MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ryan P. Dillon
Dillon Legal Group, P.C.
Franklin, Indiana

ATTORNEY FOR APPELLEE

Donna Jameson
Greenwood, Indiana

IN THE COURT OF APPEALS OF INDIANA

In Re: The Guardianship of H.L.H. (minor child);

Phyllis C. VanWinkle,

Appellant-Cross-Petitioner,

v.

Logan Hilbert,

Appellee-Respondent,

and

Gary Tumey and Meridian Tumey,

Appellee-Petitioner.

July 20, 2021

Court of Appeals Case No. 21A-GU-176

Appeal from the Hendricks Superior Court

The Honorable Robert W. Freese, Judge

Trial Court Cause No. 32D01-2007-GU-68

Pyle, Judge.

Statement of the Case

[1] Phyllis VanWinkle ("Maternal Grandmother") appeals the trial court's order granting Meridian Tumey's ("Paternal Cousin") and Gary Tumey's (collectively "the Tumeys") joint petition for appointment as co-guardians of ten-year-old H.H. ("H.H."). Maternal Grandmother specifically argues that the trial court abused its discretion in granting the Tumeys' petition. Concluding that the trial court did not abuse its discretion, we affirm the trial court's judgment.

[2] We affirm.

Issue

> The sole issue for our review is whether the trial court abused its discretion when it granted the Tumeys' petition for co-guardianship of H.H.

Facts

[3] The facts most favorable to the judgment reveal that H.H. was born in August 2010. Her mother ("Mother") died of a heroin overdose in Indiana in April 2019. At that time, H.H. and her father ("Father") moved in with Maternal Grandmother in Kentucky.

[4] In August 2019, Maternal Grandmother pleaded guilty, in Indiana, to committing one count of Class A misdemeanor operating a vehicle while intoxicated endangering a person in November 2018. *See* INDIANA CODE § 9-30-5-2. The trial court sentenced Maternal Grandmother to 365 days of

probation, which included 180 days of home detention. Maternal Grandmother and H.H. lived at Paternal Grandmother's home in Indiana while Maternal Grandmother was on probation. During that time, Maternal Grandmother drank alcohol in violation of her probation agreement.

[5] The trial court granted Maternal Grandmother's petition for discharge from probation supervision at the end of January 2020. At that time, H.H. returned to Kentucky with Maternal Grandmother. While H.H. was living in Kentucky, Paternal Cousin spoke with her every other day on social media.

[6] In July 2020, Father told Paternal Cousin that "he wanted [H.H.] in a safer environment from [Maternal Grandmother] [who] was a raging alcoholic[.]" (Tr. Vol. 2 at 6). Father further told Paternal Cousin that Maternal Grandmother "ha[d] had multiple issues with drinking and driving but none had been reported by police just the one . . . in Morgan County." (Tr. Vol. 2 at 6). During one incident when H.H. and Father were both in the car, Maternal Grandmother was "driving on the wrong side of the road and [Father] had to make her pull over because she [had] almost hit a car head on while she was intoxicated." (Tr. Vol. 2 at 41-42).

[7] On July 7, 2020, Father and the Tumeys went to Kentucky, picked up H.H., and took her back to Indiana. Shortly thereafter, the Tumeys filed a petition for emergency co-guardianship of H.H. The Tumeys included with their petition a signed document from Father, which "g[a]ve temporary custody of [H.H.] to

[the Tumeys] while [Father went] to [drug] treatment and further if needed." (App. Vol. 2 at 5). The trial court granted the Tumeys' petition three days later.

[8] In August 2020, Maternal Grandmother filed a counter-petition requesting guardianship of H.H. In October 2020, Father executed a consent to Maternal Grandmother's counter-petition. In November 2020, the Tumey's filed a petition requesting permanent co-guardianship of H.H.

[9] The trial court held a hearing on the petitions in November 2020 and heard as testimony the facts as set forth above. In addition, Paternal Cousin testified that H.H., who had previously had to repeat the third grade, was passing her classes and enjoying her teachers. Paternal Cousin further testified that H.H. was seeing both a school counselor and a psychiatrist. Paternal Cousin also testified that she had seen Father the day before he had executed his consent to Maternal Grandmother's counter-petition and that Father had been "high on heroin" at that time. (Tr. Vol. 2 at 16).

