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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF JESSICA)
(REISHUS) ANDERSON,)
)
Appellant-Petitioner,)
)
vs.)
)
DEVIN A. REISHUS,)
)
Appellee-Respondent.)

No. 48A04-0712-CV-687

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0607-DR-646

May 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jessica (Reishus) Anderson (Mother) appeals from the final dissolution decree that awarded sole custody of her minor child, D.R., to Devin Reishus (Father). On appeal, Mother presents the following issues for review:

1. Did the trial court err in failing to provide that Mother should have the right of first refusal to care for D.R. when Father was unavailable but D.R.'s paternal grandmother was available?
2. Did the trial court abuse its discretion in awarding Father sole custody of D.R.?

We affirm.

The facts favorable to the ruling are that Mother and Father began dating when they were sixteen and eighteen years old, respectively. Mother became pregnant by Father in March of 2004 and turned seventeen in July of that year. Mother and Father were married on October 15, 2004. D.R., the parties' only child, was born on December 30, 2004. Mother and Father lived with Mother's parents from October 2004 until March 2005. In March 2005, Mother got into a physical confrontation with her mother, resulting in Mother and Father moving out of Mother's parents' home. Mother and Father then lived with Father's parents until August 2005, at which time Mother and Father obtained an apartment of their own.

The parties separated on June 4, 2006. Following the separation, Mother moved back in with her parents. Mother works three nights per week at Pizza Hut and earns approximately \$170 per week. At the time of the final hearing, Mother had not yet enrolled in college, but had plans to take classes at Ivy Tech. Shortly after the separation, Mother became pregnant by another man and gave birth to a baby girl in March 2007.

After the separation, Father began living with his parents in Alexandria and continued to do so at the time of the final hearing. Father is a student at Anderson University and is scheduled to graduate in 2008. When not in school, Father works for his father doing construction and earns \$10 an hour. Father's mother is a homemaker and is able to care for D.R. while Father is at school or at work.

Mother filed a petition for dissolution on July 12, 2006. A provisional order was entered on August 22, 2006.¹ On December 11, 2006, Mother filed a request for findings of fact and conclusions of law and also for a determination of whether her right of first refusal to care for D.R. applied when Father was unable to care for D.R. while D.R. was in his custody, but Father's mother was. On December 14, 2006, a master commissioner, in an *ex parte* order, determined that Mother's right of first refusal applied and thus ordered that Mother should be offered the first opportunity to watch D.R. when Father was working, at school, or otherwise unavailable to care for D.R. during those weeks that Father had custody of D.R. The commissioner further ordered that Father's parents "shall not be considered an exception to this rule." *Appendix* at 28.

The final hearing on the dissolution petition was held over the course of two days, March 26 and April 20, 2007. Following submissions of proposed decrees and findings of fact and conclusions of law by both parties, the trial court signed a proposed decree submitted by Father, but did not issue findings of fact and conclusions of law. Mother timely filed a motion to correct error (MCE), challenging, among other things, the trial

¹ Under the terms of the provisional order, Mother and Father had joint custody of D.R., alternating weeks.

court's failure to issue findings of fact and conclusions of law as she requested. The trial court held a hearing on Mother's MCE on July 31, 2007. On August 14, 2007, the trial court corrected its error by issuing findings and conclusions, which followed in large part the proposed findings and conclusions submitted by Father, and issuing a second decree of dissolution. The trial court awarded custody of D.R. to Father. With regard to Mother's right of first refusal, the trial court provided:

Mother shall have parenting time pursuant to the [Parenting Time] Guidelines. However, [the] Guidelines will be followed in determining mother's first right of refusal.²

Appendix at 7, 14. As part of its findings, the trial court indicated that the *ex parte* order issued by the commissioner did not follow the Parenting Time Guidelines (the Guidelines) with respect to Mother's right of first refusal. The court, citing *Shelton v. Shelton*, 835 N.E.2d 513 (Ind. Ct. App. 2005), *summarily aff'd*, 840 N.E.2d 835 (Ind. 2006), stated that the right of first refusal does not apply if, when the custodial parent is unavailable, a family member in the household with the custodial parent is available. Mother filed the instant appeal.

1.

Mother first argues that the trial court erroneously denied her the right of first refusal to care for D.R. Specifically, Mother claims that the trial court interpreted the Guidelines so as to deny her the right of first refusal to care for D.R. when Father is

² The first decree signed by the court on May 10, 2007 included additional language. Specifically, in that decree the court stated: "Mother shall have parenting time pursuant to the [Parenting Time] Guidelines. However, [the] Guidelines will be followed in determining mother's first right of refusal. *In other words, if Father is unavailable and his parents are available, [D.R.] will stay with Father's parents.*" *Appendix* at 36 (emphasis supplied).

unavailable, but Father's mother is available to care for him. Mother claims that "[t]he paternal grandmother is not a member of father's household. He [Father] is a member of her [paternal grandmother's] household since the father is living with his parents." *Appellant's Brief* at 4. Mother therefore asserts that she should be given the opportunity for additional parenting time whenever Father is unavailable to care for D.R.

