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ATTORNEYS FOR APPELLANTS

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IN THE  
COURT OF APPEALS OF INDIANA

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Jennifer Romero and Azael  
Romero,  
*Appellants-Petitioners,*

v.

Jessica McVey, et al.,  
*Appellees-Respondents.*

April 8, 2021

Court of Appeals Case No.  
20A-MI-1983

Appeal from the Tippecanoe  
Superior Court

The Honorable Faith A. Graham,  
Judge

Trial Court Cause Nos.  
79C01-2006-MI-80 and 79D03-  
1905-JC-74

**Altice, Judge.**

### Case Summary

- [1] In these somewhat unusual circumstances, Jennifer and Azael Romero (Grandparents) appeal the trial court's order denying their petition for grandparent visitation rights as to their now eighteen-month-old granddaughter,

J.I., who has been placed in the care of her maternal aunt since birth.

Grandparents contend that the trial court erred in finding that it was not in J.I.'s best interests to grant the visitation order.

[2] We reverse and remand for further proceedings consistent with this opinion.

## **Facts and Procedural History**

[3] A.W. (Father) and Mother<sup>1</sup> are the parents of J.I., who was born out of wedlock on May 8, 2019. Immediately following the birth, J.I. was placed in the care of Jessica McVey—the infant's maternal aunt—because of Mother's drug abuse problems. J.I.'s older half-sibling had been placed in McVey's care prior to J.I.'s birth. McVey intends to adopt both children, and she filed the necessary documents to begin that process on the day of J.I.'s birth.

[4] On May 14, 2019, the Indiana Department of Child Services (DCS) filed a petition alleging that J.I. was a Child in Need of Services (CHINS), citing Mother's substance abuse. One week later, Mother executed documents consenting to J.I.'s adoption by McVey. Mother had no contact with either J.I. or DCS after that day, and her whereabouts are unknown.

[5] Father's paternity was established. He is currently incarcerated in the Indiana Department of Correction (DOC), following a conviction and sentence for child

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<sup>1</sup> Mother did not appear at the visitation hearing, and she is not identified by name in the record of the proceedings before us.

molesting. Father has an anticipated release date sometime in 2023, intends to consent to McVey's adoption of J.I., and plans to execute all necessary documents for the adoption to proceed.

[6] On June 3, 2020, Grandparents—Father's mother and stepfather—filed a verified petition for grandparent visitation and thereafter filed a motion to intervene in the CHINS proceedings. On August 4, 2020, the trial court conducted a hearing on both matters. DCS and the Court Appointed Special Advocate (CASA) objected to the petition, opining that visitation matters should be left to mutual agreement between McVey and Grandparents. DCS had authorized Grandparents to have contact with J.I. throughout the CHINS proceedings pursuant to various guidelines and safety plans that had been implemented. Grandparents had, in fact, "maintained such contact as authorized." *Appendix Vol. II* at 24.

[7] The evidence showed that Grandparents reside in Kingman, which is approximately one hour and ten minutes from McVey's Lafayette residence. Grandparents drive to Lafayette for all their visits with J.I. and rent a hotel room so that J.I. can be in a home-like environment. Grandparents testified that they would be willing to continue their visits with J.I. in this manner because it is "important to continue to have a relationship with [their] grandchild." *Transcript Vol. II* at 10. They also want to keep J.I. healthy and not take her out in public because of COVID-19 concerns. In their petition, Grandparents requested that J.I. be permitted to stay overnight at their residence every other weekend. Grandparents have a separate bedroom in their

home that J.I. would occupy during her visits. Although McVey had extended the length of the visitation periods over the course of approximately seven months, Grandparents filed their petition out of concern that McVey would cease visitations with J.I. once the adoption was finalized.

[8] Upon questioning by the trial judge, McVey testified that she supports J.I.'s relationship with other members of the Romero family and would not attempt to "terminate any . . . family connections." *Id.* at 23. McVey also explained that J.I. "needs as many people as she potentially can have loving her and encouraging her." *Id.* at 23-24. Notwithstanding Grandparents' concern, McVey characterized J.I.'s relationship with Grandparents as "healthy," and acknowledged that she planned to continue J.I.'s visits with Grandparents on a regular basis. *Id.* at 21. McVey testified that because she and Grandparents had successfully planned and coordinated the visits thus far, they would be able to continue to work together and develop future visitation schedules without court intervention. Father testified that he wanted J.I.'s visitation with Grandparents to continue.

