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ATTORNEYS FOR APPELLANT:

MATTHEW T. ALBAUGH
HARMONY A. MAPPES
Baker & Daniels LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

MICHAEL T. MCNALLY
ALISON PLAVIN
Ice Miller LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF M.C.,	)	
	)	
A.H., Mother,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 30A01-1005-JP-256
	)	
Mi.C., Father,	)	
	)	
Appellee.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-0809-JP-196

February 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

A.H. ("Mother") appeals the trial court's order awarding physical custody of her daughter M.C. to Mi.C. ("Father"). Mother raises three issues, which we revise and restate as:

I. Whether the court properly took judicial notice of court records relating to an action alleging M.C. to be a child in need of services ("CHINS");

II. Whether the court properly awarded physical custody of M.C. to Father; and

III. Whether the court abused its discretion by ordering Mother not to allow contact between M.C. and Larry Stone.

We affirm.

The relevant facts follow. Father and Mother were in a relationship and M.C. was born on January 15, 2005. For the first two and a half years of M.C.'s life, Mother and Father were in a relationship and Father saw M.C. "seven days a week." Transcript at 273. Father had significant contact with M.C. for the first three years of her life. At some point, Father and Mother's relationship ended, and Mother became involved with Larry Stone. In July 2008, Father married Z.C. ("Stepmother").

On August 13, 2008, Father's sister, K.C., was caring for M.C., and M.C. asked several times during the day if it was "a bath night," and K.C. told her that it was a bath night. Id. at 244. M.C. implied that she did not want to take a bath that night and wanted to postpone the bath. K.C. eventually went to run the water for a bath, and M.C. became "very nervous and agitated" and started shaking. Id. Prior to this bath, M.C. loved baths and "looked forward to them anytime she got one." Id. at 245.

Three days later when Stepmother was caring for M.C., M.C. panicked again before bath time and was afraid "that something bad was going to happen." Id. at 174. M.C. divulged to Stepmother that she had been previously "hurt" by Stone. Id. M.C. later made allegations against Mother, Father, and Stepmother.

On September 4, 2008, Father filed a Verified Petition for the Establishment of Paternity, Emergency Custody, and Child Support.[1] On September 26, 2008, the court held a hearing and served Mother with a petition for paternity. On October 1, 2008, Mother filed a Verified Petition for Custody and Child Support.[2] On October 17, 2008, the court held a hearing, and Mother and Father agreed that M.C. was Father's natural child. The court entered an order regarding Father's paternity, but did not make a decision on the issues of custody and support because there was a CHINS case pending involving M.C.

A chronological case summary entry dated November 10, 2008, states: "THE COURT HAVING CONDUCTED HEARING ON RELATED CHINS MATTER NOW FINDS THAT THE ISSUES BEFORE THE COURT ARE MOOT UNTIL RESOLUTION OF CHINS CAUSE." Appellant's Appendix at 4. On July 21, 2009, the court scheduled a hearing on the issues of custody, visitation, and support for August 25,

[1] The record does not contain a copy of Father's petition. We remind Mother that Ind. Appellate Rule 50(A)(2) provides that "[t]he appellant's Appendix shall contain . . . pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal . . . ."

[2] The record does not contain a copy of Mother's petition.

2009.[3] After a number of continuances, the court held a hearing on April 19, 2010. After the hearing, the court took the matter under advisement.

On April 30, 2010, the court entered an order awarding Father physical custody of M.C. and awarding Mother "parenting time, consistent with the Indiana Parenting Time Guidelines so long as she does not allow any contact, direct or indirect, between the child and Larry Stone." Id. at 13.

I.

The first issue is whether the court properly took judicial notice of court records relating to an action alleging M.C. to be a CHINS. Mother argues that the court "explicitly acknowledged its reliance on the CHINS case record in its findings" and "considered and relied on evidence that appeared only in the CHINS case record and was *never entered into evidence in the instant case*." Appellant's Brief at 9-10. Mother points to Findings 8, 9, 25, and 26 of the court's order for this proposition.

Mother argues that "[t]he parties did not request nor were they on notice that evidence outside the evidence they presented at the hearing could or would be considered by the court." Id. at 11. Mother points out that the trial court "foreshadowed its consideration of both causes." Id. at 10. Mother points to the following statements of the trial court made before the presentation of evidence: "I will tell you, because these cases are intertwined, the CHINS case and its [sic] almost impossible to separate;" and "Court will make a note on the record that this is a Paternity action, however, this child is subject

[3] The record does not include a copy of any order related to the CHINS action.

to a CHINS action and explains the presence of the Department of Child Services." Transcript at 9, 11. Mother also points to the following statement made by the court after the presentation of evidence: "[M]y understanding, and I'm going by, you know, I have the CHINS case also, that they backed on [sic] the issue of changing custody and all this type of thing . . . ." Id. at 290.

