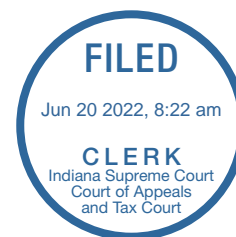


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Mark A. Thoma
Leonard, Hammond, Thoma & Terrill
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
David E. Corey
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of:
R.H. and R.M. (*Minor Children*),
and

S.H. (*Father*),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner,

June 20, 2022

Court of Appeals Case No.
21A-JC-2495

Appeal from the Allen Superior
Court

The Honorable Sherry A. Hartzler,
Magistrate

The Honorable Lori K. Morgan,
Judge

Trial Court Cause Nos.
02D08-1909-JC-524
02D08-1909-JC-525
02D08-2012-MI-838
02D08-2012-MI-839

Robb, Judge.

Case Summary and Issues

- [1] S.H. appeals the trial court’s order granting custody of his biological children R.H. and R.M. (collectively “Children”) to his parents J.H. and B.P.H. (collectively “Grandparents”). S.H. raises multiple issues for our review which we restate as: (1) whether the trial court abused its discretion by granting custody of the Children to Grandparents; and (2) whether the Indiana Department of Child Services (“DCS”) engaged in reasonable efforts to reunify S.H. with the Children. Concluding that the trial court did not abuse its discretion and DCS engaged in reasonable efforts, we affirm.

Facts and Procedural History

- [2] S.H. and E.H. (collectively “Parents”)¹ are the biological parents of the Children. On September 27, 2019, Kentucky child welfare authorities responded to a report that Parents had left the Children unattended in a parked car in a Kentucky parking lot. Parents then returned to Fort Wayne, Indiana with the Children. On September 28, DCS visited Parents’ Fort Wayne residence and found the Children “dirty and disheveled[.]” Appellant Father’s Appendix (“Appellant’s App.”), Volume II at 171. DCS removed the Children

¹ E.H. is not a party to this appeal.

from Parents' home and placed them with Grandparents. On September 30, Parents informed DCS that they had moved to Tennessee. However, the Children remained in Indiana with Grandparents. On October 1, DCS filed a Verified Petition Alleging Children to be Children in Need of Services ("CHINS").

[3] On November 26, the Children were adjudicated as CHINS. The trial court issued a dispositional decree ordering S.H. to, in part: refrain from criminal activity; maintain safe, clean, and sustainable housing; submit to a diagnostic assessment and follow all recommendations; enroll in a home-based services program, participate in all sessions, and successfully complete the program; and attend and appropriately participate in all visits with the Children as directed.

See Exhibits, Volume 1 at 75.

[4] On December 2, 2020, Grandparents filed petitions for custody of the Children. Subsequently, DCS filed a motion for permanency and joinder requesting Grandparents be granted custody of the Children. On July 26 and August 24, 2021, the trial court held hearings on DCS' motion for permanency. Family Case Manager ("FCM") Sara Weldon testified that S.H. completed a diagnostic assessment but never began the recommended counseling and that home-based casework services were not in place for him in Tennessee. Further, FCM Weldon testified that she would have concerns about the Children's safety if they were returned to Parents, stating Parents were both unemployed, had no medical insurance, and their housing was unstable, having had three different

addresses since moving to Tennessee. *See* Transcript, Volume 2 at 79, 88.² FCM Weldon also visited the Children every thirty days at Grandparents' home and described them as "thriving[,] . . . well fed[,] . . . safe, [and] stable." *Id.* at 78. Both FCM Weldon and Court Appointed Special Advocate ("CASA") Nicole Fischer testified that granting custody of the Children to Grandparents was in the Children's best interests. *See id.* at 69, 78.

[5] J.H. ("Grandfather") testified that prior to the Children being placed in his care, Parents had been kicked out of the mobile home they lived in due to cleanliness issues and that he was unhappy about the Children's living conditions such as the "cleanliness of the kids, their eating habits, their sleeping habits, . . . and just how dirty and not structured these children were[.]" *Id.* at 8-9. Grandfather also explained that all communication between Parents and the Children was done over the phone because Parents moved out of state after the Children were placed with Grandparents but that those communications went from "being consistent to not being consistent." *Id.* at 16. The only time Parents visited in person was when they needed to appear in court or if there was a birthday. Further, Grandfather did not believe S.H. was employed at the time of the hearing.

[6] On October 14, 2021, the trial court entered its order granting Grandparents custody of the Children. The trial court found, in part:

² Citation to the Transcript is based on pdf. pagination.

8. The Court finds that the children were removed from their parents . . . due to concerns related to unstable housing, substance abuse, and failure to supervise. Upon the removal of the children, they were observed to be unkempt, had feeding issues, and behavioral issues. The children have improved in the care of their grandparents. . . .

* * *

10. Factual admissions were made by Mother as follows: that in July 2018, neglect in the form of a drug-exposed infant was substantiated against Mother; that in August 2019, the family was residing in a home that was condemned; that in September 2019, Mother advised [DCS] that she had moved to Tennessee; that child welfare authorities in Kentucky responded to a report that the children were left by Mother, without supervision, in a car in a parking lot; that Mother tested positive for THC and admitted to marijuana use in August and September 2019; that neither Mother nor Father were currently able to personally provide stable housing and supervision; and that she and the children would benefit from services that she was unable to receive without the coercive intervention of the Court.