[9] Following the hearing, the trial court denied Grandparents' motion to intervene in the CHINS matter and took the petition for grandparent visitation under advisement. On October 13, 2020, the trial court denied the petition for grandparent visitation and entered the following order:

13. Paternal Grandmother and Step grandfather were authorized to have contact with [J.I.] throughout the CHINS proceeding pursuant to certain guidelines and safety plans and have

maintained such contact as authorized. Such contact progressed to approximately sixteen . . . to twenty . . . hours per month as arranged between Maternal Aunt and Maternal Grandmother.

14. Maternal Aunt and Paternal Grandmother have occasionally arranged additional contact.

15. Paternal Grandmother and Step Grandfather request an order for grandparent visitation on alternating weekends.

16. Paternal Grandmother and Step Grandfather report a concern that Maternal Aunt will not allow contact post-adoption.

17. Maternal Aunt reports a desire for [J.I.] to remain connected with maternal and paternal relatives post adoption.

18. No evidence has been presented suggesting that Maternal Aunt will restrict appropriate contact with maternal or paternal relatives post adoption.

19. Father supports the Verified Petition for Grandparent Visitation.

20. DCS and CASA believe the decision regarding grandparent visitation is best left to Maternal Aunt who will become the Adoptive Mother.

21. There is no evidence that Maternal Aunt is not a fit caretaker for [J.I.].

22. No evidence has been presented suggesting that Maternal Aunt will not act in the best interests of [J.I.] either pre or post adoption.

[The] Court recognizes the unusual situation in which this petition has been filed. Based on the totality of the circumstances and for the reasons stated herein, [the] Court finds it is not in the best interests of [J.I.] to issue an order for grandparent visitation. [The] Court encourages the parties to continue established communication in support of [J.I.'s] overall well-being.

Verified Petition for Grandparent Visitation is denied.

The CHINS proceeding is currently pending.

*Appellants' Appendix* at 24-25. Grandparents now appeal.

## Discussion and Decision

### I. Standard of Review

[10] Trial courts are afforded a great deal of deference in family law matters because of their opportunity for extended face-to-face interactions with the parties. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Trial judges maintain the ability to assess the credibility and character of the parties involved and are in a superior position to resolve a best interests dispute. *Id.* Thus, we review a trial court's grandparent visitation order for an abuse of discretion. *K.L. v. E.H.*, 6 N.E.3d 1021, 1031 (Ind. Ct. App. 2014). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *In re Guardianship of Morris*, 56 N.E.3d 719, 723 (Ind. Ct. App. 2016).

[11] Ind. Code § 31-17-5-6 requires that a grandparent visitation order be accompanied by specific findings of fact and conclusions of law. Accordingly, we apply the two-tiered Indiana Trial Rule 52 standard of review. *In re Visitation of M.L.B.*, 983 N.E.2d 583, 585 (Ind. 2013). We first determine whether the evidence supports the findings, and then whether the findings support the judgment. *In re K.I.*, 903 N.E.2d 453, 457 (Ind. 2009). We set aside findings of fact only if they are “clearly erroneous,” deferring to the trial court’s superior opportunity “to judge the credibility of the witnesses.” *Id.* “A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment,” and will also be found clearly erroneous “when the trial court applies the wrong legal standard to properly found facts.” *Id.*

[12] McVey has not filed an appellee’s brief. When an appellee fails to file a brief, we do not develop an argument on the appellee’s behalf. *C.V. v. C.R.*, 64 N.E.3d 850, 852 (Ind. Ct. App. 2016). Instead, we may reverse the trial court’s judgment if the appellant’s brief establishes prima facie error. *Riggen v. Riggen*, 71 N.E.3d 420, 422 (Ind. Ct. App. 2017). Prima facie error is error “at first sight, on first appearance, or on the face of it.” *Id.*

## II. Grandparent Visitation Order

[13] There are limited circumstances where “[a] child’s grandparent may seek visitation rights.” I.C. § 31-17-5-1. As are the circumstances here, Grandparents may file a petition for visitation when a child was born out of wedlock and Father’s paternity was established. *Id.* I.C. § 31-17-5-2(a) provides

that “[t]he court may grant visitation rights if the court determines that visitation rights are in the best interests of the child.” In evaluating a child’s best interest, a trial court “may consider whether a grandparent has had or has attempted to have meaningful contact with the child.” I.C. § 31-17-5-2(b). Grandparent visitation rights must be established prior to an adoption for a grandparent to have guaranteed contact with the child post-adoption. *See* I.C. § 31-17-5-9(2)(A).

