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IN THE
COURT OF APPEALS OF INDIANA

C.A.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 55A04-1011-JP-723
	)	
J.B.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-0805-JP-118

July 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-respondent C.A. (Mother) appeals the trial court's order, awarding custody of her son, A.L.A., to his biological father, J.B. (Father). Additionally, Mother maintains that the trial court abused its discretion by changing A.L.A.'s surname. Finding no error, we affirm.

FACTS

In 2002, Mother and D.J. were married and living in Texas; D.J. was serving in the military. During an argument, "[D.J.'s] nose got scratched and the neighbors called the cops and [Mother] went to jail." Tr. p. 70. Mother was convicted of battery, served time in jail, and placed on probation. Mother violated her probation by returning to Indiana but testified that she was currently in contact with Texas authorities to resolve the issue. Mother explained that she had to leave because she had given birth to their daughter, A.A., and had no means of support in Texas because D.J. had been deployed to Iraq. Sometime in 2003, Mother and D.J. divorced.

D.J. returned from Iraq with multiple health problems, including post-traumatic stress disorder (PTSD), traumatic brain injury, and restless legs syndrome. D.J. is on multiple medications to control these conditions.

At some point, D.J. and Mother reunited, but the relationship deteriorated. By July 2007, Mother and A.A. had moved in with Father.

In early December 2007, when Mother was five months pregnant with A.L.A, Mother and D.J. took A.A. to a museum. When Father found out, he became upset, and Mother moved out of his house and moved back into D.J.'s house.

On April 9, 2008, while Mother was living with D.J., A.L.A. was born. D.J. believed that A.L.A. was his son, and D.J.'s name was placed on the birth certificate. However, on May 30, 2008, Father requested that the Morgan County Prosecutor's Office file a paternity action, naming Mother, Father, and D.J. as co-respondents. Eventually, an October 2008 DNA test indicated that Father was A.L.A's biological father.

In early June 2008, Mother and D.J. were evicted from their home and A.L.A., Mother, and A.A. moved in with Father. Mother resided with Father until February 2009. During that time, Father paid expenses for A.L.A., bathed him, changed, his diapers, fed him, and did the things that a father would do for his child.

In February 2009, the relationship between Mother and Father broke down, and Father decided to move out of the house. As Father was moving out, Mother called the police. After the police arrived, Mother was told to leave for twenty-four hours to give Father the opportunity to move without incident. A few days later, Mother returned and stayed with Father for several days, but it became clear that the relationship would not work.

About one week later, the Department of Child Services began to investigate why the police had been called to the residence while children were present. Mother and Father decided to meet to discuss the issue; however, a few hours later, relations broke down, and Father was arrested for and later convicted of battery and disorderly conduct.

Although it is unclear from the record where Mother lived following Father's arrest, Mother and the children moved into an apartment in the summer of 2009. D.J.

has spent a great deal of time at Mother's apartment but cannot move in because Mother will lose her housing subsidy.

As stated above, the Morgan County Prosecutor's Office filed a paternity petition on May 30, 2008. An initial hearing on this petition occurred on April 2, 2009, but because the hearing concluded after 4:00 p.m., the trial court could not set the date of the dispositional hearing.

On April 13, 2009, Father corrected his address with the Morgan County Clerk's office and was told that the date of the dispositional hearing was August 27, 2009. The Morgan County Prosecutor sent information about this date with the DNA results, but Mother testified that she never received the information.

Father appeared for the August 27, 2009, dispositional hearing, but neither Mother nor D.J. appeared. The trial court heard evidence from Father and found that he was A.L.A.'s legal father, awarded custody to him, and ordered the child's surname to be changed to that of Father.

Mother filed a motion to vacate and to set aside the paternity and custody order on the grounds that she had not received notice of the hearing. Evidentiary hearings were held on October 8 and 16, 2009. At the conclusion of the October 16 hearing, the trial court determined that Mother had not received notice of the August 27 hearing and partially granted Mother's motion. Specifically, the trial court chose not to disturb its paternity finding but concluded that a hearing on the merits was necessary "as to the other issues that would flow from that." Tr. p. 49.

A second and final dispositional hearing was held on September 2, 2010. At the final hearing, Father testified that Mother had told him about numerous disputes between her and D.J., involving A.A., shutting off Mother's cell phone, and breaking into her apartment. Father also stated that Mother and D.J. have told him that D.J. frequently "passes out." Id. at 161.

Mother denied that there had been any disputes between herself and D.J. or that she had described any to Father. Mother also denied that D.J. "pass[es] out." Id. at 175-76. Mother did state that she has taken medication for depression for the past ten years and more recently began taking medication for Attention Deficit Disorder (ADD).

