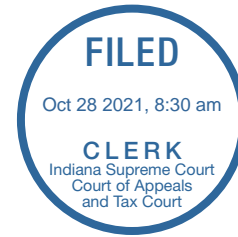


MEMORANDUM DECISION

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

In the Matter of D.C. and K.C.
(Children in Need of Services)

and

A.C. (Mother),
Appellant-Respondent,

v.

Indiana Department of Child
Services,
Appellee-Petitioner.

October 28, 2021

Court of Appeals Case No.
21A-JC-934

Appeal from the Huntington
Circuit Court

The Hon. Davin G. Smith, Judge

Trial Court Cause Nos.
35C01-2103-JC-12
35C01-2103-JC-13

Bradford, Chief Judge.

Case Summary

[1] D.C. was born on May 1, 2010, and K.C. was born on December 26, 2011 (collectively, “the Children”), to A.L.C. (“Father”) and A.C. (“Mother”) (collectively, “Parents”), who were married at the time. After the dissolution of Parents’ marriage in 2015, Mother and Father were awarded joint physical and legal custody of the Children. At some point, Father moved to Georgia and Mother became the Children’s primary caregiver. On March 3, 2021, the Department of Child Services (“DCS”), having received reports of substance abuse by Mother and her new husband (“Stepfather”) and excessive truancy by the Children, petitioned to have the Children adjudicated children in need of services (“CHINS”). At a hearing in mid-April of 2021, Father requested that he be given primary physical and legal custody of the Children in lieu of adjudication on the CHINS petitions. After the fact-finding hearing on May 14, 2021, the juvenile court dismissed DCS’s CHINS petitions and awarded primary physical and legal custody of the Children to Father. Mother argues that the juvenile court erred in addressing custody in a CHINS proceeding and abused its discretion in awarding primary custody of the Children to Father. Because we disagree with both contentions, we affirm.

Facts and Procedural History

[2] D.C. and K.C. were born in 2010 and 2011, respectively, to Parents, who were married at the time. Father and Mother divorced in 2015, and, pursuant to the dissolution decree, shared physical and legal custody of the Children. As it happens, the dissolution had been heard in the Huntington Circuit Court, the

same court from which this appeal comes. As of early 2021, Father was residing in Georgia, while Mother and the Children resided in Huntington County with Stepfather.

[3] On or about March 3, 2021, DCS received a report that Mother and Stepfather were under the influence of some intoxicant due to erratic behavior at the home of Mother's oldest child. DCS also learned that D.C. had had thirty-three and one-half unexcused absences in the current school year, while K.C. had had twenty-three, and that the Children's school had reached out to Mother and had received no response. DCS was also aware that Mother had a history of substance abuse, including abuse of cocaine, methamphetamine, and prescription medicines, and had received treatment in 2017 through an informal adjustment.

[4] On March 4, 2021, DCS petitioned to have the Children adjudicated CHINS on the basis that Mother was neglecting their education. Despite successful service, Mother did not appear for the initial hearing on March 12, 2021, and the juvenile court issued a writ of body attachment. At the continued initial hearing on March 17, 2021, DCS family case manager Reagan Graft ("FCM Graft") testified that she had visited Mother's residence the day before and found it in "disarray" with possible trash on the floor and to be unsuitable for children. Tr. Vol. II p. 11. The juvenile court ordered detention and placement of the Children with maternal step-grandmother with Mother to have supervised visitation. On March 31, 2021, the juvenile court appointed Donna Spear as guardian *ad litem* ("GAL Spear").

- [5] On April 9, 2021, the juvenile court ordered a trial in-home visitation with Mother on the condition that she keep her home clean and satisfactorily complete any proposed family-preservation services. On April 15, 2021, the juvenile court held a detention hearing, at which FCM Graft testified. FCM Graft indicated that Mother and Stepfather had submitted to drug screens the previous week and that both had tested positive for methamphetamine and fentanyl as well as methadone, the only drug of the three for which they had a prescription. FCM Graft also testified that she had tried four times in the previous week to make a court-ordered home visit without success and had received reports of D.C. falling asleep in class at school. FCM Graft opined that the Children's safety could not be maintained given Mother's lack of cooperation and in light of recent developments. Finally, FCM Graft testified that DCS had completed an assessment of Father's home in Georgia and considered it a viable placement option.
- [6] Father also testified at the detention hearing and indicated that he was willing and able to take care of the Children and that Georgia authorities had evaluated his home and had found it suitable. Father indicated that he was willing to take care of the Children in the long term and was prepared to accept primary physical custody. At the end of the hearing, the juvenile court ordered the Children detained and placed with Father as soon as he or a relative could travel to Huntington County to collect them.
- [7] The fact-finding hearing was conducted on May 14, 2021, at which Father requested a change in custody of the Children in lieu of adjudication of them as