Mother argues that the court treated the two cases as one because "the reports from Drs. Lawlor and Mueller in the CHINS case that both parties explicitly agreed could be considered by the court in this case were never submitted as exhibits, were never entered into the record, and were not even incorporated into the record on appeal."[4] Appellant's Reply Brief at 2.

Father argues that each of the trial court's findings challenged by Mother are supported by specific testimony from the hearing in this matter. Father also argues that Mother invited any error by specifically eliciting testimony regarding the substantiation of the charges against Stone in the CHINS proceeding, and that any error was harmless.

Both parties overlook Ind. Evidence Rule 201, which governs judicial notice. Evidence Rule 201 was amended in 2009 and went into effect on January 1, 2010. Pursuant to the amendment, a court may now take judicial notice of "records of a court of this state." Ind. Evidence Rule 201(b)(5). Before this amendment, a court could not take judicial notice of its own records in another case previously before it, even on a related

[4] While the parties agreed that the court should consider the reports of Dr. Lawlor and Dr. Mueller and the reports are referenced in the court's order, in the examination of witnesses at the hearing, and in closing arguments, neither report appears in the parties' appendices.

subject with related parties. See, e.g., Whatley v. State, 847 N.E.2d 1007, 1009 (Ind. Ct. App. 2006).

Further, "[a] court may take judicial notice, whether requested or not," Ind. Evidence Rule 201(c), and "[j]udicial notice may be taken at any stage of the proceeding." Ind. Evidence Rule 201(f). "[A] party does not have to be notified *before* a court takes judicial notice." In re Paternity of P.R., 940 N.E.2d 346, 349-350 (Ind. Ct. App. 2010). Ind. Evidence Rule 201(e) provides: "A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Ind. Evidence Rule 201(e).

To the extent that Mother argues that she was not on notice that evidence outside the evidence presented at the custody hearing would be considered, we observe that both parties explicitly agreed that the court could consider the reports by Dr. Lawlor and Dr. Mueller at the beginning of the custody hearing. Appellant's Brief at 10. We also observe that Mother does not argue that the basis of the portions of the trial court's order that she challenges were not contained in the records of the court related to the CHINS action.

Based upon Ind. Evidence Rule 201, we conclude that the court properly took judicial notice of the records in the CHINS action. See P.R., 940 N.E.2d at 350 (holding that the trial court properly took judicial notice of the protective order file under Evidence Rule 201 and that mother failed to make a timely request for an opportunity to be heard

pursuant to Rule 201(e) when mother did not make a request to the trial court for an opportunity to be heard as to the propriety of taking judicial notice).

We also observe that the evidence presented at the custody hearing supported the court's findings which were challenged by Mother. With respect to Finding 8, which stated in part that "[i]n the CHINS case there was a finding of 'substantiated' against [sic] [Mother's] boyfriend, Larry Stone, (Stone)," Appellant's Appendix at 9, the record reveals that Gina Colclazier, the Court Appointed Special Advocate ("CASA"), testified that the allegations against Stone were substantiated.

Finding 9 states:

> 9. After the first month into the CHINS case, the original caseworker was replaced by John Mullany because the supervisor felt he was more open-minded on this case. This leads the Court to believe the original caseworker may have displayed a prejudicial attitude toward a particular parent.

Appellant's Appendix at 10. John Mullany testified that he was the second case worker on the case and that he was assigned to the case because he has "a knack for staying particularly objective on cases and not letting [his] emotions particularly control." Transcript at 218.

Finding 25 provides:

> 25. In the original CHINS case, Gina Colclazier was appointed as the CASA and has been involved with the CHINS case essentially from the beginning. The CASA recommended that the child be reunited with [Mother] but only if [Mother] is no longer living with Larry Stone, who was the alleged perpetrator of the molest of the child.

Appellant's Appendix at 12. The record reveals that Colclazier testified that she had been a part of the CHINS case. The following exchange occurred during the direct examination of Colclazier:

> Q Do you have any fear that [Mother] will not protect [M.C.]?
>
> A I do have concerns of whether or not she would keep him away, keep Stone away.

Transcript at 112.

