MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Brionna Thomas,

Appellant-Respondent

v.

Christopher Thomas,

Appellee-Petitioner

February 26, 2024

Court of Appeals Case No.
23A-DC-2081

Appeal from the Jackson Superior Court

The Honorable Bruce A. MacTavish, Judge

Trial Court Cause No.
36D02-2209-DC-164

Memorandum Decision by Judge Kenworthy
Judges May and Vaidik concur.

Kenworthy, Judge.

Case Summary

[1] Brionna Thomas ("Mother") appeals the trial court's dissolution decree in which the court awarded Christopher Thomas ("Father") legal and physical custody of the couple's four children ("Children") and awarded Mother parenting time. Mother presents two issues for review, which we reorder and restate as:

1. Did the evidence support the trial court's specific findings related to medical care, discipline, and an unsubstantiated abuse allegation?

2. Did the trial court err in awarding Father custody?

We affirm.

Facts and Procedural History

[2] Father and Mother (collectively, "Parents") were married in 2011. Together they had four boys, born in 2012, 2016, 2019, and 2020. On September 9, 2022, Father filed a petition for dissolution and a motion for a provisional order. The trial court initially set the provisional hearing for October 31.

[3] Throughout the marriage, Father worked full time at Rightway Fasteners. His work schedule was typically from 5:00 a.m. until 5:00 p.m., with occasional weekend overtime shifts. Mother was primary caretaker for Children and did not work outside the home. She homeschooled the two oldest children (ages

ten and six when Father filed the petition) and had cared for the younger children (ages three and two) in the home since their birth.

[4] Prior to the hearing, Mother filed a motion to preserve the status quo. Father had notified Mother he intended to enroll the two oldest boys in public school and take Children to the doctor to receive vaccinations. At the time, none of the children were fully vaccinated. Mother asked the trial court to preserve Children's homeschool and vaccination status until the provisional hearing or the parties could agree on the issues. The trial court granted Mother's motion.

[5] The trial court held a bifurcated provisional hearing on December 12 and 19. By that time, Parents had enrolled the older children in public school and Children had begun receiving vaccines through the health department. Parents agreed at the hearing to continue with the vaccine schedule. Also, Mother had been offered a full-time job at a daycare, set to begin in the new year. Because both parents would be working outside the home, Father wanted his parents ("Grandparents") to care for Children when Parents were at work. Children's paternal grandfather ("Grandfather") testified Grandparents could do so.

[6] The trial court entered a provisional order on January 5, 2023. In relevant part, the court ordered: (1) Children receive all required vaccinations within thirty days; (2) Parents remain in the home during the pendency of the case; (3) Grandparents watch the younger children during the workday and the older children after school until either parent returned home; and (4) Parents share parenting time under a mutually agreeable schedule.

[7] The trial court held a final hearing on July 24. The parties presented evidence about Parents' beliefs about vaccination and Mother's preference for home remedies and chiropractic care. Since the provisional order, Mother had started her job and Grandparents were providing childcare during the week. In June, Mother had taken the two-year-old, A., to the emergency room after A. allegedly stated Grandfather had touched him inappropriately. The hospital staff reported the incident to the Department of Child Services ("DCS"), which investigated the report as an allegation of child molestation. DCS conducted a Children's Advocacy Center ("CAC") forensic interview and interviewed all parties involved. DCS ultimately found the allegation was unsubstantiated.

[8] On August 7, the trial court entered its decree of dissolution and awarded Father legal and physical custody of Children and Mother parenting time. Mother now appeals.

Standard of Review

[9] As an initial matter, Father did not file an appellee's brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for him, and we apply a less stringent standard of review. *Easterday v. Everhart*, 201 N.E.3d 264, 268 (Ind. Ct. App. 2023). We may reverse if the appellant establishes *prima facie* error, which is error at first sight, on first appearance, or on the face of it. *Id*. Nevertheless, the appellee's failure to file a brief does not relieve us of our obligation to correctly apply the law to the facts

in the record to determine whether reversal is required. *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 725 (Ind. Ct. App. 2009).

[10] Here, neither party requested the trial court enter findings and conclusions under Trial Rule 52, but the court entered some specific findings. "Where a trial court enters findings *sua sponte*, the appellate court reviews issues covered by the findings with a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment." *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016). We set aside findings if they are clearly erroneous. *Campbell v. Campbell*, 993 N.E.2d 205, 209 (Ind. Ct. App. 2013) (citing *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997)), *trans. denied*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Id*. A judgment is clearly erroneous if the trial court applies the wrong legal standard to properly found facts. *Id*. We review any issue not covered by the findings under the general judgment standard; that is, we should affirm based on any legal theory supported by the evidence. *Steele-Giri*, 51 N.E.3d at 123–24.

[11] In a dissolution proceeding, the trial court shall determine custody and enter a custody order based on the best interests of the child. Ind. Code § 31-17-2-8 (2017). In determining the child's best interests, the trial court shall consider all

relevant factors, including the enumerated statutory factors.[1] *Id*. We afford considerable deference to a trial court's custody determination because the trial court "sees the parties, observes their conduct and demeanor, and hears their testimony." *Campbell*, 993 N.E.2d at 209. "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*. On appeal, it is not enough the evidence might support some other conclusion; rather, it must positively require

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[1] The factors include:

> (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.
>
> (9) A designation in a power of attorney of:
>
> > (A) the child's parent; or
> >
> > (B) a person found to be a de facto custodian of the child.

the appellant's proffered conclusion before there is a basis for reversal. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002).

The evidence supported the trial court's specific findings as to Children's medical care, discipline, and the abuse allegation.

[12] Mother argues the following specific findings made by the trial court are not supported by the evidence and therefore are clearly erroneous:

> 8. The Court strongly believes both parents in this case share responsibility for not obtaining vaccinations and proper medical care for all four (4) boys. Also, both parents used overly harsh discipline in the extended groundings of the older boys.
>
> 9. [Mother] claimed at the provisional hearing she took medical advice for her children from a chiropractor not a family doctor or a pediatrician. After the court ordered the children vaccinated in the Provisional Order, [Mother] gave them herbal remedies to try to undue [sic] the effects of vaccinations.
>
> 10. The Court hopes awarding [Father] legal and physical custody will allow the boys to receive proper vaccinations and medical care. Further, the Court believes awarding [Father] custody will prevent them from being subject to inappropriately harsh discipline.
>
> ***
>
> 14. The Court finds the allegations of molestation against [Grandfather] were without any legitimate basis. The Court is concerned with [Mother] making these allegations. Barbara Osborn[] of DCS testified that the child, [A.], was unable to even use language in the CAC interview at a level equal to what Mother claimed [A.] had said. Further, no medical records were

> introduced from the child's emergency room visit that support any molestation occurred.

Appellant's App. Vol. 2 at 74–75.

[13] Mother first argues it was inappropriate for the trial court to consider Parents' beliefs about vaccination at all. She observes Indiana law recognizes "parental rights to forego recommended vaccination of children." *Appellant's Br.* at 21. In support, she cites an Indiana Code provision providing parents of public-school students a religious exemption from immunization requirements. *See id.* (citing I.C. § 20-34-3-2 (2005)). She reasons the court's order invades Parents' "constitutional rights to raise their children and express their religious beliefs[.]" *Id*.

[14] But Mother did not make this religious exemption claim in the trial court. Rather, she explained she initially wanted to administer vaccines on a delayed schedule for the older children, and for the younger two stated, "I had done more research and I just really wasn't comfortable with it[.]" *Tr. Vol. 2* at 69. She agreed her position could be summarized as "they'll get antibodies [if they get a disease] therefore they don't need the shot[.]" *Id.* at 88. Further, Mother's argument on appeal is undeveloped and lacks citation to constitutional authority. We thus decline Mother's invitation to review a religious exemption claim raised for the first time on appeal. *See Layman v. State*, 42 N.E.3d 972, 975–76 (Ind. 2015) (holding constitutional claims not raised in the trial court were waived for appellate review and declining to exercise discretion to hear

them where the claims demanded further evidentiary development at the trial court).

[15] Turning to the evidence presented, Children previously were not fully vaccinated in part because Father and Mother disagreed about the issue. Mother did not want to vaccinate Children, but Father was not as certain. The two oldest children initially received some vaccines, but the younger two did not. Father testified Mother believed "vaccination is more harmful than it is good." *Tr. Vol. 2* at 12.

[16] After Father filed the petition for dissolution, Parents took Children to a physician and began a delayed vaccine plan, which Mother described as "less vaccinations at once," administered through the health department. *Id.* at 69. Mother then cancelled and rebooked vaccine appointment times without Father's knowledge. At the final hearing, Father testified Mother "doesn't like to take them to their appointments" and "I believe she would come off of them if given custody." *Id.* at 162–63. Father also introduced into evidence images of herbal supplement bottles called "Vaccine Detox" Mother purchased for Children. *See Tr. Vol. 3* at 61. Although Mother testified it was "an immune booster while they're getting their vaccinations," the trial court could have reasonably inferred Mother intended to administer the herbal remedy to impede the effects of vaccines. *Tr. Vol. 2* at 205.

[17] Regarding Mother's preferred source for Children's medical treatment, Father testified Mother's "first pick would be Doctor Levi at Clay's Chiropractic" and

Mother "trusts the chiropractor more than she trusts any doctor." *Id.* at 11. Mother also testified that after a doctor recommended certain medical care for Children, she sought the second opinion of a chiropractor. At the final hearing, Grandfather testified about Mother's general preference for home remedies and alternative medicine. He testified Mother "resisted vaccination at all times" and "treated most ailments with home remedies, essential oils, ah, putting essential oils on their feet, ah, she told me once to put coconut oil in a child's ear because he had an earache. So, it's essentially home remedies, all chiropractic care." *Id.* at 141–42. Evidence thus supports the trial court's finding Mother preferred to take chiropractic advice.

[18] With respect to discipline, Parents both testified they struggled to find effective ways to manage challenging behaviors sometimes exhibited by C. In the past, they had spanked C., but found it was not an effective form of discipline. More recently, Mother had placed C. in extended "time outs" by grounding him to his room for days or, on one occasion, two weeks at a time. Father felt Mother used time outs "excessively," but in large part agreed to Mother's approach because "she's the one running the show there when I'm not there[.]" *Id.* at 36.

[19] Nevertheless, Mother argues Parents provided the same type of medical care and discipline during the marriage, therefore the trial court erred in finding Father would ensure Children receive appropriate medical care and discipline moving forward. However, Father testified he regretted acquiescing to Mother's more strongly held beliefs about vaccination and was uncomfortable with the severity of discipline meted out when he was not present. In Father's

view, his desire to take a new approach was "righting wrongs" he made in the past. *Id.* at 190. It was within the trial court's purview to credit Father's testimony. *See Campbell*, 993 N.E.2d at 209 ("[O]n review, we will not reweigh the evidence, judge the credibility of witnesses or substitute our judgment for that of the trial court.").

[20] Finally, Mother argues the trial court's finding regarding the abuse allegation against Grandfather was erroneous and the court should not have relied on it in making its custody determination. In her investigation report, Family Case Manager Barbara Osborn ("FCM Osborn") concluded A. "did not disclose any sexual abuse" and Father "stated it is unlikely the child could even make such a statement due to the child's current speech development." *Tr. Vol. 3* at 56. After FCM Osborn summarized A.'s allegation at the final hearing, counsel elicited the following testimony:

> Q. Okay. Was the two-year-old age [sic] to describe things in sentences in five and six words when you talked to him?
>
> A. My observation of that was no.

Tr. Vol. 2 at 128. Taken together, the evidence fairly supports the trial court's finding A. "was unable to even use language in the CAC interview at a level equal to" the reported statement. *Appellant's App. Vol. 2* at 75. Further, the trial court's concern Mother was the sole source of the allegation reflects a credibility determination the court was entitled to make. *See Campbell*, 993 N.E.2d at 209.

[21] The trial court's specific findings related to medical care, discipline, and the abuse allegation are not clearly erroneous.

The trial court did not err in awarding Father custody.

[22] Mother first argues she was the most stable and consistent part of Children's lives, and thus the trial court erred in granting Father legal and physical custody. In support, Mother cites *Kirk*, in which our Supreme Court noted "children will normally prosper and mature . . . under a standard of consistency . . . ." 770 N.E.2d at 308 (quoting *Kuiper v. Anderson*, 634 N.E.2d 556, 558 (Ind. Ct. App. 1994)). She emphasizes she quit her job to be primary caretaker when C. was born, homeschooled the older children, and generally managed the daily childcare and household until Father petitioned for dissolution. Mother also alleges "Father's employment prevented him from being a meaningful caretaker" and due to his work schedule, he was "minimally involved" in Children's lives. *Appellant's Br.* at 4, 16.

[23] Although evidence shows Mother had been primary caretaker in the home during Father's workdays for the past decade, Father, too, was a stable presence in Children's lives during the marriage. In addition to providing financially for the family, Father cared for Children, played with them, took them to church, and nurtured loving relationships with them. When Father was not at work and Mother was not at home, Father was primary caretaker for Children. As part of the property settlement, the trial court also awarded Father the family residence, allowing Children to stay in the home. Evidence does not support Mother's argument that stability could be achieved only if she were the

custodial parent. *See Campbell*, 993 N.E.2d at 209 ("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.").

[24] Because Father's work schedule required him to obtain childcare, Mother also argues the trial court's order "was tantamount to putting [Children] in the custody of the third-party grandparents who had previously only provided a few hours of respite care." *Appellant's Br*. at 17. Father testified he was searching for a new job that would allow him to be home more with Children. Even still, with both parents now working outside the home, each would need to arrange for childcare during the workday. To provide financial support for themselves and their children, all parents who work outside the home must rely on relatives, friends, or professionals to provide childcare services. We therefore are not persuaded Father's childcare arrangement with Grandparents effectively transformed them into *de facto* custodians. Further, when Mother is not at work, she will have an opportunity to exercise additional parenting time pursuant to the Indiana Parenting Time Guidelines Section I(C)(4).

[25] Finally, Mother argues the trial court's order lacked specific findings regarding Children's best interests, thereby precluding our review of the custody determination. However, neither party requested specific findings of fact and conclusions thereon under Trial Rule 52. Therefore, we review any issue not covered by the findings under the general judgment standard. *Steele-Giri*, 51 N.E.3d at 123. We will affirm based on any legal theory supported by the evidence. *Id*. at 124.

[26] The parties introduced evidence Father was able to provide a stable home for Children and had nurtured positive relationships with them over the years. The record contains ample evidence Father was a loving, responsible parent. Even absent additional specific findings, the parties presented evidence from which the trial court could have concluded awarding Father legal and physical custody of Children was in Children's best interests.

Conclusion

[27] The evidence supported the trial court's findings. The trial court did not err in awarding Father legal and physical custody of Children.

[28] Affirmed.

May, J., and Vaidik, J., concur.

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