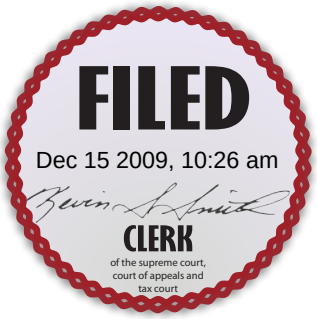

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IN THE COURT OF APPEALS OF INDIANA

J.H.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A05-0904-CV-186
	)	
E.H.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D04-0510-DR-1061

December 15, 2009

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge.

Appellant-Petitioner J.H. ("Father") appeals following the trial court's partial denial of his petition to modify certain provisions of his dissolution decree relating to parenting time and child support, and its award of $500 in attorney's fees. Upon appeal Father claims that the trial court abused its discretion in several respects. We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY[1]

Father and Mother, who divorced on July 18, 2007, are the parents of one child, G.H. As part of the dissolution proceedings, on May 24, 2007, Father and Mother entered into an agreement regarding custody, parenting time, and child support for G.H., which the trial court approved. Under that agreement, Mother and Father had joint legal custody of G.H. with Mother having primary physical custody. In addition, the parties agreed to consult with one another prior to making major life decisions for G.H. relating to her health, education, religion, and anything affecting her physical and emotional well-being. The agreement also provided that Father was to pay child support in the amount of $135 per week. The child support obligation worksheet calculated this support based partly upon Mother's childcare expenses of ninety dollars per week.

Neither Mother nor Father has a conventional work schedule. Father is a firefighter whose work schedule permits him four consecutive days off, called a "four day kelly," at

[1] Many of the facts cited by Father are not supported by page references to the record on appeal as required by Indiana Appellate Rule 46(A)(6)(a), impeding our review. Further impeding our review, Father did not include the original dissolution decree in his Appellant's Appendix. Indiana Appellate Rule 50(A)(2)(f) requires an appellant to include in his appendix all documents necessary for the resolution of the appeal. Because the decree appears to have been substantially recorded in the CCS, we address the merits of Father's claims.

various times of the month. Tr. p. 31. In addition to his four-day-kelly period, Father has full days off in between his twenty-four-hour working days. Mother is employed by Deaconess Hospital and has a six-week schedule which she receives one week in advance. Pursuant to the parties' agreement, Father was to have parenting time with G.H. during his four-day-kelly period, but that if Mother was not working on the fourth day of that period, Mother would have parenting time with G.H. on that fourth day instead of Father.[2]

Prior to the dissolution, both Father and Mother filed informations for contempt against one another. The trial court set the contempt matters for a September 25, 2007 hearing, at which point the parties recited an agreement resolving their respective contempt informations, which the trial court approved. This agreement provided, *inter alia*, that the parties would exchange copies of their work schedules within five days of having received them; that Mother had parenting time on the fourth day of Father's four-day-kelly period only when she did not work that day; and that Mother was not required to identify her childcare provider unless the parenting guidelines required. This agreement, however, was not incorporated into the record at the time. Apparently Father's counsel prepared a proposed entry of this agreement, to which Mother's counsel allegedly did not respond.

On March 7, 2008, Father filed a petition to modify alleging, *inter alia*, that G.H. was now in school, reducing her daycare expenses; that Mother did not provide Father with adequate notice of her work schedule to permit him to determine his parenting time with

[2] This provision permitting Mother to exercise parenting time on the fourth day of Father's four-day-kelly period on days when she did not work was reaffirmed in a subsequent agreement entered by the parties and approved by the court on September 25, 2007.

G.H.; and that Mother did not provide Father with the identity of her daycare provider or schedule. Accordingly, Father requested that his support be modified in accordance with the Child Support Guidelines; that Mother be ordered to provide Father with her work schedule within three days of receiving it; and that Mother advise Father of her daycare provider and schedule.

On April 1, 2008, Father moved to place of record the September 25, 2007 agreement recited by the parties and approved by the court. On June 11, 2008, Mother again filed an information for contempt, alleging that Father had kept G.H. for eighteen consecutive days without permitting Mother parenting time, and that Father had failed to return G.H. after his summer parenting time had ended.[3]

The trial court held a hearing in the matter on August 11, 2008. At that hearing, Mother requested that the support for G.H. remain the same given G.H.'s new parochial school expenses. In making this request, Mother indicated that she and Father had discussed sending G.H. to parochial school and that Father had disapproved of the idea. According to Mother, tuition for parochial school was $1800, with an additional $150 for books.

