ATTORNEYS FOR APPELLANTS

Alexander N. Moseley
Bryan L. Ciyou
Ciyou and Dixon, P.C.
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Scott Geels and Erica Leitch,
Petitioners - Appellants,

v.

Desiree Morrow and Sean Riley,
Respondents - Appellees

January 26, 2022

Court of Appeals Case No. 21A-MI-960

Appeal from the Allen Superior Court

The Honorable Charles F. Pratt, Judge

Trial Court Cause No. 02D08-1906-MI-000437

May, Judge.

[1] Scott Geels and Erica Leitch (collectively, "Scott and Erica") appeal the trial court's denial of their petition for guardianship of A.R. ("Child"). Scott and Erica challenge one finding and contend the trial court's findings do not support its conclusion that it is not in Child's best interests for Scott and Erica to be awarded guardianship of Child. We affirm.

Facts and Procedural History

[1] Child was born on September 9, 2016, to Desiree Morrow ("Mother") and Sean Riley ("Father") (collectively, "Parents"). Parents have never been married; Father signed a paternity affidavit at the time of Child's birth. Child lived with Parents until Parents' separation in November 2017.

[2] Mother relied on Erica for daycare from November 2017 to January 2018. In January 2018, Mother asked Scott and Erica to care for Child on a full-time basis after the "heat went out" in her apartment. (Tr. Vol. II at 155.) Mother intended for Child to stay with Scott and Erica until she "either a) found a stable place to live, or b) was able to find a different house to rent[.]" (*Id.*) Mother testified she attempted to visit Child while Child was in Scott and Erica's care:

> [O]ver the course of the time from January - the end of January to May, I was having communication with Erica every day asking about [Child], asking how she is doing, asking, um, like is she up, can I come over. It was set at first that I was supposed to come over there and see her, um, every couple days after work. But then it came right off in the beginning to where Erica was saying that [Child] was in bed at 4:30 in the evening. [Child's]

> taking a nap, we're not gonna wake her up. [Child's] taking a nap. [Child's] playing right now, or she's out with Scott right now or um, I'm home working and I need to have quiet so she with Scott to a soccer game.

(*Id*. at 156) (errors in original). Mother testified Scott and Erica did not communicate with her for two months in June and July 2018. They began communicating again in approximately August 2018, and Mother saw Child intermittently, though she claimed "it was almost impossible for [her] to see [Child] because they were putting [Child] to bed at 6:00 p.m. and saying that she was sleeping from 6:00 p.m. every night until 11:00 a.m. every morning." (*Id*. at 157.)

[3] Scott and Erica presented evidence that, during the time Child was in their care, they presented themselves as Child's parents and took Child to "family gatherings, holidays, cookouts, family reunions . . . classes at the library, art, music, story time . . . sporting events . . . the Botanical Conservatory, Science Central, Art Museum, just different things to - to broaden [Child's] horizons." (*Id*. at 32.) During this time Scott and Erica also "financially assisted [Mother] paying her sixty dollars ($60.00) per week." (App. Vol. II at 15.) Child lived with Scott and Erica from January 2018 until October 2018.

[4] On October 19, 2018, Mother asked Scott and Erica to return Child to Mother's care. They refused, citing concern for Child's safety, and Mother called police. Police contacted the Department of Child Services ("DCS"), which investigated the incident. DCS found Mother's residence appropriate and released Child

into Mother's care. Child lived with Mother for ten days until Mother returned Child to Scott and Erica.

[5] Child lived with Scott and Erica from late November 2018 until March 5, 2019. During this time and until approximately April 2019, Scott and Erica paid Mother's rent. On March 5, 2019, Mother retrieved Child from Scott and Erica's care. On April 9, 2019, Mother allowed Scott and Erica to see Child, which was the last time they saw Child. On June 7, 2019, Scott and Erica filed a petition to establish guardianship of Child.[1]

[6] From approximately June 2019 until May 2020, Child resided with Father and his girlfriend, Shanna ("Girlfriend"). On May 16, 2020, Mother retrieved Child from Father's care and Child has remained in Mother's care since. On September 17, 2020, Scott and Erica filed their request for findings of fact and conclusions of law. The trial court held a hearing on the guardianship petition on September 18, 2020, took the matter under advisement, and directed the parties to file proposed findings of fact and conclusions of law within sixty days.

[7] On October 27, 2020, Scott and Erica filed a motion to reopen the evidentiary record based on information they received after the September 18, 2020, hearing regarding a DCS investigation into Mother and her boyfriend, Brian ("Boyfriend"). The trial court granted the motion and held a hearing for the

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[1] Scott and Erica filed a petition to establish guardianship of Child on March 14, 2019, and that petition was dismissed on June 8, 2019. The details of that proceeding, including the reason for dismissal, are unclear from the record.

presentation of the new evidence on April 7, 2021. On April 29, 2021, the trial court issued its order denying Scott and Erica's petition for guardianship of Child.

