

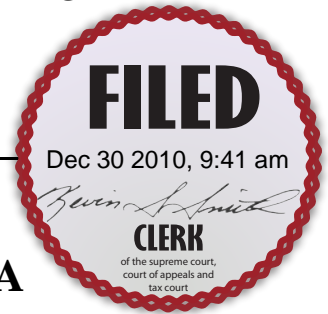
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE PATERNITY OF C.B.:)
)
D.B.,)
)
Appellant-Respondent,)
)
vs.)
)
A.C.,)
)
Appellee-Petitioner.)

No. 29A05-1004-JP-321

APPEAL FROM THE HAMITLON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
The Honorable David K. Najjar, Magistrate
Cause No. 29D01-0602-JP-164

December 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

D.B. (Mother) appeals from the trial court's order awarding A.C. (Father) sole physical and legal custody of the parties' minor child, C.B. Mother presents one issue for our review: Did the trial court abuse its discretion by awarding custody of C.B. to Father?

We affirm.

Mother and Father met at a bodybuilding competition in 2001 where Mother was a contestant and Father was a judge. They began dating shortly thereafter. Father has two children, ages 19 and 9, from previous relationships. Father also has a criminal history consisting of multiple forgery offenses and two counts of attempted theft. Father went by the name A.C. at the time, as he currently does, because he did not like his given name of F.B.C. At some point, Father simply chose to go by A.C. Father denied having additional aliases or that he used multiple social security numbers as alleged by Mother.

When Mother and Father met, Mother was married and had two school-aged children. Mother divorced her husband and moved to Indiana to be with Father. Her children remained in Ohio with their father. In 2003, Mother claimed physical abuse at the hands of Father and obtained a protective order against him. Mother, however, immediately reunited with Father and moved with him back to Indiana.

Mother gave birth to C.B. on August 20, 2005. At the time, Mother worked at GNC Nutrition Centers and Father ran a gym known as Body Double Fitness. On January 11, 2006, Mother filed for a second protective order against Father for herself and C.B., but she and C.B. continued to live with Father until the end of January 2006, when Father was served with the *ex parte* order.

On February 2, 2006, Father filed the instant paternity action. Father subsequently filed a petition for temporary sole custody on February 22, 2006, and the parties entered into an agreed order on March 1, 2006, in which the parties agreed that Father was C.B.'s biological Father and that Father would be C.B.'s primary caregiver. For purposes of Father's petition, the trial court ordered that a guardian ad litem (GAL) be appointed to assist in determining custody.

Father continued to be self-employed and remained C.B.'s primary caregiver until December 2006 when he moved to Ohio to seek employment. C.B. remained in Indiana with Mother. In Ohio, Father eventually gained employment with Chrysler. Shortly after Father relocated to Ohio, Mother began withholding parenting time from Father and continued to thwart Father's visitation with C.B. until February 2007 when, with the help of the appointed GAL, visitation was resumed pursuant to an agreement between the parties. Father traveled 600 miles (300 miles each way) every weekend to visit C.B. Father would pay for a motel room each time and pay for all expenses during the course of the visit. Father would frequently arrive in Indianapolis on a Thursday and visit with C.B. until Saturday or Sunday. Occasionally, Father would have C.B. one week at a time.

In December 2007, Mother began withholding parenting time again and continued to do so throughout the year 2008. In December 2008, the trial court ordered two overnight visits for Father and C.B. In January 2009, two weeks before the scheduled final hearing on Father's petition, Mother made allegations that Father had sexually abused C.B. to the GAL, Department of Child Services (DCS), and the Avon Lakes, Ohio police department. Mother's allegations included that Father inappropriately open-mouthed kissed C.B., that

Father touched C.B.'s vagina, and that Father had placed a "tribal tattoo" near C.B.'s private area. *Transcript* at 84. Mother had C.B., who was three and a half at the time, submit to a vaginal examination and to an interview with DCS that was ultimately forwarded to the police department.

