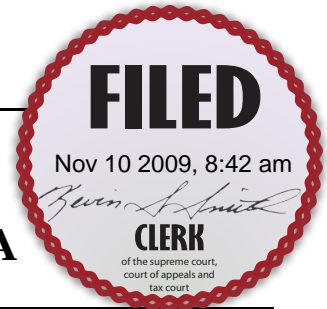


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

OCTAVIA FLORENCE SNULLIGAN
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

MARCUS BURNSIDE,)
)
Appellant-Respondent,)
)
vs.)
)
TOSHA BURNSIDE,)
)
Appellee-Petitioner.)

No. 49A02-0904-CV-320

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM 7
The Honorable Gerald Zore, Judge
The Honorable Victoria M. Ransberger, Master Commissioner
Cause No. 49D07-0803-DR-13236

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Marcus Burnside (Marcus), appeals the trial court's Decree of Dissolution of Marriage dissolving his marriage to Tosha Burnside (Tosha) and the trial court's Decree of Paternity of their two children.

We reverse and remand with instructions.

ISSUE

Marcus raises two issues on appeal, which we restate as the following issue: Whether the trial court abused its discretion when ordering joint and physical custody of the children.

FACTS AND PROCEDURAL HISTORY

Marcus and Tosha were first married in 1995 and divorced in 1997. They remarried again in 1997, but divorced in 2002. In August 2004, they married for a third time but separated in March 2008. During the course of their relationship, two children were born: Kal.B., a son,¹ born on September 24, 1998 and Kam.B., a daughter, born on August 29, 2005.

On April 21, 2008, Marcus and Tosha submitted a preliminary Agreed Entry, stating they agreed to share both temporary legal and physical custody. However, the trial court declined to approve the Agreed Entry because it could not find that the

¹ K.B.1 was born between the first divorce and the second marriage. His paternity was established on November 18, 2008.

arrangement was in the best interest of the children; instead, the court referred the parties to the Domestic Relations Counseling Bureau (DRCB) for a custody evaluation.

The DRCB report recommended that Marcus and Tosha share joint physical custody provided they participate in conflict resolution counseling. The DRCB report noted, however, that there were lingering “concerns regarding both parents’ emotional maturity as evidenced by having married and divorced each other on three occasions, without any apparent improvement in their ability to resolve conflict.” (Appellant’s App. Vol. II, p. 23). Ultimately, if joint custody became unworkable between the parties, the DRCB report concluded that the children should “reside primarily with their father and spend time with their mother beyond that specified in the Indiana Parenting Time Guidelines.” (Appellant’s App. Vol. II, p. 23).

On August 22, 2008, the parties attended mediation; however, the only consensus the parties could reach was that Kal.B. would receive counseling because he expressed suicidal thoughts. As a result of their inability to reach a conclusion regarding custody, the trial court conducted a hearing on October 31, 2008. During the hearing, Tosha requested joint physical and legal custody while Marcus requested sole custody of the children and accused Tosha of being physically abusive towards Kal.B. by spanking him. Both parties also submitted child support worksheets.

On December 9, 2008, the trial court entered findings of Fact and Conclusions of Law awarding Marcus and Tosha joint physical and legal custody. The trial court listed

three findings to support its decision to award the parties joint physical and legal custody of the children. These relevant findings were:

18. The [c]ourt after carefully considering all of the evidence and testimony and having ordered the counseling for high-conflict families, now orders that the parties share joint physical and legal custody of [Kal.B.] and [Kam.B]. The DRCB recommendation is consistent with this Order. The parties shall work together to keep [Kal.B.] in [Marcus'] school district for continuity as he is reportedly doing well in the school environment. [Kal.B.] shall remain in counseling.

19. The [c]ourt considered the relevant factors delineated in Indiana Code [s]ection 31-17-2-8, including among others— (4) the interaction and interrelationship of the child with (a) the parents; (6) the mental and physical health of all individuals involved; and (7) evidence of a pattern of domestic or family violence by either parent.

