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IN THE
COURT OF APPEALS OF INDIANA

M.J.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 40A05-0812-CV-727
	)	
J.J.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE JENNINGS SUPERIOR COURT
The Honorable James Funke, Jr., Judge
Cause No. 40D01-0504-DR-072

July 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

M.J. ("Mother") appeals the trial court's grant of a petition for modification of child custody filed by J.J. ("Father") regarding their daughter, A.J, and the trial court's grant of Father's request to be named de facto custodian of Mother's son, L.L., whom she had with another man. Mother raises two issues, which we revise and restate as whether the trial court abused its discretion by granting Father's petitions to modify custody of L.L. and A.J. We affirm in part and reverse and remand in part.

The relevant facts follow. Mother had a son, L.L. L.L.'s biological father is not identified in the record and never exercised parenting time with L.L. Father began to be involved in L.L.'s life when L.L. was four months old. In March 2001, Mother and Father were married. While Mother and Father were married, L.L. lived with them full time. Father never adopted L.L., but developed a strong bond with L.L. during the course of the marriage. Mother and Father had one child, A.J., born on January 2, 2003.

Mother and Father divorced in March 2006. The agreed decree of dissolution of marriage provided that Mother and Father would share joint physical custody of A.J., but did not address L.L. After the divorce, Father spent "roughly three (3) days, three and half (3 ½) days each week" with L.L. Transcript at 25. L.L. would usually stay with Father on a Friday and until Sunday or Monday.

In July 2007, the police investigated an active methamphetamine lab at the residence of Mother and Shawn Burton. The police discovered two active methamphetamine labs in the house. Fred Overlock, a child abuse investigator for the

State of Indiana, immediately removed A.J. and L.L. from the house due to the fumes. Mother admitted that she was under the influence of and addicted to methamphetamine.

A.J. was placed into Father's custody, and L.L. was placed with his maternal grandmother. Father continued to have contact with L.L. of roughly three days per week. Father and L.L.'s maternal grandmother worked out a plan "to make sure" the children could stay together. Id. at 45.

In September 2008, Mother pled guilty to maintaining a common nuisance as a class D felony and was sentenced to eighteen months of probation. Burton was convicted of manufacturing methamphetamine.

Mother went to meetings and stated that she had been clean for fifteen months, but still visits Burton in the Jennings County Jail. Mother moved her residence from North Vernon, Jennings County, to Vallonia, Indiana, where she lives with her parents, her two sisters, and her brother. Mother works about twenty hours a week at a recovery agency as a secretary in Columbus.

On April 1, 2008, Father filed a verified petition for modification of child custody / child support and requested to be named de facto custodian of L.L.[1] After a hearing, the trial court entered the following order:

ORDER ON MODIFYING CUSTODY

[1] Mother does not include a copy of Father's petitions in her appendix. We remind Mother that Ind. Appellate Rule 50(A)(2) requires the appellant to include in her appendix the "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal . . . ."

Comes now the Court and after hearing held on October 3, 2008 finds the evidence show [sic] that there as [sic] a substantial change in circumstances and it is in the best interest of [A.J.] that custody be given to [Father].

1. Child support shall begin October 17, 2008 and shall be calculated by attorney, Brad Johnson based upon his salary ($27,000.00) annually and her salary (minimum wage) with no child care.
2. [Mother] shall have visitation per the Indiana Parenting Guidelines and extra visitation when [Father] is working nights.
3. [Father] shall maintain the medical insurance on the children.
4. [Father] shall pay the 1st _____ of uninsured medical.

ORDER ON DE FACTO CUSTODIAN

This was an extremely difficult decision to make for the following reasons:

1. [L.L.] is not mentioned in the divorce decree.
2. [Mother] allowed [Father] to have visitation with [L.L.] every time he had visitation with their daughter, [A.J.] [See: IC.31-17-2-8.5(b)(4)].[2]
3. After the methamphetamine arrest on July 5, 2007, the division of child services placed [L.L.] with his grandmother and [A.J.] with [Father]. However, the grandmother also gave [Father] liberal visitation with [L.L.].
4. The parties both agree that the children should stay together.

This Court finds that [Father] does not meet the requirements as a De facto Custodian, but since the parties want the children to stay together, and this Court gives custody of [A.J.] to Mr. Jones, the Court grants [Father]'s petition to become De facto Custodian of [L.L.].

Appellant's Appendix at iii.

The sole issue is whether the trial court abused its discretion by granting Father's petitions to modify custody of L.L. and A.J. We review custody modifications for an

[2] Bracketed text appears in original.

abuse of discretion and have a "preference for granting latitude and deference to our trial judges in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). "We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." Id. The Indiana Supreme Court explained the reason for this deference in Kirk:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). Therefore, "[o]n 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 may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

The child custody modification statute provides that "[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8] . . . ." Ind. Code § 31-17-2-21. Ind. Code § 31-17-2-8 lists the following factors:

(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.[3]

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[3] Ind. Code § 31-17-2-8.5 provides:

(a) This section applies only if the court finds by clear and convincing evidence that the child has been cared for by a de facto custodian.

(b) In addition to the factors listed in section 8 of this chapter, the court shall consider the following factors in determining custody:

(1) The wishes of the child's de facto custodian.
(2) The extent to which the child has been cared for, nurtured, and supported

A. A.J.

Mother argues that Father "failed to prove a substantial change in any of the factors that the Court can consider in determining whether a change of custody is appropriate" as to A.J. Appellant's Brief at 20. Mother also argues that "[t]here was no evidence that the children's physical, mental or emotional well-being was negatively impacted in any way by any of [her] actions." Id. Father argues that numerous substantial changes occurred since the parties' divorce in March 2006.

