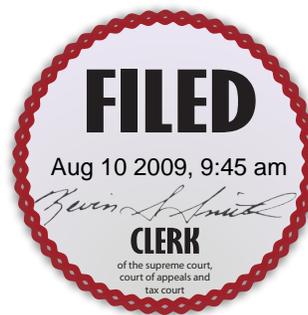


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEY FOR APPELLEE:

JASON A. CHILDERS
ANGELA WARNER SIMS
Hulse Lacey Hardacre Austin
Sims & Childers, P.C.
Anderson, Indiana

DAVID W. STONE IV
Stone Law Office & Legal Research
Anderson, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SHANNON HARSHMAN,
Appellant-Respondent,

vs.

RANDY HARSHMAN,
Appellee-Petitioner.

)
)
)
)
) No. 48A05-0904-CV-235
)
)
)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable George Pancol, Senior Judge
Cause No. 48D02-0708-DR-785

August 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Shannon Harshman (“Mother”) appeals the dissolution order that awarded her former spouse, Randy Harshman (“Father”), physical custody of the parties’ two children. Finding the custody determination was not clearly erroneous, we affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father were married in 1996 and had two children, Ma.H., born in January 2000, and My.H., born in July 2004 (“the children”). Father filed for dissolution in August 2007. The trial court held dissolution hearings on August 26, 2008 and October 14, 2008. During these hearings, evidence was presented showing that Mother is employed at the Community Justice Center (“CJC”) where she is the supervisor of the case management department. She works with convicted felons who are on probation to help them establish themselves in the community and participate in relevant educational or mental health programs. The CJC has a policy that employees are prohibited from having personal relationships with a client until one year after the client has left the program.

One of Mother’s female co-workers from the CJC, Courtney Stuart, testified that in January 2006, she and Mother had a sexual encounter at Mother’s house while the children were in the house. Stuart indicated that after she found out that she had been subpoenaed to testify in the dissolution hearing, Mother had encouraged her to deny that they had had a sexual encounter. Stuart testified that Mother also had a sexual relationship with a male CJC client, who had been convicted of burglary and drug-related offenses, and had sex with him in the CJC offices. She also stated that Mother had

prematurely discharged this male client from the CJC program despite the fact that he had not successfully completed the program because Mother did not want him to tell anyone about their relationship. Stuart testified Mother had a sexual relationship with a female CJC client, Shantel Wills,¹ who also had drug-related convictions including dealing in cocaine and who had violated probation by possessing marijuana and testing positive for cocaine and marijuana.² Additionally, Mother testified that, at the time of the hearing, she was in a relationship with Shantel, who was unemployed, was still married, and had three children, and that she and Shantel were planning on getting a house together.

The trial court conducted in-camera interviews with the children, who were then eight years old and four years old. The dissolution decree included the following relevant findings:

3. Two children were born during [Mother and Father's] marriage. [Ma.H.] was born on January 18, 2000; and [My.H.] was born on July 7, 2004. [Ma.H.] is in the third grade attending elementary school

4. Father has continued to reside at the marital residence after Mother left the marital residence. Father has built a playhouse for his daughters at the marital residence; has paid all bills in reference to the marital residence; and has kept it well maintained. [The children] recognize the marital residence as their home.

¹ The parties and the trial court refer to Shantel Wills as "Shantel," but some of the exhibits refer to her as "Shantelle."

² The evidence shows that Mother, who had been Shantel's supervisor at the CJC when she was on probation, began her relationship with Shantel less than one year after Shantel had completed the CJC program.

* * * * *

7. Mother began having extra[-]marital affairs in 2006. She is currently having an affair with Shantel Wills. Shantel Wills has been convicted for numerous drug related offenses; and Mother has been her supervisor through CJC. Mother admitted they are currently having a homosexual relationship.

(Appellant's App. at 6-7.)³ The trial court awarded joint legal custody of the children to Mother and Father with physical custody to Father.

DISCUSSION AND DECISION

Mother's sole argument on appeal is that the trial court erred by awarding Father physical custody of the children.

An initial child custody order is determined "in accordance with the best interests of the child." *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008) (quoting Ind. Code § 31-17-2-8). When making such a best interest determination, there is no presumption

³ Mother's Appellant's Appendix was filed as a "Confidential Appendix of the Appellant," and all the materials contained therein were filed on green paper. The filing of material on green paper stems from the requirement that information deemed confidential under Indiana Administrative Rule 9(G)(1) must be filed in accordance with the special procedures for filing confidential information that are set out in Trial Rule 5(G) and Appellate Rule 9(J). None of the materials in Mother's "Confidential" Appendix (chronological case summary, the trial court's dissolution order, a notice of appeal, Notice of Completion of Clerk's Record, Notice of Completion of Transcript, copies of pages from the Transcript, and an exhibit) appear to contain information deemed confidential under Indiana Administrative Rule 9(G)(1). Simultaneously with this opinion, we are issuing an order for Mother to either: (1) show cause why all the materials in her "Confidential Appendix of the Appellant" are deemed confidential under Administrative Rule 9, a statute, or an order and filed on green paper; or (2) if the Appendix should have been filed on white paper and should be publicly accessible, file an appropriate Appendix pursuant to Indiana Appellate Rule 50.

