MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Erika Nicole (Hadler) Sever,
Appellant-Respondent,

v.

Barbara Martin and Richard Martin,
Appellees-Petitioners

September 28, 2021

Court of Appeals Case No. 21A-MI-575

Appeal from the Rush Circuit Court

The Honorable David E. Northam, Judge

Trial Court Cause No. 70C01-1607-MI-229

May, Judge.

[1] Erika Nicole (Hadler) Sever ("Mother") appeals the trial court's modification of the visitation order granting Barbara Martin ("Grandmother") and Richard Martin ("Grandfather") (collectively, "Grandparents") visitation with her daughter, M.S. ("Child"). We reverse and remand because Mother has made a prima facie showing that the trial court abused its discretion when it increased Grandparents' visitation with Child.

Facts and Procedural History

[2] Mother gave birth to Child on November 6, 2014. Child's biological father was the son of Grandparents and is deceased. Mother married Stephen Sever ("Father") sometime in 2016, and Father adopted Child sometime shortly thereafter.

[3] On July 12, 2016, Grandparents filed a petition requesting visitation with Child. On February 14, 2017, the trial court granted Grandparents' petition and ordered, in relevant part:

> 1. That [Grandparents] shall receive grandparents visitation on the 1st Saturday and 3rd Sunday of each month moving forward on the following schedule:
>
> a. Mother shall supervise the first four (4) visits from 1:00PM to 3:00 PM at the Rushville, Indiana McDonald's.
>
> b. The Mother shall partially supervise the next four (4) visits for no more than forty-five (45) minutes from 1:00PM to 3:00 PM at the Rushville, Indiana McDonald's.

> c. All visitation after the first eight (8) visits shall be from 1:00PM to 7:00 PM, unsupervised, drop-off by [Mother] by 1:00PM to [Grandparents'] home and drop-off by [Grandparents] by 7:00 PM to Respondent's home;
>
> 2. That special holiday time shall be agreed upon by the parties[.]

(App. Vol. II at 16.) On August 7, 2020, Mother and Father divorced. Pursuant to Mother and Father's dissolution decree, Father was awarded parenting time with Child every other weekend.

[4] On September 10, 2020, Mother filed a motion to modify the grandparent visitation order. Mother contended:

> 2. The current Order does not allow for overnights and is limited in its scope.
>
> 3. Mother was notified that [Grandparents] have put their home on the market and intend on moving to Ohio. Their future home would be at least 4 hours away and out-of-state.
>
> 4. Further, Mother has recently divorced the adoptive Father of [Child] that takes priority over any grandparent visitation.
>
> 5. Mother does not want [Child] traveling out-of-state and does not want [Child] to have overnights as part of any future Grandparent visitation order.
>
> 6. Mother would agree to allow [Grandparents] to come see [Child] once a month per a new Order once they move to Ohio that complies with both her schedule, the new parenting time

> schedule with Father, and requires [Grandparents] to travel to a location near her to see [Child].

(*Id*. at 18-9.)

[5] The trial court held a hearing on the matter on February 8, 2021. On March 3, 2021, the trial court issued its order modifying Grandparents' visitation as follows:

> 7. [Grandparents] shall have grandparent visitation the first weekend of each month that [Mother] has [Child] for twenty-four (24) hours.
>
> 8. [Grandparents] shall notify [Mother] whether they will exercise their grandparent visitation at their residence in Ohio or at their daughter's home in Indiana seventy-two hours prior to the grandparent visitation.
>
> 9. [Grandparents] shall provide all transportation for grandparent visitation.
>
> 10. [Grandparents] shall adhere to any medical routines of [Child].
>
> 11. At the conclusion of the 2020-2021 school year the grandparent visitation shall increase to a thirty-six hour visit the first weekend of the month [Mother] has [Child].
>
> 12. Commencing in the Summer of 2022 and each Summer thereafter [Grandparents] shall receive one five-day week and the weekends at the beginning and end of the week.

(*Id*. at 14-5.)

