MEMORANDUM DECISION

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IN THE

COURT OF APPEALS OF INDIANA

Joseph Hudson,

Appellant-Respondent,

v.

Jacqueline Traut,

Appellee-Petitioner

December 28, 2023

Court of Appeals Case No. 23A-MI-1561

Appeal from the Johnson Superior Court

The Honorable Kevin Barton, Judge

Trial Court Cause No. 41D01-2205-MI-000091

Memorandum Decision by Judge May
Judges Bailey and Tavitas concur.

May, Judge.

[1] Joseph Hudson ("Father") appeals the trial court's order granting maternal grandmother, Jacqueline Traut ("Grandmother"), grandparent visitation with Father's child, L.H. ("Child"). Father argues the trial court erred when it granted Grandmother visitation with Child. He presents two issues for our review:

> 1. Whether the trial court failed to adequately address whether Father was a fit parent; and
>
> 2. Whether the trial court failed to adequately consider the "special weight" given to Father's decision to limit Grandmother's visitation with Child.

We affirm the trial court's order.

Facts and Procedural History

[2] Child was born to Father and M.V. ("Mother") on November 5, 2013. On April 28, 2015, Father initiated a case to establish his paternity of Child. On August 12, 2015, the trial court issued an order establishing Father's paternity of Child, granting joint legal custody, and requiring equally shared parenting time. On May 25, 2016, pursuant to Father's motion for modification, the trial court granted Father physical custody of Child, with Mother to have parenting time subject to the Indiana Parenting Time Guidelines. From May 2016 until November 2021, the parties engaged in extensive litigation regarding custody. In November 2021, the trial court entered an order granting Father sole legal

and physical custody of Child. At that time, the trial court granted Mother parenting time but prohibited overnight visitation.

[3] At some point during this time, Father began allowing his former stepfather ("Step Grandfather"), Child's maternal grandfather ("Grandfather"),[1] and Grandmother periodic visitation with Child. Step Grandfather and Grandfather both lived in Indiana and saw Child regularly. Father and Grandfather agreed:

> 6. Unless otherwise agreed upon, Grandfather shall have [Child] for one overnight per month, one day each year during [Child's] birthday week, an additional day during [Child's] holiday break, as well as any other times and days which Father and Grandfather may determine they agree upon. Father and Grandfather agree that they will work together, especially, to find additional time for Grandfather and [Child] to spend together during her summer vacation.
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> 7. . . . Grandfather may continue to have phone/mail/email contact with [Child] consistent with what he has always exercised.
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> 8. . . . Father will continue to keep Grandfather informed as to events in [Child's] life such as: competitions, concerts, exhibitions, graduations and the like so that Grandfather may be permitted to support [Child] as he is able.

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[1] Grandmother and Grandfather are divorced.

(App. Vol. II at 17.) For a period of time, Grandmother moved out of Indiana and did not see Child. However, upon her return to Indiana, Father allowed Child to have one overnight visit per month with Grandmother.

[4] On January 28, 2022, Father's wife, Emily Dunlap ("Stepmother") filed a petition to adopt Child. On May 3, 2023, the trial court denied Stepmother's petition to adopt Child, finding adoption was not in Child's best interests. On May 4, 2022, Grandmother filed for grandparent visitation with Child. Grandmother requested:

> a. one overnight per month;
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> b. the opportunity for occasional weekend trips with [Child] to such places as Gatlinburg, Tennessee or Ohio;
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> c. some time around [Child's] birthday;
>
> d. some time around holidays; [and]
>
> e. the opportunity for written communication, to send gifts and packages and for reasonable telephone calls.

(*Id*. at 18.) On April 25, 2023, the trial court held a hearing on Grandmother's request for grandparent visitation with Child.

[5] On June 6, 2023, the trial court issued an order granting Grandmother's request for grandparent visitation. In its order, it noted:

> Father agreed to the following:

> A. Grandmother should call [Child].
>
> B. Grandmother should send packages and written communications, including card[s], letters, text messages and e-mails, to [Child].
>
> C. Grandmother could have an overnight [visit] with [Child] every other month.
>
> D. It is in [Child's] best interest for Grandmother to have some overnights with [Child].
>
> E. [Child] has not been harmed by the monthly overnight visits with Grandmother [that Father voluntarily allowed prior to these proceedings].

