

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Cara Schaeffer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEY FOR APPELLEE

Elisha M. Comer
The Law Office of Melissa
Winkler-York
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of C.D.C.;

Harley Carey,
Appellant-Mother

v.

Kayla Austin,
Appellee.

December 5, 2023

Court of Appeals Case No.
23A-JP-998

Appeal from the Fayette Circuit
Court

The Honorable Hubert Branstetter,
Jr., Judge

Trial Court Cause No.
21C01-1108-JP-332

Memorandum Decision by Judge Pyle

Judges Tavitas and Foley concur.

Pyle, Judge.

Statement of the Case

[1] Harley Carey (“Mother”) appeals the trial court’s order that awarded custody of her eleven-year-old son, C.C. (“C.C.”) to his paternal aunt, Kayla Austin (“Austin”). Mother argues that the trial court abused its discretion when it awarded custody of C.C. to Austin. Concluding that the trial court did not abuse its discretion, we affirm the trial court’s judgment.

[2] We affirm.

Issue

Whether the trial court abused its discretion when it awarded custody of C.C. to Austin.

Facts

[3] Mother is the parent of an eleven-year-old son, C.C., a nine-year-old son, G.B. (“G.B.”), an eight-year-old daughter, A.C. (“A.C.”), and a six-year-old son, R.C. (“R.C.”). This appeal concerns only C.C. C.C.’s father is Kenneth Austin (“Father”), who acknowledged paternity of C.C. in 2013. Pursuant to the terms of an agreed paternity order, Mother has primary physical custody of C.C. Father pays child support for C.C. but is unable to exercise regular parenting time because Father lives in Pennsylvania. Father lives with his girlfriend, their son, and the girlfriend’s daughter. Austin is Father’s sister.

[4] In July 2022, C.C. was visiting Austin and her significant other, Joshua Floyd (“Floyd”), at their home in Michigan, which is located five hours from

Mother's home in Connerville, Indiana. During the visit, while C.C. was talking to Mother on the telephone, Austin overheard Mother tell C.C., "[y]our brother pooped in your room again." (Tr. Vol. 2 at 12). Austin, who had "never heard of such a thing," asked C.C. about the conditions in Mother's home. (Tr. Vol. 2 at 12). C.C. told Austin that the home was not clean, his bedroom door was broken, and it was normal for the family's dog to defecate in his bedroom. Austin asked Mother if she and Floyd could repair C.C.'s bedroom door when they brought him back to Mother's home, and Mother agreed to the repair.

[5] When Austin, Floyd, and C.C. arrived at Mother's home, C.C. led Austin and Floyd up the stairs to his bedroom. Austin noticed that there was "filth on the stairs . . . including animal waste." (Tr. Vol. 2 at 13). As Austin looked into the upstairs bedrooms, she noticed human feces smeared in several areas of A.C.'s room. There was also a diaper with human feces under A.C.'s bed. Austin further noticed that several walls in G.B.'s bedroom were without drywall and that the insulation was exposed. In addition, a bird's nest had fallen from the exposed insulation onto G.B.'s bed. All of the children's mattresses were "dog feces- and urine-soaked[,]'" and the paint was peeling off the children's bedroom walls and ceilings. (App. Vol. 2 at 114). The upstairs bathroom was not functional, and the walls were without drywall.

[6] Although Austin and Floyd had only intended to repair C.C.'s door, the couple spent four hours cleaning Mother's house without Mother's help. Austin and Floyd also purchased a lead paint detector, which revealed the peeling paint in

the children's bedrooms contained lead. Austin and Floyd took the children's mattresses off the bedframes and set them up against the walls to discourage the children from sleeping on them until Austin and Floyd could clean them.