CHINS. Although Mother argued that she should have a “full” custody hearing, she did not object when the juvenile court voiced its intention to move forward on the custody issue. Tr. Vol. II p. 96. Father testified that he had had the Children for approximately three weeks and that they had been enrolled in school two days after they arrived in Georgia. Father also indicated that he thought the Children were adjusting well and requested that the juvenile court award him primary legal and physical custody with some sort of unsupervised visitation for Mother. FCM Graft testified that, even after the Children’s placement with Father, there were still concerns about Mother, specifically that she was still testing positive for illegal substances, “her levels have gone up[,]” and she had been inconsistent in taking advantage of the services offered to her. Tr. Vol. II p. 111. When asked if it was in the Children’s best interests to remain in Father’s care, FCM Graft opined that “due to the concerns with the illegal substance abuse with mom, um, it would be appropriate for [the Children] to remain with [Father] at this time.” Tr. Vol. II p. 113. FCM Graft also indicated her belief that DCS would have no reason to continue its involvement with the case if custody were awarded to Father. GAL Spear concurred with FCM Graft’s recommendations. Mother acknowledged that she had had a positive drug screen on May 6, 2021, and admitted that she last used drugs five days before the hearing, or May 9.

[8] On May 18, 2021, the juvenile court awarded physical and legal custody of the Children to Father and dismissed DCS’s CHINS petitions with an order that provides, in part, as follows:

The Court GRANTS Father’s motion for change of custody in lieu of adjudication and ORDERS that Father shall have primary physical and legal custody of the [Children], subject to Mother’s parenting time exercised under the following conditions:

1) Mother shall have parenting time with the [C]hildren pursuant to the Indiana Parenting Time Guidelines when distance is a major factor. This parenting time shall be supervised by Garret Williams and the children shall stay at the residence of Mr. Williams during any visits to Indiana.

2) Mother shall provide negative drug screen results to Father three (3) days prior to the beginning of each period of supervised parenting time and on a weekly basis while the children are staying in Indiana and Mother is exercising supervised parenting time.

[...]

The Indiana Department of Child Services, local office in Huntington County, (hereinafter “DCS”), by its counsel, filed its Motion to Dismiss the CHINS Petition in this cause. The Court having examined the same and being duly advised in the premises, NOW FINDS AND ORDERS as follows:

The Motion to Dismiss is GRANTED and the child in need of services cause is DISMISSED WITHOUT PREJUDICE.

Order pp. 1–2.

Discussion and Decision

I. Whether the Juvenile Court Erred in Addressing Custody Matters in a CHINS Proceeding

[9] Mother contends that the juvenile court erred in addressing custody matters in a CHINS proceeding. The juvenile court awarded custody of the Children to Father pursuant to Indiana Code section 31-30-1-12, which provides, in part, as follows:

(a) Subject to subsection (b), a court having jurisdiction under IC 31-17-2 of a child custody, parenting time, or child support proceeding in a marriage dissolution has concurrent original jurisdiction with the juvenile court for the purpose of modifying custody, parenting time, or child support of a child who is under the jurisdiction of the juvenile court because:

(1) the child is the subject of a child in need of services proceeding;

[...]

(c) If, under this section, a juvenile court:

(1) modifies child custody, child support, or parenting time; and

(2) terminates a child in need of services proceeding or a juvenile delinquency proceeding regarding the child;

the order modifying child custody, child support, or parenting time survives the termination of the child in need of services proceeding or the juvenile delinquency proceeding until the court having concurrent original jurisdiction under subsection (a) assumes or reassumes primary jurisdiction of the case to address all issues.

