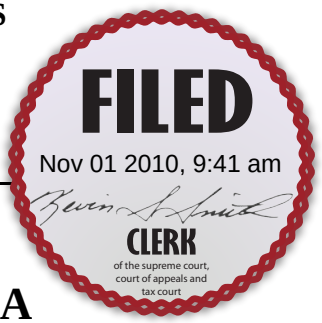
ATTORNEYS FOR APPELLANT:

TIMOTHY E. STUCKY
Blume, Connelly, Jordan,
Stucky & Lauer, LLP
Fort Wayne, Indiana

ATTORNEY FOR APPELLEES:

DANIEL G. PAPPAS
Fort Wayne, Indiana



IN THE
COURT OF APPEALS OF INDIANA

IN RE THE CUSTODY OF L.H., A MINOR CHILD,	)	
R.E., Appellant/Petitioner,	)	
vs.	)	No. 02A03-1002-DR-111
B.L., Appellee/Intervenor.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel F. Donahue, Judge
The Honorable Lori K. Morgan, Magistrate
Cause No. 02D07-0706-DR-646

November 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner R.E. ("Father") appeals the trial court's order granting maternal aunt B.L.'s ("Aunt") petition for the custody of R.E.'s four-year-old daughter, L.H. Concluding there is sufficient evidence to support the trial court's judgment that 1) Aunt is L.H.'s de facto custodian; 2) Aunt rebutted the presumption that the natural parent should have custody of his child; and 3) it is in L.H.'s best interests to be placed in the custody of Aunt, we affirm.

FACTS AND PROCEDURAL HISTORY

L.H. was born on March 15, 2006. She was placed with Aunt when she was nineteen days old because she tested positive for marijuana at birth. One month later, L.H. was adjudicated to be a Child in Need of Services ("CHINS") and ordered to remain in Aunt's care. In August 2006, Father married L.H.'s mother, K.H. Aunt filed a petition as an intervenor seeking custody of L.H. On October 12, 2006, Father filed a petition to establish paternity of L.H. Father was adjudicated to be L.H.'s legal and biological father in January 2007. Six months later, Father filed a petition for dissolution wherein he requested custody of L.H. The dissolution was granted in March 2008; however, no custody order was issued because of the pending CHINS proceeding and the pending custody dispute between Father and Aunt. Aunt's action was subsequently consolidated with the dissolution action.

The trial court held a custody hearing in the fall of 2009. Testimony at the hearing revealed that thirty-seven-year-old Father lives with his girlfriend, L.Y., his ten-year-old son, B.E., and L.Y.'s five- and nine-year-old daughters. Father also has a son and a daughter in California. Father is disabled with nerve damage on the right side of his body and damaged

disks in his lower back. He has not been employed since 2001 and receives social security disability. His son suffers from ADHD and bi-polar disorder. L.Y.'s oldest daughter also suffers from ADHD. Both children take medication and attend counseling. The family has moved twice in the past three years, and the police have been called to their home three times in the past two years because of domestic disputes. Father pled guilty to class D felony battery for kicking a child in the genitals. Father admitted at the hearing that sometimes it gets "a little crazy" at the family's house. Tr. 201. Father acknowledged that L.H. does not want to eat at his home and sometimes wets the bed while she is there. L.H.'s behavior changes when she returns to Aunt's house after visits with Father. She frequently screams and curses, and is also aggressive. She says that she "want[s] to take [her] daddy's clothes off . . . ." Tr. 217.

Father initially expressed an interest in attending family counseling with L.H. Dr. Therese Mihlbauer, L.H.'s psychologist, spoke with Father in November 2008 and asked him to contact her office to schedule his first appointment. Father called to schedule the appointment seven months later in June 2009. He cancelled the appointment three days before he was scheduled to attend it. He eventually attended three counseling sessions. Dr. Mihlbauer testified that Father appeared more focused on his anger towards Aunt than on L.H. and her best interests. Father did not want L.H. to call Aunt "mommy" even though Dr. Mihlbauer told him that L.H.'s sense of connection to Aunt was threatened when she was required to call Aunt a different name. Father also appeared more concerned about where L.H. would live than her progress in counseling. Father did not return to Dr. Mihlbauer after

the third session. Father also did not attend the spring program or the parent-teacher conference at L.H.'s preschool. Aunt attended both.