[14] In *In re K.I.*, our Supreme Court declared that a grandparent visitation order should address the following factors that were set forth by this court in *McCune v. Frey*, 783 N.E.2d 752, 757-59 (Ind. Ct. App. 2003):

(1) a presumption that a fit parent’s decision about grandparent visitation is in the child’s best interests (thus placing the burden of proof on the petitioning grandparents);

(2) the ‘special weight’ that must therefore be given to a fit parent’s decision regarding nonparental visitation (thus establishing a heightened standard of proof by which a grandparent must rebut the presumption);

(3) ‘some weight’ given to whether a parent has agreed to some visitation or denied it entirely (since a denial means the very existence of a child-grandparent relationship is at stake, while the question otherwise is merely how much visitation is appropriate); and

(4) whether the petitioning grandparent has established that visitation is in the child’s best interests.

*K.I.*, 903 N.E.2d at 462; *see also In re Visitation of M.L.B.*, 983 N.E.2d at 586.

[15] Here, it is apparent that the trial court addressed the factors of *McCune* with its focus on McVey as the parent in deciding that Grandparents should not have court-ordered visitation. In our view, those factors do not apply in these circumstances because *McCune* and its progeny specifically apply to the child's parents. *See, e.g., Crafton v. Gibson*, 752 N.E.2d 78, 96 (Ind. Ct. App. 2001), (observing that a grandparent seeking visitation has the burden of rebutting the presumption that a "decision made by a fit *parent* to . . . limit visitation was made in the child's best interest") (emphasis added). Our grandparent visitation statutes contemplate only "occasional, temporary, visitation that does not substantially infringe on a *parent's* fundamental right to control the upbringing, education and religious training of their children." *K.I.*, 903 N.E.2d at 462 (emphasis added) (citations omitted).

[16] While McVey is J.I.'s caretaker, she is not her legal parent. And even assuming that relevant documents have been filed to begin the adoption process, McVey has no fundamental right with respect to J.I. at this time because no adoption has occurred. Our statutes contemplate that it is the trial court's duty to determine what is in the best interests of a child, as Grandparents are at risk of losing all rights and visitation with J.I. if the adoption occurs. *See* I.C. § 31-17-5-9(2)(A). Hence, we proceed to address the central issue as to whether the trial court erred in concluding that awarding Grandparents visitation with J.I. would not be in J.I.'s best interests.

- [17] First, we note that while Mother had no contact with J.I. or DCS following J.I.'s birth and her whereabouts are unknown, Father was present at the hearing and testified that he supported Grandparents' continued visitation with J.I. Father's testimony is entitled to "some weight" that he has "agreed to some visitation." *Megyese v. Woods*, 808 N.E.2d 1208, 1213, (Ind. Ct. App. 2004). This factor is significant because "once a parent agrees to some visitation, the dispute is no longer over whether the grandparent will have *any* access to the child, but instead over how often and how much visitation will occur." *Crafton*, 752 N.E.2d at 97 (emphasis added).
- [18] The evidence established Grandparents' desire and willingness to remain in contact with J.I., as they consistently drove over an hour and rented a hotel room on visitation days. Grandparents stayed in the hotel with J.I. to provide her with a home-like environment, and they did not want to waste their visitation time with J.I. in the car driving to some other location. Moreover, Grandparents were careful about taking J.I. out in public because of the pandemic.
- [19] Grandparents desired increased time and overnight visits with J.I. at their DCS-approved residence so they could promote a safe and "stable environment" for J.I. *Transcript Vol. II* at 10. Grandparents also agreed to abide by all court orders even if the trial court instituted a no contact order between biological Father and J.I., if it meant they would be granted court-ordered visitation.

[20] In addition to Grandparents' testimony, McVey acknowledged that J.I. has a healthy relationship with Grandparents and that over time, she has increased visitation periods from four hours to nearly twenty hours per month. McVey also encouraged involvement and visitation from other Romero family members so J.I. will have the support and encouragement that she needs from those who love her.

[21] It was established that J.I., who is almost two years old, is forming bonds and relationships with the people who love her. Grandparents have had consistent and meaningful contact with J.I. to the extent that DCS and McVey have permitted, and it is apparent from this record that Grandparents are acting in J.I.'s best interests. As a result, the evidence presented at the hearing and the trial court's findings do not support the determination that court-ordered visitation would not be in J.I.'s best interests. We therefore conclude that the denial of Grandparents' petition for visitation was clearly erroneous. We reverse and remand with instructions that the trial court conduct further proceedings as necessary to determine the appropriate amount of Grandparent visitation and enter a decree establishing said visitation.

[22] Reversed and remanded.

Kirsch, J. and Weissmann, J., concur.