[10] While Mother does not deny that the juvenile court had the legal ability to address the custody question in the CHINS proceeding, Mother briefly argues that in so doing it denied her the ability to have a “proper” custody determination made in the dissolution matter. Appellant’s Br. p. 13. First, at the May 14, 2021, hearing, Mother was silent when the juvenile court asked if there were any objections to Father’s motion to address custody at the hearing. Moreover, despite Mother’s seeming implication that she was somehow blindsided by the juvenile court’s decision to proceed on the custody issue in the CHINS cases, she did not request a continuance to further prepare or retain

separate custody counsel. Consequently, Mother has waived this argument for appellate review. See *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015). “[A]ppellate review presupposes that a litigant’s arguments have been raised and considered in the trial court.” *Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013). Mother also does not explain how she could have been caught off-guard given that Father had orally moved for a change of custody almost a month previously, on April 15, 2021. While Mother also notes that her trial counsel objected to proceeding on the custody matter in the CHINS proceeding and suggested that it might be more proper to address it in the dissolution proceeding, she does not actually argue on appeal that the trial court erred in failing to sustain her trial counsel’s objection or that it would be improper to proceed on the custody matter in the CHINS proceeding. Mother has failed to establish that the juvenile court erred in addressing the custody matter in what started out as a CHINS hearing.

II. Whether the Juvenile Court Abused its Discretion in Awarding Primary Physical and Legal Custody to Father

[11] As a general matter, Indiana has a deep-rooted preference “for granting latitude and deference to our trial judges in family law matters.” *Steele-Giri v. Steele*, 51 N.E.3d 119, 123–24 (Ind. 2016) (citing *In re Marriage of Richardson*, 622 N.E.2d 178 (Ind. 1993)). 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.” *Steele-Giri*, 51

N.E.3d at 123–24 (citing *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) and *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

[12] Indiana Code section 31-17-2-8 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
 - (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.
- (9) A designation in a power of attorney of:

(A) the child’s parent; or

(B) a person found to be a de facto custodian of the child.

As the statute makes clear, the list not exhaustive, because the “court shall consider *all* relevant factors.” *Id.* (emphasis added).

[13] Determinations regarding child custody fall within the juvenile court’s sound discretion. *Swadner v. Swadner*, 897 N.E.2d 966, 973 (Ind. Ct. App. 2008). We will affirm unless we determine that the juvenile court abused its discretion. *Id.* “On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal.” *Best v. Best*, 941 N.E.2d 499, 503 (Ind. 2011). “We cannot weigh the evidence but must consider it in a light most favorable to the judgment.” *Id.* Finally, when changing Children’s custody to Father, the juvenile court was not required to enter a finding as to the statutory factors, *M.G. v. S.K.*, 162 N.E.3d 544, 548 (Ind. Ct. App. 2020) (citations omitted), nor was it required to cite to the applicable statutory law. *Hecht v. Hecht*, 142 N.E.3d 1022, 1031 (Ind. Ct. App. 2020).

[14] We conclude that there is sufficient evidence in the record to sustain a finding that there was a substantial change in circumstances such that modification of custody was in the Children’s best interests. To summarize, the juvenile court heard evidence of Mother’s long-term, continuing, and (apparently) increasing substance abuse; Stepfather’s substance abuse; Mother’s neglect of the Children’s educational needs; and Mother’s failures to sufficiently clean her residence, cooperate with DCS, or take advantage of services offered to her.

Evidence of Mother's drug use was especially compelling, dating back to at least 2017 and with her admitting at the fact-finding hearing that she had last used drugs only five days previously and only three days after a positive drug screen. The evidence leads to a reasonable conclusion that Mother has serious substance-abuse issues that she has yet to address.

[15] Additionally, FCM Graft opined that granting Father custody of the Children was in their best interests and would also mean that DCS could terminate its involvement in the case, and GAL Spear concurred with DCS's recommendations. Given the evidence of Mother's inability or unwillingness to cease her substance abuse and that Father is able to provide a safe and stable home, we cannot say that the juvenile court abused its discretion in awarding physical and legal custody of the Children to Father. *See, e.g., Baxendale v. Raich*, 878 N.E.2d 1252, 1258 (Ind. 2008) (noting that "[e]vidence of a parent's drug or alcohol use can be relevant to that parent's health and the child's best interests" in custody proceedings); *Robertson v. Robertson*, 60 N.E.3d 1085, 1087 (Ind. Ct. App. 2016) (GAL agreed that substance use by a stepfather, *inter alia*, equated a "continuing and substantial change of circumstances" that supported modification of custody to the father).

[16] We affirm the judgment of the juvenile court.

Robb, J., and Altice, J., concur.