

## MEMORANDUM DECISION

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IN THE  
**Court of Appeals of Indiana**

In re the Guardianship of E.J.D.

Bertha Phipps,  
*Appellant-Intervenor*

v.

Tina S. Keen and Jeffery Willhoit,  
*Appellees-Petitioners*

Harlie R. Swallows and Justin Michael Dickey,  
*Appellees-Respondents*

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May 8, 2024

Court of Appeals Case No.  
23A-GU-2990

Appeal from the Madison Circuit Court

The Honorable Mark Dudley, Judge

Trial Court Cause No.  
48C06-2306-GU-284

**Memorandum Decision by Judge Vaidik**  
Judges May and Kenworthy concur.

**Vaidik, Judge.**

## Case Summary

- [1] Bertha Phipps, the great-grandmother and de facto custodian of a minor, appeals the trial court’s appointment of Jeffery Willhoit and Tina S. Keen, who are not married to each other or related to the minor, as guardians. Jeff and Tina did not file an appellees’ brief. Finding Bertha has established prima facie error, we reverse and remand.

## Facts and Procedural History

- [2] Harlie R. Swallows (“Mother”), who was born in January 2002, lived with her grandmother, Bertha, for most of her life. When Mother was younger, Bertha dated Jeff. After Bertha and Jeff broke up around 2013, he moved to Georgia, and Mother didn’t have much contact with him.
- [3] In September 2019, E.J.D. was born to Mother, then seventeen, and Justin Michael Dickey (“Father”). The next month, Father beat E.J.D., resulting in numerous injuries. Father was arrested and charged with Level 3 felony neglect of a dependent. A child in need of services (CHINS) case was opened, and E.J.D. was placed with Bertha (Mother continued living in Bertha’s house). In

2022, Father was convicted and sentenced to nine years, with six years in prison.

- [4] E.J.D. remained in the care of Bertha until the CHINS case was resolved. When Mother got custody of E.J.D. back, they stayed living with Bertha.
- [5] In 2023, Jeff and his new girlfriend, Tina, moved from Georgia to Indiana. In early June, Mother was having a falling out with Bertha, and she and E.J.D. moved in with Jeff and Tina. At that time, Jeff and Tina had never seen E.J.D., who was nearly four years old, in person.
- [6] On June 9, Bertha petitioned for guardianship of E.J.D. in Cause No. 48C01-2306-GU-281. Two weeks later, Jeff and Tina petitioned for guardianship of E.J.D. under a new cause number, 48C06-2306-GU-284. The trial court allowed Bertha to intervene in GU-284 and dismissed GU-281.
- [7] A hearing was held in late September. Mother, then twenty-one, acknowledged that E.J.D. had lived with Bertha for 90% of her life. Tr. p. 23. She stated that she had moved to Tennessee, where her boyfriend lives, in July, that she needed to get her life together, and that she wanted Jeff and Tina to be guardians of E.J.D. until she did. She didn't want Bertha to be guardian because she didn't think Bertha would let her see E.J.D. The trial court told Mother that she needed to get her life together because E.J.D. "needs to be back with [her]." *Id.* at 37. Mother agreed. Jeff testified that he was an over-the-road truck driver and was home only three to four days each month but that Tina would care for E.J.D.

[8] In October, the trial court issued the following order appointing Jeff and Tina as guardians of E.J.D.:

1. Evidence before the Court consisted of [Jeff and Tina] requesting appointment as Co-Guardians and [Bertha's] request to be appointed guardian.

\* \* \* \*

3. The Court finds that the allegations contained in the Petition for Co-guardianship are true.

4. Biological Mother consents to the Co-Guardianship.

5. The Court finds that [E.J.D.] is in need of Permanent Co-Guardians by reasons of her minority.

6. Biological Father's consent is not required as he is incarcerated for an offense against the minor child.

7. Minor child has no estate.

\* \* \* \*

9. The Court now appoints [Jeff and Tina] as Co-Guardians.

\* \* \* \*

12. The Court further finds it would be in the minor child's best interest to award visitation rights to [Bertha] consisting of the Indiana Parenting Time Guidelines for a non-custodial parent.

\* \* \* \*

14. Biological Mother’s visitation, if she elects to exercise any, shall not interfere with the visitation awarded Bertha Phipps.

Appellant’s App. Vol. II pp. 13-14.

[9] Bertha now appeals.

## Discussion and Decision

[10] Bertha appeals the appointment of Jeff and Tina as guardians of E.J.D. Jeff and Tina did not file an appellees’ brief. When an appellee does not respond to an appeal, we will not undertake the burden of developing an argument on their behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court’s judgment if the appellant’s brief presents a case of prima facie error. *Id.* In this context, “prima facie error” means error “at first sight, on first appearance, or on the face of it.” *Id.*

[11] Bertha argues the trial court should have appointed her guardian because she is the great-grandmother and de facto custodian of E.J.D. while Jeff and Tina are “non relatives.” Appellant’s Br. p. 18. Bertha qualifies as a de facto custodian because she was the primary caregiver for and financial supporter of E.J.D. for at least one year. *See* Ind. Code §§ 29-3-1-3.5, 31-9-2-35.5(2).

[12] Indiana Code article 29-3 addresses guardianships. Indiana Code section 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 an incapacitated person or minor.” This case

involves a petition to appoint a guardian for a “minor,” which is “an individual who is less than eighteen (18) years of age and who is not an emancipated minor.” I.C. § 29-3-1-10; *cf.* I.C. § 29-3-1-7.5 (defining “incapacitated person”). A trial court shall appoint a guardian if it 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.” I.C. § 29-3-5-3(a).

[13] There are several things a court should consider when selecting a guardian, including (1) “[a]ny request made for a minor by: (A) a parent of the minor; or (B) a de facto custodian of the minor”; (2) “[t]he relationship of the proposed guardian to the individual for whom guardianship is sought”; and (3) the best interest of the minor. I.C. § 29-3-5-4(a)(2), (7), (9). When a court selects a guardian, it should consider a list of people in the following order:

- (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.

I.C. § 29-3-5-5(a) (emphasis added). Notably, only three of these subsections apply to the appointment of a guardian for a minor (as opposed to an incapacitated person)—(1), (2), and (6)—and subsection (6) is the only one that applies here. In addition, Section 29-3-5-5(b) provides that the court may pass over a person having priority if it is in the best interest of the minor:

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] Here, it does not appear from the trial court’s order that it considered Bertha’s request **as de facto custodian of E.J.D.**, that Jeff and Tina have no relation to E.J.D., or the best interest of E.J.D. as required by Section 29-3-5-4(a). It also does not appear that the court gave priority to Bertha as de facto custodian of E.J.D. or considered whether it was in E.J.D.’s best interest for Jeff and Tina, who have no priority, to be guardians as required by Section 29-3-5-5. While the trial court’s order uses the phrase “best interest,” it does so only in the context of stating that Bertha should be awarded parenting time as a noncustodial parent.

[15] Bertha has established prima facie error. We therefore remand this case to the trial court. We note, however, that whether Bertha or Jeff and Tina should be guardians of E.J.D. may be moot on remand. After the notice of appeal was filed, Mother petitioned to get custody of her daughter back. The trial court stayed that request pending this appeal. If the court decides to give E.J.D. back to Mother, which it said was the ultimate goal, then there would be no need to determine whether Bertha or Jeff and Tina should have guardianship of E.J.D.

[16] Reversed and remanded.

May, J., and Kenworthy, J., concur.

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