MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Stacy Nalley,
Appellant-Petitioner,

v.

Eric Attebery,
Holly Davis,
Appellee-Respondent

June 14, 2021

Court of Appeals Case No. 20A-GU-1911

Appeal from the Warrick Superior Court

The Honorable Amy Steinkamp Miskimen, Judge

Trial Court Cause No. 87D02-1803-GU-12

Bailey, Judge.

Case Summary

[1] Stacy Nalley ("Guardian") appeals the denial of her motion to correct error, which challenged an order terminating her guardianship of her grandchild, A.D., and awarding custody to A.D.'s father, Eric Attebery ("Father"). Guardian presents the issue of whether the trial court clearly erred by terminating the guardianship. We affirm.

Facts and Procedural History

[2] A.D. was born on January 8, 2018 to Guardian's daughter ("Mother"). Within days, A.D. was removed from the care of Mother, who had been diagnosed as having schizophrenia, and placed in the custody of Guardian. Approximately two weeks after A.D.'s birth, Guardian reached out via social media to Father, but Father initially declined to acknowledge his paternity or become involved in A.D.'s life.

[3] On April 23, 2018, Mother and Guardian appeared at a guardianship hearing. With Mother's consent, Guardian was appointed as the guardian of A.D.'s person. On August 16, 2019, the State of Indiana intervened in guardianship proceedings for the purposes of establishing A.D.'s paternity and parental child support obligations. DNA testing identified Father as A.D.'s biological father, and Father entered into an agreement establishing his paternity and child

support obligation.[1] Father began to exercise some parenting time with A.D., but Guardian declined to allow overnight visits. On May 21, 2020, Father petitioned to terminate the guardianship.

[4] On September 30, 2020, the trial court conducted a hearing on the petition. Guardian testified that Mother was not capable of caring for A.D., but Guardian believed that she, rather than Father, should have custody of A.D. Guardian's stated reasons were that A.D. had been with her all but fifteen days of his life, Father had initially been reluctant to accept parental responsibilities, and Father had not properly attended to A.D.'s injuries and cleanliness during visits. Guardian asked for a specific declaration from the trial court that she had the status of a "de facto custodial parent" who "stands in the shoes of a parent notwithstanding the guardianship." (App. Vol. II, pgs. 117-18.)

[5] Father testified that he was employed full-time and lived with his girlfriend and their infant child, E.D. According to Father, he and A.D. had developed a bond, and A.D. often asked to see E.D. Father had recently rented a two-bedroom house from a family member, and E.D.'s mother expected to provide in-home care for both children while Father worked. Father conceded that he had not had contact with A.D. for nineteen months but also asserted that he had not been given timely notice of guardianship proceedings.

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[1] Mother was also ordered to pay child support.

[6] On October 5, 2020, the trial court granted the petition to terminate the guardianship, finding the guardianship to be "no longer necessary." (App. Vol. II, pg. 12.) The trial court specifically denied "the Guardian's petition to declare Guardian as custodial parent" explaining, "This Court finds that the guardianship statute never provides for a de facto parent. Further, in her petition, the Guardian fails to cite any statute or case law that allows this." (*Id.* at 13.) Guardian filed a motion to correct error, asserting that she was a de facto custodial parent and that the trial court had failed to accord proper weight to her relationship with A.D. when determining A.D.'s best interests. The motion to correct error was summarily denied. Guardian now appeals.

Discussion and Decision

[7] At the outset, we observe that no appellee's brief was filed in this case. In these circumstances, we apply a less stringent standard of review with respect to the showing necessary to establish reversible error. *In re Paternity of M.S.*, 146 N.E.3d 951, 956 (Ind. Ct. App. 2020). 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.* Moreover, we will not undertake the burden of developing legal arguments on the appellee's behalf. *Id.*

[8] Where, as here, the trial court has entered findings and conclusions in accordance with Indiana Trial Rule 52, we employ a two-tiered standard of review. *In re Guardianship of L.L.*, 745 N.E.2d 222, 227 (Ind. Ct. App. 2001), *trans. denied*. We first determine whether the evidence supports the findings,

and then consider whether the findings support the judgment. *Id.* The trial court's findings and judgment will not be set aside unless they are clearly erroneous. *Id.* A judgment is clearly erroneous when it is unsupported by the conclusions drawn, and conclusions are clearly erroneous when they are not supported by findings of fact. *Id.* A judgment is also clearly erroneous when the trial court has applied the wrong legal standard to properly found facts. *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005). In reviewing the order being appealed, we will neither reweigh the evidence nor assess witness credibility. *In re M.B. and P.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. Rather, we will consider only the evidence that supports the trial court's judgment together with all reasonable inferences to be drawn therefrom. *Id.*

[9] Where, as here, a trial court enters findings of fact and conclusions of law sua sponte, the specific findings control only as to the issues they cover, while a general judgment standard applies to issues on which the trial court has not entered findings. *M.S. v. C.S.*, 938 N.E.2d 278, 282 (Ind. Ct. App 2010). We may affirm a general judgment on any theory supported by the evidence. *Id.* "As we have repeatedly observed in child custody cases, trial courts are in the position to see the parties, observe their conduct and demeanor, and hear their testimony; therefore, their decisions receive considerable deference on appeal." *Nunn v. Nunn*, 791 N.E.2d 779, 787 (Ind. Ct. App. 2003). Pure questions of law, however, are reviewed de novo. *M.S. v. C.S.*, 938 N.E.2d at 282.

