MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Alexander N. Moseley
Dixon & Moseley, P.C.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Leonard Rodriguez,
Appellant-Petitioner,

v.

Bethann Fort,
Appellee-Respondent

July 31, 2023

Court of Appeals Case No. 23A-JP-281

Appeal from the Marion Circuit Court

The Honorable Tiffany U. Vivo, Judge

Trial Court Cause No. 49C01-1909-JP-39414

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Leonard Rodriguez ("Father") appeals the Marion Circuit Court's order granting in part and denying in part his petition to modify custody of his two

children with Bethann Fort ("Mother"). Father presents two issues for our review:

> 1. Whether the trial court abused its discretion when it denied his petition to modify physical custody of his son A.R.
>
> 2. Whether the trial court abused its discretion when it ordered the parties to share legal custody of his children with Mother.

[2] We affirm in part and remand in part.

Facts and Procedural History

[3] Father and Mother have two children together: R.R., born April 29, 2005, and A.R., born January 3, 2013 (collectively, the "Children"). After Father's paternity was established, in 2020, the trial court issued an order granting the parties joint physical and legal custody of the Children. Pursuant to that order, Mother was required to "enroll [R.R.] in family counseling to address their relationship." Appellant's App. Vol. 2, p. 28. But Mother did not comply, and she did not exercise parenting time with R.R., with whom she continued to have a difficult relationship. But Mother continued to exercise parenting time with A.R., with whom she had a good relationship.

[4] On April 7, 2021, Father filed a petition to modify custody of the Children. In particular, Father moved the trial court to grant him primary physical custody and sole legal custody of the Children. He alleged that Mother had "willfully disobeyed the Court's Order regarding family counseling" and moved the court to find Mother in contempt. *Id.* at 29. Following a preliminary hearing on

Father's petition, the trial court entered a provisional order granting Father primary custody of the Children, with Mother exercising parenting time.

[5] The trial court appointed a Guardian ad Litem ("GAL"), who prepared a report in September 2022. In her report, the GAL recommended that the parties share legal custody of the Children and that Father retain primary custody of the Children "until such time that Mother has her own valid driver's license and vehicle." *Id.* at 66. Significantly, Mother has had transportation issues due to a seizure disorder and has not had a driver's license for a few years. Mother had difficulty getting A.R. to school on time when she was exercising parenting time. A.R. has mostly stayed with Father on school nights, even on nights that were designated as Mother's parenting time.

[6] Following a hearing on Father's petition, the trial court issued an order concluding in relevant part as follows:

> 17. Since entry of the final order in this matter, there has been a substantial change in circumstances relating to the wishes of Father regarding custody, and the interaction and interrelationship of Mother and [R.R.] in that their relationship has become even more tenuous. It is in the children's best interest that custody be modified.
>
> 18. Father shall have primary physical custody of [R.R.] The parties shall have joint physical custody of [A.R.] The parties shall have joint legal custody of both children.

Id. at 21. In particular, the trial court ordered that the parties "shall alternate having [A.R.] in their physical care on a week on week off basis." *Id.* This appeal ensued.

Discussion and Decision

Standard of Review

[7] In granting Father's petition to modify custody in part, the court entered findings of fact and conclusions thereon following an evidentiary hearing. In such appeals, we review the court's judgment under our clearly erroneous standard. *Jones v. Gruca*, 150 N.E.3d 632, 640 (Ind. Ct. App. 2020), *trans. denied*. "We 'neither reweigh evidence nor judge witness credibility.'" *Id.* (quoting *R.L. v. Ind. Dep't of Child Servs. & Child Advocates, Inc.*, 144 N.E.3d 686, 689 (Ind. 2020)). Rather, a judgment is clearly erroneous only when there are no record facts that support the judgment or if the court applied an incorrect legal standard to the facts. *Id.*

[8] Mother has not filed an appellee's brief in response to Father's arguments on appeal. Accordingly, "the trial court's judgment will be reversed" if Father establishes "prima facie error." *In re Paternity of B.Y.*, 159 N.E.3d 575, 578 (Ind. 2020). "Prima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006) (citation omitted).

Issue One: Physical Custody of A.R.