Father denied all of the allegations. An investigation revealed that Father's fiancé put the tattoo of butterflies on C.B.'s stomach, just below her belly button, right where C.B. said she wanted it. No charges were filed against Father because it was determined that none of the allegations were supported by any evidence. An officer with the Avon Lakes police department included in the investigative report that "the timing of the allegations, approximately two weeks prior to a custody hearing, raises concerns." *Exhibits Vol. 2, April 30, 2009 Supp. Report of Successor GAL.*¹

Given the allegations of abuse, Mother would not permit Father was to visit with C.B. Father's only parenting time between the time the allegations were made in January 2009 through October 2009 resulted from the intervention of the GAL. On April 19, 2009, Father was granted a five-hour visit. Following the visit, Mother contacted the GAL and told her that Father took C.B. to the restroom during the visit and exposed his "ding-dong." *Id.*

Father had two non-overnight parenting days in May 2009. As of June 2009, Father had not had any overnight parenting time for over five months. At that point, the GAL tried to assist with a visitation agreement between Mother and Father. Attorneys for both parties reported that the major hold-up to finalizing an agreement was "Mother's unwillingness to

agree to extended parenting time and to help facilitate transporting the child to Ohio.” *Exhibit Vol. 2, September 11, 2009 Supp. Report of GAL*. Throughout the summer, Mother continued to deny Father’s requests for vacations with C.B. Mother permitted Father to have two parenting days in July 2009.

On July 20, 2009, Mother invited Father to dinner with her and C.B. to celebrate C.B.’s fourth birthday. Father declined the invitation. The GAL noted that the invitation seemed odd given Mother’s allegations that Father was sexually abusing C.B.

Mother agreed to let Father have parenting time from July 30 through August 1, 2009 while he was in town for a funeral. Father’s fiancé testified that during this visit, C.B. made comments to her such as “my mommy doesn’t like you”, she “wants you to leave”, and “she doesn’t want you to be with my daddy.” *Transcript at 172*. C.B. also told Father’s fiancé that Mother called her “vomit” because that is what she calls people she does not like. *Id.*

On August 4, Mother reported to the GAL that during his recent overnight visits with C.B., Father urinated on C.B.’s stomach and open-mouthed kissed her and that Father’s fiancé told C.B. to “touch Daddy’s ding-dong.” *Exhibit Vol. 2, September 11, 2009 Supp. Report of GAL*. On the advice of the GAL, Mother contacted the DCS and they investigated the incident. C.B. was interviewed at Chaucie’s Place and the interviewer noted that C.B. was more interested in playing than talking. The interviewer found that Mother was more “focused on proving the abuse allegation than concerned about the repercussions of said abuse to [C.B.]” *Id.* C.B. related the allegations set forth above during a counseling session

¹ The reports of the GAL are found in Volume 2 of the Exhibits. The reports are in chronological order, but not sequentially numbered, making citation to specific matters difficult. Herein, citations to the GAL reports

with a licensed social worker. During that session, C.B. told the social worker that “a Police Officer was going to take Daddy to jail.” *Id.* Father and his fiancé denied all of the allegations. Ultimately, the DCS determined that the abuse allegations were unsubstantiated. The GAL’s investigation into the allegations led her to conclude that it was highly unlikely that the alleged abuse occurred. The GAL questioned whether Mother was coaching the child.

After the latest allegations were made, Mother stopped all communications with Father and would not permit contact or phone conversations between Father and C.B. In her September report, the GAL noted that Mother was not “interested in initiating a positive long term solution for [C.B.] to have a lasting relationship with her Father.” *Id.* Nevertheless, the GAL continued to recommend (as had been recommended in four previous reports) that Mother retain custody of C.B. and that Father have only supervised parenting time.

The parties agreed to continue a hearing scheduled for September 14, 2009 and submit themselves and C.B. to psychological assessments by Dr. Richard Lawlor. The assessments took place on September 17. According to Dr. Lawlor, Father’s psychological testing results were within normal limits. Mother’s psychological testing results were within the normal range of functioning, but “raise[d] some potential for concern in some areas.” *Appellee’s Appendix* at 26. For example, testing revealed that Mother was “extremely defensive” and that there were “concerns with impulsivity and tendencies toward acting without regard for

will be to Exhibit 2 and the corresponding date of the report so relied upon.

the consequences to herself or others.” *Id.* at 26, 27. Mother discussed with Dr. Lawlor the allegations of sexual abuse against Father. Dr. Lawlor concluded:

The current evaluation is troubling, and I do think that both parents bring to this situation a mixture of positive and negative features in their personal functioning. I do not, however, find any evidence to support concerns that [Father] has been abusive, either physically or sexually, to [C.B.] There is, however, significant evidence and concern presented in the current evaluation about too much talking with [C.B.] by her mother and at least inadvertent coaching about these issues. That pattern, which seems to be demonstrated for the past several years, was also seen on the day of this evaluation

Id. Dr. Lawlor continued:

I do think that [Mother]’s pattern of making accusations about [Father] clearly displays a pattern of, at a minimum, exaggerated responses, and at worst, deliberate attempts to falsify information about incidents involving [Father]. At this point, the danger involves including [C.B.] in those types of situations, with repeated investigations into the possibility of sexual abuse. There has been no evidence to support any of these concerns at this time, but [C.B.] is now at risk because of the repeated conversations and interviews to which she has been exposed.

