## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Mark A. Brown,
*Appellant-Defendant,*

v.

Jennifer M. Brown,
*Appellee-Plaintiff*

November 2, 2023

Court of Appeals Case No. 23A-DC-792

Appeal from the Clinton Circuit Court

The Honorable Justin H. Hunter, Special Judge

Trial Court Cause No. 12C01-1612-DR-861

**Memorandum Decision by Judge May**
Judges Bailey and Felix concur.

**May, Judge.**

Mark A. Brown[1] ("Father") appeals the portion[2] of the trial court's order granting a motion by Jennifer M. Brown ("Mother") to relocate their three children – B.B., A.B., and M.B. (collectively, "Children") – from Frankfort, Indiana, to Chicago, Illinois. Father argues the evidence before the trial court did not support its findings and those findings did not support its conclusions regarding the factors in Indiana Code section 31-17-2.2-1(c), which is the statute governing relocation of children subject to an order determining child custody and/or parenting time. We affirm.

# Facts and Procedural History

[1] Mother and Father divorced on May 9, 2017. Mother was awarded primary physical custody of Children – B.B., born September 29, 2011; A.B., born October 31, 2013; and M.B., born November 13, 2014. At the time of dissolution, the trial court awarded Father "liberal and reasonable parenting time[.]" (App. Vol. II at 126.) Initially the trial court ordered Father to pay $1,100.00 per month in child support. However, Father's child support obligation later decreased to $106.00 per week.

[2] On August 24, 2021, Mother filed a notice of relocation indicating her intent to relocate Children to Chicago, Illinois, on or about December 17, 2021, because

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[1] Father is often referenced in the record as Allan.

[2] The trial court's order also denied Father's request for modification of custody. Father does not appeal that portion of the order.

she was moving in with her fiancé and had also secured employment in the Chicago area. On September 3, 2021, Father filed his response and objection to Mother's relocation with Children. He also filed a motion to modify custody, parenting time, and child support. In that motion, he requested that, "should [Mother] relocate to her proposed destination in Chicago, Illinois, Father be [declared] the primary physical custodian of the parties' three (3) minor children and the Court establish child support and parenting time for [Mother] accordingly." (*Id*. at 127.) On September 7, 2021, Father filed a motion for temporary restraining order to prevent Mother from relocating Children until "the Court has fully adjudicated all matters in reference to [Mother's] proposed relocation." (*Id*. at 15.) On September 20, 2021, Mother filed a motion for temporary order permitting Children's relocation prior to the final adjudication of the matter.

[3] On December 27, 2021, the trial court held a hearing regarding Father's motion for temporary restraining order and Mother's motion for temporary order permitting Children's relocation. On December 27, 2021, the trial court issued an order denying Father's motion for temporary restraining order. It granted Mother's motion for temporary order permitting Children's relocation as long as "the relocation occurs either between school semesters or at the end of the grade year[.]" (*Id*. at 127.) The trial court ordered the parties to participate in mediation to address certain issues associated with the relocation.

[4] The parties attended mediation and, on May 10, 2022, tendered to the trial court their mediated agreed entry. Therein, Father reiterated his objection to

Children's relocation but the parties reached an interim agreement on a number of issues, including: audiovisual connectivity, extended summer parenting time for Father, custodial exchange location, timeliness of exchanges, expectations for missed parenting time due to inclement weather, Children's involvement in extracurricular activities and the parties' individual financial responsibilities therefor, reduction in Father's child support obligation due to the relocation, extended family visitation, and other matters related to parenting time timeframes and taxes. On May 23, 2022, the trial court approved the parties' mediated agreed entry.

[5] Mother relocated Children during Father's extended summer parenting time in the first half of the 2022 summer break. On December 2, 2022, the trial court held a final hearing on Mother's notice to relocate. Prior to the hearing, the trial court held in camera interviews with each child to ascertain their feelings regarding relocation. During the subsequent hearing, the trial court received additional evidence and testimony. At the end of the hearing, the trial court ordered the parties to submit proposed findings of fact and conclusions of law, along with affidavits of attorney's fees.

