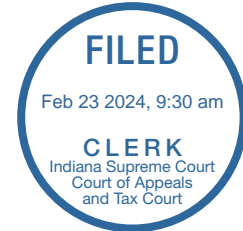


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Emily Rutherford
Appellant-Respondent

v.

Ryan McMurtrey
Appellee-Petitioner

February 23, 2024

Court of Appeals Case No.
23A-DC-2220

Appeal from the Floyd Circuit Court

The Honorable J. Terrance Cody, Senior Judge

Trial Court Cause No.
22C01-1704-DC-244

Memorandum Decision by Judge Riley
Judges Brown and Foley concur

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Respondent, Emily Rutherford (Mother), appeals the trial court's parenting time Order following Mother's motion to lift parenting time restrictions with respect to the minor child, R.M. (Child).

[2] We reverse and remand.

ISSUE

[3] Mother presents this court with three issues on appeal, which we consolidate and restate as: Whether the trial court abused its discretion when it allowed Child to decide the frequency and location to exercise parenting time with Mother.

FACTS AND PROCEDURAL HISTORY

[4] Mother and Appellee-Petitioner, Ryan McMurtrey (Father), were married on May 2, 2008. One Child was born during the marriage on October 21, 2008. On November 16, 2011, the district court for Mayes County, in Oklahoma, entered a decree of dissolution of marriage, which awarded the parties joint custody of Child, with Child primarily residing with Mother. On May 23, 2017, the Oklahoma custody order was domesticated and registered with the trial court.

[5] In early 2021, Mother began to abuse alcohol, which negatively impacted her ability to parent Child. In April 2021, Mother was hospitalized prior to a

scheduled hearing regarding Child’s custodial arrangement. The trial court took judicial notice of an order entered in another unrelated domestic relations case involving Mother, which suspended Mother’s parenting time with two younger children from a subsequent marriage. On April 23, 2021, without a hearing and without issuing any findings, the trial court suspended Mother’s parenting time with Child. Following an in-camera interview with Child on July 26, 2021, the trial court entered its findings on August 23, 2021, concluding that, in consideration of Child’s wishes, “parenting time shall remain suspended until [Mother] can provide evidence of her physical and mental ability to resume parenting time, supervised or unsupervised.” (Appellant’s App. Vol. II, p. 85). The trial court did not provide a specific parenting time schedule, instead directing that, “[Child] needs time and space to process her relationship with [Mother]. If [Child] wishes to have in person visitation/parenting time with [Mother], supervised or unsupervised, the parties shall schedule the same at such times, locations and under such conditions that [Child] is comfortable.” (Appellant’s App. Vol. II, p. 86). Mother sought professional help and began working with addiction specialists at the VA. She was diagnosed with substance abuse disorder and began a course of addictive and alcohol use therapy, which she engaged in regularly.

[6] On February 9, 2022, Mother filed a motion to lift the suspension of her parenting time, attaching letters from her medical providers confirming Mother’s mental and physical stability. That same day, Mother also filed a motion for court-ordered counseling, seeking to aid Child and Mother “in their

relationship and [asking] that the counselor be able to recommend whether therapeutic counseling sessions between [Mother] and [Child] would be appropriate,” as well as an emergency motion for establishment of parenting time. (Appellant’s App. Vol. II, p. 96). On January 6, 2023, Mother filed another motion to lift the parenting time restrictions and to set a certain parenting time schedule. She notified the trial court that she had “actively addressed and overcome the issues that understandably caused this [c]ourt concern” and advised that Father “facilitate[d] only minimal time for [Mother] and [Child], and only at his discretion. [Mother] had minimal parenting time at Target in November, for lunch in December. [Mother] received no holiday parenting time this year, or last year.” (Appellant’s App. Vol. II, p. 103).

[7] On May 24, 2023, the trial court scheduled a hearing on Mother’s pending motions. Prior to the hearing, the Guardian Ad Litem (GAL) filed her report, in which she noted that Mother’s parenting time was reinstated with the two younger half-siblings from the subsequent marriage, and which was required to “be supervised and to occur for 4 hours on alternating Saturdays, in an Order from April 8, 2022.” (Appellant’s App. Vol. II, p. 111). GAL advised that

There has been a breakdown in the relationship between [Mother] and [Child]. [Child] did not express having a strong bond with [Mother]. [Child] blames [Mother] for not being honest with her and her siblings, and for not being reliable and trustworthy. It was clear that [Child] felt like [Mother] had ample opportunities to see [Child] and her siblings without a set parenting time schedule, and that it was significant to [Child] that [Mother] was choosing not to take these opportunities.

[Mother] has lot of work to do to build back [Child's] trust and to repair this relationship.