Id. at 28. After his evaluation of the parties (including Father’s fiancé), Dr. Lawlor suggested that Mother be awarded physical custody of C.B. Dr. Lawlor noted, however, that

[i]f reports of suspected abuse of [C.B.] by her father were to continue, with unsubstantiation, as there has been in the past, I do think that there would at that point be a need to reassess the physical custody situation, and whether or not [Mother] herself poses a danger of psychological abuse to [C.B.].

Id. at 28-29.

In her supplemental report in October 2009, the GAL considered Dr. Lawlor’s recommendation and noted that she was “puzzled” that Dr. Lawlor suggested that Mother continue to be the physical custodian of C.B. *Exhibit Vol. 2, October 2009 Supp. Report of*

GAL. The GAL relied upon Dr. Lawlor's evaluation and made the following recommendation:

The issue of physical custody remains even more difficult. [C.B.] has spent the majority of the past two years with her Mother. She is comfortable with her babysitter and has an established routine. The GAL is reluctant to change physical custody but is extremely concerned that Mother may continue the pattern of coaching the child with allegations against Father. . . . Dr. Lawlor felt it prudent to leave physical custody with Mother at this time. The GAL, as well, recommends that Mother continue to have primary physical custody at this time. . . . However, the GAL is not beyond recommending the same in the future if the GAL continues to see [C.B.]'s relationship with her Father deteriorate by the efforts of her Mother.

Id. In the same report, the GAL recommended that Mother seek counseling regarding the effects on C.B. of repeated allegations of sexual abuse.

In the months that followed, Mother attended two counseling sessions and as of February 2010, had no further appointments scheduled. Mother inaccurately reported that her counselor told her no further sessions were needed. After the GAL's October report, Mother made two additional allegations against Father. Mother reported to the GAL that Father and his fiancé made C.B. watch them take a bath together over Father's Thanksgiving parenting time. This allegation was not further reported or otherwise pursued. Following Father's holiday parenting time, Mother reported that C.B. wanted to show her how Father kissed her and then C.B. demonstrated a "tongue kiss." *Appellee's Appendix* at 32. Thereafter, Mother withheld visitation from Father and was ultimately found in contempt. Mother also reported the incident to the Avon Lake, Ohio police department and following an investigation, it was concluded that the matter was "unsubstantiated and is closed." *Exhibit Vol. 2, March 17, 2010 Supp. Report of GAL.*

In February 2010, and as a result of Mother's latest allegations, the parties submitted themselves to a follow-up evaluation by Dr. Lawlor. In his supplemental report, Dr. Lawlor noted that during the session, Mother attempted to have a "secret" conversation with C.B. and that Mother's primary concern was that C.B. talk about the most recent alleged incident. *Appellee's Appendix* at 39. After this second evaluation of the parties, Dr. Lawlor concluded:

Because [Mother] is clearly unable to deal with this situation in a realistic and helpful manner, I am suggesting at this point that custody be changed and that [Father] be the primary physical custodian, both from a legal and from a physical perspective. If [C.B.] remains with her mother, she is at significant risk to come to think of herself as an abused child.

Id.

The GAL submitted a follow-up report in February 2010 in which the GAL reviewed events occurring since her October 2009 report. The GAL noted that Mother had not followed through with the previous counseling recommendation and further noted Dr. Lawlor's recommendation of a change in custody following his most recent evaluation of the parties. Given the circumstances, the GAL concluded that a complete change of physical custody for C.B. was warranted and recommended to the court that Father have sole legal and physical custody.

For limited periods of time throughout this process, Mother and Father have been able to communicate with regard to C.B. The majority of time, however, communication between Mother and Father is impossible or non-existent. In the September 2009 supplemental report of the GAL, the GAL noted that Mother and Father continually "bash each other in emails" sometimes sending as many as five to six emails a day, each communication several pages in

length. *Exhibit Vol. 2, September 11, 2009 Supp. Report of GAL.* The GAL advised the parties to stop sending what she considered “unproductive hostile emails.” *Id.* The GAL further noted that phone contact between Mother and Father started out good, but became sporadic and controlled by Mother. The divisiveness of the communication pattern between Mother and Father has lead many involved with the parties to conclude that a joint custody situation is not feasible.