Mother further testified that her schedule sometimes required that she work until 7:00 p.m. and that she had arranged for after-school child care for G.H. on those days. Father requested parenting time during these hours on days that Mother worked until 7:00 p.m. and he did not work. According to Mother, from approximately October 2007 to July 25, 2008,

[3] This extended period apparently ended on a four-day-kelly period, so Father's parenting time ultimately amounted to twenty-two days rather than eighteen.

she had informed Father of her daily work schedule within five days of having received the schedule but had not specified her working hours. Mother additionally testified that she did not wish to subject herself to Father's "micromanagement" by supplying him with her work hours and the name of her babysitter.

On September 22, 2008, the trial court entered an order, and on March 2, 2009, an amended order[4] with, *inter alia*, the following provisions: that Mother was required to inform Father of her work schedule on the fourth day of his four-day-kelly period within three days of receiving her work schedule to permit Father the maximum amount of notice; that Mother was relieved of the obligation to provide Father with her specific schedule for that day or any other days; that Father was not in contempt with respect to his lengthy span of summer parenting time, but that during any future parenting time span exercised by either Father or Mother exceeding seven days, the other parent could exercise one full day of parenting time, including an overnight; that this seven-day provision included scheduled vacations and that each parent must provide the other with thirty days' notice to permit visitation during that vacation; that Father had a right of first refusal with regard to parenting time on days when Mother worked until 7 p.m., and that Mother should provide Father with five days' notice of these days; that Father owed $65 per week in child support excluding daycare expenses; that Father would assume fifty-nine percent and Mother forty-one percent of the daycare expenses; that Father pay $500 in Mother's attorney fees; and that the parties

[4] This amended order was in response to Father's motion to correct errors. Father's motion was based partly upon Mother's alleged failure, pursuant to the agreement resolving the contempt petitions, to provide Father with her work schedule within five days of receiving it. Apart from ordering that Mother provide the schedule within three days of receiving it, the court denied Father's contempt petition.

split equally the cost of parochial school.

DISCUSSION AND DECISION

I. Parenting Time

A. Standard of Review

In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child. *In re Paternity of G.R.G.*, 829 N.E.2d 114, 122 (Ind. Ct. App. 2005). When reviewing the trial court's resolution of a parenting time issue, we reverse only when the trial court manifestly abused its discretion. *Id.* If the record reveals a rational basis for the trial court's determination, there is no abuse of discretion. *Id.* We will not reweigh evidence or reassess the credibility of witnesses. *Id.*

Notably, Mother did not file an appellee's brief in the instant case. When an appellee fails to submit a brief, we do not undertake the burden of developing her arguments, and we apply a less stringent standard of review, specifically that we may reverse if the appellant establishes prima facie error. *See Zoller v. Zoller***,** 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002).

B. Right of First Refusal

Father suggests that the trial court abused its discretion by denying him the right to maximize his parenting time with respect to his right of first refusal. Section I(C)(3) of the Parenting Time Guidelines provides as follows:

> **Opportunity for Additional Parenting Time.** When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time. The other parent is under no obligation to provide the child care. If the other parent elects to provide this care, it shall be done at no cost.

In the instant case the trial court permitted Father the right of first refusal on days when Mother worked until 7:00 p.m. or later on a given day. Father challenges this provision by arguing that it impermissibly gives him the right of first refusal *only* on those days when Mother works until 7:00 p.m. or later, which Father argues contravenes the guidelines. Yet this was the focus of Father's request. Father testified that he wished to pick G.H. up from school on days when Mother was working late and keep her until Mother left work. Mother testified at the modification hearing that her hours were subject to change and that day shifts she had worked in the past ended at either 3:00 p.m. or 7:00 p.m. Because G.H. attended school during the day, Mother did not need child care when her work shift ended at 3:00 p.m. But on days when Mother worked until at least 7:00 p.m., she did need child care, and the trial court permitted Father the right of first refusal on those days. We are unable to see how the trial court's order contravened the guidelines.

Father additionally claims that he is entitled to Mother's full schedule for purposes of determining whether she is accurately representing her schedule. Yet there was evidence at the hearing that Father harassed Mother, suggesting that Father's full knowledge of her schedule might work to her detriment. In addition, the trial court provided that Mother's failure to timely apprise Father of the relevant portions of her work schedule could result in its ordering her to provide him the full schedule. To the extent Father argues that five days'

notice is inadequate, the record reveals that Mother only receives her schedule one week in advance of its effective date. In light of Mother's clear scheduling constraints and the trial court's reluctance to give Father full access to the particulars of Mother's schedule, we find no abuse of discretion in the trial court's requiring that she give five days' advance notice of the days she works until 7:00 p.m. Father's challenge to the terms of his right of first refusal fails.

