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IN THE
COURT OF APPEALS OF INDIANA

Jacquetta Hahn-Weisz,
Appellant-Intervenor,

v.

Samuel C. Johnson,
Appellee-Petitioner,

and

Amber Johnson,
Appellee-Respondent.

June 15, 2022

Court of Appeals Case No. 22A-DC-36

Appeal from the Union Circuit Court

The Honorable Matthew R. Cox, Judge

Trial Court Cause No. 81C01-1907-DC-147

Tavitas, Judge.

Case Summary

[1] Jacquetta Hahn-Weisz ("Grandmother") appeals the trial court's grant of a petition to modify custody of J.J. ("the Child") filed by Samuel Johnson ("Father"). The Child began living with Grandmother in February 2019. Grandmother intervened in Father and Mother's dissolution proceedings and filed a petition for third-party custody of the Child. The Child remained in Grandmother's custody pursuant to a temporary agreement of the parties. In July 2021, however, Father filed a petition to modify custody, which the trial court granted. Grandmother argues that the trial court failed to consider the relevant statutes and the Child's best interests. We agree with Grandmother and reverse the trial court's grant of Father's petition for modification of custody.

Issue

[2] Grandmother raises two issues, which we consolidate and restate as whether the trial court erred by granting Father's motion for modification of custody.

Facts

[3] Father and Amber Johnson ("Mother") were married in 2012, and the Child was born in 2012. The parties separated in November 2015, and the Child was left in Father's care. In December 2016, the Child reported to Mother that she was being molested by her two older half-brothers in Father's home, and criminal charges were filed against the brothers. The Child remained with Mother and was not returned to Father's care.

[4] In February 2019, the Child began residing with Grandmother. Mother signed informal guardianship and custody documents in July 2019, which purported to give Grandmother custody of the Child but were never filed in any court. Grandmother has been providing care for the Child since that time. Neither Mother nor Father provided financial support for the Child.

[5] Father filed a petition for dissolution of marriage in July 2019, and the trial court granted the petition for dissolution in December 2019. The trial court noted that the parties could not agree on custody, visitation, and support issues at that time and appointed a Court Appointed Special Advocate ("CASA"). In February 2020, the CASA requested that the trial court schedule a hearing to address parenting time. The CASA advised the trial court that: (1) Grandmother desired the trial court's assistance with establishing parenting time guidelines pending resolution of the custody matter; and (2) the CASA was not yet prepared to make a custody recommendation as the Child just recently began therapy. Also in February 2020, Father filed a petition to schedule a hearing regarding custody, parenting time, and child support, along with a motion requesting reunification therapy between Father and the Child.

[6] In March 2020, Grandmother filed a motion to intervene and a petition for third-party custody. Grandmother alleged that: (1) the Child has lived with Grandmother since February 2019 with the exception of a four-week period in the summer of 2019; (2) Mother signed informal guardianship and custody

documents in July 2019, to give Grandmother custody of the Child[1]; (3) the Child was sexually abused by her two half-brothers while in the care of Father in 2015 and 2016; (4) Father has had limited contact with the Child; (5) contact between Father and the Child resulted in the Child having nightmares and bed-wetting incidents; (6) Grandmother has found a therapist for the Child; and (7) Mother has little interest in parenting or supporting the Child. Grandmother requested custody of the Child and an order that Mother and Father pay child support. The trial court granted Grandmother's motion to intervene.

[7] In May 2020, the CASA recommended that: (1) the Child continue living with Grandmother; and (2) the Child continue therapy and participate in reunification therapy with Father when recommended by the therapist. The trial court held a hearing in June 2020, and the parties advised the trial court that they had reached a "temporary agreement." Appellant's App. Vol. II p. 53. Among other things, the parties agreed that: (1) Grandmother would have "sole legal and physical custody" of the Child "pending further order" of the trial court; (2) the Child would continue in therapy; (3) Father's contact with the Child would be subject to the therapist's recommendations; and (4) Mother would have her usual parenting time subject to the therapist's recommendations. *Id.*

[1] These documents are not valid legal documents that give Grandmother physical and legal custody.