[6] On December 12, 2022, Father filed a verified notice to the trial court alleging A.B. was involved in an altercation at school and, when Father contacted the school regarding that incident, he discovered he was not listed as an emergency contact and therefore could not receive information about the incident. On January 24, 2023, the trial court issued its order granting Mother's relocation of Children and denying Father's request to modify child custody. It ordered the

parties to continue to abide by the May 23, 2022, approved mediated agreed entry. In addition, the trial court ordered Mother to pay a portion of Father's attorney's fees. On February 22, 2023, Father filed a motion to correct errors. The trial court denied his motion on March 13, 2023.

# Discussion and Decision[3]

[7] As an initial matter, we note Mother 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).

[8] Appellate review of family law matters is conducted with a preference for granting latitude and deference to trial courts. *Kicken v. Kicken*, 798 N.E.2d 529, 532 (Ind. Ct. App. 2003). We afford such deference because of the trial court's "unique, direct interactions with the parties face-to-face." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). "Our trial judges are in a superior position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children" due to their ability

[3] We remind Appellant's counsel that he should not copy wholesale from appellate opinions without quotation marks or citation to the case being quoted.

"to assess credibility and character through both factual testimony and intuitive discernment." *Id*. Thus, we "will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. The concern for finality in custody matters reinforces this doctrine." *Baxendale v. Raich*, 878 N.E.2d 1252, 1257-58 (Ind. 2008). We will reverse only if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Keown v. Keown*, 883 N.E.2d 865, 868 (Ind. Ct. App. 2008).

[9] Father challenges the portion of the trial court's order granting Mother's request to relocate with Children. When requesting the relocation of children subject to a custody or parenting time order, the relocating parent must file a notice of intent to move with the trial court that issued the custody or parenting time order. Ind. Code § 31-17-2.2-1(a)(1). The nonrelocating parenting "shall file a response [to that request] not more than twenty (20) days after the day the nonrelocating parent is served notice of the relocation request." Ind. Code § 31-17-2.2-5(a). Once a nonrelocating parent files a response indicating objection to the relocation, "[o]n the request of either party, the court shall hold a full evidentiary hearing to allow or restrain the relocation of the child and to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation, or child support order." Ind. Code § 31-17-2.2-5(d). During this hearing, "[t]he relocating individual has the burden of proof that the proposed relocation is made in good faith and for a legitimate reason." Ind. Code § 31-17-2.2-5(e). "If the relocating individual meets the burden of proof under

subsection (e), the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the best interest of the child." Ind. Code § 31-17-2.2-5(f).

[10] Here, Mother filed a motion for special findings pursuant to Indiana Trial Rule 52(A). "When a trial court enters findings of fact and conclusions of law pursuant to Trial Rule 52, we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment." *Alifimoff v. Stuart*, 192 N.E.3d 987, 998 (Ind. Ct. App. 2022), *trans. denied*. We will set aside the trial court's findings and conclusions only "if they are clearly erroneous, that is, if the record contains no facts or inferences supporting the judgment. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made." *Id*. (internal citation omitted). We do not reweigh the evidence or judge the credibility of the witnesses, and we consider the evidence in the light most favorable to the trial court's decision. *Id*. Additionally, when reviewing the trial court's decision, unchallenged findings are "accepted as correct." *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992).

[11] When making its decision regarding a request to relocate, the trial court must consider:

> (1) The distance involved in the proposed change of residence.
>
> (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.

(3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.

(4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.

(5) The reasons provided by the:

(A) relocating individual for seeking relocation; and

(B) nonrelocating parent for opposing the relocation of the child.

(6) Other factors affecting the best interest of the child.

Ind. Code § 31-17-2.2-1(c).

[12] Father challenges the trial court's findings supporting its conclusion that Mother's relocation request was made in good faith and for a legitimate reason. Regarding that issue, the trial court found and concluded:

2. [Mother] has met her burden of proof that the proposed relocation is made in good faith and for legitimate reasons, including the following:

a) She relocated to reside with her fiancé, [D.E.].

> b) As a result of the reduction of [Father's] child support obligation from One Thousand One Hundred Dollars ($1,100.00) per month to One Hundred Six Dollars ($106.00) per week, she was unable to maintain a single-parent home for herself and [Children], and likely would have been required to move into a home with her parents;
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> c) She secured employment in the Chicago area, working as a real estate broker and as a co-owner of one of [D.E.'s] businesses; and
>
> d) She and [D.E.] have adequate income to support their family unit.