C. Telephone Contact

Father argues that he is not permitted reasonable telephone contact with G.H., which he argues is in contravention of the Guidelines. Section I(A)(3) of the Guidelines provides, in pertinent part, as follows:

> **3. [Communications] With a Child By Telephone.** Both parents shall have reasonable phone access to their child at all times. Telephone communication with the child by either parent to the residence where the child is located shall be conducted at reasonable hours, shall be of reasonable duration, and at reasonable intervals, without interference from the other parent.

Father suggests that the trial court's denial of his request that Mother identify her daycare provider essentially denies him his telephone privileges because he has no way to locate G.H. Yet the context in which Father raised this issue was his wish to exercise the right of first refusal, which the trial court granted, so his need to establish telephone contact with G.H. when she is in child care seems less pressing. In any event, Father does not dispute that when G.H. is not in his care he speaks to her over the telephone on a daily basis. Father's allegation that the trial court's order unfairly infringes upon his telephone contact with G.H. is without merit.

D. Extended Parenting Time

In response to Mother's contempt petition, the trial court declined to find Father in contempt for exercising what he concedes was an extended twenty-two-day parenting time period with G.H. To avoid future such uninterrupted parenting time, however, the trial court imposed the following seven-day limitation:

> [N]o parenting time with either the Father or Mother shall exceed 7 days without the other parent having one full day, including overnight, with the child during that 7 day period. Should either party schedule a vacation lasting longer than 7 days, that parent shall give appropriate notice to the other parent, not less than 30 days, and the provision above concerning 1 day and overnight parenting time during that 7 day period shall apply.

Appellant's App. p. 14. Father argues this limitation on extended parenting time was a deviation from the Guidelines requiring a written explanation, which Father claims the trial court failed to provide. *See* Ind. Parenting Time Guidelines, Scope of Application 2 ("Any deviation from these Guidelines by either the parties or the court must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case.")

In issuing the above provision, the trial court limited uninterrupted extended parenting time to seven-day periods. This appears to be more restrictive than Section II(B)(3) of the Guidelines, which only provides for visitation if extended summer parenting time lasts at least two weeks. We cannot agree, however, that the trial court failed to justify its deviation from the Guidelines. The record reveals and Father concedes that he maintained custody of G.H. for an uninterrupted twenty-two days in May and June of 2008. Mother testified that she was denied visitation during this period a number of times, and Father does not dispute

that his extended uninterrupted parenting time was a violation of the Guidelines. It was within this context that the trial court limited uninterrupted extended parenting time. Although, as the trial court found, there was no order in place requiring visitation by Mother during Father's extended parenting time, the trial court was within its discretion to minimize the risk of further extended uninterrupted parenting time by permitting either party more frequent visitation when G.H. was in the other's care. We find no abuse of discretion.

II. Support

A. Parochial School

The trial court found that G.H.'s enrollment in parochial school constituted a substantial change in circumstances and ordered that Mother and Father split equally the cost of parochial school. In challenging this order, Father points to his joint responsibility for decisions relating to G.H.'s education and argues that because the decision to send G.H. to private school was a unilateral one made by Mother, he should not have to share in the cost. Father also claims that the issue of his paying for parochial school was improperly raised as a defense to his petition for modification of support rather than in a proper modification petition.

A court may order a parent to pay part or all of a child's extraordinary educational costs when appropriate. *In re Paternity of C.H.W.*, 892 N.E.2d 166, 171 (Ind. Ct. App. 2008) (citing *Snow v. Rincker*, 823 N.E.2d 1234, 1237 (Ind. Ct. App. 2005)), *trans. denied*. Decisions to order the payment of these extraordinary educational expenses are reviewed under an abuse of discretion standard, while apportionment of expenses is reviewed under a

clearly erroneous standard. *Id.* Additionally, the trial court has discretion to determine what is included in educational expenses. *Id.*

There is a rebuttable presumption that an award of child support based on application of the Guidelines is the correct amount. *Sims v. Sims*, 770 N.E.2d 860, 864 (Ind. Ct. App. 2002) (citing Ind. Child Support Rule 2). In cases where a court concludes that a particular amount reached by application of the Guidelines would be unjust, the court must "'enter a written finding articulating the factual circumstances supporting that conclusion.'" *Sims*, 770 N.E.2d at 864 (quoting Ind. Child Support Rule 3). In circumstances where extraordinary educational expenses are ordered separately from child support, principles of the Indiana Child Support Guidelines still apply with the same force. *Id.* Thus, in awarding any amount of extraordinary educational expenses, a trial court must exercise its discretion in a way consistent with the Guidelines. *See id.*; *see also Carr v. Carr*, 600 N.E.2d 943, 946 n.3 (Ind. 1992).