Despite the dissension between Mother and Father, Dr. Lawlor described C.B.’s relationship with both of her parents as “comfortable and relaxed.” *Appellee’s Appendix* at 22. Dr. Lawlor also described C.B. as a “delightful” little girl who is outgoing and friendly, but quiet. *Id.* at 37. When returning from a visit with one parent, C.B. is excited to see her other parent. A relationship with both parents has been recognized as being in C.B.’s best interests.

The parties appeared for a final hearing regarding Father’s paternity petition on March 2, 2010. Mother moved for continuance of the hearing as her attorney could not be in attendance because of unforeseen circumstances. Before granting the continuance over Father’s objection, the court ordered that Father be awarded temporary sole physical custody of C.B. pending the final hearing. The court, keeping in mind that its foremost consideration is the best interests of the child, found as follows:

The Court based upon the history of this case, based upon the evidence that has been submitted, based upon the reports that have been generated, and submitted to the court over the history of this case, [i]s no longer satisfied that the status quo, being the mental, emotional, physical well being of the child can be kept while in [Mother]’s care. I believe that the better status quo will be kept in [Father]’s care and custody over the next three weeks. Two weeks effectively. And so . . . I will grant [Father’s] request for a temporary change

of custody. With regard to legal custody I am going to temporarily change that to joint legal custody. For both parents [sic] and primary physical custody at this point will be with [Father].

Transcript at 13-14.

The final hearing was held as rescheduled on March 23. At the conclusion of the evidence, the court took the matter under advisement and invited the parties to submit proposed orders in lieu of final argument. On April 1, 2010, the court issued a thirty-five page order including extensive findings of fact, ultimately awarding Father sole legal and physical custody of C.B. Mother now appeals.

It appears that the trial court entered findings and conclusions *sua sponte*. When reviewing the specific findings and conclusions thereon, we must first determine whether the record supports the factual findings, and then whether the findings support the judgment. *Bryant v. Bryant*, 693 N.E.2d 976 (Ind. Ct. App. 1998), *trans. denied*. On appeal, we will not set aside the findings or judgment unless they are clearly erroneous, and “due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.” *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009) (quoting Ind. Trial R. 52(A)). We therefore consider only the evidence favorable to the judgment and the reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility. *Bryant v. Bryant*, 693 N.E.2d 976. A judgment is clearly erroneous when there is no evidence to support the findings, the findings do not support the judgment, or the trial court applies the wrong legal standard to properly found facts. *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453.

Mother argues that the trial court abused its discretion in “modifying” legal and physical custody from Mother to Father. *Appellant’s Brief* at 3. Specifically, Mother argues

that there was no evidence of a substantial and continuing change of circumstances to support a modification of custody and that the court failed to consider the best interests of the child. In response, Father asserts that this is not a custody modification proceeding so he need only establish what is in C.B.'s best interests.

In an initial custody determination, there is no presumption in favor of either Mother or Father, and the trial court's determination is based on the best interests of the child. *See In re Paternity of Winkler*, 725 N.E.2d 124 (Ind. Ct. App. 2000). A more stringent standard governs requests for modification of custody. *Id.* In a hearing to modify custody, the burden is on the petitioner to show a change in circumstances so decisive in nature as to make a change in custody necessary for the welfare of the child. *Id.*; *see also* Ind. Code Ann. § 31-14-13-6 (West, Westlaw through 2010 2nd Regular Sess.). A stricter rationale is required to support a change in custody because permanence and stability for the child are deemed crucial for the welfare and happiness of the child. *Paternity of Winkler*, 725 N.E.2d 124.

In determining which standard is appropriate, we must look to the unique facts of the case. *Id.* In *Winkler*, the father acquiesced in the mother having sole legal custody of the minor child for twelve years and further admitted that the mother was the child's primary caregiver. Although there had been no custody determination by the trial court, the *Winkler* court concluded that under the facts of that case the stricter standard for modification should be applied.

Here, there has never been a custody determination by the trial court. Shortly after Father filed this paternity action, the parties agreed that Father would be C.B.'s primary caregiver and he in fact was for her first year of life. After Father moved to Ohio, he

maintained contact with C.B., except for periods of time when Mother interfered with Father's efforts for one reason or another. Father would travel back to Indiana to visit C.B. and occasionally, have C.B. for a week at a time. The facts of this case are unlike those presented in *Winkler*. Under the facts of this case, we conclude the trial court properly applied the standard for an initial custody determination. In our review, we will therefore focus on the best interests of the child as well.