At the final hearing, the parties agreed that A.L.A. was happy, healthy, and well behaved. Indeed, the parties agreed that neither Mother's nor D.J.'s mental problems have had any serious impact on A.L.A.

Mother has been unemployed since May or June 2009 and is a licensed hairstylist. Father works at a repossession company, which he has owned since 2009. D.J. is 100% disabled by his PTSD and other health conditions.

At the time of the final hearing, Father was living with his mother and had made arrangements to rent his father's house because his father works out of state. D.J. was living with his parents and building a house. Mother lived in an apartment but intended to move in with D.J. when his house was completed.

At the time of the final hearing, Mother and D.J. were engaged to be remarried. There was no evidence whether she intends to use D.J.'s surname; however, there is also no evidence that she has ever used his surname without it hyphenated with her own.

Moreover, A.A., who was born while Mother and D.J. were married, bears Mother's surname.

On October 28, 2010, the trial court entered an order containing extensive findings of facts. The trial court acknowledged that this was "an extremely close case." Appellant's App. p. 10. The trial court also noted that although evidence was presented that the child was doing well at the moment, this did not "outweigh the matters that give the court significant long term concerns regarding Mother and the factors as they apply to her." Id. The trial court concluded that it was in the best interests of A.L.A. that he be placed in Father's custody and "that mother should have extremely liberal contact with the child." Id. Mother was also ordered to pay $23 per week in child support. The order did not address A.L.A.'s surname, which had been changed to Father's surname following the August 27 hearing.

Mother filed a notice of appeal on November 26, 2010, and on December 31, 2010, Mother filed a verified motion to stay and remand to permit the trial court to clarify whether its original order, changing A.L.A.'s surname, remained in effect. On January 21, 2011, this Court granted the motion and on January 27, 2011, the trial court issued an order of clarification, stating that it had left its original ruling on the child's surname in place pending the final hearing and had then determined that the child's surname should be as ordered following the August 27 hearing. Furthermore, the trial court added the explicit finding that it was in the child's best interests to have Father's surname.

On March 3, 2011, Mother filed a motion to lift the stay and set due date. This Court lifted the stay, and this appeal proceeded on March 10, 2011.

DISCUSSION AND DECISION[1]

I. Custody

A. Standard of Review

Mother argues that the trial court erred by granting custody of A.L.A. to Father. As a general matter, a trial court's custody decision is reviewed for an abuse of discretion. Russell v. Russell, 682 N.E.2d 513, 515 (Ind. 1997).

Here, the trial court issued extensive findings of fact, sua sponte. When a trial court makes findings of fact, this Court will not set the findings and judgment aside unless they are clearly erroneous. Piles v. Gosman, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. Id. If there are issues that the findings do not cover, this Court applies a general judgment standard to those issues, affirming on any legal theory supported by the evidence. Id. We will not reweigh the

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[1] As an initial matter, Mother has filed a Motion to Strike the Appellee's Appendix. This motion is granted in part. Specifically, we grant the motion as to items one, two, four, six, seven, and eight. Items one and two were neither offered into evidence nor did the trial court take judicial notice of them. Nevertheless, we note that these items were discussed in the transcript to some degree. Items four, six, seven, and eight are merely duplicative of those contained in the Appellant's Appendix. We deny the motion as to items three and five. Item three is the DNA results, which showed that Father is A.L.A.'s biological father. Item five is a Chronological Case Summary of a criminal case against D.J., which the trial court took judicial notice of during the August 27, 2009, hearing. Indiana Evidence Rule 201(b) permits a court to take judicial notice of the court records of this State. Although the trial court later concluded that Mother did not receive notice of the August 27 hearing, she could have requested to be heard on the issue after the hearing and failed to do so. See In re Paternity of P.R., 940 N.E.2d 346, 350 (Ind. Ct. App. 2010) (holding that the trial court did not err by taking judicial notice of a protective order after a hearing had concluded because the mother could have requested an opportunity to be heard after judicial notice was taken).

evidence or determine the credibility of witnesses and will consider only the evidence most favorable to the judgment, with all reasonable inferences drawn in favor of the judgment. Hughes v. Rogusta, 830 N.E.2d 898, 902 (Ind. Ct. App. 2005).

Indiana Code section 31-14-13-2 governs the determination of child custody, following the determination of paternity, stating:

> 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.

In this case, the trial court's findings addressed every factor and they either "slightly" or "somewhat" favored Mother or were neutral, except for factors 4(C) and 6. Appellant's App. p. 8-10. Mother contends that the trial court abused its discretion by weighing these factors strongly in favor of Father.