The record reveals that the police discovered two active methamphetamine labs in the house shared by Mother, Burton, A.J., and L.L. in July 2007. A child abuse investigator for the State of Indiana immediately removed A.J. and L.L. from the house due to the fumes. Mother admitted that she was under the influence of and addicted to

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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 now seeking custody to:

(A) seek employment;
(B) work; or
(C) attend school.

(c) If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding.

(d) 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.

(e) If the court awards custody of the child to the child's de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law.

methamphetamine. In September 2008, Mother pled guilty to maintaining a common nuisance as a class D felony and was sentenced to eighteen months of probation. Burton was taken into custody and later convicted of manufacturing methamphetamine. Mother testified that she still loves Burton and visits him in the Jennings County Jail. Mother moved her residence from North Vernon in Jennings County "all the way down to" Vallonia, Indiana. Transcript at 29. Father does not smoke, and Mother smokes cigarettes in the house "where the kids are." Id. at 82. While Mother testified that she had "been clean" for fifteen months at the time of the hearing, the trial court was in the best position to judge the credibility of Mother's testimony. Id. at 92.

Based upon the record, we conclude that there is sufficient evidence to establish that modification of custody is in the best interests of A.J. and that a substantial change has taken place in the interaction and interrelationship of A.J. with A.J.'s parent or parents, A.J.'s adjustment to her home and community, and the health of all of the individuals involved. See Rea v. Shroyer, 797 N.E.2d 1178, 1184 (Ind. Ct. App. 2003) (holding that the trial court did not abuse its discretion when it modified custody); Barnett v. Barnett, 447 N.E.2d 1172, 1175 (Ind. Ct. App. 1983) (holding that instability of mother's life, considered with other factors, warranted modification of custody).

B. L.L.

Mother argues that the trial court failed to make specific findings to support its decision to change custody of L.L. The Indiana Supreme Court's decisions in In re K.I., 903 N.E.2d 453 (Ind. 2009), In re Huss, 888 N.E.2d 1238 (Ind. 2008), and In re B.H., 770

N.E.2d 283 (Ind. 2002), reh'g denied, provide a framework for trial courts to apply when considering a custody dispute between a natural parent and a third party.

When considering a request for child custody by a third party, a trial court must consider "the important and strong presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent." In re Huss, 888 N.E.2d 1238, 1245 (Ind. 2008) (quoting B.H., 770 N.E.2d at 287). "Not only does this presumption provide a measure of protection for the rights of the natural parent, but 'more importantly, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests.'" Id. (quoting B.H., 770 N.E.2d at 287). The Court held:

> [B]efore placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." [Hendrickson v. Binkley, 161 Ind. App. 388, 396, 316 N.E.2d 376, 381 (1974), cert. denied, 423 U.S. 868, 96 S. Ct. 131 (1975).] In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person.

K.I., 903 N.E.2d at 458 (emphasis supplied) (quoting B.H., 770 N.E.2d at 287). The Court in B.H. also held that "[a] generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required." B.H., 770 N.E.2d at 287. Thus, the Indiana Supreme Court "has explicitly mandated trial courts to issue detailed and specific findings when a child is placed in the care and custody of a person other than a natural parent." In re A.R.S., 816 N.E.2d 1160, 1162 (Ind. Ct. App. 2004).

Here, the trial court did not make specific and detailed findings. We therefore reverse and remand this case to the trial court with instructions to issue detailed and specific findings as required by B.H.[4] See In re A.R.S., 816 N.E.2d at 1163 (reversing the trial court's denial of mother's petition to terminate guardianship of her two children and remanding because the trial court did not issue detailed and specific findings).

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[4] Mother also appears to argue that de facto custodian status is a necessary prerequisite to the custody award of L.L. to Father. The Indiana Supreme Court has noted:

> [T]here is an unresolved issue regarding whether "de facto custodian" status is a necessary prerequisite in a dissolution proceeding to a spouse receiving custody of a child for whom the spouse is not the biological parent. Several non-dissolution cases have held that a party who is not a natural parent need not allege or claim status as a de facto custodian in order to pursue custody. Allen v. Proksch, 832 N.E.2d 1080 (Ind. Ct. App. 2005) trans. not sought; In re the Custody of G.J., 796 N.E.2d 756, 761 (Ind. Ct. App. 2003), trans. denied; see also Nunn v. Nunn, 791 N.E.2d 779, 784-85 (Ind. Ct. App. 2003) trans. not sought. In dicta, however, the Court of Appeals in Custody of G.J. suggested that in a dissolution proceeding, the award custody [sic] of a child to a non-biological parent may be restricted only to a person who qualifies as a de facto custodian. Custody of G.J., 796 N.E.2d at 762. This conclusion is not expressly stated in the language of the de facto custody statutes, which define the term "de facto" and designate additional factors to be considered when considering a claim for custody by a de facto custodian.

In re Marriage of Huss, 888 N.E.2d 1238, 1248 n.3 (Ind. 2008).

For the foregoing reasons, we affirm the trial court's grant of Father's petition to modify the custody of A.J. and reverse the trial court's grant of Father's petition regarding L.L. and remand this case to the trial court to issue specific and detailed findings as to L.L.

Affirmed in part; reversed and remanded in part.

CRONE, J., and BRADFORD, J., concur.