

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Paternity of
R.L.S.;

Palmer Smith, III,
Appellant-Petitioner,

v.

Tawnee Trusty,
Appellee-Respondent.

November 3, 2023

Court of Appeals Case No.
23A-JP-454

Appeal from the Grant Superior
Court

The Honorable Brian F. McLane,
Magistrate

Trial Court Cause No.
27D02-2110-JP-99

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

- [1] Palmer Smith, III (“Father”), appeals the order of the trial court establishing his paternity of R.S. (“Daughter”) and granting, to Father and Tawny Trusty (“Mother”), joint legal and shared physical custody of Daughter. Father argues that the trial court’s custody determination was contrary to the evidence. We conclude that the trial court’s custody determination was well within the wide discretion we afford trial courts in child custody matters and, accordingly, affirm.

Issue

- [2] Father presents one issue, which we restate as whether the trial court abused its discretion by ordering Mother and Father to share physical custody of Daughter.

Facts

- [3] Father and Mother dated for several years and, in November 2012, had Daughter. The parties separated in April 2019. Since their separation, the parties have shared custody of Daughter. Although at first they were able to cooperate on issues involving Daughter, the parties’ relationship deteriorated over time, especially after Father, on October 14, 2021, filed the instant paternity action and sought primary custody of Daughter.
- [4] Father lives in a four bedroom home, where Daughter has her own bedroom. While at Father’s house, Daughter has significant fear and anxiety at bedtime.

Although she falls asleep in her own bed, Daughter wakes up during the night and spends about half of the night in Father's bed.

[5] Mother lives in a two-bedroom home with her fifteen-year-old daughter. Both the older child and Daughter have separate bedrooms, and Mother sleeps on the couch in the living room. Mother also has a boyfriend who sometimes spends the night with her. Mother claims that Daughter does not experience in her home the bedtime fear and anxiety that Father reports at his home.

[6] Father alleged that Mother left Daughter in the car while Mother went to a bar with her boyfriend. Mother explained that her boyfriend came out to the car to speak with Mother. Mother admitted that, on one occasion, she went to a bar with her boyfriend, left Daughter in the care of Mother's fifteen-year-old daughter, and stayed at the bar until 3:00 a.m.

[7] Daughter struggles with bad dreams at night and emotional outbursts, including some at school. When experiencing these outbursts, Daughter would place her fingers into her mouth, causing herself to gag. Daughter participates in therapy to address her anxiety issues. At the time of the hearing, Daughter had been attending her therapy sessions for about nine months. Both parents agree that Daughter should continue her therapy.

[8] Upon filing the paternity petition, Father requested, and the trial court appointed, a guardian ad litem ("GAL"), who interviewed the parties, Daughter, and several of their friends and family members. The GAL filed a

report on April 11, 2022, in which she recommended that Father have primary physical custody of Daughter.

[9] The trial court held a hearing on Father’s paternity petition on August 5, 2022. At the hearing, the GAL testified that, in her opinion, it was in Daughter’s best interests that Father have primary physical custody. At the end of the hearing, the trial court took the matter under advisement. On September 7, 2022, the trial court entered an order that provides:

4. The child of the parties is an 11-year-old girl.
5. Both parents desire custody of the child.
6. The parties resided together for the majority of the child’s life. The parties separated in April, 2019.
7. Since their separation, the parties have shared custody of the child.
10. Mother and Father’s relationship has deteriorated during the pendency of this action.

* * * * *

14. Both parents have concerns about the other parent’s parenting style. Father believes Mother is too abrupt with the child. The child has indicated that Mother is mean to her and uses derogatory comments toward her. Mother believes that Father babies the child.
15. It is clear that the child’s emotional well-being has become an issue over the past year. The deterioration of the parties’ relationship closely coincides with the onset of the child’s emotional issues. The child has experienced bad dreams, angry outbursts and placing her fingers in her mouth to the point of making herself gag.

17. Both parties have indicated a strong desire to co-parent, but their parenting styles are diverse and there does not appear to be a middle ground.
18. The child has had a significant relationship with both parents for her entire life. Though there are significant concerns regarding Mother's at-time[s] lackadaisical attitude towards the child's emotional issues, it is in the child's best interests to maintain a strong relationship with her Mother. Similarly, Father's willingness to allow the child to sleep in his bed seems to be indicative of him overcompensating for the child's emotional needs. However, it is in the child's best interests to maintain a strong relationship with her Father.
19. For the reasons stated above, the court finds that it is in the child's best interests that the parties share joint legal and physical custody. Given the respective work schedules, the parents shall share custody of the child on a week on/week off basis with the exchange being Sunday at 6:00 PM. For the purpose of holiday scheduling, the parties shall follow the Indiana Parenting Time Schedule for holidays with Father being designated as the "custodial parent".

Appellant's App. Vol. II pp. 9-11.

[10] Father filed a motion to correct error on October 6, 2022, which the trial court heard on December 27, 2022. The trial court denied the motion to correct error on January 31, 2023. Father now appeals.

I. Standard of Review

[11] "Appellate deference to the determinations of our trial court judges, especially in domestic relations matters, is warranted because of their unique, direct

interactions with the parties face-to-face, often over an extended period of time.” *Hahn-Weisz v. Johnson*, 189 N.E.3d 1136, 1141 (Ind. Ct. App. 2022) (quoting *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011)). Trial courts are “‘enabled to assess credibility and character through both factual testimony and intuitive discernment,’ and, therefore, are ‘in a superior position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children.’” *Id.* (quoting *Best*, 941 N.E.2d at 502).