B. Factor 4(C): The Interaction and Interrelationship of A.L.A. with D.J.

Mother argues that the trial court abused its discretion when it determined that:

> [D.J.] has significant mental health issues, and, given that and some physical issues, is 100% disabled. [D.J.] has behavioral problems and is debilitated by PTSD. He is being treated with several medications and the court is not convinced that they are consistently successful in treating his symptoms. This boomerang relationship appears to be unstable and inconsistent. The child's exposure has resulted in confusion of the child as to his "father" and is allowed to refer to [D.J.] as "Daddy." This relationship is a source of significant concern to the court.

Id. at 8-9.

Initially, we note that the parties do not dispute that D.J. spends a lot of time at Mother's apartment. Accordingly, the trial court did not err in analyzing the interrelationship between D.J. and A.L.A. in assessing the child's best interests.

As for the relevant evidence pertaining to this factor, Mother stated that she is aware of seven medications that D.J. has been prescribed to treat his substantial mental and physical conditions, including PTSD, diabetes, and brain trauma. Tr. p. 78-79. Indeed, D.J.'s ailments are so debilitating that he is considered 100% disabled. Id. Father testified that Mother has told him of several instances when D.J. has suddenly lost consciousness. Id. at 161-62.

Additionally, there was evidence that Mother's and D.J.'s relationship was turbulent. Specifically, Father testified that Mother had told him that D.J. had shut off her phone. Id. at 142. Mother told Father this to explain why he had not been able to contact her regarding visitation exchanges. Mother also told Father that D.J. had tried to break into her apartment and had failed to take A.A. to school one day. Id. at 142-43.

Moreover, the record indicates that Mother and D.J. have separated and reunited numerous times. At the time of the final hearing, Mother and D.J. were engaged to be married. Under these facts and circumstances, we cannot say the trial court abused its discretion in finding that this factor weighed "strongly" in favor of Father. Appellant's App. p. 9.

C. Factor 6: Mental and Physical Health of All Individuals

Mother maintains that the trial court abused its discretion when it found that:

> Neither party has significant physical health issues, but the mother has a history of moderate mental health issues that appear to be longstanding and have a minor but consistent negative impact on her functioning. Mother is medicated for these issues and appears to generally be addressing these issues satisfactorily at this time, but concerns remain. Father is without concerns as to mental or physical issues at this time, having some past minor substance abuse history. The child has not been identified as having any concerns at this time. [D.J.'s] issues are significant as discussed and evaluated as per above. No significant issues exist as to any other extended family relationships. This factor weighs greatly in favor of the father.

Appellant's App. p. 9-10.

In this case, Mother testified that she has been treated for depression "[o]n and off since [she] was seventeen," or for the past ten years. Tr. p. 91. More recently, Mother had been prescribed medication to treat her ADD. Similarly, Father testified that while

Mother was living with him, she was "always up and down" and "doesn't stay focused very good on what needs to be done." Id. at 149. And as discussed above, D.J. has substantial mental and physical health issues. In light of this evidence, this argument fails.

D. Other Factors Weighted Improperly

Mother argues that the trial court abused its discretion by not giving appropriate weight to certain factors. More particularly, Mother contends the trial court erred by weighing factors 4(B) and 7 only "slightly" in her favor. Appellant's App. p. 8, 10.

In analyzing A.L.A.'s relationship with his one-half siblings, the trial court observed that Father is the noncustodial parent of a thirteen-year-old son, but has a "free and open pattern of contact with the child." Id. at 8. The trial court noted that A.LA. has had significant contact with his half brother and that a "strong and appropriate bond exists." Id. The trial court also observed that Mother has custody of A.A. and that she is much closer in age; the trial court stated that a "strong and appropriate bond is apparent." Id.

At the final hearing, Father testified that when Mother, A.L.A, and A.A. moved in with him in June 2008, his older son was also staying with him. Tr. p. 128. Father stated that his older son is with him "ninety-five percent of the time" that A.L.A. is with him and that they have a good time when they are together. Id. at 151. Likewise, Father testified that his older son "is available to be with me any time I want." Id. at 171. In light of Father's frequent contact with his older son and our deferential

standard of review, we cannot say that the trial court erred when it weighed this factor only slightly in favor of Mother.

Mother also maintains that the trial court abused its discretion when it found that

> The Court finds that there is no "pattern" of violence in either home. Much has been made of the battery case flowing from the parties break up, but under the Court's understanding of current domestic violence analysis this appears to be an incident of Situational Couple Violence or more likely Separation Instigated Violence rather than the Coercive Controlling Violence which would give the court great concern. Under this analysis this factor only slightly favors the mother.

Appellant's App. p. 10.