[7] Two weeks later, Austin and Floyd returned to Mother's home to continue cleaning and to install drywall. Father and paternal grandparents ("paternal grandparents") accompanied Austin and Floyd to Mother's home. When they arrived at the home, Austin and Floyd were disheartened to see that the condition of the home had deteriorated and was even worse than it had been during their previous visit. They noticed pet feces, dirty diapers, and trash strewn throughout the home. In addition, there were human feces in a trashcan. The children's filthy mattresses had been returned to the bed frames, and G.C.'s mattress still had remnants of the bird's nest on it. Father also noticed that an electrical outlet had "melted out of the wall." (Tr. Vol. 2 at 39). Austin, Floyd, Father, and paternal grandmother spent eight hours cleaning and making repairs throughout the home without Mother's help.

[8] In August 2022, Austin and Floyd returned to Mother's home for a third time. Father and paternal grandparents accompanied them again. Austin and Floyd brought the children new mattresses, mattress protectors, and smoke detectors. They also purchased lead encapsulating paint to seal the lead paint and regular paint to seal the lead encapsulating paint. In addition, Austin and Floyd purchased trash cans for all the rooms.

[9] When they arrived at Mother’s home, Austin and Floyd were again disheartened to find that the home was in even worse condition than it had been during their previous visit. Austin noticed rotten food strewn throughout the house and feces on the floor. There were moldy dishes in the dining room, and no working appliances in the kitchen. Maternal grandmother (“maternal grandmother”) lived next door, and the children had been using her microwave oven to make Ramen, popcorn, and macaroni and cheese cups. At some point, Mother and maternal grandmother, who was at Mother’s home, “got into a screaming match.” (App. Vol. 2 at 115). Father took C.C. to Floyd’s truck “to keep him from the chaos.” (App. Vol. 2 at 115). A neighbor called the police, who arrived to find Mother “beating on [Floyd]’s truck’s window.” (App. Vol. 2 at 115). An officer suggested that Father contact DCS. A DCS assessor subsequently arrived at Mother’s house; however, the extent of DCS’ involvement in the case is unclear from the record.

[10] At the end of August 2022, Austin filed a petition asking the trial court to award her third-party custody of C.C. Austin also filed a motion asking the trial court to appoint a guardian ad litem, and the trial court granted that motion. The trial court subsequently appointed Stephanie Kress (“GAL Kress”) to serve as the guardian ad litem.

[11] In December 2022, GAL Kress visited Mother’s home. GAL Kress immediately noticed that the home did not have heat. Mother told GAL Kress that she needed to have the gas tank refilled. GAL Kress did not notice a difference between the temperature outside and the temperature inside the

home, with the exception of Mother's bedroom, which had a space heater. In addition, the home "was extremely cluttered and filthy." (App. Vol. 2 at 113). GAL Kress noticed "multiple large piles of dirty dishes, some containing mold." (App. Vol. 2 at 113). In addition, there was trash strewn throughout the house. When GAL Kress went upstairs to the children's rooms, she noticed that the floors were "extremely cluttered with dirty clothing, trash, food, and animal feces." (App. Vol. 2 at 113). In addition, there was still peeling paint in the children's bedrooms.

[12] The trial court held a hearing on Austin's custody petition in April 2023. At the hearing, the trial court heard the facts as set forth above. In addition, Austin testified that she had recently visited Mother's home in March 2023. According to Austin, during that visit, "[t]he amount of crumbs and feces, particularly in [C.C.]'s room [had] just blow[n] [her] mind because it [had] been . . . nine months . . . since [they had] first realized how big of a problem this was and nothing ha[d] changed." (Tr. Vol. 2 at 18). According to Austin, she had a strong bond with C.C., had introduced him to new activities, and had dedicated time to pursuing enrichment activities with him because he had twice failed the third grade. Austin had also dedicated time to teaching C.C. basic hygiene, such as brushing his teeth, washing his hands, and showering. Austin further testified that if the trial court awarded her custody of C.C., she planned to make monthly trips from Michigan to Connersville so that C.C. could maintain contact with his siblings.