(App. Vol. II at 127-8.) The evidence in the record, including the testimony of Mother and D.E., supported those four findings by the trial court.

[13] In his argument, Father also challenges each of the trial court's findings based on the statutory factors found in Indiana Code section 31-17-2.2-1(c). Regarding the first factor, the distance involved in the proposed relocation, the trial court found:

> As noted in the Order Approving Temporary Relocation of Children, the approximate distance between [Father's] and [Mother's] residences is 140 miles. [Father] contends this move puts [Children] 3 hours away by a drive. It is more accurate to say the distance is 2.5 hours by driving, assuming good weather conditions.

(*Id*. at 128.) Father argues the round trip he would need to take to exercise his parenting time with Children would be "approximately two and one half (2.5)

hours" and the distance between Mother's proposed relocation and Father's residence "must be considered significant." (Br. of Appellant at 21-22.) During the hearings, Mother testified the distance between her proposed residence and Father's residence was approximately 140 miles. She agreed to meet Father halfway at a location where there were restaurants and noted the other exits between Father's residence and a proposed halfway point were "more isolated exits." (Tr. Vol. II at 37.) Thus, there exists evidence in the record to support the trial court's finding regarding the distance involved in Mother's proposed relocation. Father's argument is an invitation to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Samples*, 12 N.E.3d at 950 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[14] Relatedly, regarding the second factor, which is the hardship and expense involved for him to exercise his parenting time, Father argues that he would suffer hardship because Children's relocation has "drastically decreased" his parenting time and because the parenting time he exercised in the months between the trial court's decision and when he filed his appeal "is not meaningful parenting time[.]" (Br. of Appellant at 22-3.) Regarding this factor, the trial court found:

> The parties' Mediated Agreement addressed the hardship and expense involved by [Father] exercising parenting time. As expressed by the Court's Order Approving Temporary Relocation of Children, the parties' good faith participation in mediation yielded an outcome addressing meaningful parenting

> time and minimizing hardship that is more functional than a Court-ordered decision.

(App. Vol. II at 128.) While the mediated settlement agreement does not prohibit Father from continuing to object to relocation, the parties did agree that Father would have extended summer parenting time to equalize parenting time lost throughout the year and would continue to receive parenting time on the weekend schedule agreed to by the parties for the non-summer months. Additionally, Mother testified in support of, and the trial court ordered, a reduction in Father's child support obligation to "offset [Father's] travel expenses[.]" (Tr. Vol. II at 21.) Thus, there exists evidence in the record to support the trial court's finding regarding the hardship and expense involved for Father to exercise his parenting time following the proposed relocation. Father's argument is an invitation to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Samples*, 12 N.E.3d at 950 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[15] Regarding the third factor – the effect relocation would have on the continuing relationship between Father and Children – Father argues the trial court disregarded the relationship Children have with their extended family. Regarding this factor, the trial court found:

> The testimony and evidence establish that the relationships between [Father] and [Children] have been preserved through the parenting time arrangements and financial accommodations in the parties' Mediated Settlement Agreement. It is true that [Father] has less ability to be present for or be involved in

> [Children's] extracurricular activities, however, it is unlikely that [Father's] relationship with [Children] will be diminished by this fact alone. The terms of the mediated agreement, as best as possible, maximize the likelihood that [Father's] relationship with [Children] will be preserved and the financial consequences to [Father] will be minimized.

(App. Vol. II at 128-9.) Father points to testimony by his mother and sister, both of whom testified Children's relocation would significantly limit their visitation with Children and damage their relationship with Children. However, this factor does not address the relationship between Children and their extended family – it instead requires the trial court to consider the effect of the relocation on the relationship between Father and Children. Father points to evidence that, in the past, Mother has thwarted his parenting time and denied him extended parenting time. However, Mother contended she did not interfere with Father's parenting time "[o]ther than the occasions with with [sic] your concern with COVID" and she would "continue to promote [Father's] access to [Children]." (Tr. Vol. II at 104.) Thus, there exists evidence in the record to support the trial court's finding regarding the preservation of the relationship between Father and Children following the proposed relocation. Father's argument is an invitation to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Samples*, 12 N.E.3d at 950 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[16] The majority of Father's argument focuses on the fourth factor: whether there is an established pattern of conduct by Mother to thwart Father's exercise of his parenting time with Children. Regarding this factor, the trial court found:

> D) . . . [Father] has successfully demonstrated that [Mother] has in past years unreasonably violated the Court's orders concerning [Father's] parenting time. The Court considers the following to be relevant:
>
> (i) [Father] filed a Motion for Rule to Show Cause on April 28, 2020, alleging Mother was intentionally withholding his court ordered parenting time. Judge Bradley Mohler, Presiding Judge of the Clinton Circuit Court, conducted hearing in June and found [Mother] was in contempt of court for failing to allow [Father] parenting time and ordered [Father's] parenting time to immediately resume and allowed make-up time and took the issue of sanctions against [Mother] under advisement. [Mother] thereafter filed an Amended Rule to Show Cause. Judge Mohler recused before deciding the sanctions and before conducting hearing on [Mother's] Amended Motion for Rule to Show Cause. [Father] filed a second Motion for Rule to Show Cause. Special Judge Lori Schein assumed jurisdiction and, after a hearing, DENIED [Mother's] Motion for Rule to Show Cause and GRANTED [Father's] second Motion for Rule to Show Cause against [Mother]. In said order, the Court found that [Mother's] testimony that she withheld parenting time to protect their youngest daughter, [M.E.], was not credible. The Court further stated that [Mother] willfully disobeyed the [sic] Judge Mohler's prior order.
>
> (ii) [Father] has been uncooperative with [Mother] when it is strategically advantageous for him to do so. Petitioner's Exhibit 3, 4, 5, 6 and 7 and Respondent's Exhibit F admitted [in]to evidence at the hearing on December 2, 2022, are typical of the communications among the parents in this case. In this

> Court's opinion, [Mother] has demonstrated through her text messages and by her actions an intent to be cooperative and to help keep [Father] involved with [Children] since [Mother] filed her Notice of Intent to Relocate notwithstanding [Father's] perception otherwise; [Father] has on a number of occasions retorted to [Mother] with rude, unhelpful communications when [Mother] makes reasonable attempts to resolve parenting issues; [Father] puts [Children] in the middle of communications that should be only among parents; and [Father] places blame on [Mother] whenever something does not appear to be to his satisfaction.

(App. Vol. II at 129.) In a footnote in part ii, the trial court explained:

> An exception to [Mother's] otherwise apparent recent cooperation appears evident in a portion of [Father's] Notice of 12/12/2022 wherein [Mother] listed a person other than [Father] to be an "emergency contact" at [Children's] school. The Court does not share [Father's] perception that [Mother] engaged in a scheme to conceal facts surrounding an isolated incident of misbehavior at school around Halloween. The facts recited in [Father's] notice of 12/12/2022 are barely helpful to determine the best interest of [Children]. Nevertheless, the Court finds that [Father] should have access to information about what is happening at [Children's] school, and if a school in Illinois will not allow [Father] to have such information short of being listed as an "emergency contact," then [Mother] should make that happen by designating [Father] to be one of the "emergency contacts." The Court's order of 12/23/2022 remains unchanged by the Order issued today.

(*Id*.) Father notes at length the conditions under which Mother was found in contempt of court and ordered to pay a portion of Father's attorney's fees in 2020 because she denied him parenting time during the COVID pandemic.

However, while Mother acknowledged the contempt citation, she told the court all missed parenting time had been made up. Additionally, Father contends the trial court did not give his exhibits regarding Mother's lack of cooperation the same weight it gave Mother's exhibits regarding Father's lack of cooperation. Finally, Father notes Mother's action of listing D.E. as an emergency contact at Children's school and not Father, resulting in Father's inability to contact the school to learn more about a behavioral issue with one of Children. Mother testified she made D.E. Children's emergency contact because "[t]here was only one form" and she did not list Father because if an emergency happens Father would be unavailable to assist in any retrieval of Children. (*Id*. at 220.) The trial court addressed the emergency contact issue and ordered Mother to add Father as an emergency contact by amending the form. Thus, there exists evidence in the record to support the trial court's finding regarding any established pattern of conduct by Mother to thwart Father's exercise of his parenting time with Children. Father's argument is an invitation to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Samples*, 12 N.E.3d at 950 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[17] Regarding factor five – Mother's reasons for relocation – Father challenges Mother's testimony regarding this issue. Regarding this factor, the trial court found:

> As noted, [Mother] has met her burden of showing that the relocation is in good faith and for legitimate reason[s]. [Father's]

> reasons for opposing the relocation relate to his inability to attend school and extracurricular events with [Children] due, in large part, to [Father's] work schedule and the distance involved.