Discussion and Decision

[6] We first note Grandparents did not file an appellees' brief.

> Where the appellee fails to file a brief on appeal, we may, in our discretion, reverse the trial court's decision if the appellant makes a prima facie showing of reversible error. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). In this context, prima facie error is defined as "at first sight, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006). This rule was established for our protection so that we can be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *McGill*, 801 N.E.2d at 1251.

In re Visitation of C.L.H., 908 N.E.2d 320, 326-27 (Ind. Ct. App. 2009).

[7] We review a trial court's order modifying Grandparent Visitation for an abuse of discretion. *D.G. v. W.M.*, 118 N.E.3d 26, 29 (Ind. Ct. App. 2019), *trans. denied*. A court abuses its discretion when its decision is contrary to law or is against the logic and effect of the facts and circumstances before the court. *Id*. The Grandparent Visitation Act provides "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child." Ind. Code § 31-17-5-7. The party seeking modification of a Grandparent Visitation order bears the burden of showing the visitation should be altered. *In re Adoption of A.A.*, 51 N.E.3d 380, 390 (Ind. Ct. App. 2016), *reh'g denied*, *trans. denied*.

[8] Our Indiana Supreme Court set explained the purpose of Grandparent Visitation in *In re Visitation of L-A.D.W.*:

> Indiana has enacted legislation which recognizes that "a child's best interest is often served by developing and maintaining contact with his or her grandparents." *K.I.* [*ex rel. J.I. v. J.H.*,] 38 N.E.2d [453,] 462 [(Ind. 2009)] (*quoting Swartz v. Swartz*, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999)).
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> * * * * *
>
> This Court has stated that "[t]he Grandparent Visitation Act contemplates only occasional, temporary visitation that does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of their children." *K.I.*, 903 N.E.2d at 462 (internal citations and quotations omitted). This pronouncement recognizes that while parents have a constitutional liberty interest in the upbringing of their child(ren), Grandparents are not afforded the same legal rights as parents and do not have a constitutional liberty interest with their grandchildren. *See Id*. at 462. This broad constitutional protection does not require, nor do we think it would be wise to set, a strict guideline for grandparent visitation. Similarly, we do not read this constitutional protection to require crafting visitation schedules that in no way resemble visitation under the Parenting Time Guidelines, even though sole reliance upon the Guidelines is impermissible. *See Id*. at 461-62. Rather, we continue to give substantial deference to the trial court's determination of family law matters. *See Kirk* [*v. Kirk*], 770 N.E.2d [304,] 307 [Ind. 2002]. We also remain confident in the ability of our courts to determine when grandparent visitation would substantially infringe upon the custodial parent's constitutional right to guide the upbringing of their child. *See e.g. Hoeing v. Williams*, 880 N.E.2d 1217, 1221-22 (Ind. Ct. App.

> 2008) (determining awarded visitation impermissibly impeded Mother's ability to direct child's religious upbringing).
>
> However, we reiterate that grandparent visitation is not to be confused with the rights of the custodial parent. The rights of grandparents to seek visitation is not rooted in common law, but is a product of legislation. *See In Re Visitation of M.L.B.*, 983 N.E.2d 583, 585 (Ind. 2013). The Indiana legislature did not even pass a law allowing for grandparent visitation until 1982. *See* Ind. Code § 31-1-11.7-1, -8 (1982). Despite grandparents having some recognized right to visitation, the "natural parents have a fundamental constitutional right to direct their children's upbringing without undue governmental interference...." *In Re Visitation of M.L.B.*, 983 N.E.2d at 586. Under the Grandparent Visitation Act, the trial court has authority to order visitation and set the amount of visitation, but nowhere within that legislation has the court been permitted to award grandparents the right to determine the child's upbringing. *See* Ind. Code §§ 31-17-5-1,-10. Even in cases involving parenting time of a non-custodial parent, Indiana courts have recognized that the custodial parent's right to direct the child's upbringing is "paramount" to the non-custodial parent's right to visitation, as long as interference with the non-custodial parent's visitation is reasonable. *A.G.R. ex rel. Conflenti v. Huff*, 815 N.E.2d 120, 125 (Ind. Ct. App. 2004); *See also Periquet-Febres v. Febres*, 659 N.E.2d 602, 606 (Ind. Ct. App. 1995). Likewise, in the case of grandparent visitation, the custodial parent's right to direct the upbringing of the child remains paramount.