In making a final custody determination in a paternity case, “[t]he court shall determine custody in accordance with the best interests of the child.” I.C. § 31-14-13-2 (West, Westlaw through 2010 2nd Regular Sess.). In making its determination, 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 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 parents;
 - (B) the child's siblings; and
 - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to 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 2.5(b) of this chapter.

Id.

In arguing that the trial court failed to consider the custody arrangement to be in the best interests of C.B., Mother does little more than list seventeen evidentiary facts she claims the trial court failed to consider. Most items contained in the list are rife with Mother's

views on how the court should have interpreted the evidence she claims was ignored by the court. In this vein, Mother is simply requesting this court to reweigh the evidence and judge the credibility of the witnesses. While we will not engage in such review on appeal, we will briefly address specific arguments raised by Mother.

Mother asserts that the trial court failed to consider the effect of Father's "documented history of domestic and child abuse as well as illicit drug trafficking and administration" on the mental and physical health of C.B. *Appellant's Brief* at 14. We begin by noting that Mother's assertions on appeal are an exaggeration of the evidence presented. For example, the evidence fell far short of establishing that Father "headquartered an illegal drug distribution and administration clinic" *Id.* Mother presented a witness who testified that Father, a personal trainer, injected the witness with human-growth hormone. Father denied the allegation and presented evidence that he did not engage in such activities. Mother's attempts to portray Father as an abuser and drug dealer were countered by Father's contrary explanations or vehement denials as to Mother's allegations. In any event, Mother's concerns of domestic and drug abuse were brought to the court's attention and were a constant theme running through Mother's evidence. Given Father's conflicting evidence, the issue became one of credibility. From the court's order, it is clear that the court did not believe Father presented a danger to C.B. in this manner. To the contrary, the court made it clear that it found Mother's conduct in coaching C.B. about sexual abuse at the hands of Father to be more harmful to C.B.

Mother maintains that the court failed to consider the fact that C.B. has adjusted to a safe, stable home provided by Mother, something Mother claims Father is unable to provide.

Mother asserts that in Father's care, C.B. could be rendered homeless and without support at any moment because Father's living arrangements are at the mercy of his relationship with his fiancé. The GAL and Dr. Lawlor both noted that Father and his fiancé were committed to each other and both considered Father's fiancé to be an important part of the custody evaluation, so much so she was included in the GAL's and Dr. Lawlor's assessments. Evidence demonstrated that C.B. had a good relationship with Father's fiancé and that Father and his fiancé provided for C.B.'s needs. This is not to discount the fact that Mother also has provided C.B. with a stable home environment. Indeed, the GAL acknowledged that in Mother's care, C.B. was living in a safe, stable, well-adjusted home, school, and daycare environment. The record demonstrates, however, that Father is likewise capable of providing the same for C.B., despite Mother's claims to the contrary.

In its thirty-five page order, the trial court made extensive findings of fact relating to joint legal and physical custody of C.B. and what arrangement would be in C.B.'s best interests. In this context, the court noted both positive and negative attributes of Mother and Father. The court noted that both parents strongly desire to be C.B.'s custodial parent. Despite Mother and Father's inability to communicate and cooperate with each other in matters relating to C.B., the court noted that C.B. is generally well cared for and happy when with either parent. The court made detailed findings about the allegations of sexual abuse and noted that none of the allegations had been substantiated or disclosed by C.B. The court expressed its concern that Mother was coaching C.B. about the allegations of sexual abuse and the possible harm such could inflict upon C.B. if it continued. Additionally, the court demonstrated that it carefully considered and accorded much weight to the opinions of the

GAL and Dr. Lawlor, who both ultimately recommended that Father having custody of C.B. was in C.B.'s best interests. There is nothing in the record that leads us to conclude that the court was "punishing" Mother. *Appellant's Brief* at 17. The court made it clear that it was considering C.B.'s best interests and that it carefully considered all of the evidence presented before determining that Father be awarded sole physical and legal custody of C.B.

We have reviewed the record and cannot say that the court abused its discretion in deciding that Father should have sole physical and legal custody of C.B. and that Mother should have supervised visitation until such time as her counselor determines that supervised parenting time is no longer warranted.

Judgment affirmed.

MAY, J., and BROWN, J., concur.