As Father points out, he has joint custody. Under both the parties' agreement and Indiana Code section 31-9-2-67 (2007), persons with joint custody share the responsibility for decisions concerning the child's education. Further, the Guidelines suggest that a trial court contemplating extraordinary educational expenses for elementary or secondary education consider the following: (1) whether the expense is the result of a personal preference of one parent or whether both parents concur; (2) if the parties would have incurred the expense while the family was intact; and (3) whether or not education of the

same or higher quality is available at less cost. *See* Child Support G. 6, cmt. ("Extraordinary Educational Expenses").

The evidence at the modification hearing indicated that G.H.'s enrollment in parochial school was a result of Mother's preferences only, and that such enrollment occurred after the parties divorced. There was additional evidence that Father wished for G.H. to attend public school at Scott School, and there was no apparent evidence that Mother investigated this option or any other schools. Given this unrebutted evidence, the above Guidelines appear to operate against an award of extraordinary educational fees. *See Sims*, 770 N.E.2d at 864. The trial court was therefore required to enter written findings detailing the circumstances making application of the Guidelines unjust. *See id.* (citing Child Supp. R. 3). Apart from finding that G.H.'s enrollment in parochial school constituted a change in circumstances and that Father and Mother should split the cost equally, the court entered no such findings. Indeed, it appears that the issue of Father's financial responsibility for parochial school was raised more as a defense by Mother to Father's modification petition than as an independent basis for modification of Father's support. Accordingly, we remand this cause to the trial court for an entry of findings justifying Father's payment for and share of G.H.'s parochial school expenses, and, if the court deems necessary, a hearing on the matter.

B. Retroactive Support

Following Father's petition to modify, the trial court reduced his support from the $135 per week, including childcare expenses, stipulated in the parties' agreement, to $65 per

week excluding childcare expenses.[5] Father claims that the trial court abused its discretion in failing to make this reduction retroactive to the date of his modification petition. It is within a trial court's discretion to make a modification of child support relate back to the date the petition to modify is filed, or any date thereafter. *Quinn v. Threlkel*, 858 N.E.2d 665, 674 (Ind. Ct. App. 2006). We will reverse a decision regarding retroactivity only for an abuse of discretion or if the trial court's determination is contrary to law. *Id.* However, "'modifications normally speak only prospectively.'" *Id.* (quoting *Talarico v. Smithson*, 579 N.E.2d 671, 673 (Ind. Ct. App. 1991). "'Allowing trial courts discretion in making the modification of child support effective as of the date the petition is filed may serve to avoid dilatory tactics.'" *Id.* (quoting *Talarico*, 579 N.E.2d at 673-74).

Father points to no evidence suggesting that Mother employed dilatory tactics to delay the modification hearing. While the modification hearing was continued multiple times, this was done with the mutual agreement of counsel. Given this evidence and the fact that modifications usually apply only prospectively, we find no abuse of discretion in the trial court's failure to order retroactive modification of child support.

III. Attorney's Fees

Father argues that the trial court abused its discretion by awarding Mother $500 in attorney's fees. Indiana Code section 31-15-10-1(a) (2007) grants a trial court the authority to order a party to pay the other party's reasonable attorney's fees. *Walters v. Walters*, 901 N.E.2d 508, 515 (Ind. Ct. App. 2009) When determining whether to award attorney fees, a

[5] Father was further ordered to pay fifty-nine percent of daycare expenses.

trial court "'*must* consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors, which bear on the reasonableness of the award.'" *Id.* (quoting *Bertholet v. Bertholet*, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000) (emphasis in original)). We will review a trial court's award of attorney's fees for an abuse of discretion. *Id.* Moreover, a trial court is not required to give reasons for its determination. *Id.*

In the instant case, the trial court found that father's weekly income was approximately $890 and that Mother's weekly income was approximately $617, a difference of $273. In addition, Mother testified that this was the third time Father had petitioned the court to order her to identify the particulars of her schedule, which the trial court again declined to do. In light of the circumstances, we cannot say that the trial court abused its discretion in requiring Father to pay $500 toward Mother's claimed $1600-plus in attorney's fees.

IV. Conclusion

We are unpersuaded that the trial court abused its discretion with respect to its various parenting time determinations in the modification order. We are further unpersuaded that Father's challenges to the trial court's prospective modification order and award of attorney's fees are meritorious. We must conclude, however, that the trial court did not adequately justify its decision to require Father to pay half of the expenses for G.H.'s parochial school. We therefore remand to the trial court for entry of findings on the matter and an evidentiary hearing, if necessary, to facilitate that determination. Accordingly, we affirm in part and reverse and remand in part to the trial court.

The judgment of the trial court is affirmed in part and reversed and remanded in part with instructions.

NAJAM, J., and FRIEDLANDER, J., concur.