MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Katherine Winn,
Appellant-Respondent,

v.

Alan Devellen,
Appellee-Petitioner.

January 18, 2024

Court of Appeals Case No. 23A-JP-1806

Appeal from the Putnam Superior Court

The Honorable Melinda K. Jackman-Hanlin, Magistrate

Trial Court Cause No. 67D01-2003-JP-21

Memorandum Decision by Judge Mathias
Judges Tavitas and Weissmann concur.

Mathias, Judge.

[1] Katherine Winn ("Mother") appeals the trial court's order modifying primary physical custody over A.D. ("Child") from Mother to Alan Devellen ("Father"). Mother raises a single issue for our review, which we restate as whether the trial court's judgment is clearly erroneous. We affirm.

Facts and Procedural History

[2] In May 2021, the trial court entered its original order on paternity, custody, parenting time, and child support between Mother and Father with respect to Child. In the May 2021 order, the court found that Mother was to have primary physical custody over Child and Father was to exercise parenting time.

[3] Mother became unemployed December 2021 and has not obtained employment since then. She now lives in Indianapolis at a residence owned by her boyfriend. In December 2021, Mother was arrested in Avon for shoplifting from a department store. Child was with Mother at the time of the offense. Mother eventually pleaded guilty and was sentenced to probation.

[4] While on that probation, in June 2022 Mother committed a second shoplifting offense from a different department store. Child was again with Mother at the time of the offense. Mother was released to home detention for that offense in August. However, instead of returning to her home in Indianapolis, Mother and Child resided with Father in Putnam County. There, Child attended Cloverdale Elementary School.

[5] Mother was released from her home detention at Father's residence on November 1, at which time she moved back to her Indianapolis residence with

Child. Although in Indianapolis, Mother remained "responsible . . . for getting [A.D.] to school" at Cloverdale Elementary. Tr. Vol. 2, p. 15. However, Mother frequently got A.D. to school late, and A.D. received 39 tardies during the 2022-23 school year after Mother had returned to her Indianapolis residence. Mother blamed A.D.'s numerous tardies on "traffic" and having to "fight to get [A.D.] to go to school." *Id.* at 23.

[6] Thereafter, Father filed a petition to modify custody so that he would have primary physical custody over Child. After an evidentiary hearing on Father's petition, the trial court agreed, finding as follows:

> There has been a substantial change of circumstances that no longer makes the [May 2021 o]rder reasonable. Mother is no longer employed and is fully dependent upon her boyfriend for support[;] Mother made the erroneous decisions of shop[-]lifting on two separate occasions with [A.D.] being present[;] and Mother made the decision to keep [A.D.] at Cloverdale Elementary[,] which made [A.D.] tardy to school 39 times in one school year.

Appellant's App. Vol. 2, p. 17. The court further found that modifying custody was in Child's best interests because Child "needs stability and to not keep ping-ponging from place to place/school to school. If Mother retained custody, [A.D.] would be changing schools for a third time in three years." *Id.* at 18. The court added that "Mother's decision[-]making has continued to put [A.D.] in harm[']s way." *Id.*

[7] Mother now appeals.

Standard of Review

[8] Mother appeals the trial court's order granting Father's petition to modify custody. In modifying the parties' custody over A.D., the trial court entered findings of fact and conclusions thereon following an evidentiary hearing. In such appeals, we will not set aside the trial court's judgment unless it is clearly erroneous. *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016). A finding is clearly erroneous if it is not supported by the evidence, and a judgment is clearly erroneous if it is not supported by the findings. *See id.*

[9] Further:

> there is a well-established preference in Indiana "for granting latitude and deference to our trial judges in family law matters." *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." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "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." *Id.* "Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011) (citations omitted).

Id. at 124.

[10] We also note that Father has not filed an appellee's brief. In such circumstances, we "need not develop an argument for [Father] but instead will reverse the trial court's judgment if [Mother's] brief presents a case of prima facie error." *In re Adoption of E.B.*, 163 N.E.3d 931, 935 (Ind. Ct. App. 2021) (citation and quotation marks omitted). Prima facie error means "at first sight, on first appearance, or on the face of it." *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014). "Still, we are obligated to correctly apply the law to the facts in the record to determine whether reversal is required." *Id.*

Discussion and Decision

[11] On appeal, Mother first asserts that the trial court erred in modifying custody over Child because there is "no specific evidence" that Mother's lack of employment, dependence on her boyfriend, multiple acts of shoplifting in Child's presence, and inability to get Child to school on time had a "negative impact" on Child. Appellant's Br. at 9. Mother cites no authority for her position that Father was required to make any such specific showing to support his petition. Rather, Indiana Code section 31-17-2-21 (2023) makes clear that, to support a modification of custody, the petitioner must demonstrate that "the modification is in the best interests of the child" and that "there is a substantial change in one (1) or more of the factors" relevant to the initial award of custody. Father met those burdens, and Mother's argument for an additional burden is not well taken.

[12] Mother next asserts that Father also has had convictions following the initial May 2021 custody order, for which he has been placed on home detention.

According to Mother, this shows that "the greater weight of the evidence" makes Father a poor full-time caregiver to Child. Appellant's Br. at 10. Certainly our trial courts sometimes have to pick between two less-than-ideal choices. But Mother's argument that the trial court here picked the wrong one is simply a request for this Court to reweigh the evidence, which we will not do.

[13] Mother next argues that the trial court erroneously relied on excused absences Child had from school in modifying custody. On this point, Mother is incorrect. The trial court relied on Child's numerous tardies, not on excused absences. And Mother conceded to the court that she was the one responsible for Child's substantial number of tardies. There is no error here.

[14] Last, Mother contends that the modification of custody over Child is not in Child's best interests. Mother contends that Father did not fully exercise his parenting time, that Child has "emotional distress" about attending Cloverdale Elementary due to concerns about bullying, and that Child has medical issues that Father is not "adept at handling." *Id.* at 11. All of this was before the trial court for its consideration, and the trial court acted within the evidence when it found and concluded that, those concerns notwithstanding, modification of custody over Child was in Child's best interests based on Mother's employment, criminal, and living circumstances.

[15] For all of the above-stated reasons, we affirm the trial court's judgment modifying primary physical custody over Child from Mother to Father.

[16] Affirmed.

Tavitas, J., and Weissmann, J., concur.