(Appellant's App. Vol. II, p. 112). GAL ultimately recommended that it was not "in [Child's] best interest to force her to participate in parenting time. [Child's] contact with [Mother] should be scheduled at [Child's] discretion. [Mother] should reach out once per month with suggestions of dates she can commit to visiting with [Child]. [Child] can then communicate her wishes to [Mother]." (Appellant's App. Vol. II, p. 115). She further recommended that Child dictate her mental healthcare and participate in therapy "if she wishes." (Appellant's App. Vol. II, p. 115).

[8] On August 25, 2023, the trial court issued its parenting time Order. The trial court observed that Mother was employed full time, has her own home, and was pursuing a nursing degree as a full-time student. Mother was addressing her alcohol abuse disorder and mental health issues through the VA. At the hearing, Mother admitted to an alcohol abuse disorder which was being treated on an as needed basis and to taking medication for anxiety and ADHD for her ongoing mental health issues. She had started trauma-based therapy for PTSD. Overall, the trial court noted that "[s]ince the entry of this [c]ourt's order suspending [Mother's] parenting time her personal circumstances have improved as she has provided evidence of addressing her alcohol abuse and mental health issues." (Appellant's App. Vol. II, p. 34). Finding that it should "give significant consideration to [Child's] wishes and significant weight to the GAL's report and recommendations," the trial court concluded,

In person contact unsupervised parenting time between [Mother] and [Child] separate from sporting events, school events and extracurricular activities shall occur at least once per month. The contact shall be unsupervised and occur at such times, locations and under such conditions that [Child] is comfortable with. [Mother] shall reach out to [Child] once per month with dates she can commit to meeting with [Child]. [Child] shall select the date and suggest activities and/or locations that she would enjoy. Arrangements for the time, place, location and duration shall then be finalized. This in person contact/unsupervised parenting time shall not occur at [Mother's] home, shall not include overnights and [Child] shall not be a passenger in a motor vehicle driven by [Mother].

All other in person/unsupervised parenting time between [Child] and [Mother] shall be scheduled at [Child's] discretion.

(Appellant's App. Vol. II, pp. 34, 38).

[9] Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[10] Initially, we note that Father did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing appellee's arguments, and we apply a less stringent standard of review. *Dumka v. Erickson*, 70 N.E.3d 828, 830 (Ind. Ct. App. 2017). We may reverse if the appellant establishes *prima facie* error, which is error at first sight, on first appearance, or on the face of it. *Id.* The *prima facie* error rule relieves this court of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee. *Id.*

[11] “Generally speaking, parenting time decisions are committed to the sound discretion of the trial court.” *In re B.J.N.*, 19 N.E.3d 765, 769 (Ind. Ct. App. 2014). “We therefore review parenting time decisions for an abuse of discretion.” *Id.* “A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law.” *Hatmaker v. Hatmaker*, 998 N.E.2d 758, 761 (Ind. Ct. App. 2013). If there is a rational basis for the trial court’s determination in a parenting-time dispute, then no abuse of discretion will be found. *Downey v. Muffley*, 767 N.E.2d 1014, 1017 (Ind. Ct. App. 2002). “Further, we may not reweigh the evidence or judge the credibility of witnesses.” *Id.*

[12] Mother now contends that the trial court abused its discretion by awarding Child the unbridled authority to determine when, where, and for how long as “Child is comfortable with” parenting time should take place. (Appellant’s App. Vol. II, p. 34). Mother maintains that it is improper for Child to have decision making power thrust upon her, not only because it puts her in the middle of the fractious parental relationship, but because such decisions fall solely within the province of the trial court.

[13] The Indiana Parenting Guidelines Section II(E)(3) (emphasis added) states: “If a child is reluctant to participate in parenting time, each parent shall be responsible to ensure the child complies with the scheduled parenting time. *In no event shall a child be allowed to make the decision on whether scheduled parenting*

time takes place.” Further, Comment 1 under Indiana Parenting Time Guideline Section II(E), provides, in relevant part:

The rearing of a teenager requires parents to make decisions about what their teen should be allowed to do, when, and with whom[.] If parents are not able to agree, the teenager, who very much wants freedom from adult authority, should never be used as the “tie breaker.” [] As a general rule, a teenager should be involved in making important decisions if the parents agree the opportunity to make the decision is valuable, and the value of that opportunity outweighs any possible harm of a poor decision. If the parents feel the welfare of the child is dependent on the decision made, and if they allow the child to make a decision simply because they cannot agree, the parents are in danger of failing the child.

[14] In support of its Order restricting Mother’s parenting time and giving Child the discretion to determine whether to spend time with Mother, the trial court relied on Indiana Code section 31-17-4-2, which provides that

[t]he court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent’s parenting time rights unless the court finds that the parenting time might endanger the child’s physical health or significantly impair the child’s emotional development.