Discussion and Decision

[8] As an initial matter, we note Parents did not file an Appellees' brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id.* Prima facie error is "error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006). Where an appellant is unable to meet that burden, we will affirm. *Hill v. Ramey*, 744 N.E.2d 509, 511 (Ind. Ct. App. 2001).

[9] Indiana Code section 29-3-5-3 governs the appointment of a guardian and states, in relevant part:

> (a) Except under subsection (c), if it is alleged and the court finds that:
>
> > (1) the individual for whom the guardian is sought is an incapacitated person or a minor; and
> >
> > (2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person or minor;

> the court shall appoint a guardian under this chapter.
>
> * * * * *
>
> (c) If the court finds that it is not in the best interests of the incapacitated person or minor to appoint a guardian, the court may:
>
> > (1) treat the petition as one for a protective order and proceed accordingly;
> >
> > (2) enter any other appropriate order; or
> >
> > (3) dismiss the proceedings.

A guardianship proceeding involving a minor "is, in essence, a child custody proceeding that raises important concerns about parental rights and the 'best interests' of children." *In re Guardianship of L.L.*, 745 N.E.2d 222, 227 (Ind. Ct. App. 2001), *trans. denied*.

[10] When we examine child custody decisions involving third parties, it is well-established that

> there is a presumption that fit parents act in the best interests of their children. . . . [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel v. Granville, 530 U.S. 57, 68 (2000). Further,

> [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 presumption in favor of the natural parent will not be overcome merely because a third party could provide better things 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 be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent, but 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.

Truelove v. Truelove, 855 N.E.2d 311, 314 (Ind. Ct. App. 2006) (emphasis added)

[11] "Child custody determinations are within the discretion of the trial court and will not be disturbed except for an abuse of discretion. We will not reverse unless the trial court's decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom." *Id*. Additionally,

> in reviewing a judgment requiring proof by clear and convincing evidence, an appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence.

In re Guardianship of B.H., 770 N.E.2d 283, 288 (Ind. 2002).

[12] When, as here, a party requests findings and conclusions pursuant to Indiana Trial Rule 52(A),

> we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. We will not set aside the findings or the judgment unless they are clearly erroneous. The trial court's findings of fact are clearly erroneous if the record lacks any evidence or reasonable inferences to support them. A judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings.

Truelove, 855 N.E.2d at 314.

[13] The trial court determined Scott and Erica were de facto custodians of Child. Pursuant to Indiana Code section 31-9-2-35.5, a de facto custodian is, relevant to the facts before us, "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[.]" To determine whether a child has resided with someone for the period of time required for a de facto custodianship to exist, "[a]ny period after a child custody proceeding has been commenced may not be included" in the determination. Ind. Code § 31-9-2-35.5. When Scott and Erica filed for guardianship, Child was not yet three years old, and Child lived with Scott and Erica for approximately one year in 2018 and 2019, before they filed for guardianship. As such, Scott and Erica were Child's de facto custodians. *See id.*

[14] When making its child custody decision, the trial court must first consider those factors under Indiana Code section 31-17-2-8, which include, in relevant part:

> (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.

When, as here, a child has been cared for by a de facto custodian, the trial court must also consider:

> (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.

Ind. Code § 31-17-2-8.5.

[15] Scott and Erica argue the trial court's findings do not support its conclusion that it was in Child's best interests to deny their petition for guardianship because:

> (1) Mother is presently unfit to care for Minor Child; (2) Mother long acquiesced to [Scott and Erica's] care of the Minor Child; and (3) Mother's past abandonment of the Minor Child has led to the affections of the Minor Child and [Scott and Erica] to become so interwoven that to sever them would seriously mar and endanger future happiness of the Minor Child.

(Br. of Appellants at 15.) Further, Scott and Erica allege "the trial court's findings of fact and the record evidence clearly and convincingly demonstrate that awarding custody of the Minor Child to [Scott and Erica] represents a substantial and significant advantage to the Minor Child." (*Id.*)

[16] In its order, the trial court determined Child lived with Scott and Erica from January 2018 to October 2018 and from November 2018 until March 5, 2019, for a cumulative total of approximately fourteen months. Additionally, the trial court found, regarding Child's best interests and related factors:

> 9. [Mother] testified that she consented to the custodial arrangement with [Scott and Erica] because her home was without a functioning furnace. She wanted them to care for [Child] until she secured a different residence.
>
> * * * * *
>
> 22. On August 12, 2020 the Department of Child Services received a complaint that [Boyfriend] had struck [Child]. An assessment report was completed. The report includes the following:
>
> > a. [Mother] asserted that [Child] has autism, is lazy and does not like to learn.

b. [Child's] bruised face was the result of being hit by a toy thrown by her one-year old half-brother. [Mother] described her one-year old son as "extremely mean". [sic]

c. [Mother] stated that [Boyfriend] will "pop' [sic] [Child] to get her attention. Being "popped' [sic] is a form of discipline that [Child] advised as also being employed by [Mother].

d. The case manager did not observe any bruises on [Child's] face. He found the home to be clean and appropriate and the children clean, well fed and well taken care of.

e. A safety plan was signed and the case was unsubstantiated.

