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IN THE
COURT OF APPEALS OF INDIANA

CONSTANCE V. SPENCE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 82A01-0906-CV-301
	)	
MICHAEL J. SPENCE,	)	
	)	
Appellee-Petitioner.	)	
	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
The Honorable Terrell R. Maurer, Magistrate
Cause No. 82D04-0704-DR-292

November 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Constance V. Spence ("Mother") appeals the part of the trial court's final decree of dissolution awarding sole custody of the parties' son, G.S., to Michael J. Spence ("Father"). Specifically, Mother contends that Father presented insufficient evidence concerning the factors delineated in Indiana Code section 31-17-2-8. We agree. But because the trial court did not find Mother's evidence credible on these factors, we reverse as to custody and remand with instructions.

Facts and Procedural History

Father and Mother married in 1988. They had one child, G.S., who was born in 1996. Father, represented by counsel, filed a petition for dissolution of marriage in April 2007. Father also filed a motion for a provisional order concerning, among other things, custody and parenting time of G.S. On May 1, 2007, Father filed a notice of intent to relocate, which provided that he had accepted employment in New Mexico, which is Mother's and Father's home state and where both had relatives, and that relocation was in the best interests of G.S. Mother, represented by counsel, filed a motion for an order to not remove G.S. from Indiana.

Three provisional hearings were held on May 16, 21, and 23, 2007. The parties were represented by counsel at these hearings. Following these hearings, the trial court entered the following provisional order on May 23:

> 1. The Court finds that one (1) child was born of the marriage, [G.S.], age 10.
>
> 2. The Court further finds that it's in the best interest of the child for the Husband to be the primary physical custodian of the child during the pendency of this action, and is allowed to move to New Mexico.

* * * * *

> 3. The Court further finds the Wife may endanger the child's emotional and mental health based upon the above mentioned findings. Wife may have parenting time with the child for two (2) weeks this summer supervised by Martin Vigil. Parties are ordered to arrange said supervised parenting time with Martin Vi[]gil.
>
> 4. Wife may also communicate with child by telephone daily as arranged by the parties. Parties are ordered to make no disparaging comments about the other parent to the child.
>
> 5. Husband shall immediately place the child into therapy with an appropriate counselor in the Las Cruces, New Mexico area while this matter is pending.

Appellant's App. p. 46-48 (specific findings omitted). Mother filed a motion to reconsider, and the court entered another order on June 29 which clarified its May 23 provisional order. *Id.* at 56-57.

Thereafter, the parties' attorneys withdrew their appearances, and the parties proceeded *pro se*. Mother filed numerous motions, including motions for contempt against Father. On one occasion, the trial court found Father in contempt and sentenced him to thirty days in jail but suspended the sentence and ordered him to comply with the provisional order. *Id.* at 21. In addition, Father asked for several continuances of the final hearing, and the final hearing was scheduled for May 2008. On October 30, 2007, the trial judge, the Honorable Mary Margaret Lloyd, recused herself, and the case was assigned to the magistrate's calendar, keeping the same final hearing date in May 2008.

About one week before the final hearing, a new attorney entered an appearance on behalf of Mother. The final hearing was held before the magistrate on May 12, 2008. Father represented himself at the hearing, and Mother was represented by her new

attorney. Father's evidence consisted mainly of two emails Mother had authored, one to Father (Exhibit 2) and the other to Dr. Martin Greer, G.S.'s counselor in New Mexico (Exhibit 5). Because Dr. Greer was not present for the hearing, the magistrate ruled that Dr. Greer's report concerning G.S. was not admissible. Father briefly testified that he felt Dr. Greer was helping G.S., while Mother wanted Dr. Greer off the case and threatened to file a professional misconduct complaint against him. Eventually, Dr. Greer withdrew as G.S.'s counselor.

The bulk of the evidence came from Mother. She testified that it took a long time for G.S. to find friends in New Mexico and that he missed his friends in Indiana and wanted to return to Indiana. Mother testified that G.S., who was eleven years old at the time of the hearing, had expressed a desire to live with her. Mother also testified about her parenting ability and that Father had battered her in front of G.S. Finally, Mother presented testimony from three witnesses concerning her parenting ability.

Father then cross-examined Mother, at which point it emerged that G.S. was earning As and Bs in New Mexico and that Mother had contacted Father's employer about his thirty-day jail sentence.

