

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Joshua Wells,
Appellant-Respondent,

v.

Kristen Wells,
Appellee-Petitioner

February 27, 2024

Court of Appeals Case No.
23A-DC-1638

Appeal from the Hamilton Superior Court
The Honorable Michael A. Casati, Judge

Trial Court Cause No.
29D01-2107-DC-5052

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

- [1] Joshua Wells (Father) appeals the trial court's order modifying custody and granting Kristen Wells (Mother) sole legal and primary physical custody of their children. He asserts that the trial court abused its discretion by modifying custody. He also contends that the court abused its discretion by restricting his parenting time and granting Mother the authority to decide if and when he could exercise parenting time. We conclude that the trial court did not abuse its discretion by modifying custody or restricting Father's parenting time. However, we agree with Father that the trial court abused its discretion by granting Mother authority over his parenting time. Accordingly, we affirm in part, reverse in part, and remand.

Facts and Procedural History

- [2] The evidence in support of the judgment follows. Mother and Father were married in July 2011. They have two children (the Children), L.W., born in December 2014, and V.W., born in February 2017. Father has three other children from a previous relationship: a girl, E.W., who is the oldest of Father's children, and two twin boys, Jax.T. and Jad.T., who were fourteen at the time of the May 23, 2023 emergency hearing.
- [3] During Mother and Father's marriage, Father hit, pushed, punched, grabbed, and bruised Mother. In one incident, Father pushed Mother across a bathroom into a cabinet and grabbed her arms, causing bruising. The Children were in the

bathub in that bathroom, and the twins were present in the home. In May 2020, Father “whipped” the twins with a belt and left bruises on Jax.T. Tr. Vol. 2 at 16-17.

- [4] In July 2021, Mother filed a petition for marriage dissolution. E.W. initially resided with Mother at the marital residence. Father purchased a home two doors down and resided there with the twins. In the autumn of 2021, Mother contacted Father for assistance when E.W. failed to get up for school. Father came over and struck E.W. with a belt, which caused significant bruising. As a result of this incident, Father’s parenting time with E.W. was suspended, and he was ordered to engage in reunification therapy with her.
- [5] In February 2022, following a hearing, the court issued a provisional order, in which it found that it was in the Children’s best interests for Mother and Father to temporarily share joint physical custody. Father’s holiday parenting time was synchronized with that of his twin boys.
- [6] In January 2023, the court approved the parties’ settlement agreement and issued a dissolution decree. Pursuant to the parties’ agreement, they shared joint legal and physical custody of the Children with the same equal parenting time schedule and holiday schedule that had been provided in the provisional order.
- [7] Between January 2023 and May 2023, the twins told their maternal grandmother that they were afraid of Father and that Father told them that they should be afraid of him. During April, the police and the Department of Child

Services (DCS) were called to Father's home three or four times. The reasons for each of these visits are not in the record before us. One of the visits resulted in DCS arranging for a doctor to examine Jax.T. for a black eye that he obtained during Father's parenting time. Jax.T. told the doctor that Father had grabbed him, put him in a "tight headlock," and gave him a "really hard noogie" with his fist across Jax.T.'s forehead and eye. *Id.* at 20. Just after the incident occurred, Jad.T. went to Mother's house to use her phone because Father had taken both boys' phones away from them. Jad.T. was "frantic" to contact his grandmother about the incident between Jax.T. and Father. E.W. was present at Mother's home at the time, and she and Mother went to speak to Father at his home. In E.W.'s presence, Father told Mother that "he would sign [E.W.] over to [Mother] if [she] would do some sort of agreement to not change custody of the [Children]." *Id.* at 44-46.

[8] As a result of Father's conflicts with the twins, "he specifically said if any effing thing happen[ed] with the [Children's] parenting time, [their] life was over, M-Fers." *Id.* at 14. Father also retaliated against the twins by throwing away their belongings, such as clothes, toiletries, and sporting equipment. He also threw away the phone that the twins' maternal grandmother had given to them for extra security. Father threatened the twins, "always telling them their life is over, they're not worth anything ... they'll never see [their grandmother] again." *Id.* at 16.

[9] Father's parenting with the Children was scheduled to correspond with his parenting time with the twins. Thus, the Children were likely present at

Father's home when some of the conflicts between Father and the twins occurred. The Children became apprehensive about going to Father's home and cried on the mornings that they had to go to Father's. *Id.* at 64. V.W. developed a need to contact Mother several times throughout the day, including during school and extracurricular activities. Mother wanted to put the Children in therapy, but Father refused.

[10] In May 2023, Mother filed a petition for modification of custody and parenting time and requested an expedited hearing. The trial court held an emergency hearing, at which both parties testified, and the maternal grandmother of Father's other children testified on Mother's behalf regarding the condition of those children. At the conclusion of the hearing, the trial court found "a pattern of domestic violence by [F]ather" and "credible evidence" that domestic violence was taking place in Father's house and that his other children were "being terrorized." *Id.* at 90. The court stated that "the concern is that the [C]hildren of this marriage have to be present during parenting time with the others." *Id.* In addition, the court was "quite concerned that [F]ather ha[d] not approved the ability for the [C]hildren of this marriage to receive therapy, which might produce evidence to the Court relevant to their mental health and give them an outlet if they are being exposed to any form of violence." *Id.*

[11] In June 2023, the trial court issued an order on emergency hearing granting Mother's petition, which in relevant part provides as follows:

2. Based on the evidence presented at the emergency hearing, the Court finds that a substantial change in circumstances has occurred.