- [13] In addition, Father testified that although he was concerned about the unsanitary and unsafe conditions in Mother's home, he did not have the financial means or living space to provide a home for C.C. Father asked the trial court to award custody of C.C. to Austin.
- [14] GAL Kress testified that Mother's home was not "safe or habitable" for C.C. (Tr. Vol. 2 at 33). According to GAL Kress, it was in C.C.'s "best interest for [Austin] to have custody of him." (App. Vol. 2 at 117).
- [15] On the other hand, Mother testified that she had cleaned up her house. Further, according to Mother, "DCS ha[d] been to [her] house three times and every single time[,] DCS case workers said that the house was "[im]maculate." (Tr. Vol. 2 at 48). However, Mother acknowledged that she had not brought to the hearing any DCS reports stating that her house was immaculate, and no DCS case worker testified at the hearing. Mother further testified that all four of her children suffer from illnesses and disabilities and that she was "at Riley Hospital constantly." (Tr. Vol. 2 at 53). Mother specifically testified that C.C. suffers from allergies to animals but that he was not allergic to her dog. Mother also acknowledged that A.C. has a cat. Mother further testified that nine-year-old G.B. wears diapers because he suffers from a neurological issue. In addition, Mother acknowledged that eight-year-old A.C. defecates throughout the house. According to Mother, A.C. defecates in the house because she has "complex congenital heart disease" and "her bowel will fill up and she gets constipated and it's not her fault." (Tr. Vol. 2 at 62).

[16] Following the hearing, in April 2023, the trial court issued a detailed ten-page order finding that Mother had no reasonable explanation for the conditions in her home and that Mother had had nine months to improve the conditions in the home and had failed to do so. The trial court's order further provides, in relevant part, as follows:

47. In this case, [Austin] established by clear and convincing evidence that [M]other's home is unsanitary and unfit for [C.C.]. Photographic evidence as well as testimony and observations by the GAL were presented [and] indicated that over the course of nearly a year, Mother's home was unsafe and unhealthy for [C.C.]. Mother made no significant efforts to remedy the unsanitary or unsafe living conditions in the home, despite visits from DCS, GAL, and this court action.
48. Further Mother testified that the children are always ill, and the court ponders if this is due to the unsanitary environment in which they are forced to live by Mother's lack of ability or desire to maintain the home. Mother stated that [C.C.] has allergies but did not know what they were and further testified that there is a cat that comes in the home and that she has a dog.
49. It is a substantial benefit to [C.C.] to live in a home that is clean, sanitary, and safe, not only to his physical health and wellbeing, but also his mental health.
50. Mother has demonstrated a clear pattern of unfitness in her ability to maintain a safe home for [C.C.]. It is imperative that [C.C.] be able to grow as a child in a home free of animal feces and toxic lead paint, working utilities, running water, ample food, etc. While it seems clear that [Austin] has the financial stability to provide additional opportunities for [C.C.], the court's determination is made

based on the facts that Mother is unable or unwilling to provide the basic necessities for [C.C.].

51. It is in the best interest of [C.C.] for [Austin] to be awarded sole legal and primary physical custody.

(App. Vol. 2 at 143-44).

[17] Mother now appeals.

Decision

[18] At the outset, we note that there is a well-established preference in Indiana for granting latitude and deference to the trial court in family law matters. *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016). Appellate courts “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.” *Id.* (cleaned up). “On 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.* (cleaned up). “Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.” *Id.* (cleaned up).

[19] We further note that where, as here, a trial court’s order contains specific findings of fact and conclusions thereon, we engage in a two-tiered review. *In re A.G.*, 6 N.E.3d 952, 957 (Ind. Ct. App. 2014). First, we determine whether the evidence supports the findings, and then, we determine whether the findings

support the judgment. *Id.* The trial court’s findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting the judgment. *Hazelett v. Hazelett*, 119 N.E.3d 153, 157 (Ind. Ct. App. 2019). A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

[20] In addition, we note that Mother does not challenge the trial court’s findings. As a result, we accept these findings as true. *See Moriarty v. Moriarty*, 150 N.E.3d 616, 626 (Ind. Ct. App. 2020) (explaining that unchallenged trial court findings are accepted as true), *trans. denied*. We now turn to the substantive issue in this case.