On May 20, 2008, the trial court entered the final decree of dissolution.[1] The portions relevant to child custody and parenting time follow:

> 6. The Court recognizes that the decisions which follow regarding . . . the custody, support and parenting time of the parties' minor child are critically

[1] The magistrate made the recommendations in the final decree of dissolution, and the trial court approved and adopted them as the final order of the court. Appellant's App. p. 128. This was proper, as a magistrate can conduct an evidentiary hearing or trial but cannot enter a final order in a matter such as this. *See* Ind. Code §§ 33-23-5-5, -9. The judge who signed off on the final decree of dissolution is the Honorable Robert J. Pigman. Appellant's App. p. 128. Other judges entered orders throughout the pendency of this case.

important to everyone involved. *It is unfortunate, however, that the parties have done so little to create an evidentiary record upon which these decisions can be based.* Throughout the course of this case, the parties have attempted to communicate with the Court through ex parte letters, faxes and telephone calls and through the filing of pro se pleadings requesting relief "without hearing." Despite repeated warnings that [the] Court would make decisions based solely on the evidence introduced at the final hearing, the parties continued to refer to the "evidence" that had previously been submitted to the Court rather than simply presenting their evidence at the final hearing. *The Court has not considered this extrinsic evidence and has confined its consideration to the evidence submitted at the final hearing.*

* * * * *

17. The Court believes that during the course of the marriage, both parties were good parents who were actively involved [in] [G.S.]'s care and participated meaningfully in his education and extra curricular activities. The events surrounding the breakup of the parties' marriage brought changes which led Judge Lloyd [who later recused herself] to conclude, after hearing approximately 8 hours of testimony over several days, that the Husband should have temporary custody of [G.S.]. These events are reflected in Judge Lloyd's findings in her May 23, 2007 provisional orders.

18. The Court finds that the Mother has continued to allow her own interests to supercede the best interests of the child despite Judge Lloyd's clear warning of the consequences of doing [s]o. Specifically, the Court finds:

> A. Judge Lloyd ordered the Father to find a counselor in New Mexico for [G.S.] and provide counseling for him. The Mother's email to the counselor which was introduced as Father's exhibit 5 is manipulative and threatening. The Mother could have encouraged a positive relationship between [G.S.] and his counselor and perhaps even offered to participate in [G.S.]'s counseling, but she was more interested in pursuing her own agenda.
>
> B. Judge Lloyd made it clear that the Mother should not involve the child in her disputes with the Father. The Mother acknowledged sending an email to the Father in December 2007 in which she threatened to go to Judge Tornatta's office with [G.S.] to file an Information for Contempt if the Father did not obtain new health insurance. The Mother indicated in her email that [G.S.] had concerns he wanted to express to the judge about not having

> insurance. It was inappropriate for the Mother to discuss this issue with [G.S.] during her limited parenting time with him, and it was highly inappropriate to threaten to take him to Judge Tornatta when she filed her Information for Contempt so that he could express his concerns. [G.S.] has enough to worry about at 11 years of age as a result of his parents' divorce. He certainly does not need his mother increasing his anxiety by suggesting that he may be denied medical treatment due to his father's failure to provide health insurance.
>
> C. The Mother's email to the Father which was admitted as Father's exhibit 2 is cruel, manipulative and threatening. The Mother's emails and the evidence taken as a whole create the impression that the Mother is so driven to pursue her own interests that she is unable to control herself. She blames the Father, the counselor in New Mexico and the "corrupt and biased" Court for problems she is essentially creating herself. She has demonstrated a pattern of putting [G.S.] in the middle of her disputes with the Father and using him when she thinks she can obtain an advantage regardless of the serious and lasting harm this conduct may cause.

> 19. The Father is not blameless in the ongoing disputes between the parties. He has completely failed to fulfill his financial obligations to the Mother as set forth in Judge Lloyd's May 23, 2007 provisional orders. Likewise, he has made it difficult for the Mother to exercise the parenting time provided by that order. The Court believes that the Father's failure to obey the provisional orders has contributed to the Mother's behavior. The Court cautions the Father that Court orders are to be obeyed until modified.
>
> 20. The Court grants sole legal custody of the Parties' minor child to the Father. The Mother may exercise parenting time with [G.S.] pursuant to the Indiana Parenting Time Guidelines. So long as the Mother resides in Indiana, Section III of the guidelines will apply. If the Mother relocates to a reasonable driving distance to the child's residence in New Mexico, Section II of the guidelines will apply. The Mother's summer 2008 parenting time with [G.S.] will begin the Saturday after school ends at 12:00 noon local time.

Id. at 121-22, 125-27 (emphases added). Mother now appeals.

Discussion and Decision

Mother appeals the trial court's award of sole custody of G.S. to Father.[2] We initially note that Father did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments for him, and we apply a less stringent standard of review with respect to showings of reversible error. *Zoller v. Zoller*, 858 N.E.2d 124, 125 (Ind. Ct. App. 2006). That is, we may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

Child 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), *trans. denied*. This is because the trial court can observe the parties' conduct and demeanor and listen to their testimony. *Pawlik v. Pawlik*, 823 N.E.2d 328, 329 (Ind. Ct. App. 2005), *trans. denied*. The value of such close proximity cannot be overstated in the matter of deciding custody, where courts are "often called up to make Solomon-like decisions in complex and sensitive matters." *Id.* at 329-30 (quotation omitted). As such, we will reverse the trial court only if we conclude that the trial court's decision is against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. *Id.* at 330. When reviewing a

[2] Mother also argues that the court erred in denying her motion for cause to be heard by a judge. Specifically, after the trial court judge recused herself and assigned the case to the magistrate's calendar, Mother filed a motion to have a judge hear the case instead of a magistrate. On appeal, Mother cites Indiana Code section 33-33-49-32, which allows a party to a superior court proceeding that has been assigned to a magistrate request that an elected judge preside over the proceeding instead of the magistrate. However, this chapter applies only to Marion County, and this case was heard in Vanderburgh County. Mother's argument thus fails.

trial court's decision, we will not reweigh the evidence, judge witness credibility, or substitute our judgment for that of the trial court. *Id.*

When making an initial determination of custody, both parents are presumed equally entitled to custody. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 945 (Ind. Ct. App. 2006). In general, an initial custody order is determined in accordance with the best interests of the child. *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008). In making this determination, the trial court shall consider all relevant factors in determining the child's best interests, including a nonexclusive list of factors provided in Indiana Code section 31-17-2-8:

> (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.

On appeal, Mother argues that Father "presented little or no evidence concerning the statutory fact[or]s enumerated by I.C. § 3[1]-17-2-8." Appellant's Br. p. 12. Mother points out that the evidence Father presented at the final hearing focused on G.S.'s counseling in New Mexico and two emails (Exhibits 2 and 5), which do not touch upon

all of the statutory factors. As such, Mother's argument continues, the evidence does not support the trial court's award of sole custody of G.S. to Father.

We partially agree with Mother. Although the trial court made detailed findings when awarding sole custody of G.S. to Father, it did so without making findings on many of the factors delineated in Indiana Code section 31-17-2-8. For example, Father did not present evidence on G.S.'s adjustment to home, school, and community in New Mexico. Although Father, in his opening statement, said that G.S. was doing very well in New Mexico, had adjusted to his new environment, and was enjoying school and making new friends, Tr. p. 14-15, this is not substantive evidence. *See Singh v. Lyday*, 889 N.E.2d 342, 351 (Ind. Ct. App. 2008) ("[O]pening statements are not substantive evidence."), *reh'g denied*, *trans. denied*. Father presented no evidence of G.S. wishes, although Mother did. Father presented no evidence of domestic violence on Mother's part, though Mother presented evidence of domestic violence on Father's part. Likewise, the court made no findings on these statutory factors. Father did admit into evidence two emails written by Mother, which admittedly address Mother's mental health and her interaction with G.S., and the court relied heavily upon these emails in its findings. We note, however, that the court's findings do not actually mention these statutory factors. When taking the trial court's findings as a whole, then, we are not convinced that the court fully considered the factors set forth in Indiana Code section 31-17-2-8 when considering G.S.'s best interests. This is important because Indiana Code section 31-17-2-8 provides that the court "shall" consider the factors.

That being said, we understand the court's frustration concerning the lack of evidence presented at the final hearing, particularly by Father. This illustrates one of the dangers of proceeding *pro se* in a case such as this, and we echo Judge Mathias's warning:

> We encourage parties facing issues involving the custody of children to obtain counsel to aid in the litigation of custody disputes. Because the court's order has such a profound effect on the lives of the parties and their children, we cannot emphasize enough the importance of presenting sufficient evidence and developing an adequate record.

In re Paternity of J.J., 911 N.E.2d 725, 731 n.3 (Ind. Ct. App. 2009). We therefore reverse. This, however, does not mean that Mother shall have custody of G.S. As reflected in findings 18(A), (B), and (C), the evidence the trial court found convincing did not paint Mother in the best light. We thus remand this case for the trial court to conduct a new hearing on the issue of G.S.'s custody and receive evidence on the statutory factors.

On remand, we note that although the court referenced the provisional order in its findings, Indiana Code section 31-15-4-13 provides, "The issuance of a provisional order is without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceeding." We point this out because when initially establishing custody, both parents are presumed equally entitled to custody.

Reversed in part and remanded.

BAILEY, J., and BRADFORD, J., concur.