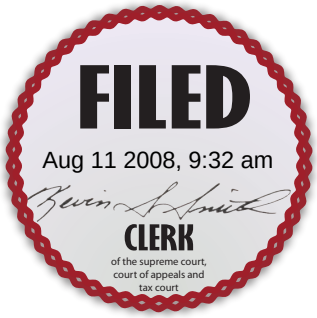

APPELLANT PRO SE:

GREGORY HARE
Greenfield, Indiana

IN THE COURT OF APPEALS OF INDIANA

GREGORY HARE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 73A05-0705-JV-248
	)	
HEATHER ELLISON,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack Tandy, Judge
Cause No. 73D01-9910-JP-115

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Gregory Hare ("Hare") appeals the trial court's order denying his petition to modify custody and subsequent order to pay appellate attorney fees. Hare raises many issues,[1] which we consolidate and restate as follows:

I. Whether the trial court's order denying Hare's petition to modify custody is contrary to the evidence.

II. Whether the trial court erred in awarding appellate attorney fees.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Hare and Heather Ellison ("Ellison") are the parents of M.H., but were never married. When paternity was established, the trial court awarded Ellison primary physical custody of M.H. and awarded Hare visitation rights. Hare was ordered to pay child support.

Hare filed a petition to modify custody of M.H. in which he raised allegations of child abuse and neglect, visitation issues, inappropriate discipline, and inadequate medical care. The trial court heard evidence on Hare's petition, ultimately entering an order denying Hare's request for modification. After Hare filed his notice of appeal, Ellison filed a request with the trial court for appellate attorney fees. The trial court heard evidence on Ellison's request and ordered Hare to pay Ellison's appellate counsel a total of $3,000.00 to be paid in monthly installments of $250.00 should he continue to pursue the appeal.

[1] Hare also contends that the trial court erred in failing to hold certain individuals accountable for their alleged failure to report child abuse. These issues are not properly before the court and are irrelevant to the appeal.

DISCUSSION AND DECISION

I. Petition to Modify Custody

We note at the outset that Ellison has failed to file a brief in this appeal. When the appellee has failed to submit a brief we need not undertake the burden of developing an argument on the appellee's behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). Instead, we will reverse the trial court's judgment if the appellant's brief presents a case of *prima facie* error. *Id*. *Prima facie* error is defined as, at first sight, on first appearance, or on the face of it. *Id*. Where an appellant has failed to meet this burden, we will affirm. *Id*.

In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered. *Hughes v. Rogusta*, 830 N.E.2d 898, 900 (Ind. Ct. App. 2005). The moving party bears the burden to prove the modification of custody is in the best interest of the child and there has been a substantial change in the child's life. *See Leisure v. Wheeler*, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005); IC 31-17-2-21. Because Hare had the burden of proving that the existing custody should be altered, and did not prevail, he is appealing from a negative judgment. *Nunn v. Nunn*, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003). We will reverse a negative judgment only if it is contrary to law, that is, where the evidence is shown to point unerringly to a conclusion different from that reached by the trier of fact. *Id.*

We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. *See Kirk v. Kirk*,

770 N.E.2d 304, 307 (Ind. 2002). We set aside judgments only when they are clearly erroneous and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. *Id*. When reviewing a trial court's determination on a petition to modify custody, we may not reweigh the evidence or judge the credibility of the witnesses. *See Green v. Green*, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006). We consider only the evidence most favorable to the judgment and any reasonable inferences from that evidence. *Id*.

A large part of Hare's brief is spent highlighting evidence introduced at the modification hearing that conflicts with the trial court's judgment. When evidence is conflicting, our standard of review requires that we do not reweigh the evidence but consider the evidence most favorable to the ruling. *Crabtree v. State*, 762 N.E.2d 217, 221 (Ind. Ct. App. 2002). If conflicting evidence is presented during the course of trial-level proceedings, the fact-finder is charged with resolving the conflicts. *Lambert v. Farmers Bank*, 519 N.E.2d 745, 747 (Ind. Ct. App. 1988).

We decline Hare's invitation to reweigh the evidence here. The trial judge's order reflects his thoughtful consideration and resolution of the conflicting evidence. The trial judge stated in relevant part as follows:

> 9) No evidence was presented that [Ellison] failed to follow the terms of the Informal Adjustments. While the behavior underlying contact with Child Protective Services is not good, the Court views the incidents as [Ellison] being overwhelmed with the raising of three children as a single person. She was working a job in the evening and night hours. She apparently did not have much help form [sic] [Hare] in taking care of [M.H.], nor was the Father of her other two children involved in their raising. The Court also notes these incidents occurred more than six years ago.

> 10) …[Hare's] energies have gone to attempt to accumulate evidence that [Ellison] is deficient in her care of [M.H.] rather than being a parent to [M.H.].
>
> 11) [Hare] has had great instability in his life in the last decade. He has had numerous jobs, periods of unemployment, and multiple addresses. He has been in and out of [M.H.'s] life. He has had periods of emotional instability and even threatened suicide while holding a handgun in the presence of [Ellison] and her children. [Hare] testified he was bi-polar but believed his medication was now properly adjusted.
>
> 13) The Court has concerns about both parents based on the evidence. [Ellison] appears to get in relationships with abusive men. Testimony was presented that [Ellison's] current husband…has spanked [M.H.] with a belt. [Ellison] has been neglectful of [M.H.] in the past while attempting to work and take care of her children's economic needs.
>
> [Hare] has been shown to be abusive and unstable. The Court believes [Hare] is more stable currently, thanks in large part to the positive influence of his wife….

Appellant's App. at 14-15.

Although Hare attempts to present conflicting explanations of various incidents, the trial judge was in the best position to judge the credibility of the witnesses and assess the evidence. The record supports the trial judge's decision. Hare has failed to establish *prima facie* error. The existence of conflicting testimony and evidence does not amount to *prima facie* error. The record supports the trial court's conclusion not to modify child custody.

II. Appellate Attorney Fees

After Hare filed his notice of appeal, Ellison requested appellate attorney fees. The trial court ordered Hare to pay Ellison's appellate counsel a total of $3,000.00 in fees in monthly installments should Hare pursue his appeal.

As noted above, Ellison did not file an appellee's brief. Her appellate counsel did enter an appearance, and filed some motions with this court, prior to withdrawing his

appearance. Therefore, we reverse the trial court's award of appellate attorney fees, and remand this matter to the trial court for a determination of the amount of compensation owed to Ellison's appellate counsel, in light of the fact that no brief was filed.

Affirmed in part, reversed in part, and remanded.

VAIDIK, J., and CRONE, J., concur.