[8] In September 2020, the CASA submitted another report to the trial court. The CASA noted that the Child "has made much progress in the last three months, but there is still work to be done." *Id.* at 59. The CASA recommended "that there be no custody or placement change" for the Child at that time. *Id.* In February 2021, the CASA submitted another report to the trial court. At that time, although progress was being made in Father's relationship with the Child, the parties agreed that the Child should remain in the custody of Grandmother.

[9] In March 2021, the CASA informed the trial court that the Child's relationship with Father continued to improve and that "[c]ustody of [the Child] is not an issue at this time" because the parties were "willing for [the Child] to remain in her grandmother's custody." *Id.* at 67. The CASA noted that the parties were "pretty much in compliance" with the June 2020 order and that the "parties are in agreement that the child's best interests is paramount in the decisions they make." *Id.* The CASA informed the parents that a custody change would require them to initiate that action with the trial court, and the CASA requested that her appointment in the matter be terminated. The trial court granted CASA's request to terminate her appointment.

[10] In June 2021, only three months after the CASA's last report, Father filed a motion to modify the June 2020 temporary custody order. Father alleged that the custody order was no longer in the Child's best interests due to a substantial change of circumstances. Father requested custody of the Child.

[11] Without reappointing the CASA, the trial court held a hearing on August 30, 2021. Father testified that he was living with his wife and three children and that his two sons involved in the abuse of the Child would never reside with Father again. On cross-examination by Grandmother, Father admitted that he had not seen the Child since May 2021. Grandmother testified that the Child was thriving in school, the Child's bed-wetting had improved, the Child was no longer in therapy but sees the school counselor, and the Child still has nightmares.

[12] In December 2021, the trial court granted Father's petition for modification of custody, in part, as follows:

> The Court being duly advised in the premises now grants Father's Motion in part.
>
> This Court recognizes that there is "[t]he traditional right of parents to establish a home and raise their Children which is protected by the Fourteenth Amendment of the United States Constitution." *Bailey v. Tippecanoe Div. of Fam. & Child. (In re MLB.*), 666 N.E.2d 73, 76 (Ind. Ct. App. l996), *trans. denied*.
>
> However, this Court shall also consider the best interests of the child.
>
> Here, [the Child] has been in the care of the Intervenor, [Grandmother], for over three (3) years. The child has adjusted to Intervenor's home. The child has also adjusted to her school in Franklin County, Indiana. The child also sees her counselor at school two (2) times per week.

The Father has physically relocated his residence to a private lot in Brownsville, Union County, Indiana. The residence is appropriate for all who live there. If custody is granted to Father, the Child would share a room with Father's daughter [ ].

The Court is concerned that an abrupt change of custody would cause distress to the child. The child is thriving in her school, the parenting time between Father and child has been sporadic, and the child has spent little time at Father's residence.

However, the Court finds that the danger that caused the removal of the child from Father's home no longer exists. The child's brother, who is a sexual predator, is an adult and currently incarcerated and will-no longer reside in Father's home.

As a result of the above findings, the Court now grants Father sole legal and physical custody of the child beginning at the end of the 2021-2022 [sic] school year. Mother shall continue to exercise her parenting time with the child as outlined in the June 12, 2020 Order. The Intervenor is also entitled to one (1) weekend per month with the child after custody is changed to Father's care.

In the interim, the Father shall be entitled to every other weekend with the child at his residence; one (1) week day visit for three (3) hours if permissible; half of Christmas Break from school; all of Spring Break from school; and all other holidays from now until the end of school.

Once custody is changed to Father's care, Father shall ensure that the Child has counseling services available to her if needed. Further, once custody is changed, the Court will review and modify the existing child support obligations of Father and Mother.

> All other orders contained in the June 12, 2020 Order shall remain in force and effect.
>
> This is an appealable final order with all issues resolved.

