

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Guardianship of:

R.P. (Minor Child),

A.W. and M.W.,

Appellants,

v.

J.G. and M.G.,

Appellees.

April 30, 2021

Court of Appeals Case No.
20A-GU-2123

Appeal from the Decatur Circuit
Court

The Honorable Timothy B. Day,
Judge

Trial Court Cause Nos.
16C01-1912-GU-60
16C01-2001-GU-2

Brown, Judge.

- [1] A.W. (“Foster Father”) and M.W. (“Foster Mother” and together with Foster Father, “Foster Parents”) appeal the trial court’s order denying their petition for guardianship of R.P. and granting the petition for guardianship filed by C.G., R.P.’s paternal grandmother (“Grandmother”), and J.G., R.P.’s step-grandfather (“Grandfather” and together with Grandmother, “Grandparents”). Foster Parents raise two issues which we consolidate and restate as whether the court abused its discretion in granting Grandparents’ petition for guardianship. We affirm.

Facts and Procedural History

- [2] In August 2015, R.P. was born to B.P. (“Father”) and T.W. (“Mother”). Two weeks after her birth, R.P. was placed in Foster Parents’ care. In September 2018, Mother died. At some point, DCS filed a petition to terminate Father’s parental rights, and the court denied the petition.
- [3] On December 23, 2019, Grandparents filed a petition for guardianship of R.P. under cause number 16C01-1912-GU-60 (“Cause No. 60”). On January 8, 2020, Foster Parents filed a petition for guardianship of R.P. under cause number 16C01-2001-GU-2 (“Cause No. 2”).
- [4] On January 22, 2020, the Indiana Department of Child Services (“DCS”) filed a verified motion to intervene in Cause No. 60 and objected to a guardianship for R.P. with Grandparents.
- [5] On January 23, 2020, the trial court held a consolidated hearing. Foster Parents’ counsel stated that she could put together an agreement and that “there

will be a change of placement to [Grandparents], but that will take place gradually . . . over the course of 90 days” Transcript Volume II at 5.

[6] On February 17, 2020, the court entered an Agreed Order under Cause Nos. 2 and 60 which provided that Foster Parents were the current foster placement of R.P. under cause number 16C01-1508-JC-265 (“Cause No. 265”), the parties agreed that placement in Cause No. 265 would transition to Grandparents over the course of the next ninety days, and that Grandparents would be permitted to enroll R.P. in pre-school.

[7] On August 20, 2020, and October 29, 2020, the court held a consolidated hearing. The court heard testimony from Ryan Vogt-Foster, a licensed clinical social worker, Family Case Manager Kristen Lazo (“FCM Lazo”), Suzanne Fox, a certified pediatric nurse practitioner and pediatric mental health specialist, Guardian ad litem Rebecca Cavin (“GAL Cavin”), Foster Parents, and Grandparents.

[8] After the presentation of evidence, counsel for DCS asked the court for a decision without delay and stated that the court had a “tough decision” and “[t]hese are both loving homes.” Transcript Volume III at 76. The court stated that it had lost sleep over the case, “I was the judge in the CHINS case, and I am the judge in the CHINS case,” Grandmother was “sitting right there almost every hearing,” and “the entire dynamics of the case changed when” Mother died. *Id.* at 78-79. The court stated: “I have just gone back and forth and tormented over it. But, you know, it – the longer I hear it, the more it – what I

need to do becomes clear.” *Id.* at 81. The court stated that R.P. was doing well, going to school, involved in extracurricular activities. It stated: “As between the two petitions, I have one that’s consented to by the only parent – biological parent this child has and one that is not consented to. Okay. That’s a big deal. I have biological grandparents versus non-relatives. I consider that.” *Id.* at 82. The court explained:

We have a parent here who has a relationship with this child, and I am not – I already once said I’m not terminating it. I firmly believe that if this guardianship on – as requested by [Foster Parents] would be granted, I would effectively be terminating [Father’s] parental rights. They – [Foster Father] testified clearly. They – one of the main reasons we want to do this is we don’t want to ever see that child go back to [Father]. When they mentioned we’re willing to allow grandparents to have visitation, not one word about [Father]. Not one word about [Father] having visitation. That is like crystal clear to me that the whole idea behind this is to get this guy out of here. I can’t do that. I’ve said no already. I’m not going to say no a second time with the guardianship.