[9] Father first contends that the trial court abused its discretion when it denied his petition to award him primary custody of A.R. Indiana Code section 31-14-13-6 requires the party seeking to modify an existing custody order to prove that: (1) modification is in the best interests of the Child; and (2) there has been a substantial change in one or more of the factors set forth in Indiana Code Sections 31-14-13-2. The factors set forth in Indiana Code section 31-14-13-2 ("Section 2") are:

> (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 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 parents;
> >
> > (B) the child's siblings; and
> >
> > (C) any other person who may significantly affect the child's best interest.
>
> (5) The child's adjustment to 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 if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

[10] Here, again, the parties' original custody order awarded them joint physical custody of the Children. Thus, Father must show that modification of that order is in the Children's best interests and that there has been a substantial change in circumstances to support modification.

[11] Father argues that the trial court erred when it denied his request for primary physical custody of A.R. "because several of the findings made in support of the decision are clearly erroneous. Additionally, the evidence presented undoubtedly reveals that [a] substantial change in circumstances occurred such that it was in A.R.'s best interest for custody to be modified." Appellant's Br. at 13. We address each contention in turn.

[12] Father first contends that the trial court's Finding No. 9 is clearly erroneous. The trial court found that "Mother exercised regular parenting time after the provisional hearing in May[] 2021 until the Preliminary Order on Modification was entered in March[] 2022. Mother failed to familiarize herself with the holiday provisions of the Guidelines." Appellant's App. Vol. 2, p. 20. Father maintains that that finding is erroneous because "the undisputed evidence reveals that Mother did not exercise regular parenting time after the provisional hearing in May of 2021 until March of 2022." Appellant's Br. at 13. We cannot agree.

[13] While the undisputed evidence shows, and the trial court found, that Mother's relationship with R.R. is "strained," the evidence shows that Mother has regularly exercised parenting time with A.R. Appellant's App. Vol. 2, p. 20. For instance, Father's wife ("Stepmother") testified that Mother exercised parenting time with A.R. "every other weekend" following the December 2020 custody order. *Id.* at 85. That evidence supports the trial court's finding that Mother exercised regular parenting time with A.R. between May 2021 and March 2022. While the trial court's finding is not explicitly limited to parenting time with A.R., it is obvious in the context of the other findings that Mother has barely seen R.R. and Finding No. 9 must refer only to A.R. Father has not shown that this finding is clearly erroneous.

[14] Father next contends that the trial court's Finding No. 13 is clearly erroneous. The trial court found that "Father has shown inflexibility regarding Mother's parenting time." Appellant's App. Vol. 2, p. 20. Father maintains that, to the contrary, the evidence shows that he has been flexible with Mother. But Father ignores Mother's testimony that Father is to blame for her diminished parenting time with A.R. during the school year. *See* Tr. p. 129. Father's contention is a request that we reweigh the evidence, which we will not do on appeal.

[15] Finally, Father contends, generally, that the evidence supports the modification of custody of A.R. In support, Father states that: he has been A.R.'s de facto primary caregiver since 2020; he has been primarily responsible for getting A.R. to school; Mother has voluntarily given up parenting time on school days/nights; Mother has shown that she is incapable of getting A.R. to school

on time; and the GAL recommended that Father be granted primary custody of both Children.

[16] While Mother's testimony was inconsistent regarding the reasons that she generally does not have parenting time with A.R. on school nights, she ultimately testified that she "can get the [C]hildren to school" but that Father does not allow her to have the Children on school nights. Tr. p. 129. And while the GAL recommended, on the one hand, that Father be primary custodian for both Children, she also qualified her recommendation. The GAL stated specifically that "Father should maintain primary physical custody until such time that Mother has her own valid driver's license and vehicle." Appellant's App. Vol. 2, p. 66. The trial court specifically found that Mother had a driving test "the day after the final hearing" and intended to drive A.R. to school once she had a license. *Id.* at 20.

[17] We remand to the trial court for a determination of whether Mother has, in fact, obtained a driver's license and vehicle. If she has, we would hold that Father has not shown that the trial court erred when it did not find that a modification of physical custody of A.R. is in his best interests or that there has been a substantial change in circumstances to support modification. But if Mother is still unable to drive the Children to school, we would reconsider our analysis of this issue on appeal.

