how she had "no decision in the move" and "did not create this situation," and how the move causes "less grandparent time" and "additional cost for [Child's] parenting time with

Grandmother." *Id.* at 11, 12. Other findings relate to Father's perceived inadequacies, including that he "has not" placed Child's needs above his own and made decisions "to the exclusion of the grandparent child relationship," which is "[m]orally wrong." *Id.* at 11, 12.

[7] The trial court awarded Grandmother the following visitation: (1) two weeks in the summer to take place in Indiana, (2) one week at Christmas in Indiana, (3) every other year during Child's spring break, to take place in Indiana, and (4) another week at a time of Grandmother's choosing, to take place in Oregon. The trial court ordered Father to pay for all Child's travel. The court also ordered,

> 11. Father shall provide to Grandmother all updated school records and grades from [Child's school he] has attended in Oregon, and the same shall be filed with this Court by November 10, 2021.
>
> 12. By the end of October 27, 2021, Father shall provide to Grandmother documentation of [Child's] [b]and practices, performances and activities and schedules.
>
> 13. Once per month Father shall provide a video to Grandmother of a band performance [Child] appears in.

Id. at 13. Finally, the court ordered Father to pay $800 of Grandmother's attorney's fees.

[8] Father now appeals.

Discussion and Decision

[9] As an initial matter, Grandmother did not file an appellee's brief. When the appellee fails to file a brief on appeal, we may reverse the trial court's decision if the appellant makes a prima facie showing of reversible error. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). In this context, prima facie error is defined as "at first sight, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006). This rule was established for our protection so that we can be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *McGill*, 801 N.E.2d at 1251. Under that relaxed standard, we conclude reversal is appropriate.

I. Modification of Grandparent Visitation

[10] We note that, although Grandmother and the trial court referred to her as having "parenting time," Grandmother has only been awarded grandparent visitation. "[G]randparent visitation is not to be confused with the rights of the custodial parent." *In re Visitation of L-A.D.W.*, 38 N.E.3d 993, 998 (Ind. 2015). Grandparents are not afforded the same legal rights as parents and do not have a constitutional liberty interest with their grandchildren. *Id*. Historically, grandparents had no common-law right to visitation with a grandchild. *In re Visitation of M.L.B.*, 983 N.E.2d 583, 585 (Ind. 2013). Indiana has enacted Indiana Code chapter 31-17-5, also known as the Grandparent Visitation Act, which allow grandparents in some cases to assert a right to visitation. "[T]he

Grandparent Visitation Act contemplates only occasional, temporary visitation that does not substantially infringe on a parent's fundamental right to control, the upbringing, education, and religious training of their children." *Id.* (citation omitted).

[11] Father makes several arguments about the trial court's order to modify grandparent visitation.[2] The Grandparent Visitation Act provides "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child." Ind. Code § 31-17-5-7. We review a trial court's order modifying grandparent visitation for an abuse of discretion. *D.G. v. W.M.*, 118 N.E.3d 26, 29 (Ind. Ct. App. 2019), *trans. denied*. A court abuses its discretion when its decision is contrary to law or is against the logic and effect of the facts and circumstances before the court. *Id.*

[12] Father first contends reversal is necessary because the trial court did not conduct a best-interests analysis.[3] We agree. In crafting an order pertaining to

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[2] In addition to Father's motion to modify visitation, Grandmother filed a motion objecting to Child's relocation under the relocation statute. *See* Ind. Code § 31-17-2.2-5. The trial court's order does not state which motion it is addressing. Our result would be the same either way, because when the relocation is made in good faith, as was Father's here, both analyses turn on the bests interests of the child. *See Baxendale v. Raich*, 878 N.E.2d 1252, 1256 n.5 (Ind. 2008).

[3] Father argues the trial court erred by not applying the factors enumerated in *McCune v. Frey*, 783 N.E.2d 752 (Ind. Ct. App. 2003). However, *McCune* does not apply when we are "not confronted with a child custody dispute or an initial petition for grandparent visitation." *D.G.*, 118 N.E.3d at 30. Because this is not the initial petition for grandparent visitation, but a request to modify, *McCune* does not apply. Notably, it does not appear the trial court initially awarded visitation under the Grandparent Visitation Act, instead merely allocating visitation to Grandparents when custody changed from Mother to Father in 2016. However, Father can no longer challenge that initial award of visitation under *McCune*, as he failed to file a direct appeal in 2016. *See In re Paternity of P.E.M.*, 818 N.E.2d 32, 37 (Ind. Ct. App. 2004) (father waived right to challenge initial grandparent visitation award by not filing a direct appeal).

visitation, the paramount concern is the best interests of the child. *In re Guardianship of K.T.*, 743 N.E.2d 348, 352 (Ind. Ct. App. 2001). While explicit findings may not be required, the trial court must determine that the modification is in the child's best interests. *Cf. In re Paternity of P.R.*, 940 N.E.2d 346, 351 (Ind. Ct. App. 2010) (noting that there were no explicit findings that a custody modification was in the child's best interests, "[n]evertheless, because of the extensive findings, we are able to discern that the trial court determined that it was in the best interests of the children" for custody to be modified).