We are also issuing an order to the trial court reporter to file an Amended Exhibit Volume in a manner that complies with the filing requirements found in Indiana Trial Rule 5(G) and Indiana Appellate Rule 9(J) because the Exhibit Volume filed in this appeal contains materials that should be excluded from public access pursuant to Administrative Rule 9(G), including, but not limited to, Social Security numbers.

favoring either parent. The trial court is to consider all relevant factors, including the age and sex of the children; the wishes of the parents; the wishes of the children; the interaction and interrelationship of the children with the parents, siblings and other people who may significantly affect the children's best interests; the children's adjustment to home, school, and community; the mental and physical health of all individuals involved; evidence of domestic abuse; and evidence of care by a *de facto* custodian. See Ind. Code § 31-17-2-8. These statutory factors, however, are nonexclusive, and a trial court may consider other relevant factors when making a best interest determination. See *Baxendale*, 878 N.E.2d at 1254; see also *D. H. v. J. H.*, 418 N.E.2d 286, 291 (Ind. Ct. App. 1981) (explaining that “marital misconduct, including adultery, is a pertinent although not controlling factor in determining which of the parents should be awarded custody of the children”).

When awarding physical custody of the children to Father, the trial court entered findings *sua sponte*. We have set forth our standard of review in such cases as follows:

We initially observe that, in custody disputes, the trial court is often called upon to make Solomon-like decisions in complex and sensitive matters. As the trial court is in a position to see the parties, observe their conduct and demeanor, and hear their testimony, its decision receives considerable deference in an appellate court. On review, we cannot reweigh the evidence, adjudge the credibility of the witnesses, or substitute our judgment for that of the trial court. 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.

Here, the trial court *sua sponte* entered findings of fact and conclusions of law. In reviewing the judgment, we must determine whether

the evidence supports the findings and whether the findings support the judgment. The judgment will be reversed only when clearly erroneous. 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.

Speaker v. Speaker, 759 N.E.2d 1174, 1179 (Ind. Ct. App. 2001) (citations and internal quotation marks omitted).

Mother contends the trial court's physical custody determination was erroneous because it was based solely on the fact that she was having a homosexual relationship and without any finding that the children's welfare had been adversely affected by such a relationship. In support of her contention, Mother cites to *Teegarden v. Teegarden*, 642 N.E.2d 1007 (Ind. Ct. App. 1994).

In *Teegarden*, we held that "homosexuality *standing alone* without evidence of any adverse effect upon the welfare of the children does not render the homosexual parent unfit as a matter of law to have custody of the child." *Id.* at 1010 (emphasis added). In that case, the trial court granted a homosexual mother custody of her children but conditioned her custody on the mother's compliance with certain restrictions relating to her homosexual behavior. *Id.* at 1008. We held that, without evidence mother's behavior had an adverse effect upon the children, there was no basis on which to impose conditions on the award of custody to Mother and reversed the portion of the trial court's custody order that imposed such conditions. *Id.* at 1010.

Unlike *Teegarden*, here, the trial court did not base its custody determination solely on Mother's homosexuality. Indeed, the trial court's order refers not only to

Mother's homosexuality but also to her infidelity and questionable judgment by interacting with individuals who may affect the children's best interests, and there was evidence that would support the award of custody to Father regardless of any evidence of Mother's homosexuality.

The evidence from the dissolution hearings reveals that Mother began having extramarital affairs in 2006, including relationships with individuals who had been convicted of drug-related offenses. Mother was planning on getting a house with her current girlfriend, Shantel, who Mother had supervised when she was on probation from cocaine-related convictions and who was unemployed, was still married, and had three children. Various witnesses testified that Father was devoted to his children, played with them, and had made them his priority.

Holly Harshman, who is Father's sister-in-law and was Mother's confidante, testified that since the parties filed for dissolution, she observed that Father was devoted to the children and was playful with them while Mother seemed more interested in her own personal life, which caused her relationship with the children to suffer. Holly, who babysat for the children, testified that the children generally had a better attitude and seemed happier and more playful after they had been with Father and that they seemed somewhat grouchy and less talkative after spending time with Mother. Erica Privett, who had known Father and Mother since high school, testified that, prior to their separation, Father was the one who seemed to take greater responsibility of taking care of the children.

The trial judge was in a position to see Mother and Father, to observe their conduct and demeanor, and to hear them testify, and it had the opportunity to interview the children. Mother's argument amounts to a request to reweigh the evidence and credibility of the witnesses, which we will not do. *See Speaker*, 759 N.E.2d at 1179. We cannot say the trial court's physical custody determination was clearly erroneous, and we affirm the award of physical custody to Father. *See e.g., D.H.*, 418 N.E.2d at 293, 296 (explaining trial court's award of custody to the father could not be based solely on mother's homosexuality while affirming custody award because it was supported by other evidence relating to the children's best interests regardless of mother's homosexuality).⁴

Affirmed.

BAKER, C.J., and BARNES, J., concur.

⁴ To the extent Mother argues the trial court should have entered a specific finding regarding the best interest of the Children, her argument fails because she did not request specific findings of fact. *See Russell v. Russell*, 682 N.E.2d 513, 515 (Ind. 1997) ("Although a court is required to consider all relevant factors in making its determination, it is not required to make specific findings."); *Hegerfeld v. Hegerfeld*, 555 N.E.2d 853, 856 (Ind. Ct. App. 1990) ("The statute does not require the trial court to make specific findings unless specific findings are requested pursuant to Trial Rule 52(A).") (discussing predecessor statute, I.C. § 31-1-11.5-21(a)).