You know, we have placement here. We have permanency for this child. And we have the ability to maintain a parent that is not perfect, but he is a parent and is entitled to still have a relationship with his child. And I do not feel that will happen if guardianship is granted to [Foster Parents] versus [Grandparents]. And that relationship is allowed to flourish supervised. And that’s what I would order, that his visitation always be supervised unless I say otherwise. So that’s not a worry that the [Foster Parents] need to have. The child is not going to be returned to [Father] tomorrow, next week, or maybe next year.

Id. at 82-83.

[9] On October 30, 2020, the court entered a consolidated order appointing Grandparents as R.P.’s permanent guardians. Specifically, the court found that Grandparents were the most suitable persons to serve as co-guardians and were fully qualified and willing to assume the duties and responsibilities of the guardianship. It found that it was in R.P.’s best interests for Grandparents to be appointed as co-guardians, R.P. had developed a bond with Foster Parents, and it was in her best interests to have visitation with Foster Parents. The court ordered Grandparents to continue to supervise Father’s visits with R.P. and Foster Parents to have visitation with R.P. on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Discussion

[10] The issue is whether the trial court abused its discretion in granting Grandparents’ petition for guardianship. “All findings and orders of the trial court in guardianship proceedings are within the trial court’s discretion.” *In re Guardianship of J.K.*, 862 N.E.2d 686, 690 (Ind. Ct. App. 2007) (citing Ind. Code § 29-3-2-4). Thus, we will review those findings under an abuse of discretion standard. *Id.*; see also *In re Guardianship of B.H.*, 770 N.E.2d 283, 288 (Ind. 2002) (“Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion.”), *reh’g denied*. In determining whether the trial court abused its discretion, we look to the trial court’s findings of fact and conclusions thereon. We may not set aside the findings or judgment unless they are clearly erroneous. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind. 2000), *reh’g denied*. In our review, we

first consider whether the evidence supports the factual findings. *Id.* Second, we consider whether the findings support the judgment. *Id.* “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. *Menard*, 726 N.E.2d at 1210. We give due regard to the trial court’s ability to assess the credibility of witnesses. *Id.* While we defer substantially to findings of fact, we do not do so to conclusions of law. *Id.* We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999); *see also B.H.*, 770 N.E.2d at 288.

[11] The guardianship statutes provide for the appointment of guardians for minors or incapacitated persons. *See* Ind. Code § 29-3-5-1. Ind. Code §§ 29-3-5 set forth proceedings for the appointment of a guardian, and Ind. Code § 29-3-5-3 provides that, if it is alleged and the court finds that the individual for whom the guardian is sought is an incapacitated person or a minor and 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 the chapter.

[12] Ind. Code § 29-3-5-4 is titled “Considerations for appointment of guardian” and provides:

The court shall appoint as guardian a qualified person or persons most suitable and willing to serve, having due regard to the following:

(1) Any request made by a person alleged to be an incapacitated person, including designations in a durable power of attorney under IC 30-5-3-4(a).

(2) Any request made for a minor by:

(A) a parent of the minor; or

(B) a de facto custodian of the minor, including a designation in a power of attorney under IC 30-5-3-4(b) or IC 30-5-3-4(c).

(3) Any request contained in a will or other written instrument.

(4) A designation of a standby guardian under IC 29-3-3-7.

(5) Any request made by a minor who is at least fourteen (14) years of age.

(6) Any request made by the spouse of the alleged incapacitated person.

(7) The relationship of the proposed guardian to the individual for whom guardianship is sought.

(8) Any person acting for the incapacitated person under a durable power of attorney.

(9) The best interest of the incapacitated person or minor and the property of the incapacitated person or minor.