Issue Two: Legal Custody

[18] Father next contends that the trial court erred when it denied his petition to modify the parties' joint legal custody of the Children. When considering a modification of legal custody, a trial court should specifically consider whether modification is in the best interest of the child and whether there has been a change in one of the statutory factors governing awards of joint legal custody. I.C. § 31-14-13-6; *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1259-60 (Ind. Ct. App. 2010). When we review the modification of legal custody, "we must determine whether there has been a substantial change in one or more of the factors listed in Indiana Code section [31-14-13-2.3], in addition to considering any substantial change to the Section [2] factors, as is typically necessary for physical custody modifications." *Milcherska v. Hoerstman*, 56 N.E.3d 634, 641 (Ind. Ct. App. 2016) (citing *Julie C.*, 924 N.E.2d at 1259).

[19] The factors listed in Indiana Code section 31-14-13-2.3(c), applicable in paternity cases, are:

> (1) the fitness and suitability of each of the persons awarded joint legal custody;
>
> (2) whether the persons awarded joint legal custody are willing and able to communicate and cooperate in advancing the child's welfare;
>
> (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint legal custody;

(5) whether the persons awarded joint legal custody:

(A) live in close proximity to each other; and

(B) plan to continue to do so;

(6) the nature of the physical and emotional environment in the home of each of the persons awarded joint legal custody; and

(7) whether there is a pattern of domestic or family violence.

[20] In paternity cases, the trial court may award joint legal custody "if the court finds that an award would be in the best interest of the child." I.C. § 31-14-13-2.3(a). "An award of joint legal custody under this section does not require an equal division of physical custody of the child." I.C. § 31-14-13-2.3(b).

[21] Particularly germane to whether joint legal custody should be modified is "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare." *Julie C.*, 924 N.E.2d at 1260 (quoting I.C. § 31-17-2-15(2)). As we observed in *Rasheed v. Rasheed*, 142 N.E.3d 1017, 1022 (Ind. Ct. App. 2020), *trans. denied*,

> [w]here the parties have made child-rearing a battleground, joint custody is not appropriate. [*Milcherska*, 56 N.E.3d] at 642. "Indeed, to award joint legal custody to individually capable parents who cannot work together is tantamount to the proverbial folly of cutting the baby in half in order to effect a fair distribution of the child to competing parents." *Id.* (citing *Swadner v. Swadner*, 897 N.E.2d 966, 974 (Ind. Ct. App. 2008)). We will reverse a trial court's grant of joint legal custody when the evidence indicates the joint custody award "constitutes an imposition of an intolerable situation upon two persons who

> have made child rearing a battleground." *Swadner*, 897 N.E.2d at 974 (citation omitted). The primary concern of the courts with respect to legal custody is the welfare of the children and not the wishes of the parents. *Carmichael v. Siegel*, 754 N.E.2d 619, 635 (Ind. Ct. App. 2001).

[22] Here, Father maintains that he and Mother "do not communicate well," and he asserts that they "have made child-rearing a battleground." Appellant's Br. at 18-19. In support, Father cites the trial court's own finding that "Mother did not maintain effective communication with Father." Appellant's App. Vol. 2, p. 20. And he cites the GAL's testimony that "Mother does not communicate with Father." *Id.* at 85.

[23] We cannot say that the evidence of Mother's inability to communicate with Father supports Father's characterization of their child-rearing as a "battleground." Indeed, Father described himself as "easygoing" when it comes to working with Mother on parenting time issues. Tr. p. 97. While he has expressed frustration with Mother, he does not direct us to evidence showing intractable problems between them. Moreover, the trial court was able to observe the parties' demeanors during the evidentiary hearings, and we give substantial deference to trial courts in family law matters. *See Julie C.*, 924 N.E.2d at 1259. We cannot say that the trial court abused its discretion when it denied Father's petition to modify the parties' joint legal custody of the Children.

[24] For all these reasons, we affirm the trial court's denial of Father's petition for modification of custody with respect to legal custody of the Children. But we do

not decide the issue of modification of physical custody of A.R. On that issue, we remand to the trial court for a determination of whether Mother has obtained a driver's license and a vehicle.

[25] Affirmed in part and remanded in part.

Vaidik, J., and Pyle, J., concur.