

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of B.S., A.R.S.,
and N.J.S. (Minor Children),
Children in Need of Services,

and

G.S. (Father),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner

March 7, 2022

Court of Appeals Case No.
21A-JC-1803

Appeal from the Allen Superior
Court

The Honorable Lori K. Morgan,
Judge

Trial Court Cause Nos.

02D08-1908-JC-454

02D08-2012-MI-875

02D08-1707-JC-505

02D07-1801-JP-16

02D08-1510-JC-513

02D07-1601-JP-36

Crone, Judge.

Case Summary

- [1] G.S. (Father) appeals the trial court's orders granting custody of his children B.S., A.R.S., and N.J.S. (the Children) to their relatives. He argues that the trial court's custody determinations are not supported by clear and convincing evidence demonstrating that the Children's best interests are substantially and significantly served by placing them in the custody of a person other than a parent. We affirm.

Facts and Procedural History

- [2] Father and N.H. (Mother)¹ (collectively the Parents) have never been married. Father's paternity of N.J.S. and A.R.S. was established pursuant to paternity proceedings, and his paternity of B.S. was established pursuant to a paternity affidavit.² In October 2015, N.J.S. was born prematurely, and her meconium test came back positive for cocaine, opiates, oxycodone, and cannabinoids. Ex. Vol. 1 at 90-91, 97. The Indiana Department of Child Services (DCS) intervened, filed a petition alleging that N.J.S. was a child in need of services (CHINS), and placed her in the care of her maternal grandfather (Grandfather), where she has since continually resided. *Id.* at 18. In November 2015, Father plead guilty to level 6 felony possession of cocaine. *Id.* at 91; Ex. Vol. 2 at 74-75. In December 2015, N.J.S. was found to be a CHINS, based on the Parents'

¹ Mother has not appealed the trial court's custody orders.

² In both paternity proceedings, the trial court deferred ruling on the issues of custody, parenting time, and child support due to the ongoing CHINS proceedings.

admissions. Ex. Vol. 1 at 90-91, 97. The dispositional order required Father to submit to a diagnostic assessment and a drug and alcohol assessment and follow all recommendations, refrain from the consumption of alcohol and illegal drugs, submit to random drug testing, refrain from criminal activity, and visit with N.J.S. *Id.* at 102.

[3] In October 2016, Father had an altercation with Mother during which police were called.³ *Id.* at 113. In orders dated November 2016 and March 2017, the trial court found that Father continued to test positive for illegal substances. *Id.* at 118, 124. In March 2017, the trial court found that Father failed to regularly visit N.J.S. *Id.* at 124.

[4] In July 2017, A.R.S. was born prematurely, and her meconium tested positive for cocaine. *Id.* at 142. DCS removed A.R.S. from Mother's care, filed a CHINS petition, and placed A.R.S. in licensed foster care. *Id.* at 22. In January 2018, A.R.S. was adjudicated a CHINS based on the Parents' admissions. *Id.* at 142, 147-48. Father was ordered to submit to a diagnostic assessment and a drug and alcohol assessment and follow all recommendations, refrain from consumption of alcohol and illegal drugs, submit to random drug screening, refrain from criminal activity, and visit A.R.S. *Id.* at 152.

³ This altercation was briefly referred to in the November 2016 permanency plan order. The parties do not cite to any other parts of the record providing additional details about this altercation.

- [5] In September 2017, in N.J.S.'s CHINS case, the trial court found that Father had completed services, but DCS and the court-appointed special advocate (CASA) believed that he had not benefited from those services. *Id.* at 131. The trial court also found that Father had not consistently visited N.J.S. *Id.*
- [6] In March 2018, the trial court found that Father had regularly visited N.J.S., but that he had not complied with requests for drug screens in January, February, or March, and had not permitted DCS personnel to enter his home. *Id.* at 136.
- [7] By June 2018, N.J.S.'s and A.R.S.'s CHINS cases had been consolidated. *Id.* at 165. The trial court found that Father was participating in services and had been testing negative for drugs, but that he had "refused any home visits to ensure the safety of the [C]hildren being placed in his care." *Id.* at 167. The court adopted a permanency plan for N.J.S. of termination of parental rights with adoption and a concurrent plan of granting custody to Grandfather. *Id.* The court's permanency plan for A.R.S. was to reunify her with Mother and Father. *Id.* A.R.S. was still placed in licensed foster care. *Id.* at 168.
- [8] In October 2018, the trial court found that Father had completed substance abuse classes and individual counseling. *Id.* at 173. The trial court adopted a new permanency plan for both N.J.S. and A.R.S. of reunification with Mother.

Id. Both children were in Grandfather’s care.⁴ In early December 2018, B.S. was born.