23. Jamie Norwalt is [Child's] former day care provider. Unlike the Department of Child Services case manager, she testified that she observed bruising on [Child's] face and eye. When she inquired about it she was told by [Mother] that [Child's] younger half-brother hit [Child] with a toy. However, Ms. Norwalt testified that she heard [Child] exclaim that [Boyfriend] hit her.

24. For the past three years [Mother] has been in a relationship with [Boyfriend]. He is the father of seven children. The youngest was born to his relationship with [Mother]. She has physical custody of the child. He is the one year old referenced in the Department of Child's [sic] Services assessment.

25. When the guardianship was pending, [Mother] and [Child] lived in a studio apartment. At the time evidence was first heard in this case, [Mother] and [Child] were residing at a motel. Since

then she has assumed residency in a house. [Boyfriend] is frequently in that home but denies that he resides there.

26. [Mother] has another child, A.B., born to her former marriage to Andrew Botteron. Mr. Botteron has custody of A.B. and testified that [Mother] abandoned [A.B.] into his care in January, 2018.

27. From the testimony of Andrew Botteron, the court finds that, starting when [A.B.] was two years old, [Mother] followed a pattern of dropping their child in his care then demanding her return.

28. Andrew Botteron has secured protective orders restricting [Mother] and [Boyfriend] from having any contact with him or [A.B.]. Because of the protective orders, [A.B.] has limited or no contact with her half-sister [Child].

29. [Scott and Erica] have resided in the same home for eight (8) years. They have been in a relationship for ten (10) years.

30. [Scott and Erica's] home includes a separate bedroom for [Child].

31. After [Child] had been in [Scott and Erica's] care for a period of time, [Child] began referring to them as "mom" and "dad".

32. When [Scott and Erica] had [Child] in their care they read to her daily and engaged with her in activities. They arranged for sibling visitations with [A.B.].

33. [Erica] testified that [Mother] has told her of being the victim of domestic violence perpetrated by [Boyfriend]. Her testimony is disputed by [Mother] and [Boyfriend].

34. [Scott and Erica] express their love for [Child].

(App. Vol. II at 15-7) (citation to the record omitted). Further, when applying the relevant statutory factors in a separate section of its order, the trial court found:

7. [Mother] desires [Child] to remain in her care. Her position is not shared by [Scott and Erica] and [Father].

8. [Child] is four years old and has expressed her love for [Scott and Erica] as well as [Mother] and [Boyfriend].

9. Owing to the circumstances of the relationship between [Mother] and the father of her other daughter, [Child] does not have any sibling contact with her half-sister, [A.B.]. If placed in the custody of [Scott and Erica], that circumstance would likely change. However, it is questionable that [Child] would regularly see her half brother born to the union of [Mother] and [Boyfriend].

10. At the time of the closure of evidence in this case, [Child] was residing in a home on Fourth Street, Fort Wayne, Indiana. The Department of Child Services reported the home to include rooms for [Child] and her brother. The home was described as very clean with ample food.

11. Although [Mother] and [Boyfriend] appeared to be emotional and histrionic during the hearing, they responded appropriately to the Court. There is no evidence that either suffer from any mental or physical illness. Similarly, [Scott and Erica] are healthy and are able to meet the demands of a small child.

12. No evidence was presented that detailed in any depth [Mother's] reference reported in the Department of Child Services Assessment that [Child] is autistic. However, she was not diagnosed as being within the autism spectrum.

13. Initially [Child] was voluntarily placed in the care of [Scott and Erica] by [Mother]. The de facto custodian relationship evolved from an arrangement through which they provided day care. When her furnace broke, [Mother] required that [Scott and Erica] care for [Child] for an extended period. During that period, they provided [Mother] with financial assistance. The parties' testimonies differ as to what transpired following the initial placement of [Child] in the care of [Scott and Erica]. [Scott and Erica] assert that [Mother] rarely visited [Child] and would vacillate between wanting [Child] in her care or theirs. [Mother], however, testified that [Scott and Erica] withheld visitation and she had to engage the police to retrieve [Child] back into her care.

14. The Court concludes from the evidence that [Mother's] housing instability and economic circumstances motivated her decision to allow [Child] to remain in the custody of [Scott and Erica].