[13] Ind. Code § 29-3-5-5 is titled “Considerations for appointment of guardian; order of consideration; priorities,” and provides:

(a) The following are entitled to consideration for appointment as a guardian under section 4 of this chapter in the order listed:

- (1) A person designated in a durable power of attorney.
- (2) A person designated as a standby guardian under IC 29-3-3-7.
- (3) The spouse of an incapacitated person.
- (4) An adult child of an incapacitated person.
- (5) A parent of an incapacitated person, or a person nominated by will of a deceased parent of an incapacitated person or by any writing signed by a parent of an incapacitated person and attested to by at least two (2) witnesses, or in a power of attorney of a living parent of an incapacitated person under IC 30-5-3-4(c).
- (6) A parent of a minor, a de facto custodian of a minor, or a person nominated:
 - (A) by will of a deceased parent or a de facto custodian of a minor; or
 - (B) by a power of attorney of a living parent or a de facto custodian of a minor.
- (7) Any person related to an incapacitated person by blood or marriage with whom the incapacitated person has resided for more than six (6) months before the filing of the petition.
- (8) A person nominated by the incapacitated person who is caring for or paying for the care of the incapacitated person.

(b) With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the incapacitated person

or minor, may pass over a person having priority and appoint a person having a lower priority or no priority under this section.

[14] Foster Parents argue the trial court placed substantial weight on Father's consent to Grandparents' petition and Grandmother's biological connection to R.P. as her paternal grandmother. They assert that Indiana law does not require a trial court to appoint a guardian to whom Father consented where R.P.'s best interests dictate otherwise. They contend they raised and loved R.P. from the time she was two weeks old and enjoy a parent-child bond. They argue that any special consideration to be given to a relationship under Ind. Code § 29-3-5-4 would apply equally if not more to their relationship with R.P. They contend the evidence overwhelmingly leads to the conclusion that guardianship in their favor is in R.P.'s best interests. Grandparents argue that the trial court did not err by considering Father's consent and that Foster Parents request that we reweigh the evidence.

[15] While Vogt-Foster, the licensed clinical social worker, recommended placement with Foster Parents and that R.P. have a relationship with Grandparents, she also testified that R.P. was doing well with Grandparents and was bonded with them. She stated that R.P. identified Grandfather as her best friend, Grandparents support R.P. in her activities and worked hard to meet her needs, and she felt that R.P. was well-loved and cared for in both homes.

[16] FCM Lazo testified that R.P. seemed to be doing fine with the placement with Grandparents, the transition to Grandparents' house had gone well, R.P. was in the most family-like setting, and Grandparents were doing a good job with R.P.

When asked on cross-examination by Foster Parents' counsel if DCS had an opinion as to whether the guardianship with Grandparents or Foster Parents was in R.P.'s best interest, she answered: "We don't have an opinion. Both environments are safe for [R.P.], so just a guardianship in general." Transcript Volume II at 72.

[17] While Suzanne Fox, the certified pediatric nurse practitioner and pediatric mental health specialist, testified that she thought Foster Parents should have full guardianship and Grandparents have visitation rights, she also stated that R.P. was thriving in her current environment.

[18] GAL Cavin recommended that R.P. be placed with Foster Parents and that Grandparents receive visitation. However, she also testified that R.P. had "everything she could want" at Grandparents' residence and seemed happy and safe. Transcript Volume III at 6.

[19] The court heard the testimony from Foster Parents and Grandparents regarding their relationships with R.P. It heard Father's testimony acknowledging that he had not regained custody of R.P. because he was using drugs, assertion that he was no longer using drugs, and admission that a drug test would reveal marijuana. Father consented to Grandparents' guardianship of R.P. Grandfather testified that he and Grandmother supervise Father's visits with R.P. and that Father lives a couple of miles from them. Grandmother also acknowledged that Father's visits needed to be supervised.

[20] Based upon the evidence and testimony, we are unable to conclude that the trial court abused its discretion in appointing Grandparents as guardians of R.P.

[21] For the foregoing reasons, we affirm the trial court's order.

[22] Affirmed.

Bradford, C.J., and Vaidik, J., concur.