[9] In January 2019, the trial court found that Father had enrolled in and was participating in the services and programs as ordered, had regularly visited N.J.S. and A.R.S., had not tested positive for illegal substances, and had “demonstrated an ability to benefit from services.” *Id.* at 179. The court ordered that N.J.S. remain in Grandfather’s home and that A.R.S. be returned to Mother’s home. *Id.* at 180.

[10] In March 2019, the trial court found that Father was complying with services, but that there were “concerns about his interaction” with Grandfather. *Id.* at 184. The trial court found that A.R.S. was living with Mother and Father on a trial home visit and was progressing well in their care. *Id.* at 185. The court ordered A.R.S. to remain in the Parents’ care and N.J.S. to remain in Grandfather’s care. *Id.*

[11] On August 19, 2019, DCS removed A.R.S. from Mother’s home due to Mother’s drug use and placed her with Grandfather. *Id.* at 197. In September 2019, DCS removed B.S. from Mother’s home because Mother was incarcerated, placed B.S. with his paternal cousin (Cousin), and filed a CHINS petition. *Id.* at 197-98. In December 2019, B.S. was adjudicated a CHINS based

⁴ The October 2018 order indicates that A.R.S. was in licensed foster care. Ex. Vol. 1 at 174. However, Grandfather testified at the hearing that she was placed with him in August 2018. The trial court relied on Grandfather’s testimony, and Father does not dispute the August 2018 placement date.

on Mother's and Father's admissions that they had used drugs. *Id.* at 197, 203, 206. Father was ordered to submit to a psychological evaluation and a drug and alcohol assessment and follow all recommendations, enroll in a home-based services program, maintain clean, safe, and appropriate housing, refrain from criminal activity, and visit B.S. *Id.* at 211.

[12] In February 2020, the trial court found that Father was participating in services and had regularly visited the Children but had tested positive for illegal substances. *Id.* at 221. In September 2020, the trial court found that Father had not completed a psychological evaluation, had not fully cooperated with drug screens, and had not demonstrated an ability to benefit from services. *Id.* at 229. The trial court authorized Grandfather to file custody pleadings for N.J.S. and A.R.S. and Cousin to file custody pleadings for B.S. *Id.* at 230. In December 2020, DCS filed a motion for permanency and joinder for each child, seeking to place N.J.S. and A.R.S. in Grandfather's custody and B.S. in Cousin's custody. *Id.* at 16, 20, 29.

[13] In January 2021, the State filed an information alleging that in December 2020, Father committed level 6 felony residential entry, class A misdemeanor domestic battery against Mother, and class A misdemeanor battery resulting in bodily injury against Mother's male friend. Ex. Vol. 2 at 32.

[14] A hearing on DCS's motions for permanency was held in April 2021. On July 21, 2021, the trial court issued three separate orders granting Grandfather custody of N.J.S. and A.R.S. and Cousin custody of B.S. The three orders

provide the same basis for placing each child in the custody of his or her relative. Regarding N.J.S., the trial court found as follows:

9. The [P]arents have a very volatile relationship with each other and incidents of domestic violence have occurred between the two. This interferes with their ability to co-parent and to provide the child with a safe, stable home environment.

10. At the time of the hearing on the Motion for Permanency, [Father] was incarcerated for home invasion and domestic violence with [Mother] being the victim of the offenses.

11. During the CHINS proceedings there were concerns about [Father's] visitations with the child, particularly with regard to his parenting style because he was not very "hands on" during the visitations. During visits when his younger children requested to go to the restroom, he would ignore their requests. He required assistance in changing his youngest child's diaper. There were times when he would take the child on a community visit and then towards the end of the visit, when they would return to the visitation supervisor's office, he would fall asleep rather than spend time visiting with the child. He would not allow the family case managers to view his home, which made it difficult to ascertain whether the home was appropriate for placement for the child. His last visit with the child was December 3, 2020.

15. [N.J.S.] has been residing with [Grandfather] since October of 2015 and they have a strong bond and relationship.

....

17. [Father] has provided little or no financial support for the child since the initiation of the CHINS proceedings.

....

20. The child has been removed from [Parents'] home and has been placed in relative care. [Parents] have been ordered to participate in services that are designed to assist them in reunifying with the child, however, they have not participated in and/or benefitted from services provided.

21. The child is of a young age. [N.J.S.] has been in placement with her [Grandfather] for more than five (5) years The [P]arents have not regularly visited with the child over the course of the proceedings and she is not well bonded with them. [N.J.S.] is bonded with [Grandfather] ... and [has] flourished in his care. She has siblings in his home and is bonded with her other siblings in the home as well. At the time of the hearing on the Motion for Permanency, [Father] was incarcerated as a result of a conviction for an act of domestic violence perpetrated against [Mother].