3. Specifically, the Court finds there is credible evidence of a pattern of domestic violence by Father against children in his household, including physical, verbal, and psychological abuse. The Court is greatly concerned for the well-being of the Children involved in this action and Father's other children.

4. In accordance with Indiana Code § 31-17-2-1 and 31-17-2-8, the Court finds it is in the best interest of the Children that custody be modified.

5. Until otherwise agreed or ordered, Mother shall have sole legal and primary physical custody of the Children. Father shall exercise supervised parenting time as agreed upon and as authorized by Mother if Mother determines that it is in the best interests of the Children to have parenting time. Mother shall determine the parenting time supervisor and schedule. Any supervised parenting time shall NOT include overnights, and not be for more than a matter of hours, if authorized by Mother.

Appealed Order at 1-2. Father filed a motion to correct error, which was denied by a special judge. This appeal ensued.

Discussion and Decision

[12] Neither party requested special findings under Indiana Trial Rule 52(A), and the trial court entered its findings sua sponte.

As to the issues covered by the findings, we apply the two-tiered standard of whether the evidence supports the findings, and whether the findings support the judgment. We review any

remaining issues under the general judgment standard, where the judgment will be affirmed if it can be sustained on any legal theory consistent with the evidence. We may look both to other findings and beyond the findings to the evidence of record to determine if the result is against the facts and circumstances before the court. Clear error occurs when the appellate court's review of the evidence most favorable to the trial court's judgment leaves us firmly convinced that a mistake has been made.

McDaniel v. McDaniel, 150 N.E.3d 282, 289 (Ind. Ct. App. 2020) (citations, quotation marks, and brackets omitted), *trans. denied*.

[13] Our supreme court has made clear that in family law matters, Indiana has a preference “for granting latitude and deference to our trial judges.” *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)). A trial court's decisions regarding custody modification and parenting time lie within its broad discretion, and we will reverse only for an abuse of that discretion. *McDaniel*, 150 N.E.3d at 288 (custody modification); *Gomez v. Gomez*, 887 N.E.2d 977, 983 (Ind. Ct. App. 2008) (parenting time). “An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court misinterpreted the law.” *Hazelett v. Hazelett*, 119 N.E.3d 153, 161 (Ind. Ct. App. 2019). An appellate court is “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.” *Steele-Giri*, 51 N.E.3d at 124 (quoting *Kirk v. Kirk*, 770 N.E.2d

304, 307 (Ind. 2002)). “[O]n appeal we will not ‘reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.’” *McDaniel*, 150 N.E.3d at 288 (quoting *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011)). “[I]t 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.” *Duncan v. Duncan*, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), *trans. denied*. “No abuse of discretion occurs if there is a rational basis supporting the trial court’s determination.” *Gomez*, 887 N.E.2d at 983. “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).

Section 1 – The trial court did not abuse its discretion by modifying custody.¹

[14] Father first challenges the trial court’s decision to modify custody. “The party seeking a modification of custody bears the burden of demonstrating that the existing custody order should be altered.” *Maddux v. Maddux*, 40 N.E.3d 971,

¹ Father also contends that the trial court erred by admitting evidence concerning his other children, events at which the Children were not present, and events prior to the initial custody determination. He fails to cite the appellate standard of review for the admission of evidence. In addition, his argument implicates questions of statutory interpretation, but he provides no legal rules to support his interpretation. Accordingly, his evidentiary arguments are waived for lack of cogency. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant’s brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal relied on); *In re A.J.*, 146 N.E.3d 1075, 1083 (Ind. Ct. App. 2020) (concluding that appellant waived argument that court erred when it ordered him to pay child support because he failed to support it with cogent reasoning and appropriate citations to the record), *trans. denied*.

975 (Ind. Ct. App. 2015). The 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].” Ind. Code § 31-17-2-21(a). 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). The trial court is prohibited from hearing “evidence on a matter occurring before the last custody proceeding between the parties *unless* the matter relates to a change in the factors relating to the best interests of the child as described by [Section 31-17-2-8].” Ind. Code § 31-17-2-21(c) (emphasis added).² The list of factors in Section 31-17-2-8 is as follows:

- (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:

² In a situation where, as here, the parties stipulated to custody in a summary dissolution proceeding, we have held that the trial court may consider circumstances previously unknown to the court. *Dwyer v. Wynkoop*, 684 N.E.2d 245, 249 (Ind. Ct. App. 1997), *trans. denied*. Specifically, the *Dwyer* court held, “[W]hen material information related to one of the statutory factors comes to the attention of the trial court for the first time while evaluating a petition for modification for custody, such new information may constitute a substantial change in that factor for the purposes of the modification statute.” *Id.*

(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.