[10] Here, the trial court made findings of Father's current circumstances relative to his suitability as a parent and Guardian does not allege that these findings of

fact are unsupported by the evidence. Rather, Guardian contends that her role was not accorded proper weight. Apparently recognizing that the trial court was not obliged to declare her a de facto custodial parent, as requested, she asserts that she was a de facto custodian as defined by Indiana Code Section 31-9-2-35.5. Beyond her assertion that she satisfied statutory criteria, Guardian does not fully develop a corresponding cogent argument; however, she seems to suggest that the trial court did not adequately consider A.D.'s placement history. Guardian emphasizes evidence that she had long been A.D.'s caregiver while Father resisted involvement in his life.

[11] Indiana law defines a "de facto custodian" to include someone who has been the primary caregiver for, and a financial supporter of, a child who has resided with the person for at least six months if the child is less than three years of age or one year if the child is at least three years of age. Ind. Code § 31-9-2-35.5. Indiana Code Section 31-14-13-2.5, which "applies only if the court finds by clear and convincing evidence that the child has been cared for by a de facto custodian," provides in relevant part:

> (b) In addition to the factors listed in section 2 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 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.

[12] Guardian was A.D.'s primary caregiver for the requisite amount of time. Also, she provided for A.D. financially when neither parent was subject to a child support order. Thus, Guardian satisfied the statutory criteria to be considered a de facto custodian. "The apparent intent of the de facto custodian statute is to clarify that a third party may have standing in certain custody proceedings, and

that it may be in a child's best interests to be placed in that party's custody." *In re K.I.*., 903 N.E.2d 453, 462 (Ind. 2009). Here, notwithstanding the trial court's lack of explicit recognition of Guardian as a de facto custodian, there was no question that Guardian was a proper party to the custody dispute. Her standing was conferred by her role as a court-appointed guardian. And, while Indiana Code Section 31-14-13-2.5 sets forth additional proper considerations in a custody dispute with a de facto custodian, the statutory language does not mandate the trial court to articulate its reasoning. Ultimately, as discussed below, the burden remains upon a non-parent to show by clear and convincing evidence that continued third-party placement is in a child's best interests, even if the non-parent is a de facto custodian. *See A.C. v. N.J.*, 1 N.E.3d 685, 693 (Ind. Ct. App. 2013).

[13] Our Indiana Supreme Court described in detail the legal framework applicable to custody disputes between a natural parent and a third party. *Id.* In particular, *K.I.* involved a parent's action to take custody of his daughter away from a custodial grandparent. First, the Court observed that custody modifications are reviewed for an abuse of discretion, with a preference for deference to our trial judges in family law matters. *Id.* at 457. The Court then recognized that, pursuant to Indiana Code section 31–14–13–6, child custody may not be modified unless the modification is in the best interests of the child, and there is a substantial change in one or more of the statutory factors for consideration. *Id.*

[14] However, the Court in *K.I.* clearly reiterated that the non-parent must overcome the "important and strong presumption" that a child's best interests are best served by placement with his or her natural parent. *Id.* at 459 (citing *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002)). The burden is one of clear and convincing evidence proving that the child's best interests are "substantially and significantly" served by the third-party placement. *Id.* The Court specifically rejected a "burden-shifting regime" placing the third party and the parent on a level playing field, as this would be inconsistent with longstanding State precedent. *Id.* at 460.

[15] Although the party seeking a change of custody must persuade the trial court that modification is in the best interests of the child and there is a substantial change in one of the aforementioned statutory factors, "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." *Id.* The "parent comes to the table with a strong presumption" and the burden imposed by the statutory requirements is "minimal." *Id.* When the parent meets this "minimal burden," 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. *Id.* at 460-61. If the third party carries the burden, custody of the child remains in the third party. *Id.* at 461. "Otherwise, custody must be modified in favor of the child's natural parent." *Id*. In short, in a custody dispute between a parent and a third party, the burden of proof that third-party custody is warranted is always upon the third party. *See id.*

[16] Indiana Code Section 29-3-12-1(c)(4) directs that a guardianship may be terminated when the trial court determines that "the guardianship is no longer necessary[.]" Here, the trial court concluded that Guardian had not shown that continuation of the guardianship was necessary because she had established neither parental unfitness nor that a continued guardianship was in A.D.'s best interests. The factual findings in support of the guardianship termination included: Father had been restricted in his access to A.D. but nonetheless, Father and A.D. had developed a "strong bond"; A.D. "loved his baby sister"; Father was employed full-time and had acquired suitable housing with a separate bedroom for A.D.; and Father had fostered A.D.'s relationship with his maternal grandfather. (App. Vol. II, pg. 13.) The findings have evidentiary support. After paternity was established, Father consistently maintained contact with A.D. and provided for A.D. financially. Guardian's contentions that the trial court ignored Father's criminal history[2] and that Father's eighteen-year-old girlfriend is unsuitable to provide childcare are requests that we reweigh the evidence. This we cannot do. *In re M.B. and P.B.*, 666 N.E.2d at 76.

[2] Father had a misdemeanor conviction for Criminal Trespass, arising from an incident when he parked his vehicle at a graveyard and went swimming on a property without authorization. He also had an unspecified number of speeding tickets.

Conclusion

[17] The trial court did not clearly err in terminating the guardianship of A.D.

[18] Affirmed.

May, J., and Robb, J., concur.