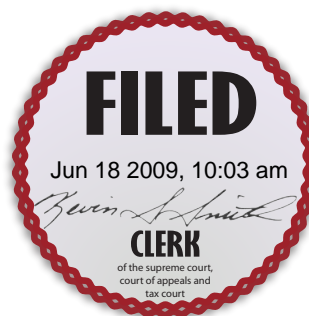


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

NIKOS C. NAKOS
Nakos & Vian
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

BRADLEY J. BUCHHEIT
Blume, Connelly, Jordan, Stucky & Lauer,
LLP
Fort Wayne, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ADRIANA L. VAN CLEAVE,)

Appellant-Respondent,)

vs.)

No. 02A04-0812-CV-697

ROBERT T. VAN CLEAVE)

Appellee-Petitioner.)

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
The Honorable Craig J. Bobay, Magistrate
Cause No. 02C01-0504-DR-346

June 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Adriana L. Van Cleave (“Mother”) appeals the trial court’s order awarding Robert T. Van Cleave (“Father”) primary physical custody of the parties’ minor child T.

We affirm.

ISSUE

Whether the trial court abused its discretion in awarding primary physical custody of T. to Father.

FACTS¹

Mother and Father married on April 27, 2001, and their daughter T. was born on October 16, 2001. On April 19, 2005, Father filed a petition for dissolution of marriage.² Mother sought a provisional order, and a provisional hearing was held on December 2, 2005. The trial court’s provisional order of December 5, 2005, found it was in T.’s best interest that Mother have temporary custody, but that Mother had “not proven that Father shall have his temporary parenting time supervised,” and it granted him temporary parenting time as provided in the Indiana Parenting Time Guidelines. (App. 3). The trial court further ordered that a custodial evaluation be conducted by Dr. David Lombard. Dr. Lombard’s report thereon was completed on May 12, 2006, and submitted to the trial court.

¹ We remind Mother’s counsel that a Statement of the Facts should be a concise narrative of the facts stated in a light most favorable to the judgment and should not be argumentative. *See Schaefer v. Kumar*, 804 N.E.2d 184, 196 n.13 (Ind. Ct. App. 2004), *trans. denied*, and Ind. Appellate Rule 46(A)(6). Statements such as “the Court placed far too much emphasis on . . .,” “the Court seemed to ignore . . .,” and “[t]o rip a female child who had been residing with Appellant for nearly three (3) years is certainly not in the best interest of the child” do not state facts and are inappropriate in that section of the brief.

² We further remind counsel for Mother that an appellant’s Appendix “shall contain . . . the chronological case summary . . .” Ind. Appellate Rule 50(A)(a).

The trial court heard evidence at final hearings over two days, June 10-11, 2008. Dr. Lombard testified, as did Father, his three adult children from a former marriage, his nephew, his sister, his former wife, and his long-time neighbor; as well as Mother, her aunt, her cousin, her work supervisors, and staff from T.'s preschool and kindergarten.

On November 6, 2008, the trial court issued its order, with findings of fact and conclusions of law. The trial court's findings and conclusion included the following:

- Mother made "a unilateral decision" to enroll T. in Lindley Elementary. "Despite Father's desire to place [T.] in a . . . parochial school," where his three "adult children by a former wife were educated" and "did well," Father "cooperated with, and participated in T.'s education" at Lindley.
- ". . . the parties have had some disagreements regarding [T.], and experience some inability to always be able to effectively communicate."
- ". . . concerning primary caretaking responsibility between the parties, Father prefers a shared or co-parenting arrangement, where the parties would share physical custody of [T.], alternating on a week to week basis between the parties," but "Mother prefers that she be awarded sole custody of [T.], with Father having parenting time according to the Indiana Parenting Time Guidelines."
- "Father has been an effective parent, both regard to [T.] and his older children. Several witnesses, including neighbors, Father's adult children and an ex-wife (. . . with whom Father shares joint legal custody of ten (10) year old daughter [C.]³) confirmed Father's caring, nurturing nature, his inspirational influence as a teacher to his children, and his ability to reach reasonable compromises when addressing issues regarding raising children. [[C.'s] mother] praised Father's parenting skills and his ability to co-parent. The Court finds these witnesses to be credible and reliable as to these matters."
- "[T.] has a closely bonded sibling relationship with ten (10) year old [C.], who is in Father's joint custodial care." (App. 10).
- "Father has a supportive extended and close-knit family and support

³ Father had five children: three adult children, ten-year old C., and T.

structure . . . , including his parents, siblings, adult children, friends and other relatives, all who positively impact [T.]’s development.”

- “Father has been a loving and involved parent to [T.], and he is capable of and does provide for [T.]’s physical and emotional needs. Father provides [T.] a physical environment that emphasizes Father’s understanding of her needs.”