22. The Court finds by clear and convincing evidence that the best interests of [N.J.S.] are substantially and significantly served by granting [Grandfather] sole legal custody and primary physical custody of [N.J.S.]. The child is well bonded with [him] and has resided with him for approximately 5 years. She has flourished in his care. She is not well bonded with her [P]arents. Her [P]arents have not participated in and/or benefitted from services provided in the CHINS proceedings. The child is in need of a permanent, safe stable home. She should not be required to wait indefinitely to achieve permanency.

Appealed Order for N.J.S. at 2-4.

[15] In general, the orders for A.R.S. and B.S. differ only as to names and dates. The trial court found that A.R.S. had been in placement with Grandfather since

August 2018 for approximately three years, and B.S. had been in placement with [Cousin] since B.S. was nine months old for approximately two years. Appealed Orders for A.R.S. and B.S. at 3-4. In addition, the trial court found that unsupervised parenting time between Father and A.R.S. and between Father and B.S. “will endanger [the child’s] physical health or significantly impair [the child’s] emotional development.” *Id.* at 4. The trial court granted Father supervised parenting time with all three Children. This appeal ensued.

Discussion and Decision

[16] The trial court made findings of fact and conclusions thereon in its orders granting custody of the Children to their relatives. As such, we “shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011) (quoting Ind. Trial Rule 52(A)). “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Id.* (quoting *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997)). In reviewing custody determinations, we neither reweigh the evidence nor reassesses witness credibility and view the evidence most favorably to the judgment. *Id.*

[17] “In conjunction with the Trial Rule 52 standard, there is a longstanding policy that appellate courts should defer to the determination of trial courts in family law matters.” *D.G. v. S.G.*, 82 N.E.3d 342, 348 (Ind. Ct. App. 2017), *trans. denied* (2018). Our supreme court has explained,

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. 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.

Best, 941 N.E.2d at 502.

[18] “The controlling factor in custody determinations is the best interests of the child.” *In re Paternity of A.J.*, 146 N.E.3d 1075, 1082 (Ind. Ct. App. 2020), *trans. denied*. When, as here, the trial court is asked to consider placing custody with a person who is not the child’s natural parent, there is a strong presumption that a child’s interests are best served by placement with the natural parent. *Manis v. McNabb*, 104 N.E.3d 611, 617 (Ind. Ct. App. 2018). Our supreme court has articulated how this presumption operates:

[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 presumption will not be overcome merely because a third party could provide the better things in life for the child. 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.

In re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) (citation and quotation marks omitted).

[19] In this case, the trial court was called upon to make an initial custody determination. Initial custody determinations are governed by Indiana Code Section 31-14-13-2, which provides,

The court shall determine custody in accordance with the best interests of the child. In determining the child’s best interest, 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 interest.
- (5) The child's adjustment to 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 chapter.

(Emphasis added.)⁵

⁵ Father asserts that instead of applying Indiana Code Section 31-14-13-2, the trial court improperly applied Indiana Code Section 31-14-13-6, which governs custody modifications. Section 31-14-13-6 provides that a party seeking a change of child custody must persuade the trial court that modification is in the best interests of the child and that there is a substantial change in one or more of the statutory best interest factors. We note that the trial court properly applied the presumption that the Children's best interests were served by placement with their natural parents and placed the burden of proving the more stringent custody modification standard on DCS. *See In re Paternity of Winkler*, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000) (noting that standard governing modification of custody is more stringent than standard governing initial custody determinations).

[20] Beginning with the first factor, we observe that the trial court considered the ages of the Children.⁶ It recognized their young ages and how much of their lives they had spent living in relative care. N.J.S. was born in October 2015 and had been in Grandfather's care for five years, essentially since her birth. A.R.S. was born in July 2017 and had been in Grandfather's care since August 2018, for nearly three years. B.S. was born in December 2018, had been placed in Cousin's care when he was nine months old, and had been in her care for approximately two years. The court found that all of the Children had a strong bond and relationship with their relative caregiver, which Father does not challenge. The Children's young ages were also a factor when the trial court considered Father's interaction and interrelationship with them, as the court found that Father was unresponsive to their need to use the bathroom and was unable to change the diaper of the youngest without assistance.

[21] As for Father's wishes, he opposed the motions for permanency, and there is no indication that the trial court ignored his wishes as it weighed whether DCS had established by clear and convincing evidence that the Children's best interests were served by placing them in custody of their relatives.