Appellant's App. Vol. II pp. 12-13. Grandmother now appeals.

Analysis

[13] Grandmother challenges the trial court's modification of custody of the Child. We first note that Father did not file an appellees' brief. "[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees but instead will 'reverse the trial court's judgment if the appellant's brief presents a case of prima facie error.'" *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)). "Prima facie error in this context means 'at first sight, on first appearance, or on the face of it.'" *Id.* This less stringent standard of review "relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee." *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014) (citing *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002)). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id*. (citing *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)).

[14] Here, neither party requested special findings under Indiana Trial Rule 52(A), and the trial court entered its findings and conclusions sua sponte. "As to the

issues covered by the findings, we apply the two-tiered standard of whether the evidence supports the findings, and whether the findings support the judgment." *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014). We reverse "the findings only if they are clearly erroneous." *In re Adoption of I.B.*, 32 N.E.3d 1164, 1169 (Ind. 2015). We review any remaining issues under the general judgment standard, under which we will affirm the judgment "if it can be sustained on any legal theory supported by the evidence." *S.D.*, 2 N.E.3d at 1287. We neither reweigh the evidence nor judge the credibility of the witnesses, and we review the trial court's legal conclusions de novo. *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013).

[15] "Appellate deference to the determinations of our trial court judges, especially in domestic relations matters, is warranted because of their unique, direct interactions with the parties face-to-face, often over an extended period of time." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). "Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, our trial judges are in a superior position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children." *Id*.

> Additionally, there is a well-established preference in Indiana "for granting latitude and deference to our trial judges in family law matters." *In re Marriage of Richardson*, 622 N.E.2d 178 (Ind. 1993). 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." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "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.*

Steele-Giri v. Steele, 51 N.E.3d 119, 124 (Ind. 2016).

[16] The modification[2] of physical and legal custody is governed by Indiana Code Section 31-17-2-21, which provides in relevant part:

> The court may not modify a child custody order unless:
>
> (1) 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 [Indiana Code Section 31-17-2-8] and, if applicable, [Indiana Code Section 31-17-2-8.5].

[2] Here, the parties agreed during the dissolution proceedings that Grandmother would have temporary custody of the Child. Father later filed a motion for modification of custody, and the trial court entered an order modifying custody. On appeal, Grandmother also argues that this was a modification of custody. It does not appear, however, that the trial court ever made an initial custody determination. Different standards apply to an initial custody determination than a modification of custody. *See, e.g., Kirk*, 770 N.E.2d at 307 ("In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered."). Regardless, however, the parties did not argue below that this proceeding was an initial custody determination, and the issue is waived. Accordingly, we will address the issue as a modification of custody.

[17] Indiana Code Section 31-17-2-8 provides that the trial court shall consider all relevant factors, including:

> (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.

[18] "Once a court determines a 'de facto custodian' exists and that individual has been made a party to a custody proceeding, in addition to the usual 'best interests' of the child factors contained in Indiana Code Section 31-17-2-8, the court shall consider" the factors in Indiana Code Section 31-17-2-8.5 in determining the child's best interests. *A.J.L. v. D.A.L.*, 912 N.E.2d 866, 871 (Ind. Ct. App. 2009). The record is silent regarding whether the trial court found that Grandmother is a de facto custodian.[3] Accordingly, we cannot

[3] Indiana Code Section 31-9-2-35.5 defines "de facto custodian" as:

> "De facto custodian", for purposes of IC 31-14-13, IC 31-17-2, and IC 31-34-4, means a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:
>
> (1) six (6) months if the child is less than three (3) years of age; or
>
> (2) one (1) year if the child is at least three (3) years of age.
>
> Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required minimum period. The term does not include a person providing care for a child in a foster family home (as defined in IC 31-9-2-46.9).

determine whether the trial court considered the factors in Indiana Code Section 31-17-2-8.5.[4]

[19] In *In Re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002), our Supreme Court addressed the placement of a child with a person other than the natural parent and 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

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[4] Indiana Code Section 31-17-2-8.5, which involves consideration of de facto custodian factors, 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 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.