20. The parties will have joint physical custody of their two minor children as follows: For the first week that this order is effective, [Marcus] shall have the children on Monday and Tuesday, [Tosha] shall have the children on Wednesday and Thursday, and [Marcus] shall have the children on Friday and through the weekend. Thereafter, the parties will alternate weekends. [].

(Appellant's App. Vol. I, pp. 10-11).

Marcus now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

We initially note that Tosha has not filed an appellees' brief. Where the appellee fails to file a brief on appeal, we may, in our discretion, reverse the trial court's decision if the appellant makes a *prima facie* showing of reversible error. *In re Visitation of C.L.H.*, 908 N.E.2d 320, 326 (Ind. Ct. App. 2009). In this context, *prima facie* error is defined as "at first sight, on first appearance, or on the face of it." *Id.* at 326-27 (citing

Orlich v. Orlich, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006)). This rule was established for our protection so that we can be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *In re Visitation of C.L.H.*, 859 N.E.2d at 327. Additionally, the statement of facts contained in appellant’s brief is deemed by us to be accurate and sufficient for the disposition of this appeal. *Id.*

A. Joint Physical and Legal Custody

Marcus contends that the trial court erred when it ordered joint legal and physical custody. Specifically, Marcus argues that the trial court should have applied Indiana Code section 31-17-2-8 regarding custody in conjunction with the statute regarding joint legal custody, I.C. § 31-17-2-15(b), when determining joint custody because he and Tosha are unable to “effectively communicate” with each other and have opposite views on appropriate discipline for their children. (Appellant’s Br. p. 17).

We review custody determinations for an abuse of discretion, with a preference for granting latitude and deference to our trial courts in family law matters. *Webb v. Webb*, 868 N.E.2d 592 (Ind. Ct. App. 2007). We will not reverse unless the trial court’s decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. *Id.* I.C. § 31-14-12-8 provides factors for an initial custody determination. It provides that:

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;
 - (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
 - (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 defacto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

When awarding joint legal custody, the trial court considers “whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare.” I.C. § 31-17-2-15(2). Therefore, the trial courts must consider “whether the parents have the ability to work together for the best interest of their children.” *Arms v. Arms*, 803 N.E.2d 1201, 1210 (Ind. Ct. App. 2004). We are reluctant to reverse a trial court’s grant of joint legal custody. *Walker v. Walker*, 539 N.E.2d 509, 512 (Ind. Ct. App. 1989). However, we will do so when the evidence indicates “a clear abuse of trial court discretion in that the joint custody award constitutes an imposition of

an intolerable situation upon two persons who have made child rearing a battleground.”
Aylward v. Aylward, 592 N.E.2d 1247, 1251 (Ind. Ct. App. 1992).

In this case, while both Marcus and Tosha recognize the importance of having the other parent involved in the children’s lives, the record indicates that the parties are unable to effectively communicate with one other.² Here, Tosha requested joint legal and physical custody despite the fact that she acknowledged that there is a “tenseness in the air and the children pick up on that.” (Transcript pp. 36-37). In fact, the record establishes the relationship between the two parties is so tense that Tosha’s mother or sister recently started dropping the children off with Marcus for his parenting time so that Tosha and Marcus do not have to interact with each other.

² Marcus also argues that the trial court abused its discretion by awarding joint custody of the children despite the fact that he and Tosha have different views on methods of disciplining the children. Indiana has recognized that a parent is privileged to apply reasonable force upon one’s child as he or she reasonably believes to be necessary for the child’s “control, training, or education.” *Willis v. State*, 888 N.E.2d 177, 182 (Ind. 2008) (quoting Restatement of Law (Second) Torts, § 147(1) (1965)). In determining whether force or confinement is reasonable for control, training, or education of a child, the following factors are to be considered:

- (a) whether the actor is a parent;
- (b) the age, sex, and physical and mental condition of the child;
- (c) the nature of his offense and his apparent motive;
- (d) the influence of his example upon other children of the same family or group;
- (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
- (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

Id. (quoting Restatement of the Law (Second) Torts, § 150 (1965)). Here, Marcus argues that that Tosha’s use of force on Kal.B. is inappropriate. On one particular instance, Tosha slapped Kal.B. three times on his buttocks for stealing. Tosha also testified to disciplining Kal.B. by slapping him across the face on one occasion. In light of Indiana precedent, while Marcus may not agree with Tosha’s method of discipline, the record does not support the claim that Tosha’s use of force is inappropriate or excessive.

Tosha also testified that she made clear to Marcus that she prefers to communicate with him by email or by certified mail on issues that do not directly relate to the welfare of their children. Nevertheless, it is clear that Tosha is actively trying to avoid communication with Marcus and placing the children in the middle of the battleground. When the children are with Marcus, instead of communicating directly with him, Tosha “prefers to communicate with the children through either notes or visits through the [] school or to the child care provider, or she purchased [Kal.B.] a cell phone, so she communicates through [Kal.B.] – to [Kal.B.] through the cell phone, but not through me.” (Tr. p. 126). In one instance, Marcus testified that Tosha had failed to communicate with him that Kal.B. was going to a school camp and only heard about it when the school nurse called him for a consent form regarding administrating Kal. B.’s medication.

Next, we turn to the DRCB report, which suggested joint custody because “[b]oth parents appear to be capable of meeting the children’s basic needs.” However, the DRCB report also expressed a reservation by acknowledging that the parties have a long history of conflict, evidenced by three marriages and subsequent divorces, and insisted that joint custody would only work if they participated in conflict resolution. (Appellant’s App. Vol. II, p. 23). Otherwise, as stated in the DRCB report, “the children will continue to be exposed to parents incapable of modeling appropriate conflict resolution, which will have a negative impact on the children’s lives.” (Appellant’s App. Vol. II, p. 23). The fact that both parents may be suitable and capable legal custodians of their children does not make

an award of joint custody appropriate. *Carmichael v. Siegel*, 754 N.E.2d 619, 636 (Ind. Ct. App. 2001). The DRCB report recommended that if the parties are unable to manage joint physical and legal custody that Marcus should have sole custody and that Tosha should spend time in excess of the minimum established by the Indiana Parenting Time Guidelines.

Finally, when making its final determination, the trial court ordered Marcus and Tosha to complete a high-conflict resolution. By doing so, the trial court acknowledged Marcus and Tosha's inability to get along with each other. "Even two parents who are exceptional on an *individual* basis when it comes to raising their children should not be granted, or allowed to maintain, joint legal custody over the children if it has been demonstrated, [], that those parents cannot work and communicate *together* to raise the children." *Id.* (emphasis in original).

While we sympathize with Tosha's request for joint legal and physical custody, we are not convinced this is in the children's best interest. *See* I.C. § 31-17-2-8. Despite three previous marriages and an attempt at counseling, it is clear that Tosha refuses to effectively communicate with Marcus regarding the children to the extent that she places the children squarely in the middle of the proverbial battleground by purchasing Kal. B. a cell phone and giving him messages to relay to Marcus.

In sum, based on the evidence before us, we conclude that Marcus has made a *prima facie* showing that the trial court abused its discretion by awarding joint legal

custody. We remand to the trial court with instructions to impose primary legal and physical custody of the children with Marcus and determine visitation with Tosha.

CONCLUSION³

Based on the foregoing, we conclude that the trial court did abuse its discretion when granting joint physical and legal custody of the children.

Reversed and remanded with instructions.

BAKER, C.J., and FRIEDLANDER, J., concur.

³ Marcus contends that the trial court erred when ordering child support without submitting a Child Support Obligation Worksheet. Because we remand back to the trial court, we will not address this issue.