[15] Specifically, Father asserts that the trial court erred “by modifying custody without a finding or evidence of any modification in any of the statutory factors since the last determination of custody.” Appellant’s Br. at 13. We disagree. The trial court found that a substantial change in circumstances occurred in that there is “credible evidence of a pattern of domestic violence by Father against children in his household, including physical, verbal, and psychological abuse.” Appealed Order at 1. A pattern of domestic violence is one of the factors listed in Section 31-17-2-8. Father does not dispute the evidence of domestic violence against Mother, E.W., or the twins, but claims that there is no evidence that he

has committed acts of domestic violence against the Children. Father’s argument misses the mark. At the close of the hearing, the trial court expressed its belief and concern that the Children were present when Father was with his other children. Thus, there is a substantial risk that the Children would be exposed to domestic violence, which could likely impact their mental and emotional health and could potentially even impact their physical health. *See In re L. T.*, 145 N.E.3d 864, 872 (Ind. Ct. App. 2020) (observing that child’s exposure to domestic violence endangered child’s mental health). In fact, the evidence shows that the Children’s mental and physical health was being negatively affected by spending time with Father. The Children cried when they had to go to Father’s home, and V.W. developed such an attachment to Mother that V.W. started to interrupt her normal activities so that she could be in contact with Mother. Mother wanted to seek therapy for the Children, but Father refused. We conclude that the trial court’s decision to modify custody was not against the logic and effect of the facts and circumstance before it. Thus, we affirm the modification of custody.

Section 2 – The trial court did not abuse its discretion in restricting Father’s parenting time.³

[16] “In parenting time disputes, our collective goal in Indiana is to seek an environment in which a child can have a ‘well-founded relationship with each

³ Mother argues that we lack jurisdiction to address the restriction of Father’s parenting time because it is not a final appealable issue. In support, she directs us to a statement that the trial court made at the hearing.

parent.” *In re Snyder*, 26 N.E.3d 996, 999 (Ind. Ct. App. 2015) (quoting *Hatmaker v. Hatmaker*, 998 N.E.2d 758, 761 (Ind. Ct. App. 2013)). Still, “[i]n all parenting time controversies, courts must give foremost consideration to the best interests of the child.” *Hazelett*, 119 N.E.3d at 161. Accordingly, parenting time may be restricted under Indiana Code Section 31-17-4-1, which provides, “[A] parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child’s physical health or significantly impair the child’s emotional development.” “Even though the statute uses the word ‘might,’ this Court has previously interpreted the language to mean that a court may not restrict parenting time unless that parenting time ‘would’ endanger the child’s physical health or emotional development.” *Hatmaker*, 998 N.E.2d at 761.

[17] Father contends that the court made “no findings concerning physical danger or threats” to the Children’s emotional development and that there is “no basis for the court to restrict Father’s parenting time.” Appellant’s Br. at 15. Again, we disagree. Although the trial court did not specifically refer to Section 31-17-4-1 in its order, the restriction of Father’s parenting time is supported by the same findings and evidence that support the modification of custody. The court clearly indicated in its order and its statements at the emergency hearing that

However, the trial court’s order does not indicate that Father’s restricted parenting is temporary or provisional. As such, we conclude that it represents a final appealable issue over which we have jurisdiction.

the Children’s mental and emotional health were at risk, and the evidence supports that assessment. Thus, the court’s decision to restrict Father’s parenting time was not against the logic and effect of the facts and circumstances before it. Therefore, we affirm the portion of the order limiting Father’s parenting time to not more than a few hours and requiring it to be supervised.

Section 3 – The trial court abused its discretion in granting Mother authority over if and when Father exercises parenting time.

[18] Finally, Father challenges the trial court’s decision to grant Mother authority over the exercise of his parenting time. Mother does not address this issue on the merits. “Failure to respond to an issue raised in an opposing party’s brief is akin to failing to file a brief as to that issue.” *Johnson v. Johnson*, 181 N.E.3d 364, 378 (Ind. Ct. App. 2021). “In such cases, we may reverse if the appellant presents a case of prima facie error, which means error at first sight, on first appearance, or on the face of it.” *Id.* at 379.

[19] In support of his argument, Father relies on *Carmichael v. Siegel*, 754 N.E.2d 619 (Ind. Ct. App. 2001). There, the trial court granted a doctor the sole authority to determine when and if the mother could have visitation with her child. On appeal, another panel of this Court stated, “A court may not delegate decisions regarding the frequency and availability of visitation to other parties, for ‘to do so would be to undermine the safeguards inherent in reserving to a detached and impartial court the task of weighing the many considerations relevant to

visitation.” *Id.* at 637 (quoting *In re A.R.R.*, 634 N.E.2d 786, 789 (Ind. Ct. App. 1994)). The court held that the mother’s visitation with her child could not be left to the doctor “or any other person or authority aside from the court itself.” *Id.*

[20] We conclude that the trial court abused its discretion in granting Mother the authority to determine if and when Father may exercise parenting time. Accordingly, we reverse this portion of the order and remand for the trial court to determine when Father should exercise supervised parenting time based on the Children’s best interests.

[21] Affirmed in part, reversed in part, and remanded.

Bailey, J., and Pyle, J., concur.

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