(App. Vol. II at 130.) Father directs us to Mother's testimony wherein she admitted she was primarily relocating to be with D.E. Regarding Mother's testimony that she had employment with a real estate office and D.E.'s hockey equipment company, Father contends the cost of living in Chicago is significantly higher than that in Frankfort and Mother is not using her advanced degrees to obtain employment. However, Mother testified that she and D.E. have adequate income to support their household, even with the reduction in Father's child support obligation. Thus, there exists evidence in the record to support the trial court's finding regarding the reasons for Mother's request for location and Father's reasons for opposing that request. Father's argument is an invitation to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Samples*, 12 N.E.3d at 950 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[18] Finally, regarding factor six – the best interests of the Children – Father asserts the trial court "sided with Mother" in its finding. (Br. of Appellant at 29.) Regarding this factor, the trial court found:

> [Mother] has, since the parties' divorce, been the primary caregiver and nurturing parent for [Children]. [Mother] has advanced degrees in education and the ability to assist [Children] in their educational endeavors. On the other hand, [Father's] work schedule is not conducive to acting as primary physical custodian of [Children]. [Father] has not maintained a stable

> residence. [Father] has lived at 3 different locations in Clinton County since the date that [Mother] filed her notice of intent to relocate. He presently lives in a house that he rents from his attorney.

(App. Vol. II at 130.) Father contends it is in Children's best interest to remain in Frankfort where he would be their primary physical custodian. However, his argument ignores Mother's testimony that, because of Father's nighttime work schedule, throughout their marriage, Father had lived in an apartment above their garage so Children would not disturb his sleep. She also testified Father did not attend the majority of M.B.'s medical appointments despite the fact that she had serious asthma.

[19] Further, Father argues the trial court discredited his testimony when finding it was not in Children's best interests to deny Mother's request for relocation because Father was not prepared to provide full time care for Children because of his nighttime work schedule and unstable housing. He testified he had many extended family members that helped him when his work schedule did not allow him to care for Children. Regarding his housing, Father provided an explanation for his three different addresses, such as a landlord sold his house and he had to move quickly. Regarding the housing issue, Mother testified she and D.E. had a house in "a great neighborhood" with "four bedrooms and three bathrooms" to accommodate Mother, D.E., Children, and D.E.'s three children. (*Id*. at 19.) She indicated she and D.E. planned on constructing an addition to the house during the coming spring and "there will be more bedrooms[.]" (*Id*. at 29.) Thus, there exists evidence in the record to support

the trial court's finding other factors affecting Children's best interests. Father's argument is an invitation to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Samples*, 12 N.E.3d at 950 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[20] The evidence presented supports the trial court's findings that Mother's request to relocate was done in good faith and for a legitimate purpose. Additionally, the evidence presented supports the trial court's findings regarding the Children's best interests as they relate to relocation such that the relocation would not be contrary to the best interests of Children. Further, the trial court made relevant findings regarding each factor of the relocation statute. Thus, the trial court's findings support its conclusion that Mother should be permitted to relocate with Children. *See*, *e.g.*, *Swadner v. Swadner*, 897 N.E.2d 966, 977 (Ind. Ct. App. 2008) (evidence supported findings which supported the trial court's conclusion the mother's request to relocate the children from Plainfield to Fort Wayne was done in good faith and for a legitimate purpose and father had not demonstrated the relocation would be contrary to the children's best interests).

# Conclusion

[21] The evidence supported the trial court's findings, which supported its conclusion that Mother's request to relocate Children was made in good faith and for a legitimate reason. Additionally, the evidence supported the trial court's findings that supported its conclusion that relocation was in Children's

best interests. Therefore, we affirm the trial court's grant of Mother's motion to relocate Children.

[22] Affirmed.

Bailey, J., and Felix, J., concur.