> 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)]. 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. 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 determination, and detailed and specific findings are required.

[20] Further, in the context of a modification of custody from a third party to a natural parent, our Supreme Court has held:

> It is of course true that a party seeking a change of custody must persuade the trial court that "(1) 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 section 2 and, if applicable, section 2.5 of this chapter." I.C. § 31-14-13-6; *see also Heagy v. Kean*, 864 N.E.2d 383, 388 (Ind. Ct. App. 2007) (holding that "[m]odification of child custody may occur only when a parent can demonstrate 'modification is in the best interests of the child, and there is a substantial change in one or more factors the court may consider.'"). But these are modest requirements where the party seeking to modify custody is the natural parent of a child who is in the custody of a third party.

> The parent comes to the table with a "strong presumption that a child's interests are best served by placement with the natural parent." *B.H.*, 770 N.E.2d at 287. Hence the first statutory requirement is met from the outset. And because a substantial change in any one of the statutory factors will suffice, "the interaction and interrelationship of the child with . . . the child's parents," *see* Indiana Code Section 31-14-13-2(2)—one of [the] grounds on which the trial court relied in this case—satisfies the second statutory requirement. In essence, although in a very technical sense, a natural parent seeking to modify custody has the burden of establishing the statutory requirements for modification by showing modification is in the child's best interest, and that there has been a substantial change in one or more of the enumerated factors, as a practical matter this is no burden at all. More precisely, the burden is minimal. Once this minimal burden is met, the third party must prove by clear and convincing evidence "that the child's best interests are substantially and significantly served by placement with another person." *B.H.*, 770 N.E.2d at 287. If the third party carries this burden, then custody of the child remains in the third party. Otherwise, custody must be modified in favor of the child's natural parent.

K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 460-61 (Ind. 2009).

[21] Grandmother argues that the trial court did not mention the applicable statutes and factors and failed to make any specific findings regarding the Child's best interests. According to Grandmother, the trial court granted the modification because the danger in Father's home no longer existed rather than considering the Child's best interests and whether there had been a substantial change in one of the statutory factors. Grandmother further argues that, if the trial court

had applied the proper standard, the evidence did not support a modification of custody.

[22] Whether or not the trial court determined that Grandmother is a de facto custodian, the trial court was required to determine the best interests of the Child. Under *K.I.*, Father had the burden of showing that modification of custody was in the Child's best interests and that there had been a substantial change. Our Supreme Court noted, however, that this burden is "minimal" given the strong presumption that the Child's best interests are served by placement with Father. *Id.* at 461. If Father met that burden, Grandmother had the burden of proving by clear and convincing evidence that the Child's best interests was "substantially and significantly served by placement" with Grandmother. *Id.* We note that the trial court's abbreviated findings do not discuss the relevant statutes, our Supreme Court's cases on this issue, the burdens of the parties, or this Child's best interests.

[23] The trial court's abbreviated findings require us to determine "whether the evidence supports the findings and whether the findings support the judgment." *S.D.*, 2 N.E.3d at 1287. Here, we have partial findings that support the trial court's inferred conclusion of a substantial change in the factors the court "shall" consider pursuant to Indiana Code Section 31-17-2-8 or Indiana Code Section 31-17-2-8.5 (if applicable). Absent from the trial court's order is a finding of the best interests of the Child—specifically whether Grandmother met her burden of clear and convincing evidence to rebut the presumption that custody with Father is in the Child's best interests. The trial court issued no

specific findings or conclusions regarding the best interests of the Child. Accordingly, we review the issue of the Child's best interests under the general judgment standard—we will affirm "if it can be sustained on any legal theory supported by the evidence." *S.D.*, 2 N.E.3d at 1287. We review the trial court's legal conclusions de novo—here the granting of sole legal and physical custody based on the trial court's findings. Our review leads us to the conclusion that Grandmother met her burden of clear and convincing evidence that modification of custody is not in the Child's best interests.

