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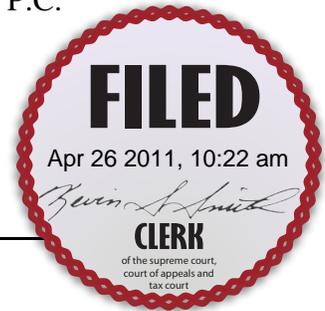
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF:)
STEPHANIE HENRY,)
)
Appellant-Petitioner,)
)
vs.)
)
JAMES H. HENRY,)
)
Appellee-Respondent.)
)
)
MELBA HENRY and)
MICHAEL HENRY,)
)
Appellees/Intervenors.)

No. 28A05-1010-DR-696

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable Dena A. Martin, Judge
Cause No. 28D05-0803-DR-147

April 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Stephanie Henry (Mother) appeals the trial court's award of custody of her three minor children to their paternal grandparents, appellees-intervenors Melba and Michael Henry (collectively, the Grandparents). Mother contends that the trial court erred in naming the Grandparents as the children's de facto custodians and claims that the evidence was not sufficient to support the trial court's award of custody to the Grandparents. Concluding that the trial court properly awarded custody of the children to the Grandparents, we affirm.

FACTS

Mother and James Henry (Father) were married in April 2003. The couple had three children before the marriage was dissolved in August 2008.¹ Mother and Father began living with the Grandparents when Mother was five months pregnant with their first child.

Mother and Father subsequently moved into their own home and were living there when their youngest child, who is now three years old, was born. However, the Grandparents remained significantly involved in the children's lives and they continued to support the children financially. More specifically, the evidence showed that Grandfather picked the children up in the morning and took them to pre-school and

¹ The children's respective birthdates are August 12, 2003, September 11, 2004, and July 14, 2007.

kindergarten. He also kept the youngest child during the day. Grandfather also picked up the children from school in the afternoon and fixed their lunches and dinners. The Grandparents also kept the children overnight on many occasions.

Following the divorce, Mother was granted physical custody of the children. However, she lost her place of residence on several occasions. In each instance, Mother brought the children to the Grandparents' house to live. For several periods in 2008, the Grandparents had the children overnight four or five days per week.

In June 2009, Mother returned the children to the Grandparents' home. At that time, the youngest child was less than three years old. They lived with the Grandparents for nearly ten months.

Pursuant to an agreement between Mother and Father, the trial court awarded physical custody of the children to Father on September 15, 2009. However, the children continued to reside in the Grandparents' home. The children visited Mother and Father at their respective residences on alternate weekends and during the summer. During this period, the Grandparents continued to support the children financially. Grandfather picked the children up and took them to school, brought them back to his home after school, fed them and cared for them, often overnight. The Grandparents also paid the children's expenses and bought their clothes. At some point, the Grandparents brought the children up-to-date on their immunizations. They also had the Medicaid benefits reinstated that had lapsed.

When Father refused to agree to joint physical custody of the children, Mother filed a petition for change of custody on March 17, 2010. Since that time, Mother has exercised parenting time with the children on alternate weekends. On June 4, 2010, the Grandparents filed a motion to intervene and a petition for legal custody of the children. The Grandparents alleged in the petition, among other things, that they have supplied “the financial, emotional and educational support and needs of the children” for the last six years. Appellees’ App. p. 10. Although Mother and Father “have kept the children periodically on weekends,” the Grandparents pointed out that neither parent has exercised substantial parenting time with the children since they were born. Id.

On August 24, 2010, the trial court conducted a hearing on the petitions. Pamela Curry, a therapist who had worked with the family, testified that removing the children from the Grandparents’ home would devastate the children both psychologically and emotionally. Curry had been in the Grandparents’ home on occasion and observed that the children felt “safe, secure, and loved.” Tr. p. 119.

She also testified that it was in the children’s best interest to remain in the Grandparents’ care and custody. Curry stated that she was particularly concerned about how a change of custody in Mother’s favor would impact one of the children who had been diagnosed with separation anxiety disorder because changes in routine can be particularly difficult for children with that condition. Curry believed that if the children were not permitted to return to the Grandparents, it would “impair [the children’s] function on a daily basis.” Id. Curry also testified that the children had become so

attached to the Grandparents that they feared they would never see them again after weekend visits with Mother or Father.

Thereafter, the trial court entered findings of fact and conclusions of law, awarding custody to the Grandparents. The trial court determined, among other things, that its decision was guided by this court's opinion in A.J.L. v. D.A.L., 912 N.E.2d 866, 870-71 (Ind. Ct. App. 2009), which held that an aunt and uncle were the de facto custodians of the children when the evidence demonstrated that the children spent the majority of the time for unspecified non-consecutive periods with them for over two years before the hearing and the aunt and uncle had provided the basic necessities for the children during that period.