Finding 26 states:

> 26. On at least two occasions, [Mother] has lied or at least misled the Court in the CHINS case into believing she has terminated her relationship with Stone.

Appellant's Appendix at 12. The record reveals that Mother testified that she previously testified in court more than once that she was no longer in a relationship with Stone. Mother described her relationship with Stone as "rocky at best" and that she and Stone had been engaged but were no longer engaged even though she does still wear the ring. Transcript at 146. Mother admitted that she was "addicted" to Stone at the April 19, 2010 hearing. Id. at 143. When asked if her previous statements were true, Mother stated: "If I was on the stand and said that we no longer have relationship [sic], that meant we no longer had a relationship at that time." Id. at 146. Mother stated that the relationship had rekindled each time. The trial court was in the best position to weigh the evidence and assess Mother's credibility. Based upon the record, we conclude that evidence presented at the custody hearing supported Findings 8, 9, 25, and 26.

II.

The next issue is whether the court properly awarded physical custody of M.C. to Father. In an initial custody determination, there is no presumption in favor of either Mother or Father, and the trial court's determination is based on the best interests of the child. See In re Paternity of Winkler, 725 N.E.2d 124 (Ind. Ct. App. 2000); see also Ind. Code § 31-14-13-2.[5]

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[5] Ind. Code § 31-14-13-2 provides:

The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including the following:

(1) The age and sex of the child.

(2) The wishes of the child's 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:

(A) the child's parents;

(B) the child's siblings; and

(C) any other person who may significantly affect the child's best interest.

(5) The child's adjustment to home, school, and community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

It appears that the trial court entered findings and conclusions *sua sponte*. Where the trial court enters findings of fact *sua sponte*, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has not found. Julie C. v. Andrew C., 924 N.E.2d 1249, 1255 (Ind. Ct. App. 2010). We will set aside the trial court's specific findings only if they are clearly erroneous, that is, when there are no facts or inferences drawn therefrom to support them. Id. at 1255-1256. In reviewing the trial court's findings, we consider only the evidence most favorable to the judgment and the reasonable inferences therefrom, and we will not reweigh the evidence or judge witness credibility. Id. at 1256. We will affirm a general judgment on any legal theory supported by the evidence. Id. at 1255.

Mother argues: (A) that the evidence does not support Findings 26, 27 and 28;[6] and (B) that the findings do not support the conclusion that Father have physical custody of M.C.

A. Findings

1. Finding 26

Mother challenges the following finding:

> 26. On at least two occasions, [Mother] has lied or at least misled the Court in the CHINS case into believing she has terminated her relationship with Stone.

[6] Mother also mentions Finding 30 but does not develop a cogent argument as to this finding. Consequently, this argument is waived. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied.

Appellant's Appendix at 12. Mother argues that her testimony from the "CHINS matter should not have been considered because it was not part of the record in this case." Appellant's Brief at 13. Mother also argues that "to the extent Mother's testimony in the CHINS case was mentioned by witnesses in this case, those references do not support a conclusion that she lied or misled." Id. Father argues that Finding 26 "results from Mother's own testimony, and the trial court's ability to judge her credibility." Appellee's Brief at 11.

To the extent that Mother argues that her testimony from the CHINS matter should not have been considered, we observe that we have already concluded that the court properly took judicial notice of the records in the CHINS action and Mother makes no argument that her testimony was not contained in the records of the court related to the CHINS action. We also observe that as previously discussed that evidence presented at the custody hearing supported this finding. Mindful that we do not assess witness credibility, we cannot say that the court's finding was clearly erroneous.

2. Findings 27 & 28

Mother challenges Findings 27 and 28 which state:

> 27. Mother now tells the Court that she will vacate Stone's home and reside with her parents in New Palestine if she is awarded physical custody of the child. She further states she will not allow any contact between Stone and the child unless it is approved by the child's counselor. The Court has little faith in [Mother's] promise.
>
> 28. The Court believes [Mother] has chosen her relationship with Stone at the expense of her relationship with the child.

Appellant's Appendix at 12.

Mother argues that the court "does not state on what evidence this conclusion is based." Appellant's Brief at 15. Mother also points out that she "testified that she would not reintroduce [M.C.] to [Stone] until the therapist believed it is okay, even stating that if the therapist never believed it was okay, then such a reintroduction would not occur." Id. Mother argues that "[a]side from the unsupported finding in paragraph 26 of the Order, the court neither found nor does the record provide any concrete basis for discrediting her promise or reason to find she has chosen [Stone] 'at the expense' of [M.C.]." Id.