[24] First, we assume that the fact that the Child's abusers no longer live with Father is a substantial change in one of the statutory factors, and we acknowledge the strong presumption that the Child's best interests are served by placement with Father. Accordingly, Father had a minimal burden here. At the August 2021 hearing, Father presented evidence that he now resides in a three bedroom, two bathroom trailer on a one-acre lot with his wife and three children; that his two older sons at issue would not be living with him; Father had three therapy sessions with the Child; that his contact with the Child since the June 2020 order has been "hit and miss"; and the Child had been to Father's house on two occasions and had a good relationship with the members of his household. Tr. Vol. II p. 7. On cross-examination, Father admitted that he had not seen the Child since May 2021.

[25] Assuming that Father met his minimal burden of showing that modification of custody was in the Child's best interests and that there had been a substantial change in the factors the court must consider pursuant to Indiana Code Section

31-17-2-8 or for a de facto custodian in Indiana Code Section 31-17-2-8.5, the burden shifted to Grandmother to prove by clear and convincing evidence that the Child's best interests was "substantially and significantly served by placement" with Grandmother. *K.I.*, 903 N.E.2d at 461. While in Father's care, the Child was molested by her two half-brothers. By acquiescence of Father and Mother, the Child has lived with Grandmother since February 2019. Father admittedly has had minimal contact with the Child for many years. Initially, contact with Father caused the Child significant distress. Per the CASA's reports, the Child's relationship with Father has improved, and her distress at seeing him has reduced. It is undisputed, however, that Father had not seen the Child between May 2021 and the August 2021 hearing.

[26] Grandmother testified that the Child is now thriving in school; the Child recently stopped bed wetting; the Child sees the school counselor once a week; Grandmother has the Child on a routine; the Child still has nightmares and night terrors; and Grandmother had "been there to pick up the pieces for almost three years now" when "nobody else has been there to do it." Tr. Vol. II p. 16-17. In fact, the trial court found that "the child is thriving in her school, the parenting time between Father and child has been sporadic, and the child has spent little time at Father's residence." Appellant's App. Vol. II p. 13.

[27] Given Father's minimal contact with the Child, the fact that the Child has lived with Grandmother for several years with Father's acquiescence, and the earlier trauma to the Child, we conclude that Grandmother presented clear and convincing evidence that the Child's best interests were substantially and

significantly served by remaining with Grandmother at this time.[5] Accordingly, Grandmother has demonstrated prima facie error in the trial court's granting of Father's petition for modification of custody.

Conclusion

[28] We conclude that Grandmother has demonstrated prima facie error. The trial court clearly erred by granting Father's petition for modification of custody of the Child. Accordingly, we reverse.

[29] Reversed.

Riley, J., and May, J., concur.

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[5] We also note that, pursuant to our Supreme Court's decision in *K.I.*, 903 N.E.2d at 462, even if custody was modified in favor of Father, visitation by Grandmother would be governed by the Grandparent Visitation Act, Indiana Code Chapter 31-17-5. "[T]he trial court may grant visitation if it determines that 'visitation rights are in the best interests of the child.'" *K.I.,* 903 N.E.2d at 462 (quoting I.C. § 31-17-5-2). "When a trial court enters a decree granting or denying grandparent visitation, it is required to set forth findings of fact and conclusions of law." *Id.*

> In those findings and conclusions, the trial court must address: (1) the presumption that a fit parent acts in his or her child's best interests; (2) the special weight that must be given to a fit parent's decision to deny or limit visitation; (3) whether the grandparent has established that visitation is in the child's best interests; and (4) whether the parent has denied visitation or has simply limited visitation.

Id. The trial court granted custody to Father and visitation to Grandmother without the findings of fact and conclusions thereon required by the Grandparent Visitation Act and *K.I.*