Aunt is a fifty-three-year-old special education teacher. She has provided for L.H.'s emotional and financial needs for more than three years without financial assistance from either parent. The testimony at the hearing revealed that Aunt and L.H. share a tight bond. Aunt participates in counseling with L.H. and attends her pre-school activities. L.H.'s mother believes the best placement for L.H. is with Aunt. DCS Caseworker JoShonda Weeks testified that Aunt's home provides a stable environment for L.H.

Following the hearing, the trial court issued an order awarding custody of L.H. to Aunt. The order provides in relevant part as follows:

> 14. . . . . The Court finds by clear and convincing evidence that the maternal aunt is a de facto custodian for the purposes of IC 31-17-2. . . .
>
> * * *
>
> 24. [Aunt] has provided [L.H.] with a stable home environment and is ensuring that the child is participating in counseling and following the recommendations of the counselor.
>
> 25. The child is well bonded to [Aunt] and frequently asks when she will see [Aunt] during periods when she is out of [Aunt]'s care.
>
> 26. The child is in need of a stable home environment and is well adjusted to the home and community in which she resides.
>
> 27. Dr. Mihlbauer has testified that the child would experience feelings of abandonment if she were unable to see [Aunt] and that ceasing contact between the child and [Aunt] would be traumatic for her.
>
> 28. The child's mother, [K.H.], the child's CASA, and the Department of Child Services' case manager agree that the child's best interests are served by remaining in the home of [Aunt].

29. [Aunt] and [L.H.] have a mother daughter relationship and [Aunt] has cared for, nurtured and supported the child since she was 19 days old. The child feels safe and secure in [Aunt]'s home and has exhibited signs of distress while in [Father]'s home or upon returning from his home. The Court concludes that separating the child from the de facto custodian with whom she has resided since she was nineteen days old and with whom she is extraordinarily bonded is contrary to the child's best interests and could cause the child to suffer emotional or mental harm.

30. The Court finds that the presumption that the natural parent (father) should have custody of his child has been rebutted by clear and convincing evidence.

31. Upon consideration of IC 31-17-2-8 and IC 31-17-2-8.5, the Court finds by clear and convincing evidence that awarding [Aunt] custody of [L.H.] is in the child's best interests.

Appellant's App. 5, 8-9. Father appeals. [1]

DISCUSSION AND DECISION

At the outset, we note our preference for granting latitude and deference to trial court judges in family law matters. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). The Indiana Supreme Court explained the reason for this deference in *Kirk*:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

[1] The trial court awarded Father parenting time pursuant to the Indiana Parenting Time Guidelines. Father does not raise parenting time as an issue in this appeal.

Id. (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). Therefore, on appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal. *Id.* We now turn to the issues in this case.

I. De Facto Custodian

Father first contends the trial court erred when it concluded that Aunt is L.H.'s de facto custodian. The gravamen of his argument is that Aunt did not meet the statutory definition of a de facto custodian.

Before custody can be awarded to a third party, that third party must demonstrate de facto custodian status by clear and convincing evidence. *A.J.L. v. D.A.L.*, 912 N.E.2d 866, 870 (Ind. Ct. App. 2009) (citing Ind. Code § 31-17-2-8.5). In reviewing a judgment requiring proof by clear and convincing evidence, an appellate court may not impose its own view as to whether the evidence is clear and convincing, but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. *Id.*

Indiana Code Section 31-9-2-35.5 (2007) defines de facto custodian in relevant part as follows:

> De facto custodian . . . means a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least … six (6) months if the child is less than three (3) years of age. . . .

> Any period after a child custody proceeding has commenced may not be included in determining whether the child has resided with the person for the required minimum period.

Here, our review of the evidence reveals L.H. was born on March 15, 2006. She was placed with Aunt on April 3, 2006, when Aunt became her primary caregiver and financial support. Father filed a petition to establish paternity on October 12, 2006, more than six months after L.H. was placed with Aunt. This evidence reveals that Aunt met the statutory requirements to be a de facto custodian. Specifically, Aunt was L.H.'s primary caregiver and financial support for more than six months when L.H. was under three years of age. The trial court did not err in concluding that Aunt was L.H.'s de facto custodian.

II. Presumption in Favor of the Natural Parent

Father next argues that even if Aunt is a de facto custodian, the trial court erred in concluding that she rebutted the presumption that favors awarding custody of a child to the natural parents. Before 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. *Paternity of T.P.*, 920 N.E.2d 726, 731 (Ind. Ct. App. 2010), *trans. denied*. The presumption that favors awarding custody of a child to the natural parents will not be overcome simply because a third party could provide the better things in life for a child. *Id.*

In a proceeding to determine whether to place a child with a person other than the natural parent, the court may consider the natural parent's (1) unfitness; (2) long acquiescence in the third party's custody of the child; or (3) voluntary relinquishment 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. *Id.* However, the trial court is not limited to these criteria. *Id.* At issue is whether the important and strong presumption that a child's interests are best served by placement with the natural parents is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. *Id.* at 731-32. This determination rests within the sound discretion of the trial court, and its judgment must be afforded deferential review. *Id.* at 732.

Here, our review of the evidence reveals L.H. has lived with Aunt since she was nineteen days old. L.H. and Aunt have a mother-daughter relationship, and Aunt provides L.H. with a stable home environment. Aunt participates in counseling with L.H. and attends her pre-school activities. On the other hand, L.H. exhibits signs of distress, such as refusing to eat and wetting the bed, when she visits Father. She curses and acts aggressively when she returns to Aunt's house. Father admits it sometimes gets "a little crazy" at his house. Tr. 201. His son suffers from ADHD and bi-polar disorder. The family has moved three times in the past two years, and the police have been called to the house for domestic disturbances. Recognizing our deferential review, this evidence supports the trial court's conclusion that Aunt has rebutted with clear and convincing evidence the presumption that Father should have custody of L.H.

III. Best Interests

Lastly, Father argues that the trial court erred in concluding it is in L.H.'s best interests to be placed in the custody of Aunt. Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion. *Aylward v. Aylward*, 592 N.E.2d 1247, 1250 (Ind. Ct. App. 1992). On review, we will not reweigh the evidence, judge the credibility of witnesses, or substitute our judgment for that of the trial court. *Id.* We will not reverse unless we find the trial court's decision is against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. *Id.*

Indiana Code Section 31-17-2-8 (2007) lists the following factors relevant to determining the best interests of the child in custody determinations:

> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child if at least fourteen (14) years old.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's home, school, and community:
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

The factors described in section 8.5(b) (2007) include the wishes of the de facto custodian, the extent to which the child has been cared for, nurtured, and supported by the de

facto custodian; the intent of the child's parent in placing the child with the de facto custodian, and the circumstances under which the child was placed with the de facto custodian, and the circumstances under which the child was allowed to remain with the de facto custodian. The statute further provides that the court shall award custody of the child to the child's de facto custodian if the court determines it is in the best interests of the child. Ind. Code § 31-17-2-8.5.

Our review of the evidence reveals that four-year-old L.H. has lived with Aunt since she was nineteen days old. Aunt has provided all financial support for L.H., and L.H. is adjusted to Aunt's home and community. Aunt participates in counseling with L.H. and attends L.H.'s preschool activities. L.H. and Aunt have a mother-daughter relationship. Throughout the CHINS proceedings, the court has ordered L.H. to be placed with Aunt.

Father is physically disabled. His son suffers from bi-polar disorder and ADHD. Father lives with his girlfriend and her two daughters, one of whom also suffers from ADHD. Police have been called to the house for domestic disturbances, and Father admits things can get "a little crazy." Tr. 201. Father attended only three sessions with L.H.'s psychologist. According to the psychologist, Father appeared more focused on his anger at Aunt than L.H.'s best interests. Father does not attend L.H.'s school activities. L.H. does not like to eat at Father's house and sometimes wets the bed while she is there. She is also aggressive and frequently screams and curses when she returns to Aunt's house from visits with Father. This evidence supports the trial court's determination that it is in L.H.'s best interests to be placed in the custody of her Aunt.

The judgment of the trial court is affirmed.

DARDEN, J., and BROWN, J., concur.