[10] Paternal Grandmother testified that she had previously seen Maternal Grandmother "falling down drunk." (Tr. Vol. 2 at 41). Paternal Grandmother also testified that she spoke on the telephone with Maternal Grandmother several times each week and that Maternal Grandmother had been inebriated during their conversations as recently as the week before the hearing. Further, according to Paternal Grandmother, she sees H.H. almost every night, and H.H. is very happy with the Tumeys. H.H. also has an extended family in the

area that includes her brother, who had been adopted by H.H.'s uncle, and a cousin who is like a sister to H.H.

[11] Maternal Grandmother testified that she had not consumed any alcoholic beverages in more than a year. Further, according to Maternal Grandmother, Father was incarcerated for two to three years at the time of the hearing. Maternal Grandmother also testified that Paternal Cousin had invited Maternal Grandmother to Thanksgiving dinner at the Tumeys' home.

[12] Following the hearing, the trial court issued an order granting the Tumeys' petition. Neither party requested findings of fact and conclusions thereon, and the trial court's order does not include them. Rather, the trial court's order states that: (1) H.H. needs a guardian because she is a minor; (2) Mother is deceased; (3) Father is incarcerated; (4) the Tumeys are the most qualified and suitable persons to serve as H.H.'s co-guardians; (5) it is in H.H.'s best interests that the Tumeys be appointed as her co-guardians; and (6) all of the statutory requirements for guardianship have been satisfied.

[13] Maternal Grandmother now appeals.

Decision

[14] Maternal Grandmother argues that the trial court abused its discretion when it granted the Tumeys' guardianship petition.[1] We disagree.

[15] At the outset, we note that we grant latitude and deference to trial court judges in family law matters. *In re Guardianship of M.N.S.*, 23 N.E.3d 759, 765-66 (Ind. Ct. App. 2014). Appellate deference to the determination of trial court judges, especially in family law matters, is warranted because of their unique, direct interactions with the parties face-to-face. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Because trial courts are tasked with assessing credibility and character through both factual testimony and intuitive discernment, trial judges are in a superior position to ascertain information and apply common sense. *Id.* Therefore, we neither reweigh the evidence nor reassess witness credibility, and we view the evidence most favorably to the judgment. *Id*.

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[1] Maternal Grandmother also argues that the trial court erred when it failed to enter detailed findings of fact and conclusions thereon in support of its order. First, Maternal Grandmother has waived appellate review of this issue because she failed to ask the trial court to enter detailed findings of fact and conclusions thereon. *See Reynolds v. Reynolds*, 64 N.E.3d 829, 834 (Ind. 2016) (explaining that a party "may not sit idly by and raise issues for the first time on appeal"). Second, waiver notwithstanding, Maternal Grandmother's reliance on *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002), is misplaced. In *B.H.*, the natural father and the stepfather became involved in a placement dispute following the death of the children's mother. The Indiana Supreme Court explained that, *in child placement disputes between natural parents and other persons*, there is a strong presumption that the children's best interests are served by placement in the custody the natural parent. *Id*. at 287. However, the trial court has the discretion to determine whether this presumption "is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served" by placement with the person other than the natural parent. *Id.* If a trial court makes the determination that there is evidence to overcome this presumption, "detailed and specific findings are required." *Id.* Here, however, natural parents are not involved in the placement dispute. H.H.'s mother is deceased and her father is incarcerated. *B.H.* is, therefore, inapplicable, and Maternal Grandmother's argument fails.

[16] Guardianship proceedings are guided by statute.[2] *M.N.S.*, 23 N.E.3d at 765-66. INDIANA CODE § 29-3-5-1(a) provides that "[a]ny person may file a petition for the appointment of a person to serve as guardian for . . . a minor[.]" The trial court shall appoint a guardian if "it is alleged and the court finds . . . (2) that appointment is necessary as a means of providing care and supervision of . . . the minor." I.C. § 29-3-5-3(a)(2).