The record reveals that the allegations against Stone were substantiated. Mother admitted that she was "addicted" to Stone and was currently in a relationship with him. Transcript at 143. Colclazier, the CASA, testified that she had "concerns of whether or not [Mother] would keep [Stone] away . . . ." Id. at 112. Based upon the record and that due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses, we cannot say that these findings were clearly erroneous.

B. Trial Court's Conclusion

Mother argues that "even assuming some basis for the findings, they do not support the conclusion that physical custody should be awarded to Father." Appellant's Brief at 15. Mother points out that the court found that M.C. currently says that she wants to live with Mother and that the CASA recommended that M.C. be reunited with Mother. Mother argues that "[t]he only criticism the court had of Mother was her relationship with [Stone]," and "[y]et the court itself had difficulty coming to terms with

the allegations against [Stone], finding him the target of a 'faulty investigation' and suggesting it unlikely that he was a perpetrator." Id. at 16. Mother argues that "the court's ultimate finding in paragraph 31 that it 'is unwilling to make a leap of faith where the safety of the child is concerned' is contradicted by the court's other findings." Id. Mother then points out that the court found that no criminal charges were filed against Stone as a result of the original allegations of abuse, that Stone took and passed a lie detector test as to the original allegations, that the investigation of the claim of abuse was faulty in that it immediately focused on Stone and failed to consider other possibilities, and that Dr. Lawlor testified that he did not believe that the child was ever molested.

Father points out that the CASA recommended that M.C. be reunited with Mother, but only if Mother was not living with Stone. Father also argues that "[u]ltimately, the trial court determined that it was not in the best interests of [M.C.] to gamble on Mother's ability to overcome her addiction to Stone or her willingness to follow through on her promises as they pertain to Mother's relationship with Stone." Appellee's Brief at 13.

The record reveals that Colclazier, the CASA, testified that and the court found that the allegations against Stone were substantiated. While the court found that Colclazier recommended that M.C. be reunited with Mother, the court's complete finding states: "The CASA recommended that [M.C.] be reunited with [Mother] but only if [Mother] is no longer living with Larry Stone, who was the alleged perpetrator of the molest of [M.C.]." Appellant's Appendix at 12. Colclazier testified that she had

"concerns of whether or not [Mother] would keep [Stone] away . . . ." Transcript at 112. The following exchange occurred during cross-examination of Colclazier:

> Q And you're concerned about the effect that if [Mother] doesn't [stay away from Stone] that'll eventually have an effect on [M.C.].
>
> A Yes.
>
> Q Regardless of whether the molest occurred or not, the trauma that she will experience with her mother being with Mr. Stone.
>
> A Yes.
>
> Q And you're concerned about the fact that [M.C.] apparently doesn't know [Mother is] living with Mr. Stone.
>
> A Yes.

Id. at 128.

Jill Leffler, a family therapist that performed home based therapy with M.C. in her foster home, expressed concern because M.C. believed that Mother lived with her parents when Mother was actually living with Stone, and Leffler's fear was that the relationship between Mother and M.C. "might suffer if [M.C.] finds out that because she's beginning to ask questions." Id. at 70.

Lastly, John Mullany, a family case manager with the Department of Child Services ("DCS") and the primary family case manager on the case involving M.C., indicated that a home based services provider stated that "given [Mother's] ongoing relationship with [Stone] that there couldn't be any – any gains." Id. at 212. Mullany also testified that the DCS recommended in February 2010 that M.C. be returned to the

care and custody of Father and that Mother continue to have supervised visitation with M.C.

Based upon the record and the trial court's findings, we cannot say that the court improperly awarded physical custody of M.C. to Father. See Owensby v. Lepper, 666 N.E.2d 1251, 1257 (Ind. Ct. App. 1996) (holding that the court's findings were sufficient to support its custody decision), reh'g denied.

III.

The next issue is whether the court abused its discretion by ordering Mother to not allow contact between M.C. and Stone. Specifically, the court ordered that Mother "is to have parenting time, consistent with the Indiana Parenting Time Guidelines so long as she does not allow any contact, direct or indirect, between the child and Larry Stone." Appellant's Appendix at 13.