11. Similar factual admissions were made by Father: that the family home had been condemned; that the Mother and Father advised [DCS] that Mother had moved with the children to Tennessee; that Mother and Father were currently unable to provide stable housing and supervision for the children; and that the family would benefit from services they would be unable to receive without the coercive intervention of the Court.

* * *

13. On February 24, 2020, a Review Hearing was held at which the Court found the parents reside in Tennessee, and that they have failed to complete services or their assessments. . . .

* * *

15. On December 10, 2020, a Review hearing was held at which the Court found that Mother and Father have completed their diagnostic assessments which recommended services; that Mother and Father completed a parenting course in Tennessee; and declined making any further findings on compliance.

16. On May 18, 2021, a Review hearing was held at which the Court found that neither parent had participated in services; that they continue to reside in Tennessee; and that out-of-state referrals were made for counseling and assessments.

17. Soon after these proceedings were initiated, Mother and Father relocated to Tennessee. Due to the relocation, it has created difficulty in providing services. Further, although Mother and Father contend they have independent and appropriate housing and that they have purchased a home, neither parent produced any documentation verifying same; and neither the DCS nor CASA has been able to verify their housing.

18. The circumstances of the relocation of Mother and Father are not entirely clear. Mother contended that she was leaving the State of Indiana, while Father was still living in Indiana in the home that was later condemned. . . .

* * *

20. Despite the DCS coordinating services with their Tennessee counterpart, neither Mother nor Father completed the services

that were initiated in Indiana prior to their relocation. While in Tennessee, Father completed an assessment, but had not initiated the recommended therapy. . . .

21. The Court finds that the DCS case manager has attempted to find an agency to provide home-based services. However, Tennessee has not provided any assistance in locating services.

22. Despite [DCS'] efforts, the onus is on the parents to ensure they complete their services. Numerous “road blocks” have been created as a result of the actions of Mother and Father. They both relocated to Tennessee while their children were still located in Indiana, and the home-based services which were ordered as a part of their parent participation plans were to assist them with employment, housing, and other community resources.

* * *

25. Ultimately, neither Mother nor Father are able to provide necessary care and supervision for the children.

26. The children were adjudicated [CHINS]. The parents have not satisfactorily completed services. They have not demonstrated an ability to benefit from services designed for the safe reunification of the children into their care. The Court finds that unsupervised parenting time by [Parents] with the children might endanger the children’s physical health or impair the children’s emotional development. Restriction of the parenting time is in the best interests of the children. . . .

27. The children’s [CASA] concurs that a modification of the children’s custody to paternal grandparents . . . serves the children’s best interests.

28. “. . . [T]here is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent’s present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness or the child [*A.J.L. v. D.A.L.*, 912 N.E.2d 866 (Ind. Ct. App. 2009)]. From the facts recited hereinabove, including the fact that the parents have not completed the services required for reunification in the [CHINS] case, the Court concludes that [the] presumption favoring the parents has been rebutted.

29. The best interests of the children are served by granting paternal grandparents . . . sole legal custody.

Appealed Order at 3-7. The trial court awarded sole legal custody of the Children to Grandparents and limited S.H. to restricted supervised visits with the Children. The trial court also terminated the Children’s wardships under the CHINS proceeding. S.H. now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Standard of Review

[7] We review a trial court’s custody modification decision for an abuse of discretion, granting latitude and deference to our trial courts in family law matters. *Wilson v. Myers*, 997 N.E.2d 338, 340 (Ind. 2013). Accordingly, we will not reweigh the evidence, judge the credibility of the witnesses, or substitute our

judgment for that of the trial court. *Robertson v. Robertson*, 60 N.E.3d 1085, 1091 (Ind. Ct. App. 2016). We will reverse the trial court’s custody decision only if it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. *Id.*

II. Custody Determination

[8] In a custody dispute between a natural parent and a third party, there is a presumption in all cases that the natural parent should have custody of his or her child. *In re L.L.*, 745 N.E.2d 222, 230 (Ind. Ct. App. 2001) (holding “de facto custodian” status does not remove the presumption in favor of natural parents obtaining or retaining custody of their children), *trans. denied*. “The third party bears the burden of overcoming this presumption by clear and cogent evidence.” *Id.* S.H. argues the trial court “abused its discretion when it determined that the best interests of the [C]hildren overcame the presumption of custody in favor of the natural parents[.]” Brief of Appellant at 19.