[17] The trial court is vested with discretion in making a determination regarding the guardianship of a minor. *In re Guardianship of A.L.C.*, 902 N.E.2d 343, 352 (Ind. Ct. App. 2009). Thus, we review a trial court's guardianship order for an abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the log and effect of the facts and circumstances before it. *Id*.

[18] Here, the gravamen of Maternal Grandmother's argument is that the trial court abused its discretion when it determined that it was in H.H.'s best interests that the Tumeys be appointed as H.H.'s co-guardians. Maternal Grandmother specifically argues that "[t]here was no evidence whatsoever presented that [H.H.] is better with the Tumeys[.]" (Maternal Grandmother's Br. 13).

[19] A guardianship proceeding is, in essence, a child custody proceeding that raises important concerns about the best interests of the child. *Roydes v. Cappy*, 762 N.E.2d 1268, 1274 (Ind. Ct. App. 2002). *See also* I.C. § 29-3-5-4 ("The court shall appoint as guardian or guardians person or persons most suitable and

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[2] The guardianship statutes were amended effective July 1, 2021.

willing to serve, having due regard to the . . . (9) the best interest of the . . . minor and the property of the . . . minor.") Accordingly, trial courts may be guided by the factors set forth in INDIANA CODE §§ 31-14-13-2 and 31-17-2-8, which are used to determine custody in accordance with the best interests of the child in custody determinations in paternity and marital dissolution actions. *Id.* Those relevant factors include: (1) the age and sex of the child; (2) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interest; (3) the child's adjustment to home, school, and community; and (4) the mental and physical health of all individuals involved.

[20] Here, our review of evidence most favorable to the judgment reveals that Father was concerned about Maternal Grandmother's alcohol consumption while H.H. was living in her home in Kentucky. Father therefore asked Paternal Cousin, who had an established relationship with H.H., and her husband to care for H.H. In July 2020, Father and the Tumeys took H.H. from Maternal Grandmother's home in Kentucky to the Tumeys' home in Indiana. At the time of the hearing, H.H. had been living with the Tumeys for four months. She was doing well in school and seeing both a school counselor and a psychiatrist. H.H., who had daily contact with Paternal Grandmother, also lived near her brother, who had been adopted by an uncle and his family. In addition, H.H. had a close relationship with a female cousin. Our review of the evidence further reveals that, although Maternal Grandmother testified that she had not consumed alcohol in over a year, Paternal Grandmother testified about

Maternal Grandmother's alcohol use while on probation and her inebriation as recently as one week before the hearing. Based on the facts and circumstances of this case, the trial court did not abuse its discretion in determining that it was in H.H.'s best interests that the Tumeys be appointed as her co-guardians and in granting the Tumeys' petition for co-guardianship of H.H.[3]

[21] Affirmed.

Najam, J., and Tavitas, J., concur.

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[3] Maternal Grandmother also argues that the trial court abused its discretion when it granted the Tumeys' petition because, pursuant to INDIANA CODE § 29-3-5-5, Maternal Grandmother had a higher statutory priority than the Tumeys to be considered as H.H.'s guardian. First, INDIANA CODE § 29-3-5-5(a) provides that "[t]he following are entitled *consideration* for appointment as a guardian under section 4 of this chapter in the order listed[.]" (Emphasis added). Thus, even if Maternal Grandmother had statutory priority, that priority was for *consideration* for appointment as H.H.'s guardian. The statute did not entitle her to priority to an appointment as H.H.'s guardian. *See A.L.C.*, 902 N.E.2d at 354. Second, as Maternal Grandmother recognizes, INDIANA CODE § 29-3-5-5(b) further provides that "[t]he court, acting in the best interest of the . . . minor, may pass over a person having priority and appoint a person having a lower priority, or no priority under this section." Maternal Grandmother argues that a best interests analysis "shows that placing [H.H.] with the Tumeys isn't truly in [H.H.'s] best interests or is at least in no way superior to staying with" Maternal Grandmother. (Maternal Grandmother's Br. 14). Maternal Grandmother's argument asks us to reweigh the evidence, which we cannot do. *See Best*, 941 N.E.2d at 502.