MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Megan N. Sparrow,
Appellant-Petitioner,

v.

Ernest V. Sparrow,
Appellee-Respondent

October 13, 2022

Court of Appeals Case No. 22A-DC-1405

Appeal from the Washington Circuit Court

The Honorable Larry W. Medlock

Trial Court Cause No. 88C01-1806-DC-98

May, Judge.

[1] Megan N. Sparrow ("Mother") appeals the trial court's decision to grant a motion filed by Ernest V. Sparrow ("Father") to modify physical and legal custody of E.S. and I.S. (collectively, "Children"). Mother argues the trial court abused its discretion when it granted this request because there was no evidence to support the modification. We affirm.

Facts and Procedural History

[2] Mother and Father married on October 13, 2015. Two children were born of the marriage: E.S., born December 7, 2015, and I.S., born December 13, 2016. On June 5, 2018, Mother filed for divorce. On October 12, 2018, the trial court entered its order dissolving the marriage. The order granted Mother primary legal and physical custody of Children subject to Father's parenting time, the specific parameters of which the trial court listed in its order.

[3] Since the trial court's dissolution order, the parties have been before the trial court frequently with issues concerning custody and child support. Most recently, on September 26, 2021, Father filed a petition for modification of custody, which is the subject of this appeal. Father argued he should be given full physical and legal custody because: (1) Mother refused to give him access to Children's medical and educational records, (2) Children are "unsupervised and unkempt and climbing on the furniture and jumping off to the floor and repeating this behavior over and over" when Father spoke to Children via video chat, (3) Children came to Father's house "filthy dirty[,]" (4) Mother failed to obtain necessary medical treatment for Children, (5) Mother would not give

Father her new home address, and (6) Mother refused to allow parenting time per the trial court's orders. (App. Vol. II at 140-1.)

[4] On March 29, 2022, the trial court held a hearing on Father's petition. On April 19, 2022, the trial court entered its order, which stated in relevant part:

> 2. That the Court ORDERS a temporary change of custody at the end of the 2021/2022 school year.
>
> 3. That the day after the commencement of the school year, [Father] shall have temporary sole care, custody and control of [Children]. The Court is making this change primarily as a result of poor school performance.
>
> * * * * *
>
> 6. This modification is subject to a review at the end of the first semester of the 2022/2023 school year as the Court will expect [Children] to improve in academic performance, if not, the Court will consider returning [Children] to [Mother].
>
> 7. [Father] will be expected [to] co-parent and to provide [Mother] with the things that he claims he does not get, as in but not inclusive [sic] to, access to all medical, educational records, supervised video chat.

(*Id*. at 143-4) (emphasis and errors in original). On May 13, 2022, Mother filed a motion to correct error and asked the trial court to stay execution of its order until it decided Mother's motion to correct error. On the same day, Mother filed a motion asking the trial court to conduct an in-camera interview with Children. On May 16, 2022, Mother filed a motion for home study and

custody evaluation by a Court Appointed Special Advocate. On May 20, 2022, the trial court denied all of Mother's motions.

Discussion and Decision

[5] As an initial matter, we note Father did not file an appellee's brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id*. Prima facie error is "error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006).

[6] Mother argues the trial court abused its discretion when it modified custody of Children to sole physical and legal custody in Father because there was no evidence to support the trial court's decision. When a party to a dissolution order requests modification of a child custody order, the trial court may not modify that 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 facts that the court may consider under section 8 and, if applicable, section 8.5[1] of this

[1] Indiana Code section 31-17-2-8.5 lists additional factors the trial court must consider if a de facto custodian cares for a child. That section does not apply here.

chapter." Ind. Code § 31-17-2-21(a). The relevant factors in Indiana Code section 31-17-2-8 are:

> (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.

[7] When reviewing cases involving the modification of child custody,

> [w]e acknowledge the well-established preference in Indiana "'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 (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.'" *Id*. (quoting *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)). In order to reverse a trial court's ruling, it is not enough that the evidence might have supported a different conclusion. *Id*. Rather, the evidence must positively require the conclusion contended for by appellant [before] we may reverse. *Id*. We may not reweigh the evidence or reassess witness credibility, and the evidence should be viewed in a light most favorable to the judgment. *Id*. (quoting *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011)).

Montgomery v. Montgomery, 59 N.E.3d 343, 349-50 (Ind. Ct. App. 2016), *trans. denied*. Unless a party requests specific findings pursuant to Indiana Trial Rule 52(A), the trial court is not required to make findings when it issues an order modifying child custody. *Milcherska v. Hoerstman*, 56 N.E.3d 634, 640 (Ind. Ct. App. 2016). The parties here did not request specific findings under Indiana Trial Rule 52(A).

[8] Here, the trial court modified custody in favor of Father in an effort to improve Children's academic performance. During the modification hearing, Father testified he had received E.S.'s report cards and "[E.S.] is having trouble in school. That tells me – he's not getting help at home, he's not getting help

where he can do his spelling or his numbers, his colors, his A-B-C's, he's not getting help, if he was getting help he wouldn't be failing school." (Tr. Vol. II at 6.) Father indicated he was unable to contact E.S.'s school to determine why E.S. was failing because of an alleged "trespass warning . . . saying [he] can't be there." (*Id*. at 8.) Father's wife ("Stepmother") testified she was concerned after seeing E.S.'s report card, which indicated E.S. was "only in the 58% percentile of the school. . . . he's actually failing in the school." (*Id*. at 20.) Stepmother also testified she tried to contact E.S.'s school, but the school "said because the mother has taken [Stepmother] off the paperwork, [Stepmother] can longer ask any information." (*Id*. at 22.) Based thereon, we conclude the trial court did not abuse its discretion when it modified custody of Children in an effort to improve Children's academic performance.[2] *See, e.g, Haley v. Haley*, 771 N.E.2d 743, 749 (Ind. Ct. App. 2002) (trial court did not abuse its discretion when it modified custody of child in favor of father based, in part, on child's lack of academic progress while in mother's care).

[2] Mother also argues the trial court violated her due process rights under the Fourteenth Amendment because Father did not allege in his petition that modification was warranted based on E.S.'s poor performance at school. We acknowledge child custody proceedings "implicate the fundamental relationship between parent and child" and thus "procedural due process must be provided to protect the substantive rights of the parties." *Fields v. Fields*, 749 N.E.2d 100, 110 (Ind. Ct. App. 2001), *trans. denied*. However, in its exercise of discretion, the trial court is "unfettered by the contents of a party's motion for the hearing[,]" because it is the child's best interests that is the "touchstone of any custody determination." *McDaniel v. McDaniel*, 150 N.E.3d 282, 291 (Ind. Ct. App. 2020) (quoting, in part, *In re Paternity of W.R.H.*, 120 N.E.3d 1039, 1042 (Ind. Ct. App. 2019)), *trans. denied*. Therefore, the allegations Father made in his petition are of no consequence and Mother's due process rights were not implicated when the trial court made its custody determination based on an issue not included by Father in his petition for modification of custody.

Conclusion

[9] Mother has not established prima facie error in the trial court's decision to grant Father's petition to modify custody of Children. Accordingly, we affirm.

[10] Affirmed.

Crone, J., and Weissmann, J., concur.