In light of the holding in A.J.L., the trial court concluded in this case that

4. In the present case the Paternal Grandparents have established by clear and convincing evidence that the three minor children have spent the majority of their lives in the home and in care of the Paternal Grandparents. The children resided with the Paternal Grandparents since September 2009 when the Mother voluntarily dropped the children off with the Paternal Grandparents for non-consecutive periods since birth and the Paternal Grandparents provided the basic necessities for the Children during that period. The Court finds that Paternal Grandparents are the defacto custodians of [the children].

Appellees' App. p. 23. Mother now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that when the trial court enters findings of fact and conclusions of law, the court first considers whether the evidence supports the findings

and then whether the findings support the judgment. In re Paternity of T.P., 920 N.E.2d 726, 730 (Ind. Ct. App. 2010), trans. denied. A trial court's findings and judgment will be set aside when they are clearly erroneous, i.e., when there is no evidence supporting the findings or the findings fail to support the judgment. A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. Id.

We further note that appellate deference to the determinations of our trial court judges, especially in domestic relations matters, is warranted because of their unique, direct interactions with the parties face-to-face, often over an extended period of time. Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, 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 children. Best v. Best, 941 N.E.2d 499, 502 (Ind. 2011).

II. Mother's Contentions

A. De Facto Custodians

Mother claims that the trial court erred in concluding that the Grandparents are the de facto custodians of the children. Specifically, she argues that the evidence did not establish that the Grandparents were the children's primary caregivers for more than one year.

In resolving this issue, we note that Indiana Code section 31-9-2-35.5 defines a de facto custodian in relevant part as follows:

“De facto custodian” . . . means a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:

- (1) six (6) months if the child is less than three (3) years of age; or
- (2) one (1) year if the child is at least three (3) years of age.

Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required minimum period.

Before custody can be awarded to a third party, that third party must demonstrate de facto custodian status by clear and convincing evidence. Ind. Code § 31-17-2-8.5. In reviewing a judgment requiring proof by clear and convincing evidence, we will not impose our own view as to whether the evidence is clear and convincing. Rather, we will determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. A.J.L., 912 N.E.2d at 870.

In this case, the trial court concluded that the Grandparents

have established by clear and convincing evidence that the three minor children have spent the majority of their lives in the home and in care of the Paternal [G]randparents. The children resided with the Paternal Grandparents since September 2009 when the Mother voluntarily dropped the children off with the Paternal [G]randparents.

Appellant’s App. p. 22-23. The trial court also observed that “prior to that time the children had resided with the Paternal Grandparents for non-consecutive periods since birth and the Paternal Grandparents provided the basic necessities for the Children during

that period. The Court finds the Paternal Grandparents are the de facto [sic] custodians of [the Children].” Id. at 23.

In light of the above, Mother claims that the judgment must be set aside because the “trial court’s sweeping ‘majority of their lives’ standard is much broader than the text of the statute.” Appellant’s Br. p. 6. However, the record demonstrates that prior to the dissolution, the Grandparents were constantly involved with the children and provided their educational needs, food, and clothing. In 2008, the children lived with the Grandparents for four or five days per week, which included overnight stays. Tr. p. 101. From the time of the divorce in August 2008, until Mother left the children with the Grandparents on June 8, 2009, Mother had changed residences at least four times. On those occasions, the Grandparents took the children into their home and cared for them. Id. at 15, 30, 58, 67. And on June 8, Mother again asked the Grandparents to take the children. Id. at 89. The youngest child was less than three years old when Mother last asked the Grandparents to care for them. As a result, the children lived with the Grandparents for nearly ten months before Mother filed her petition for a change of custody in March 2010.

After Father was awarded custody in September 2009, the children continued to live in the Grandparents’ home. Father testified that his parents have always been the primary caretakers of the children and had been for the past two years. As noted above, the Grandparents provided for the children’s immunizations and had their lapsed Medicaid benefits renewed. Id. at 42, 43, 96. The Grandparents continued to provide the

children with their educational expenses, clothing, and meals. The Grandparents also took the children to their dentist and doctor's appointments. Id. at 91, 92. Neither Mother nor Father paid the Grandparents any child support. Mother admitted that the Grandparents have had the children "for the past year." Id. at 52.

As discussed above, Curry testified that it would be in the children's best interests for them to live with the Grandparents. Id. at 121. Curry acknowledged that it would be detrimental to the children's well being and their functioning would be impaired if they were not permitted to return to the Grandparents. Indeed, the evidence established that the children are well adjusted to their school and the Grandparents.

In sum, we conclude that the evidence is sufficient to show by clear and convincing evidence that the children resided with the Grandparents a majority of the time for unspecified non-consecutive periods "for at least one year" in accordance with Indiana Code section 31-9-2-35.5, and that the Grandparents provided the basic necessities for the children during that period. As a result, the trial court did not err in concluding that the Grandparents are the de facto custodians of the children.