When reviewing a trial court's determination of a parenting time issues, we will grant latitude and deference to our trial courts, reversing only when the trial court abuses its discretion. Tamasy v. Kovacs, 929 N.E.2d 820, 837 (Ind. Ct. App. 2010). No abuse of discretion occurs if there is a rational basis supporting the trial court's determination. Id. Therefore, on appeal it 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. Id. We will not reweigh the evidence or judge the credibility of the witnesses. Id. In all parenting time issues, courts are required to give foremost consideration to the best interest of the child. Id.

Mother argues that the court's "restrictions placed on Mother's parenting time are . . . unsupported by the findings and the record . . . ." Appellant's Brief at 18. Mother argues that under Ind. Code § 31-14-14-1(a) "a court can only place a restriction on a noncustodial parent's visitation if the court also makes a specific finding that the emotional well-being or physical health of the child would be endangered."[7] Id. Mother argues that the court prohibited Mother's interaction with Stone while with M.C., but the court entered no specific findings that direct or indirect contact with Stone would endanger M.C.'s physical health or well-being or significantly impair M.C.'s emotional development. Mother concludes that "[t]he trial court's failure to make the requisite specific findings required by I.C. § 31-14-14-1 bolstered by the court's own doubt as to the veracity of the abuse allegations, constitutes reversible error." Id. at 20.

Father argues that "although Mother now claims that the evidence was insufficient to support a parenting time restriction, her own testimony reveals that she explicitly agreed that contact between [M.C.] and Stone should be prohibited." Appellee's Brief at 14. Father argues that "[i]n testifying that [M.C.] and Stone should be kept apart until approved by a therapist, Mother has waived any argument against the restriction on parenting time placed on her by the trial court." Id. at 14-15. Father argues that "Mother cannot argue that this Court should reweigh the credibility of her promises to protect [M.C.] from Stone and at the same time assert that the Court should ignore the

[7] Ind. Code § 31-14-14-1 provides that "[a] noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might: (1) endanger the child's physical health and well-being; or (2) significantly impair the child's emotional development."

undisputed testimony that contact between Stone and [M.C.] would be detrimental to [M.C.]'s emotional and psychological well-being." Id. at 14. Father also argues that the cases relied upon by Mother are distinguishable because Mother was not denied parenting time and the evidence supports a finding that M.C.'s health and well-being would be endangered by contact with Stone.

Initially, we observe that Mother testified that M.C. would not have contact with Stone if she were awarded custody. Specifically, the following exchange occurred during direct examination of Mother:

> Q . . . . Ma'am, if you awarded [sic] custody where will you reside?
>
> A My parents' house.
>
> Q And once you reside there will you have any contact – strike that. Will [M.C.] be exposed to Mr. Stone?
>
> A No, she will not and she has not since August of 2008.

Transcript at 135. On cross-examination of Mother, the following exchange occurred:

> Q What are your future plans with Mr. Stone?
>
> A To continue to have a relationship with him and reintroduce [M.C.] to him once by [sic] therapist that [sic] that's okay. I believe that she has been wronged by being made to believe that this has happened.
>
> Q And what if she never – the therapist never believes its okay, then what?
>
> A Well then [M.C.] will never be reintroduced to Mr. Stone.

Id. at 146-147.

The record also reveals that Mother was not denied parenting time; rather, she was ordered not to allow any contact between M.C. and Stone. Further, although Mother maintains that the court's order must be set aside because the trial court did not make a specific finding that Stone's interaction with M.C. would endanger M.C.'s health or well-being, the evidence presented at the hearing established that the allegations against Stone were substantiated and that there were concerns that Mother would not keep Stone away from M.C. which would have an adverse effect on M.C.

Based upon the record, we cannot say that the trial court abused its discretion by ordering that Mother not allow any contact between M.C. and Stone. See J.M. v. N.M., 844 N.E.2d 590, 599-600 (Ind. Ct. App. 2006) (observing that the father was not denied parenting time and that his parenting time was merely ordered to be supervised and within certain parameters designed to protect the best interests of the child and holding that, although there was no express finding that unsupervised parenting time would significantly impair the child's development, evidence was presented that would support that conclusion), trans. denied; Duncan v. Duncan, 843 N.E.2d 966, 972 (Ind. Ct. App. 2006) (holding that the well-being of the child is always our foremost concern and concluding that "we err on the side of caution and conclude that at this time visitation between Father and his sons would endanger their physical health or significantly impair their emotional development," that "the evidence before us does not positively require the conclusion contended by Father," and that "the trial court's findings, even though limited, support its conclusion"), trans. denied.

For the foregoing reasons, we affirm the court's order.

Affirmed.

ROBB, C.J., and RILEY, J., concur.