[22] Regarding Father's interactions with the Children, Father challenges the trial court's findings that he is not well bonded with them. However, he does not

⁶ The parties agree that factors (3) and (8) are inapplicable. Regarding factor (3), we observe that although the Children are young and could have difficulty expressing their wishes, their wishes are not irrelevant simply because they are less than fourteen years old. That said, because the parties do not cite to any evidence revealing the Children's wishes on custody, we will not discuss this factor.

challenge the trial court's finding that he had not regularly visited with the Children over the course of the proceedings and that DCS personnel had concerns about his interaction with the Children because he was not very "hands on" and would sometimes fall asleep in the supervisor's office rather than spend time visiting the Children. Appealed Orders at 2. Our review of the record shows that after A.R.S. and B.S. were removed from Mother's home in August and September of 2019, Father never progressed past having fully supervised visits with the Children.⁷ Indeed, the trial court found that unsupervised parenting time between Father and A.R.S. and Father and B.S. will endanger their physical health or significantly impair their emotional development, and Father does not challenge this finding. Father's challenge to the court's finding that he is not well bonded with the Children is merely a request to reweigh the evidence, which we must decline.

[23] Regarding the Children's interactions with other significant persons, we observe that Father does not challenge the findings that N.J.S. and A.R.S. have a strong bond with Grandfather and that B.S. has a strong bond with Cousin. He also does not challenge the finding that he and Mother have "a very volatile relationship with each other [that] interferes with their ability to co-parent and to provide [the Children] with a safe, stable home environment." Appealed

⁷ DCS asserts that Father never progressed past having fully supervised visits with the Children in six years. Appellee's Br. at 22-23. However, the record shows that A.R.S. was returned to Mother's custody from January 10 to August 19, 2019, and Father was living with Mother during that time. Ex. Vol. 1 at 185.

Orders at 2. Finally, he does not challenge the court's findings that N.J.S. and A.R.S. are bonded.⁸

[24] Turning to the Children's adjustment to home, school, and community, the trial court found that the Children were flourishing in their relatives' care. In contrast, Father would not allow the DCS family case managers to view his home, and thus it was difficult to ascertain whether it was appropriate for the Children. At the time of the hearing, Father was incarcerated and could not provide the Children with a home.

[25] Regarding the mental and physical health of the individuals involved, Father notes that he obtained a diagnostic assessment as ordered by the court. The assessment indicated that he should take parenting classes and enroll in home-based services. He states that he completed the parenting classes and had enrolled in home-based services but had not yet completed them. Father also notes that he obtained a psychological assessment as ordered, but there was no testimony as to the results. Although Father may have participated in services, the trial court found that he had not benefited from the services. Despite parenting classes, Father was not adequately attentive to the Children during visitation. Despite drug and alcohol assessments, Father returned to using drugs. He admitted to using drugs in October 2017. Ex. Vol. 1 at 148. He admitted that he used cocaine in November 2019. *Id.* at 203. In the fall of 2019,

⁸ The trial court also found that B.S. had siblings in his home with whom he is bonded, but there is no evidence that B.S. was living with siblings in Cousin's care.

Father had two other positive drug screens. Ex. Vol. 2 at 54, 58. Exposing children to illegal drug use poses “an actual and appreciable danger” to them. *White v. State*, 547 N.E.2d 831, 836 (Ind. 1989) (discussing dangers of illegal drug use on dependents in context of neglect conviction).

[26] As for the last applicable factor, Father has committed acts of domestic abuse against Mother. In October 2016, Father was involved in an altercation with Mother during which police were called. Ex. Vol. 1 at 113. Then, in December 2020, Father attacked Mother, and he was charged with level 6 felony residential entry, class A misdemeanor domestic battery, and class A misdemeanor battery resulting in bodily injury.⁹ Ex. Vol. 2 at 32. Mother reported to her case manager that Father came into her home and was approached by another male who was with her. Tr. Vol. 2 at 156. Mother said that Father threw her to the ground, punched her, kicked her, and choked her. *Id.* At the final day of the hearing on DCS’s motions for permanency, Father testified that he pled guilty to the charges and was being released on probation that day. *Id.* at 176. Given that there have been at least two incidents of domestic violence between Mother and Father, there is a risk that the Children would be exposed to additional domestic violence if placed in Father’s care. This would put the Children’s physical and mental health at risk. *See In re L. T.*,

⁹ Father’s appellate counsel states that Father was charged in April 2018 in cause number 02D04-1804-F6-409. However, those charges were against Mother. Ex. Vol. 2 at 2.

145 N.E.3d 864, 872 (Ind. Ct. App. 2020) (observing that child's exposure to domestic violence endangered child's mental health).

[27] Based on the criteria relevant to determining the Children's best interests, the trial court concluded that DCS had demonstrated by clear and convincing evidence that the Children's best interests are substantially and significantly served by granting custody to Grandfather and Cousin. We cannot say that the trial court's determination is clearly erroneous. Accordingly, we affirm the orders granting Grandfather custody of N.J.S. and A.R.S. and the order granting Cousin custody of B.S.

[28] Affirmed.

Bradford, C.J., and Tavitas, J., concur.