B. Custody to Grandparents—Sufficiency of the Evidence

Mother argues that the evidence was insufficient to support the trial court's custody award to the Grandparents. Specifically, Mother contends that the Grandparents have not rebutted the presumption that favors awarding custody of children to the natural parent.

In accordance with Indiana Code section 31-17-2-8:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no 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 parent or 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 parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) 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 [Indiana Code Section 31-17-2-8.5(b).]

(Emphasis added).

Once a court determines a "de facto custodian" exists and that individual has been made a party to a custody proceeding, in addition to the usual "best interests" of the child

factors contained in Indiana Code Section 31-17-2-8, the court shall consider the following factors in determining the child's best interests:

- (1) The wishes of the child's de facto custodian.
- (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
- (3) The intent of the child's parent in placing the child with the de facto custodian.
- (4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:
 - (A) seek employment;
 - (B) work; or
 - (C) attend school.

I.C. § 31-17-2-8.5(b). "The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child." I.C. § 31-17-2-8.5(d).

We have described the standard of review in natural parent-third party custody disputes as follows:

First, there is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. However, a general finding that it would be in the child's "best interest" to be placed in the third party's custody is not sufficient to rebut

the presumption. If the presumption is rebutted, then the court engages in a general “best interests” analysis. The court may, but is not required to, be guided by the “best interests” factors listed in Indiana Code Sections 31–14–13–2 [custody following paternity determination], 31–14–13–2.5 [custody following paternity determination, including de facto custodian], 31–17–2–8 [custody in dissolution], and 31–17–2–8.5 [custody in dissolution, including de facto custodian], if the proceeding is not one explicitly governed by those sections.

If a decision to leave or place custody of a child in a third party, rather than a parent, is to be based solely upon the child’s “best interests,” as opposed to a finding of parental unfitness, abandonment, or other wrongdoing, such interests should be specifically delineated, as well as be compelling and in the “real and permanent” interests of the child.

In re L.L. & J.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001).

Finally, in a custody dispute between a natural parent and a third party, we note that “the parties are not on par.” In re Paternity of L.J.S., 923 N.E.2d 458, 461 (Ind. Ct. App. 2010), trans. denied. Before placing a child in the custody of a third party, a trial court must be convinced that placement with the third party represents a substantial and significant advantage to the child. In re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002).

Here, the Grandparents have not alleged that Mother was unfit or that she was unloving toward the children. Rather, they assert that Mother is unable to properly support and care for the children and their concern is about the best interests of the children. Indeed, the trial court concluded that

5. Considering mother’s willingness to continually take the children to the home of the Paternal grandparents when she wasn’t able to care for the children, mother’s display of poor judgment when it comes to the health, welfare and safety of their children and the strong bond that has developed

between the Paternal grandparents and the children, the court finds by clear and convincing evidence that [the children's] best interests are substantially and significantly served by placement with the Paternal grandparents.

Appellees' App. p. 23.

The record reflects that Mother and Father's seven-year-old son has lived the majority of his life in his Grandparent's home. Since birth, he has lived away from their home on intermittent occasions. Tr. p. 20. Although Mother and Father would move out of the Grandparents' residence, they always brought the children back to them.

As discussed above, the Grandparents would often care for the children four or five days a week. Id. at 101. Even after Father was awarded custody in September 2009, the children continued to live in the Grandparents' home. The Grandparents paid the children's expenses and bought them clothing. And the evidence established that Mother did not support the children financially.²

Curry testified that it was in the children's best interests for the Grandparents to have custody and it would be detrimental for the children to have them placed with anyone else. Id. at 121. Additionally, Mother voluntarily left the children with the Grandparents, and the Grandparents cared for the children for months. Although Mother asserts that she only temporarily entrusted the children to the Grandparents so she "could obtain suitable housing," and the Grandparents simply "helped" care for the children, reply br. p. 3-4, her argument amounts to a request that we reweigh the evidence. When

² As an aside, we note that both Mother and Father testified at the hearing that they are employed. However, no evidence was presented as to their income. Appellees' Br. p. 23.

considering these circumstances, it was reasonable for the trial court to conclude that Mother voluntarily relinquished the children to the Grandparents, and that the children have bonded with them. As a result, the Grandparents have successfully rebutted the presumption that custody of the children should be placed with Mother. Moreover, it was established that the award of custody to the Grandparents is in the children's best interests.

CONCLUSION

In light of our discussion above, we conclude that the trial court properly determined that the Grandparents are the de facto custodians of the children. And while the Grandparents did not attempt to show that Mother was unfit, the evidence established that placement of the children with Mother is not in the children's best interests. The Grandparents provided the children with all their needs, Mother did not financially support the children, and the children had bonded with the Grandparents. As a result, the Grandparents rebutted the presumption that Mother should have custody of the children. Because Mother has failed to establish that the evidence failed to support the findings and judgment of the trial court, we conclude that the trial court properly awarded custody of the children to the Grandparents.

The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.