Mother points out that the trial court failed to consider that she had shown sufficient evidence to justify an ex parte order of protection in October 2009.[2] Initially, we note that the purpose of the Civil Protection Order Act (CPOA) is to promote the protection of domestic violence victims in a prompt and effective manner. Ind. Code § 34-26-5-1. To that end, a trial court may grant an ex parte order of protection "without notice and hearing" if it appears from the petition that domestic violence has occurred. I.C. § 34-26-5-9. Accordingly, Father had not been given the opportunity to be heard, and we cannot say the trial court erred by not considering the fact that Mother had been granted an ex parte order of protection against Father.

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[2] Mother indicates that she obtained two ex parte orders of protection against Father. The first was obtained in Monroe County on October 13, 2009, and the second in Morgan County on October 16, 2009. Our review of the record indicates that the second was an amended ex parte order of protection issued "to reflect that the [first] order is not in any way to be construed to interfere with the orders of custody and visitation as maybe issued in this case." Tr. p. 57.

Mother also contends that the trial court erred by relying on categories of domestic violence and concluding that the battery that Father perpetrated on her fell into a less severe category. Mother points out that an expert did not testify as to various categories of domestic violence and their corresponding severity.

Regardless of the labels used by the trial court, it is clear from the order that the trial court believed that the battery was an isolated incident rather than a pattern of controlling abuse that would have a negative impact on A.L.A. In light of this fact and Mother's battery against D.J., we cannot say that the trial court erred when it weighed this factor slightly in favor of Mother.

E. Custody Conclusion

As stated above, the trial court addressed each statutory factor in its findings of fact and determined that all but two either "slightly" or "somewhat" favored Mother or were neutral. Appellant's App. p. 8-10. The two factors that favored Father, namely the interrelationship between D.J. and A.L.A. and the mental and physical health of all of the parties were weighted "strongly" and "greatly" in his favor. Id. at 9-10. In light of the evidence presented to the trial court, we cannot say these findings were clearly erroneous.

Moreover, while both Mother and Father exhibited poor judgment at times, "the trial court was far better situated than this court to perform the necessary personal and interpersonal evaluations, and weigh the competing considerations." Sabo v. Sabo, 858 N.E.2d 1064, 1071 (Ind. Ct. App. 2006). And after reviewing the evidence, the trial court concluded that it was in A.L.A.'s best interests for Father to have custody of him. When viewing the totality of the circumstances, we cannot say that this conclusion is clearly

erroneous or against the logic and effect of the facts and circumstances before the trial court.

II. Surname

Mother contends that the trial court abused its discretion by changing A.L.A.'s surname. Indiana Code section 34-28-2-4(d) provides that "[i]n deciding on a petition to change the name of a minor child, the court shall be guided by the best interest of the child rule under IC 31-17-2-8." The statute also provides that there is presumption in favor of the parent who has been making support payments and fulfilling duties pursuant to a decree and objects to the proposed name change. Ind. Code § 34-28-2-4(d).

Here, Mother objected to the proposed name change and has cared for A.L.A. Nevertheless, she has neither made payments nor fulfilled duties pursuant to a decree because there was no decree under the applicable statute until the one that is appealed in the instant case. See Appellant's App. p. 12 (stating that the trial court had returned custody of child to Mother on October 16, 2009, "[a]s a remedial order" after concluding that Mother "did not receive actual notice of the [August 27] hearing"). Consequently, there is no presumption in her favor.

Because there is no statutory presumption in favor of either parent, the trial court's guide was the best interests standard. In its order of clarification, the trial court stated:

> The Court determined the name change should remain as originally ordered, largely in light of father being awarded custody. The Court did not receive persuasive or convincing evidence that the child's name should be that of the mother. Mother's testimony regarding her relationship with [D.J.] left the Court with the impression she would likely have his last name in the future. This would then result in the child having a different name from both parents. . . . Upon remand the Court additionally and

> explicitly finds that it is in the child's best interests to have the last name of the custodial father, as has already been effectuated.

Appellant's App. p. 12-13.

Mother contends that the trial court improperly placed the burden of persuasion on her. More particularly, Mother argues that the trial court relied on pure speculation when it surmised that she would abandoned her own name and use D.J.'s surname. Mother highlights the fact that when she and D.J. were married, she used a hyphenated form of her surname and his surname and that their daughter bears her surname.

Inasmuch as trial court granted custody of A.LA. to Father and we have affirmed that decision, we cannot say that the trial court erred by determining that it was in the child's best interests to have Father's surname. Additionally, even assuming solely for argument's sake that Mother chooses to hyphenate her name upon remarriage, A.L.A. would still be left with a different surname than both of his parents. Consequently, this argument fails, and we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

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