[9] Evidence sufficient to overcome the presumption in favor of natural parents custody includes the parents’ present unfitness, long acquiescence, or past abandonment of the child “such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.” *In re L.L.*, 745 N.E.2d at 227, 230-31; *see also In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002) (stating that a trial court is not limited to consideration of these three factors). However, a general finding that it would be in the child’s “best interests” to be placed in

the third party's custody is not sufficient to rebut the presumption. *A.J.L. v. D.A.L.*, 912 N.E.2d 866, 872 (Ind. Ct. App. 2009). If the presumption is rebutted, then the court engages in a general "best interests" analysis. *Id.*

[10] Here, there is evidence in the record of S.H.'s present unfitness. The trial court found that S.H. completed a diagnostic assessment but did not participate in the recommended therapy nor complete a home-based services program. Further, at the time of the custody hearing, S.H. was unemployed and had no insurance. Additionally, although he claimed to have purchased a home in Tennessee, this could not be verified by DCS and S.H.'s housing situation and living conditions were unknown. Because of this, FCM Weldon testified that she would have safety concerns if the Children were returned to Parents. Therefore, we conclude that Grandparents overcame the presumption in favor of the natural parents, and we must determine whether the trial court abused its discretion determining that granting custody to Grandparents is in the Children's best interest.

[11] "[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." *In re Guardianship of B.H.*, 770 N.E.2d at 287. The trial court must be convinced that placement with a third party "represents a substantial and significant advantage to the child." *Id.* S.H. contends that although placement with Grandparents may give the Children "better things in life," the Children are not afforded a "substantial

and significant advantage” by being placed with Grandparents. Br. of Appellant at 19-20 (citing *In re Guardianship of B.H.*, 770 N.E.2d at 287).

[12] Prior to their placement with Grandparents, the Children were found to be “dirty and disheveled” and S.H. admitted that he was “unable to provide stable housing and supervision” for the Children. Appellant’s App., Vol. II at 171; Appealed Order at 4. As stated above, S.H. has failed to complete home-based services, he is unemployed and uninsured, and his residential status is seemingly tenuous. S.H. has failed to adequately address the multitude of deficiencies that led to the Children being adjudicated CHINS and placed with Grandparents. Conversely, since being placed with Grandparents, the Children have been described by FCM Weldon as “thriving” and that “they’re well fed, . . . safe, [and] stable.” Tr., Vol. 2 at 78. Further, both FCM Weldon and CASA Fischer testified that granting Grandparents custody of the Children was in their best interests. *See id.* at 69, 78.

[13] We conclude that placement with Grandparents is a significant and substantial advantage to the Children and the trial court did not abuse its discretion by granting custody of the Children to Grandparents.

III. Reasonable Efforts to Reunify the Family

[14] S.H. argues that DCS failed to make efforts to reunify the family.³ DCS is required in most circumstances to make “reasonable efforts to preserve and reunify families[.]” Ind. Code § 31-34-21-5.5(b). After a child has been removed from the parent’s home, reasonable efforts should be made “to make it possible for the child to return safely to the child’s home as soon as possible.” Ind. Code § 31-34-21-5.5(b)(2). “In determining the extent to which reasonable efforts to reunify or preserve a family are appropriate . . . the child’s health and safety are of paramount concern.” Ind. Code § 31-34-21-5.5(a); *see also In re T.W.*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019) (stating what constitutes “reasonable efforts” will vary by case), *trans. denied*.

[15] S.H. contends that “DCS’s failure to complete a home visit or check what additional steps were necessary for [P]arents to complete services with the Tennessee Department of Child Protective Services was unreasonable and prejudiced” S.H.’s ability to reunify the family. Appellant’s Br. at 24. However, the only documentation S.H. provided DCS regarding proof of residence was some pictures and an unsigned lease and therefore, DCS was unable to verify that S.H. had acquired adequate housing or to complete a home visit. *See Tr.*, Vol. 2 at 79. Further, as noted by the trial court, S.H.’s relocation to Tennessee

³ DCS argues S.H. has waived this claim for failure to raise it to the trial court. It does not appear S.H. raised this particular issue to the trial court, but given our preference for deciding cases on their merits, *Omni Ins. Grp. v. Poage*, 966 N.E.2d 750, 753 (Ind. Ct. App. 2012), *trans. denied*, we will consider S.H.’s argument notwithstanding any waiver.

“created difficulty in providing services[.]” Appealed Order at 4. Pursuant to Indiana Code section 31-34-21-5.5(b), DCS is required to make only “*reasonable efforts*” to reunify the family. (Emphasis added.)

[16] Here, FCM Weldon had S.H. complete a diagnostic assessment which recommended counseling that S.H. did not complete. Further, FCM Weldon testified there was home-based casework set up in Fort Wayne, but when S.H. moved to Tennessee there was none in place. *See* Tr., Vol. 2 at 84. FCM Weldon attempted to set up home-based casework services with Tennessee’s department of child services but was unsuccessful. However, she made ongoing efforts to attempt to make services in Tennessee available to S.H. by “following up with the services . . . and following up with the parents[.]” *Id.* at 76. Therefore, given S.H.’s relocation out of state while the Children remained in Indiana, we conclude that DCS made reasonable efforts to reunify the family.

Conclusion

[17] We conclude that the trial court did not abuse its discretion in granting custody of the Children to Grandparents and that DCS engaged in reasonable efforts to reunify S.H. with the Children. Accordingly, we affirm.

[18] Affirmed.

Pyle, J., and Weissmann, J., concur.