Here, the trial court awarded custody of D.R. to Father and ordered that Mother should have parenting time pursuant to the Guidelines. The trial court also ordered that the Guidelines should be followed in determining when Mother should be offered the right of first refusal to care for D.R.

With regard to the right of first refusal, Section I(C)(3) of the Guidelines provides as follows:

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

In *Shelton*, this court addressed the issue of when the opportunity for additional parenting time under Section I(C)(3) is to be offered. We concluded:

The phrase "family member" is ordinarily inclusive of relations such as grandparents or stepparents. However, the Indiana Parenting Time Guidelines impose a preference for parental childcare, founded "on the premise that it is usually in a child's best interest to have frequent, meaningful and continuing contact with each parent." Parenting Time G., Preamble. This principle pervades the guidelines, and is apparent in the rationale of section I(C)(3): the parent without physical custody is given the opportunity for additional parenting time when the custodial parent is regularly unavailable. *The practical outgrowth of this, included in the section's language, is that the best interests of the child are also served by*

extending the parental childcare preference to responsible family members within the custodial parent's household, also the child's household. As a result, the definition most appropriate under the rationale of section I(C)(3) is that "family member" must be limited to a person within the same household as the parent with physical custody.

Shelton v. Shelton, 835 N.E.2d at 517 (footnotes omitted) (emphasis supplied). Our Supreme Court summarily affirmed this analysis, holding that the term "family member", as used in Section I(C)(3), means "'a person within the same household as the parent with physical custody.'" *Shelton v. Shelton*, 840 N.E.2d at 835 (quoting *Shelton v. Shelton*, 835 N.E.2d. at 517).

Here, it is not disputed that Father lives with his parents, and thus, they live within the same household. Further, Father's mother is a homemaker and is able to care for D.R. while Father is attending school and at work. There was no evidence that Father's mother was not responsible or that she was unfit to care for D.R. We therefore conclude that for purposes of applying Section I(C)(3), the trial court properly concluded Father's mother is a "family member" within Father's household. In other words, when D.R. is in Father's custody and Father is unavailable, but Father's mother is available to care for D.R., Mother need not be offered the opportunity for additional parenting time.³

2.

Mother argues that the trial court abused its discretion in awarding sole legal and physical custody of D.R. to Father.

³ Mother's argument that Father's mother is not a "family member" because Father lives with his parents rather than vice versa is absurd. The best interests of the child, not the ownership of the household, is the primary consideration. As has been observed, the best interests of the child are served "by extending the parental childcare preference to responsible family members within the custodial parent's household, which is also the child's household." *Shelton v. Shelton*, 835 N.E.2d at 517.

We generally give “considerable deference to the findings of the trial court in family law matters” as a reflection that the trial court is in the “best position to judge the facts, . . . to get a sense of the parents and their relationship with their children—the kind of qualities that appellate courts would be in a difficult position to assess.” *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005). Therefore, we will not reverse the trial court’s custody determination unless it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. *Pawlik v. Pawlik*, 823 N.E.2d 328 (Ind. Ct. App. 2005), *trans. denied*. When reviewing the trial court’s decision, we will not reweigh the evidence, judge the credibility of the witnesses, or substitute our judgment for that of the trial court. *Id.*

Where, as here, the trial court enters findings of fact and conclusions of law pursuant to a request by one of the parties, we apply a two-tiered standard of review:

“We first determine whether the record supports the findings and, second, whether the findings support the judgment. The judgment will only be reversed when clearly erroneous, i.e. when the judgment is unsupported by the findings of fact and the conclusions entered upon the findings. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility.”

Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004) (quoting *Wyzard v. Wyzard*, 771 N.E.2d 754, 756-57 (Ind.Ct.App.2002)), *trans. denied*.

Indiana Code Ann. § 31-17-2-8 (West, PREMISE through 2007 1st Regular Sess.) sets forth the relevant factors to be considered when making a custody determination. It provides as follows:

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 section 8.5(b) of this chapter.

In its findings of fact, the trial court noted Mother's inexperience as a homemaker and caregiver and referred to Mother's conduct during the marriage, including staying out late at night and having an affair. The court also noted that Mother had had a second child. The trial court acknowledged that Mother had a job at Pizza Hut, working three nights a week, and that she planned on taking classes at Ivy Tech. In contrast, the court

noted that Father was completing his junior year at Anderson University and that he worked for his father.

In deciding to award custody of D.R. to Father, the court noted that of particular relevance to its determination was the conduct and maturity of Mother and Father. We will not second-guess the trial court's determination in this regard. Mother's arguments challenging the trial court's findings and the court's ultimate custody determination are simply requests that we reweigh the evidence and judge the credibility of the witnesses, tasks which cannot undertake on appeal. Having reviewed the record, we conclude that the trial court's findings are supported by the evidence. Further, the trial court's findings support its determination. The trial court did not abuse its discretion in awarding sole custody of D.R. to Father.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur.