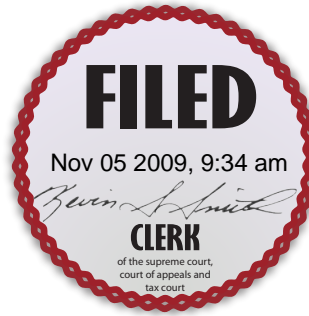


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MARRIAGE OF: )  
 )  
K.H., )  
 )  
Appellant-Petitioner, )  
 )  
and ) No. 20A03-0904-CV-157  
 )  
J.L.H., )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable Stephen R. Bowers, Judge  
Cause No. 20D02-0806-DR-134

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**November 5, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

K.H. (“Mother”) appeals a custody order awarding J.L.H. (“Father”) the physical custody of the parties’ child, J.H.<sup>1</sup> We affirm.

### **Issue**

Mother presents the sole issue of whether the trial court erroneously awarded the physical custody of J.H. to Father.

### **Facts and Procedural History**

The parties were married on January 1, 2003. They subsequently foster-parented and adopted a daughter, J.H., born December 4, 2003. On May 20, 2008, Mother left Indiana and traveled to Arizona, taking J.H. with her. She left Father a letter indicating that she needed “time away to think” and asking Father to address anger and alcohol issues. (Exhibit A). Upon discovering the note, Father contacted Mother by telephone. On the following day, while Mother and J.H. were en route to Arizona, Father listed the marital residence for sale.<sup>2</sup> On June 13, 2008, Mother petitioned to dissolve the marriage.

At a provisional hearing on July 7, 2008, the trial court awarded Father temporary physical custody of J.H. and appointed Mary Raatz to serve as a Guardian ad Litem (“GAL”). Mother was ordered to return J.H. to the State of Indiana, and she promptly did so. Father and J.H. continued to live in the marital home while it was offered for sale. At first, Mother cared for J.H. while Father worked. However, when Mother obtained employment, Father

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<sup>1</sup> The parties share legal custody of J.H.

<sup>2</sup> According to Father, this indicated his willingness to relocate to Arizona with Mother. According to Mother, Father had indicated during their telephone conversation that the marriage was over.

enrolled J.H. in a day care program.

On October 2, 2008, the GAL filed her report and recommended “no changes in [J.H.’s] custody at this time.” (App. 29.) In part, the report addressed Mother’s desire to relocate outside the state of Indiana. The GAL filed a supplemental report dated December 30, 2008, opining that Father could provide J.H. with a “stable and predictable environment.” (App. 32.) However, the GAL also advised the trial court that she had been in contact with Father’s adult adopted daughter, H.H., who claimed that Father had behaved inappropriately with her during her teenage years.

On January 22, 2009, the parties’ marriage was dissolved. Father was awarded the primary physical custody of J.H. and Mother was awarded parenting time pursuant to the Indiana Parenting Time Guidelines. However, the parties were “encouraged to arrange reasonable additional time in the best interests of the child.” (Supp. App. 33-34.) In awarding custody of J.H. to Father, the trial court noted that the statutory factors did not indicate a strong preference for one parent over the other, except for J.H.’s “relationships with people in Elkhart County” and Mother’s “expressed preference to live elsewhere.” (Supp. App. 29-30.) With regard to any allegations of inappropriate behavior by Father while raising H.H., the trial court found “there is no basis for the Court to conclude that Husband poses a risk to his daughter.” (Supp. App. 32.)

Father filed a motion to correct error, challenging the property division and the absence of a child support worksheet. On March 12, 2009, the trial court executed an Amended and Corrected Decree of Dissolution. The trial court ordered Mother to pay Father

the sum of \$7,875 to equalize the property division. The trial court also, sua sponte, ordered that Mother have one additional weeknight of parenting time with J.H. Accordingly, Mother would have J.H. in her care six nights out of fourteen, and Father would have J.H. in his care eight nights out of fourteen.<sup>3</sup> This appeal ensued.

### **Discussion and Decision**

Mother contends that the trial court improperly based its custody decision upon “concern” that Mother might relocate with J.H., if awarded physical custody, and that the trial court erroneously failed to find that Father posed a risk to J.H., given the allegations of his alcohol abuse, excessive anger, and “boundary” issues. Appellant’s Brief at 12.

Indiana Code Section 31-17-2-8, governing an initial determination of custody, provides as follows:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (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 is at least fourteen (14) years of age.
- (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:
  - (A) home;
  - (B) school; and

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<sup>3</sup> Attached to the order was a child support obligation worksheet indicating that Mother’s recommended child support obligation was \$13.38 weekly. However, citing the unique circumstances of the adoption subsidy and near-equal parenting time, the trial court declined to order that Mother pay child support to Father.

- (C) 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.

As such, an initial child custody order is determined in accordance with the best interests of the child and the court is to consider all relevant factors in determining the child's best interests, including the foregoing "nonexclusive" statutory listing of factors. Baxendale v. Raich, 878 N.E.2d 1252, 1254 (Ind. 2008). Typically, judgments in custody matters turn upon "essentially factual determinations" and thus will be set aside only when they are clearly erroneous. Id. at 1257. We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. Id. at 1257-58. Upon appeal, it is not enough that the evidence might have supported some other conclusion; instead, to provide a basis for reversal, the evidence must positively require the other conclusion. Bettencourt v. Ford, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005).

Mother argues that the trial court scarcely addressed the statutory custody considerations in its eagerness to punish her for taking J.H. to Arizona. To the contrary, it is apparent from the trial court's commentary that it considered each of the applicable statutory factors and concluded that, for the most part, the corresponding evidence did not significantly favor either parent. By all accounts, J.H. was thriving and well-adjusted, interacted appropriately with extended family and playmates, and happily spent significant amounts of time with each parent. Connie Graber, the director of J.H.'s day care, testified that J.H. was adapted to routine, and was "very interested in learning, ... well adjusted, ... [with]

wonderful manners, ... very respectful, and very kind.” (Tr. 316.) Graber testified that Father had toured and selected the facility, and was typically the parent involved with drop off and pick up and inquiries as to J.H.’s progress.

Advised by the GAL reports that Mother had expressed a preference to live outside Indiana, the trial court acknowledged the existence of that circumstance, but did not expressly award custody based upon that preference.<sup>4</sup> Rather, the trial court focused on Mother’s actual behavior of taking J.H. away for a nearly two-month period, concluding that “[t]he Husband’s behavior appears to have had a less negative impact on [J.H.] than the Wife’s taking her to Arizona and arbitrarily separating her from her father.” (Supp. App. 33.)

The trial court recognized that Father had past alcohol problems, but found persuasive the testimony of Father’s therapist, Dr. Koch. Dr. Koch opined that Father was not an alcoholic, although he had used alcohol excessively in the past. Dr. Koch had recommended individual therapy and Alcoholics Anonymous, and Father had followed both recommendations. In Dr. Koch’s opinion, Father did not display atypical anger apart from excessive alcohol use.

The trial court found the GAL’s account of her conversation with H.H. to be of “great concern.” (App. 19.) According to the GAL, H.H. had presented herself as “quite credible” and “genuinely concerned for [J.H.’s] well being and safety[.]” (App. 32.) H.H. had reported two specific incidents, one involving Father entering the bathroom while H.H. was

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<sup>4</sup> Had the trial court awarded custody to Father solely upon speculation that Mother would relocate, such would have been improper. A custody determination is to be made on present circumstances as opposed to anticipated conduct. See Bojrab v. Bojrab, 810 N.E.2d 1008, 1012 (Ind. 2004) (an award of custody subject to automatic revocation in the event of a future relocation was improper).

in the shower (H.H.'s mother was also present), and the second involving Father's touching of her buttocks during a hug (with H.H.'s mother again present but unable to see the touching). Although the GAL formed an opinion that H.H. genuinely believed that Father had conducted himself inappropriately with her, the GAL nevertheless did not conclude that Father posed a risk to J.H. or recommend that Mother have physical custody. Importantly, H.H. did not testify, did not execute an affidavit, and was not deposed. As such, the trial court had before it no direct evidence of H.H.'s allegations.

Mother claims that the trial court failed to adequately appreciate the risk to J.H. occasioned by an award of physical custody to Father. However, such risk (if any) would also be present during the exercise of unsupervised parenting time. Mother made no request for restricted parenting time, and it is noteworthy that, after the trial court issued the amended decree, the parties have near-equal access to J.H.

Distilled to its essence, Mother's argument is an invitation to reweigh the evidence. This we cannot do. It is the trial court's province to weigh the evidence and make factual determinations regarding child custody, and we do not substitute our judgment for that of the trial court. Trost-Steffen v. Steffen, 772 N.E.2d 500, 509 (Ind. Ct. App. 2002), trans. denied.

Mother has not shown that the evidence positively requires the opposite conclusion reached by the trial court. The custody order is not clearly erroneous.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.