[13] There is no explicit finding of best interests here, nor are there other findings that show a consideration of Child's best interests. The findings barely mention Child at all, or the effects this order will have on him. Father, Stepmother, and Grandmother all testified about Child's life, including his school, extra-curricular activities, and his relationship with immediate and extended family. Father presented evidence that Child, who is now almost sixteen-years old, is in school in Oregon, where he has friends and family members, is participating in band, and is attempting to get a job. There is no doubt that requiring a high-school student to spend large amounts of his school breaks on the other side of the country would affect his life, yet there are no such findings. *See In re L-A.D.W.*, 38 N.E.3d at 1001 ("While a more extensive visitation schedule may be warranted when a child is younger and requires greater supervision, as a child matures, his or her increased involvement in academics, extracurricular activities, friends, hobbies, and jobs may warrant a more modest visitation schedule."). In fact, Grandmother herself testified that at Child's age it is likely

extended visits would clash with his schedule. Yet the trial court addressed none of these considerations.

[14] Such findings are of particular importance given the extent of visitation ordered here. The trial court ordered up to five weeks of visitation a year, four of which are to occur in Indiana and which Father must pay for. This will require Child to travel back and forth to Indiana multiple times a year—during peak holiday season, spring break, and in the summer—a journey described by Grandmother as difficult. And Father is required to pay for all of Child's travel, which the record reveals will cost thousands of dollars a year, despite his limited ability to earn income.

[15] Given that much of the evidence suggests so much cross-country visitation is not in Child's best interests, and that the trial court's order does not appear to have considered Child's best interests, we agree Father has shown a prima facie case of reversible error.

[16] Although we find Father's argument above to be dispositive, for purposes of instruction on remand we will address his other challenge to the order. Father also contends the trial court abused its discretion in ordering the following:

> 11. Father shall provide to Grandmother all updated school records and grades from [Child's school he] has attended in Oregon, and the same shall be filed with this Court by November 10, 2021.

> 12. By the end of October 27, 2021, Father shall provide to Grandmother documentation of [Child's] [b]and practices, performances and activities and schedules.
>
> 13. Once per month Father shall provide a video to Grandmother of a band performance [Child] appears in.

Appellant's App. Vol. II p. 13. "The Grandparent Visitation Act does not address contact between grandparents and grandchildren other than 'visitation,' a term that our legislature has not defined." *Spaulding v. Williams*, 793 N.E.2d 252, 263 (Ind. Ct. App. 2003). We have previously found that "any contact or communication ordered, other than visitation, should be applied narrowly to preserve and protect a parent's rights." *Id.*

[17] We agree Grandmother is not entitled under the Grandparent Visitation Act to Child's school records or information relating to his extra-curricular activities. Access to such information has historically been the role of the parent. *See id*. (contact under the Grandparent Visitation Act should not "treat Grandparents as if they were parents").

[18] We reverse the trial court's order modifying grandparent visitation and remand for proceedings consistent with this opinion.

II. Attorney's Fees

[19] Finally, Father challenges the trial court's award of attorney's fees to Grandmother. Indiana follows the American Rule, which ordinarily requires each party to pay its own attorney's fees. *Swartz v. Swartz*, 720 N.E.2d 1219,

1223 (Ind. Ct. App. 1999). Thus, attorney's fees are generally not recoverable from the opposing party as costs, damages, or otherwise absent any agreement between the parties, statutory authority, or rule to the contrary. *Id.*

[20] There is no agreement between the parties as to fees, and the trial court did not identify a statutory authority or rule under which it was awarding the fees. Nor could we find one. The Grandparent Visitation Statute does not allow an award of attorney's fees. Indiana Code section 31-17-7-1, which addresses attorney's fees in custody and visitation disputes, applies only to Indiana Code chapters 31-17-2, 31-17-4, 31-17-6, and 31-17-7, not to the Grandparent Visitation Act (chapter 31-17-5). Grandmother objected to Child's relocation under Indiana Code section 31-17-2.2-1, also known as the relocation statute, which does allow an award of attorney's fees. But the relocation statute states the trial court "may award reasonable attorney's fees for a motion filed under this section in accordance with IC 31-15-10 and IC 34-52-1-1(b)."[4] And Indiana Code section 34-52-1-1(b) provides that the court in a civil action "may award attorney fees as part of the cost to the prevailing party" if it finds that either party brought an action or continued to litigate an action that is frivolous, unreasonable, or groundless or litigated the action in bad faith. *See In re Paternity of K.C.*, 171 N.E.3d 659, 677 (Ind. Ct. App. 2021) (affirming award of attorney's fees under the relocation statute where the trial court found the relocation proceeding was

[4] Indiana Code chapter 31-15-10 provides for costs and attorney's fees for proceedings under Article 15, which does not include the Grandparent Visitation Act.

groundless under I.C. § 34-52-1-1(b)). And here, the trial court did not find Father's claims to be frivolous, unreasonable, or groundless. In fact, the trial court specifically found that Father's relocation was for a legitimate reason and granted his motion for modification of visitation, although not to the extent he requested.

[21] With no identified statutory authority for an award of fees, Father has made a prima facie showing that the trial court erred in ordering him to pay Grandmother's attorney fees.

[22] Reversed and remanded.

Crone, J., and Altice, J., concur.