“Our appellate courts have interpreted this statute to require evidence establishing that visitation would endanger or impair the physical or mental health of the child.” *Manis v. McNabb*, 104 N.E.3d 611, 620 (Ind. Ct. App. 2018) (citing *Perkinson v. Perkinson*, 989 N.E.2d 758, 762 (Ind. 2013)). The

parent who seeks to restrict the other parent’s visitation rights bears the burden of proving by a preponderance of the evidence a justification for such a restriction. *Hatmaker*, 998 N.E.2d at 761. In all parenting time controversies, the court is required to give foremost consideration to the best interests of the child. *Id.*

[15] Mother does not contest that, for a limited period of time over two years ago, her parenting time was reasonably restricted. However, since that time, she has successfully engaged in therapeutic treatment to address not only her prior episodes of alcohol abuse, but also her other mental health diagnoses, which continue to be appropriately managed. By May 2023, Mother had graduated from alcohol abuse counseling with a medical clinician and had made overall improvements in many areas of her life. Yet, despite Mother’s progress, the trial court continued to restrict Mother’s parenting rights. The current Order that is before us on appeal concluded that “the extraordinary circumstances that existed [when her time was originally suspended in 2021] remain and lifting the suspension of [Mother’s] parenting time in any meaningful way would significantly impair [Child’s] emotional development.” (Appellant’s App. Vol. II, pp. 36-37). The Order found that Child would be emotionally harmed if forced to spend parenting time with Mother and cites the damage to the mother-daughter relationship that has already occurred, as well as Child’s negative memories of what Mother was like before the change in custody occurred. The trial court extensively relied on the GAL report, which cautioned that Child does not want to be forced to schedule time with Mother,

claiming that their relationship is “too far gone.” (Appellant’s App. Vol. II, p. 113). Instead, GAL reported that Child desired to see Mother at her discretion, because she has a busy schedule and parenting time “will force her to miss out on the other important things in her life.” (Appellant’s App. Vol. II, p. 113). As a result, Child acknowledged to GAL that she had not contacted Mother for “a few weeks” at the time. (Appellant’s App. Vol. II, p. 113).

[16] Although the statute requires a finding that “the parenting time might endanger the child’s physical health or significantly impair the child’s emotional development,” here, there is no objective or medical evidence of potential harm to Child besides GAL’s report. Rather, in support of the parenting time restriction, the trial court—and by extension, GAL—rely on Child’s self-reported trust issues which originated several years ago and which, due to Child’s refusal to attend therapy, have not been addressed or improved through counseling. Instead, the parenting time Order now further empowers Child to make important custodial decisions for herself, including the conditions of her parenting time with Mother and whether she should engage in therapy.

[17] We note that GAL’s testimony and recommendation alone are not determinative. *See D.B. v. M.B.V.*, 913 N.E.2d 1271, 1275 (Ind. Ct. App. 2009) (reversing an order terminating the father’s parenting time even though the GAL testified eliminating parenting time would be in the children’s best interests because the children were fearful of father, did not want parenting time with him, and should have their wishes considered because of their ages). We have previously acknowledged “the challenge of protecting a child’s emotional

development and physical health and well-being while also recognizing a parent's precious privilege of exercising parenting time with that child." *In re Paternity of W.C.*, 952 N.E.2d 810, 817 (Ind. Ct. App. 2011). While we do not minimize the current fractious relationship between Mother and Child or the stress that likely causes on both sides, a fraught relationship between a parent and a teen is simply not the egregious or extraordinary circumstance which we have previously found supporting the restriction or suspension of parenting time. *See, e.g., Duncan v. Duncan*, 843 N.E.2d 966, 972 (Ind. Ct. App. 2006) (affirming suspension of parenting time where father's sexual abuse of another of his children was substantiated, he had threatened his oldest child with a loaded gun, he showed no remorse, and he refused counseling). "Clearly, our parenting time statute does not provide for the elimination of parenting time . . . because teenagers do not wish to interact with a parent[.]" *D.B.*, 913 N.E.2d at 1275. There is certainly work to be done—by both Mother and Child—to mend the rift and re-establish the trust between them. But there is no evidence that parenting time with Mother will further harm Child's physical health or significantly impair her emotional development. The trial court has a host of tools at its disposal. It could order phased-in professionally guided supervised visitation, it could request a child psychiatrist or child psychologist to assist it in determining how best to structure reunification, or it could require Mother and Child to attend counseling. Accordingly, based on the evidence before us, we find that there is no rational basis for the trial court's restriction of Mother's parenting time, and we conclude that the trial court abused its discretion by

allowing Child to make her own decisions regarding parenting time. *See Downey*, 767 N.E.2d at 1017.

CONCLUSION

[18] Based on the foregoing, we hold that the trial court abused its discretion by allowing Child to decide parenting time with Mother.

[19] We reverse and remand.

Brown, J. and Foley, J. concur

ATTORNEYS FOR APPELLANT

Thomas E. Banks, II
Peter J. Catalano
Straw-Boone Doheny Banks & Mudd, PLLC
Louisville, Kentucky