38 N.E.3d 993, 997-98 (Ind. 2015).

[9] Mother argues the trial court abused its discretion when it extended Grandparents' visitation with Child despite Mother's request that Grandparents' visitation time be reduced based on changed circumstances.

Mother presented evidence that she had recently divorced Father and that Father had parenting time every other weekend, which would sometimes conflict with the original Grandparent visitation schedule. Mother further testified that she was uncomfortable with Child going over state lines with Grandparents, or with anyone other than her or Father. Mother is not particularly close with Grandparents, and they do not extensively communicate with each other. For instance, Mother did not know Grandparents were moving out of state until she "noticed there was a 'for sale' sign" in Grandparents' front yard. (Tr. Vol. II at 8.) Mother also testified that Child had been diagnosed with ADHD and routine is important to help treat that condition.

[10] Grandparents testified they were moving to Lima, Ohio, to be closer to Grandmother's family, of which there are sixteen siblings, some of whom Child has met. Grandparents testified that their daughter, Child's paternal aunt, lives in Indiana closer to Mother. Grandparents indicated that, if they were allowed a twenty-four-hour visitation period, "[s]ometimes we would come here and visit her at [paternal aunt's house]. Other times we would take her to Ohio and visit with friends and family." (*Id*. at 35-6.) The trip from Mother's house to Grandparents' house in Ohio would be a six hour round trip.

[11] As noted *supra*, our Indiana Supreme Court has explained "[t]he Grandparent Visitation Act contemplates only 'occasional, temporary visitation' that does not substantially infringe on a parent's fundamental right 'to control the upbringing, education, and religious training of their children.'" *Hoeing v.*

Williams, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (quoting *Swartz v. Swartz*, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999)). Mother testified that she recognizes that "it is beneficial to [Child] to have a relationship with [Grandparents,]" (Tr. Vol. II at 14), but requested that Grandparents' visitation be modified to an undecided amount of time once a month due to the changing circumstances, which include Grandparents' relocation to approximately four hours away and the parenting time schedule to be exercised by Father. The trial court's order does not grant Grandparents "occasional, temporary visitation" and instead grants Grandparents visitation similar to that of a parent, allowing exercise of over twenty overnight visits, which is not contemplated under the Grandparent Visitation Act. *See Swartz*, 720 N.E.2d at 1222 ("Grandparents . . . do not have the legal rights or obligations of parents.").

[12] The trial court's imposition of overnights as well as extended time during holidays and the summer infringes on Mother's right to control Child's upbringing by substantially inserting a third party into the schedule. This deprives Mother of more of her limited time with Child. Based thereon, we conclude Mother has demonstrated prima facie error in the trial court's decision, and we hold the trial court abused its discretion when it modified the existing Grandparent Visitation Order. *See In re Visitation of M.L.B.*, 983 N.E.2d 583, 587 (Ind. 2013) (when a parent has not denied visitation with grandparents, a trial court's imposition of an amount other than that requested by the parent "particularly implicates the danger of 'infring[ing] on the

fundamental right of parents to make child rearing decisions simply because [a court] believes a 'better' decision can be made") (quoting *Troxel v. Granville*, 530 U.S. 57, 72-3 (2000)).

Conclusion

[13] Mother has demonstrated prima facie error in the trial court's decision to modify Grandparents' visitation with Child. The trial court abused its discretion by increasing Grandparents' visitation. Accordingly, we reverse the trial court's decision and remand for proceedings consistent with this opinion.

[14] Reversed and remanded.

Kirsch, J., and Vaidik, J., concur.