(App. 9, 10). The trial court also found that Mother was “an attentive and loving parent” and that she provided for “the physical and emotional needs of [T.]” (App. 10)

The trial court noted its appointment of “Dr. David Lombard to conduct a custodial evaluation.” (App. 11). The trial court “place[d] great weight” on and “f[ou]nd[] persuasive much of the evidence provided by” his “expert opinion.” (App. 11). Specifically, the trial court noted Dr. Lombard’s recommendation that “Father be [T.]’s primary custodian, with Mother to have parenting time as provided in the Indiana Parenting Time Guidelines,” and found, as “Dr. Lombard opined, . . . that Mother unreasonably limited Father’s contact with [T.] during the provisional period of this dissolution, which was contrary to [T.]’s best interests.” (App. 11). The trial court further found that evidence provided by Dr. Lombard “demonstrate[d] that Father’s approach to co-parenting should provide a more cooperative and less restrictive approach than Mother’s.” *Id.*

Accordingly, the trial court found that it was “in the best interest of the parties’ child [T.] that Mother and Father shall have joint legal custody,” and awarded them joint

legal custody. *Id.* However, the trial court “awarded primary physical custody of [T.]” to Father, “as the best interests of the child so dictate.” *Id.*⁴

DECISION

Pursuant to Indiana Code section 31-17-2-8, the trial court “shall determine custody and enter a custody order in accordance with the best interests of the child.” “[T]here is no presumption favoring either parent” in “determining the best interests of the child,” and the trial court “shall consider all relevant factors,” including the age and sex of the child, the wishes of the parents and of the child, and the interaction and interrelationship of the child with the parents, siblings, and other significant persons. *Id.*

Custody determinations “fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion.” *Liddy v. Liddy*, 881 N.E.2d 62, 68 (Ind. Ct. App. 2008) (quoting *In re B.H.*, 770 N.E.2d 283, 288 (Ind. 2002)), *trans. denied*. On appeal, we will reverse only if we conclude that the trial court’s decision is against the logic and effect of the facts and circumstances before it, or the reasonable inferences drawn therefrom. *Id.* Moreover, in an initial custody determination, we are mindful that it is the trial court that sees the parties, observes their conduct and demeanor, and hears their testimony. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 945-46 (Ind. Ct. App. 2006) (citing *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 509 (Ind. Ct. App. 2002), *trans. denied*). Thus, on review, we will not reweigh the evidence, judge the credibility of witnesses, or substitute our judgment for that of the trial court. *Id.*

⁴ “Legal custody” encompasses the “authority and responsibility for the major decisions concerning the child’s upbringing, including the child’s education, health care, and religious training.” See Ind. Code § 31-9-2-67. “Physical custody” means “the physical care and supervision of a child.” I.C. 31-21-2-16.

Mother argues that the trial court “abused its discretion in granting primary physical custody to [Father] when there was little evidence presented to support a change of custody from the Provisional Order[],”⁵ whereby she had custody of T. for nearly three years before the final order; there was no “logical basis to change custody”; and the trial court “ignored” evidence “that benefited [her].” Mother’s Br. at 10. As to Mother’s argument that the trial court erred in giving “great weight” to Dr. Lombard’s report because it was completed in May of 2006, Mother’s Br. at 12, this argument was made to the trial court. Moreover, the opinions of Dr. Lombard in his report were also subject to challenges during his testimony, and were supported by testimony of other witnesses concerning Father’s parenting of T. up to the time of the final hearing. As to Mother’s argument that the trial court “failed to take into account” certain evidence, *id.* at 13, the weight to be given to witness testimony is a matter for the trial court. *Kondamuri*, 852 N.E.2d at 946. As to Mother’s assertion that there is no “rational basis” stated in the trial court’s order to support its determination that Father should be awarded primary physical custody of T., *id.* at 13, we cannot agree.

Mother does not dispute any of the specific findings of the trial court. The evidence established that Mother alone decided, without consulting Father, to place T. in a school which he would not have chosen for her, but that nevertheless Father had been actively involved with T.’s education at that school. It is undisputed that T. has formed a

⁵ In Mother’s brief, she refers to “a change of custody from the Provisional Orders.” Mother’s Br. at 10. However, her Appendix only contains a single provisional order.

Further, Mother makes the rhetorical assertion that the trial court “change[d] custody,” Mother’s Br. at 10, yet her cited authority in support of her assertion properly concerns a trial court’s initial custody determination; the record here establishes that the order appealed is an initial custody determination.

close bond with her half-sister C., who spends significant time in Father's home. Further, evidence established that Father's extended family is actively involved in T.'s life. The testimony clearly supports the trial court's finding that Mother would not agree to Father's proposal for shared co-parenting of T. The evidence also supports the trial court's findings that Father had effectively parented his three adult children subsequent to his divorce from their mother⁶; and that Father had effectively co-parented his ten-year old daughter C. for the preceding eight years. Finally, the trial court's finding that Father had been a loving and involved parent to T. and had provided for her physical and emotional needs is supported by testimony from Dr. Lombard and from Father's adult children, his former wife, his extended family, and his neighbor as to Father's relationship with T. and his parenting skills. These findings support the trial court's conclusion that an award to Father of T.'s primary physical custody would be in T.'s best interests.

Affirmed.

BAILEY, J., and ROBB, J., concur.

⁶ Their testimony described his extensive involvement in their school, extracurricular, and church activities after the divorce from their mother; his disciplinary method of "talking about it," (Tr. 101); his lessons in sharing, creativity, and forgiveness; and his patience and teaching "how to love" one's family (Tr. 105).