[21] Mother argues that the trial court abused its discretion when it awarded custody of C.C. to Austin. “Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion[,]” which occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before it, or the reasonable inferences to be drawn therefrom. *In re Guardianship of B.H.*, 770 N.E.2d 283, 288 (Ind. 2002). In a custody dispute between a natural parent and a third party, there is a presumption that the natural parent should have custody of her child. *A.J.L. v. D.A.L.*, 912 N.E.2d 866, 871-72 (Ind. Ct. App. 2009). The third party bears the burden of overcoming this presumption by clear and convincing evidence. *Id.* at 872. “The presumption will not be overcome merely because a third-party could provide better things in life for the child.” *In re Paternity of W.M.T.*, 180 N.E.3d 290, 297 (Ind. Ct. App. 2021), *trans. denied*. Rather, evidence

sufficient to rebut the presumption may, but need not necessarily, establish the natural parent's unfitness or acquiescence or demonstrate that a strong bond has formed between the child and the third party. *Id.*

The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's best 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. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. 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 a determination, and detailed and specific findings are required.

Id. (cleaned up).

[22] If the third party rebuts this presumption by clear and convincing evidence, then the trial court engages in a general best interests' analysis. *A.J.L.*, 912 N.E.2d at 872. INDIANA CODE § 31-14-13-2, which governs custody following a paternity determination, provides:

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 interests.
- (5) The child's adjustment to the child's 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 section.

I.C. § 31-14-13-2.

[23] “An appellate court should not disturb a trial court determination awarding child custody to a non-parent unless there is no evidence supporting the findings or the findings fail to support the judgment.” *A.J.L.*, 912 N.E.2d at 872 (cleaned up). We consider only the evidence favorable to the trial court's judgment and do not reweigh the evidence. *Id.*

[24] Here, the trial court concluded that Mother had demonstrated a pattern of unfitness because she had failed to provide C.C. with a safe and sanitary home.

The trial court further concluded that awarding custody of C.C. to Austin was in C.C.'s best interests. The evidence in the record, as set forth in the trial court's unchallenged findings, supports these conclusions. Specifically, our review of the evidence reveals that over the course of nearly one year, Mother's house has been unsanitary and unsafe despite the efforts of Austin and Floyd to remedy the conditions in the home and create a safe environment for C.C. Specifically, G.B., A.C., and Mother's dog defecate throughout the house, and Mother leaves the feces on the floor. Mother also leaves trash, dirty clothes, and rotten food on the floor. In addition, there is peeling lead paint in the children's bedrooms, and the children's mattresses were soaked with urine and feces until Austin and Floyd replaced them. During the winter months, the house did not have heat. In addition, C.C. has a strong bond with Austin, who has introduced him to new activities and has dedicated time to pursuing enrichment activities with him because he had twice failed the third grade. Austin had also dedicated time to teaching C.C. basic hygiene, such as brushing his teeth, washing his hands, and showering. We further note that both Father and the GAL recommended that the trial court award custody of C.C. to Austin. Based on this evidence, the trial court did not abuse its discretion in awarding custody of C.C. to Austin.¹

¹ Mother argues that the trial "court's decision was based primarily on the conditions of Mother's home, which Mother testified she remedied before the custody hearing. DCS inspected Mother's home and did not find it was unsuitable for children." (Mother's Br. 9). However, our review of the record reveals that although Mother testified that she had remedied the conditions in the home before the custody hearing, Austin testified that she had visited the home shortly before the hearing and that she had seen no improvement in the home. Indeed, according to Austin, she had seen feces on C.C.'s bedroom floor.

[25] Affirmed.

Tavitas, J., and Foley, J., concur.

Mother's argument is an invitation to reweigh the evidence, which we cannot do. *See Steele-Giri*, 51 N.E.3d at 124. Further, Mother's argument that DCS did not find the home unsuitable for children is not supported by the evidence. Specially, our review of the record reveals that no DCS case manager testified at the hearing and no DCS documentation was admitted into evidence at the hearing. The only testimony regarding DCS was Mother's testimony that DCS case workers had told her that her house was immaculate. The trial court clearly did not believe Mother's testimony and was not required to do so.