[12] We also noted in *Hahn-Weiz* that:

“there is a well-established preference in Indiana for granting latitude and deference to our trial judges in family law matters. Appellate courts 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. 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.”

189 N.E.3d at 1141 (quoting *Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016)) (internal citations and quotations omitted).

[13] Finally, we note that Mother has not filed an appellee’s brief, which affects our review. When an appellee fails to submit a brief on appeal, we apply a less stringent standard of review with respect to the showing necessary to establish reversible error. *I.P. ex rel. Souders v. Powell*, 148 N.E.3d 1098, 1102 (Ind. Ct. App. 2020) (citing *In re Paternity of S.C.*, 966 N.E.2d 143, 148 (Ind. Ct. App.

2012), *aff'd on reh'g*, 970 N.E.2d 248 (Ind. Ct. App. 2012), *trans. denied*). In such cases, we will not undertake the burden of developing legal arguments on behalf of the appellee, and we may reverse if the appellant establishes prima facie error, ““which is an error at first sight, on first appearance, or on the face of it.”” *Id.* (quoting *In re Paternity of S.C.*, 966 N.E.2d at 148). We are still, however, obligated to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Atkins v. Crawford Cnty. Clerk's Off.*, 171 N.E.3d 131, 138 (Ind. Ct. App. 2021) (citing *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014)).

II. Best Interests of the Child

[14] Father argues that the evidence demonstrated that it was in the best interests of Daughter that Father have primary physical custody. Indiana Code Section 31-14-13-2¹ governs the determination of custody in paternity actions and provides:

The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a 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 parents.

¹ Father mistakenly cites Indiana Code Section 31-17-2-8, which governs custody determinations following a dissolution of marriage. Regardless, both Section 31-17-2-8 and Section 31-14-13-2 contain identical provisions. See *In re Paternity of A.R.S.*, 198 N.E.3d 423, 431 n.8 (Ind. Ct. App. 2022).

(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.

[15] Indiana trial courts have discretion in both initial custody and modification of custody determinations, and we review those determinations for an abuse of discretion. *I.P.*, 148 N.E.3d at 1102 (citing *In re Paternity of Snyder*, 26 N.E.3d 996, 998 (Ind. Ct. App. 2015); *In re B.W.*, 17 N.E.3d 299, 307 (Ind. Ct. App. 2014)).

[16] Father's argument rests almost entirely on the fact that the GAL recommended in her report that Father have primary physical custody of Daughter. Father acknowledges, however, that the trial court was not required to accept the opinion of the GAL regarding custody. *See Maddux v. Maddux*, 40 N.E.3d 971, 980 (Ind. Ct. App. 2015) (recognizing that "the fact-finder is not required to

accept the opinions of experts regarding custody[.]” (citing *Clark v. Madden*, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000)). In essence, Father asks us to give the GAL’s opinion more weight than did the trial court. This, of course, we cannot do. The trial court was not required to follow the GAL’s recommendation.

[17] Father also argues that the evidence he presented supported a determination that Father should have been awarded primary physical custody of Daughter. But we are constrained on appeal to consider only the evidence that favors the trial court’s custody determination, along with any reasonable inferences that can be drawn from this evidence. Here, the evidence shows that both parties had their own strengths and weaknesses regarding parenting of Daughter. Father was more lenient and Mother more strict. The trial court heard all the evidence, reviewed the GAL’s report, and concluded that it was in Daughter’s best interests to have significant contact with both parents and, accordingly, ordered the parties to share physical custody of Daughter.

[18] We understand Father’s concerns that Daughter’s emotional issues result from, or may be exacerbated by, Mother’s parenting style. The trial court, however, noted that Daughter’s emotional issues corresponded with the deterioration of Mother and Father’s relationship. The trial court also noted that the parties agree that Daughter should continue in her therapy and counseling. We are in no position to second-guess the trial court regarding the cause of Daughter’s emotional issues. In short, the evidence does not “positively require the

conclusion contended for by” Father. *Hahn-Weisz*, 189 N.E.3d at 1141 (quoting *Steele-Giri*, 51 N.E.3d at 124).²

Conclusion

[19] The trial court was not required to adopt the recommendation of the GAL and award primary physical custody of Daughter to Father. Considering only the evidence favorable to the trial court’s decision, we cannot say that the trial court abused its discretion by concluding that it was in Daughter’s best interests for Father and Mother to share physical custody. Accordingly, we affirm the judgment of the trial court.

[20] Affirmed.

Pyle, J., and Foley, J., concur.

² We reject Father’s citation to *Maddux*, 40 N.E.3d 971. In that case, the mother had denied the children a relationship with the father and made egregious and unsubstantiated allegations about him. In ruling on the father’s petition for contempt, the trial court concluded that the mother had “irreparably harmed [the Children’s] emotional wellbeing.” *Id.* at 981 (record citation omitted). Yet when determining custody, the trial court denied the father’s petition to modify custody. We held that the findings supported the trial court’s conclusion that the mother irreparably harmed the children but that they did not support the trial court’s findings that custody should not be modified. *Id.* In the present case, there are no such irreconcilable conclusions in the trial court’s order.