* * * * *

20. [Mother] has provided an appropriate home for [Child] and the circumstances in her life have improved.

(App. Vol. II at 18-9) (citation to the record omitted).

[17] Scott and Erica do not challenge these findings,[2] and unchallenged findings "must be accepted as correct." *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1991). Scott and Erica argue the trial court did not consider certain evidence, such as their testimony and evidence suggesting Mother and Boyfriend engaged in domestic violence, Mother's pattern of leaving Child in the care of others, injuries Child allegedly suffered, and various other allegations against Mother and Boyfriend. Their request that we hold the trial court erred by not including their alternate version of events as findings of fact is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See In re Guardianship of B.H.*, 770 N.E.2d at 288 (appellate court does not reweigh evidence or judge the credibility of witnesses).

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[2] Scott and Erica challenge one finding regarding Mother's acquiescence to their custody of Child: "In October, 2018, [Mother] demanded the return of [Child] into her care. When [Scott and Erica] resisted, [Mother] engaged police." (App. Vol. II. at 15.) Scott and Erica argue the evidence does not support this finding because: (1) there was no evidence that they resisted returning Child to Mother and (2) Mother did not call police, Scott and Erica did.

The record reveals the following. On October 19, 2018, Mother came to Scott and Erica's house demanding the return of Child. (Tr. Vol. II at 25.) Earlier that week, she had indicated she wanted Child to live with her, but Scott and Erica felt Child was not safe with Mother and called the police, who advised that they call law enforcement if Mother attempted to retrieve Child at a later time. (*Id*.) When Mother came to Scott and Erica's house later that evening, they "contact[ed] the police as [they were] instructed earlier in the day." (*Id*.) Scott and Erica refused to give Child to Mother, and the police called DCS to assist in the investigation. The DCS investigator testified "it was a very emotional scene." (*Id*. at 12.) After DCS investigated Mother's residence to ensure it was appropriate for Child, the DCS investigator returned Child to Mother's care because Mother "has legal custody of [Child] and she can decide" where Child resides. (*Id*. at 13.)

While it is true that it was Scott and Erica who called the police on October 19, 2018, not Mother, that detail is of no consequence. Someone called the police because Scott and Erica refused to release Child to Mother's care upon her request that they do so. This resistance prompted a DCS investigation into Mother's residence, after which DCS found Mother's residence to be appropriate and released Child to her care. The error in the finding is mere surplusage and does not prejudice Scott and Erica, and thus is harmless. *See In re B.J.*, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008) ("Because there is evidence sufficient to support the trial court's ultimate findings on the elements necessary to sustain the judgment" the erroneous finding was "merely harmless surplusage that did not prejudice [m]other and, consequently, is not grounds for reversal."), *trans. denied*.

[18] Scott and Erica cared for Child for a period of approximately one year in 2018 and 2019 because Mother was unable to provide adequate housing for Child. During that time, Scott and Erica loved Child as if she was their own child, providing her with several amenities and opportunities she may have not otherwise had. Since March 5, 2019, Mother has provided Child with adequate care. Scott and Erica have not seen Child in two years. While Scott and Erica may have the financial means to give Child a "better" life by some standards, their ability to so does not overshadow Mother's natural and constitutional right to raise Child.

[19] Mother has stable housing and Scott and Erica have not presented evidence that she is unable to care for Child. The trial court found there was no evidence that Mother suffered from any mental or physical illness and all DCS investigations into Mother's parenting of Child have returned unsubstantiated. Child recognizes Mother as her mother and refers to her as such. Thus, the trial court's findings support its conclusion that it is not in Child's best interests for Scott and Erica to be her guardians. *See id.* at 287 ("The presumption [that the child's best interests are ordinarily served by placement in the custody of the natural parent] will not be overcome merely because 'a third party could provide the better things in life for the child.'") (quoting *Hendrickson v. Binkley*, 161 Ind.App. 388, 396, 316 N.E.2d 376, 381 (1974), *cert. denied* 423 U.S. 868 (1975) (abrogated on other grounds)). *And see In re Guardianship of L.L.*, 745 N.E.2d at 233 ("For the sake of children, society should encourage parents who are experiencing difficulties raising them to take advantage of an available

'safety net,' such as a grandparent who is willing to accept temporary custody of a child." To then grant custody of the child to that person without the heightened "best interests" consideration "would discourage such action by parents in difficult straits and discourage efforts to 'reform' or better their life situation if their chances of later reuniting with their children were reduced.").

Conclusion

[20] The trial court's unchallenged findings supported its conclusion that it was not in Child's best interests for Scott and Erica to be her guardians. Accordingly, we affirm the trial court's denial of their petition for guardianship.

[21] Affirmed.

Brown, J., and Pyle, J., concur.