(*Id*. at 17.) The trial court awarded Grandmother visitation during the first weekend of every month, which was the weekend Mother exercised her parenting time. During that weekend Grandmother would have grandparent visitation with Child from 5:00 p.m. on Saturday until 5:00 p.m. on Sunday. In addition, the trial court allowed Grandmother to take Child out of state on a trip for a seventy-hour period during the summer, subject to Father's approval; one additional overnight during Child's winter break; continued communication with Child including the ability to send gifts and packages as well as "reasonable telephone calls." (*Id*. at 22.) Finally, the trial court ordered Father to "inform Grandmother as to events in [Child's] life such as: competitions, concerts, exhibitions, graduations and the like so that Grandmother may be permitted to support [Child]." (*Id*.)

Discussion and Decision

[6] We first note Grandmother did not file 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. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). In this context, prima facie error is defined as "at first sight, on first appearance, or on the face of it." *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. *McGill*, 801 N.E.2d at 1251.

In re Visitation of C.L.H., 908 N.E.2d 320, 326-27 (Ind. Ct. App. 2009).

[7] Father contends the trial court erred in granting Grandmother visitation with Child. Indiana Code section 31-17-5 et. seq., also called the Grandparent Visitation Act, gives a trial court authority to grant grandparents visitation in certain circumstances if doing so is in the child's best interests. The trial court's decision regarding the child's best interests is left to the trial court's discretion and we will reverse only for an abuse of that discretion. *Swartz v. Swartz*, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999). Although the amount of visitation is left to the sound discretion of the trial court, "[t]he Grandparent Visitation Act contemplates only 'occasional, temporary visitation' that does not substantially infringe on a parent's fundamental right 'to control the upbringing, education, and religious training of their children.'" *Hoeing v. Williams*, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (quoting *Swartz,* 720 N.E.2d at 1221).

[8] Our Indiana Supreme Court has explained:

> Although grandparents do not have the legal rights or obligations of parents and do not possess a constitutional liberty interest with their grandchildren, nonetheless Indiana Code section 31-17-5-1, commonly referred to as the Grandparent Visitation Act, represents a Legislative recognition that "a child's best interest is often served by developing and maintaining contact with his or her grandparents." *Swartz v. Swartz*, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999). Thus, in drafting the Act, the Legislature balanced two competing interests: "the rights of the parents to raise their children as they see fit and the rights of grandparents to participate in the lives of their grandchildren." *Id*. at 1222.

K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 462 (Ind. 2009). Pursuant to Indiana Code section 31-17-5-1, as is relevant here, Grandmother could seek visitation because Child was born out of wedlock. The trial court may grant the grandparent visitation rights "if the court determines that visitation rights are in the best interests of the child." Ind. Code § 31-17-5-2(a). In determining whether grandparent visitation is in a child's best interests, "the court may consider whether a grandparent has had or has attempted to have meaningful contact with the child." Ind. Code § 31-17-5-2(b).

[9] When determining whether to grant or deny grandparent visitation, the trial court must set forth findings of fact and conclusions of law. *K.I.*, 903 N.E.2d at 462.

> In those findings and conclusions, the trial court should address: 1) the presumption that a fit parent acts in his or her child's best interests; 2) the special weight that must be given to a fit parent's

> decision to deny or limit visitation; 3) whether the grandparent has established that visitation is in the child's best interests; and 4) whether the parent has denied visitation or has simply limited visitation.

McCune v. Frey, 783 N.E.2d 752, 757 (Ind. Ct. App. 2003). When reviewing these findings and conclusions, we

> first determine whether the evidence supports the findings, and then whether the findings support the judgment. We set aside findings of fact only if they are clearly erroneous, deferring to the trial court's superior opportunity to judge the credibility of the witnesses. In turn, a judgment is clearly erroneous when the findings fail to support the judgment or when the trial court applies the wrong legal standard to properly found facts.

K.L. v. E.H., 6 N.E.3d 1021, 1032 (Ind. Ct. App. 2014) (internal citations omitted). Father argues the trial court did not make findings sufficient to satisfy the first two *McCune* factors. Specifically, he asserts the trial court did not find he was a fit parent as required by the first factor and did not give his reasons for limiting or denying visitation with Grandmother "special weight" as a fit parent.

[10] In its order, the trial court listed the four *McCune* factors and found accordingly:

> (1) the presumption that a fit parent acts in his or her child's best interests'
>
> Father acknowledges that unspecified visitation with Grandmother is in [Child]'s best interest.

> (2) the special weight that must be given to a fit parent's decision to deny or limit visitation;
>
> Father acknowledges that unspecified visitation with Grandmother is in [Child]'s best interest.
>
> * * * * *
>
> (3) whether the grandparent has established that visitation is in the child's best interests;
>
> Father acknowledges that unspecified visitation with Grandmother is in [Child]'s best interest.
>
> (4) whether the parent has denied visitation or has simply limited visitation.[2]

(App. Vol. II at 19) (footnote added).

[11] Father argues the trial court erred when it did not explicitly determine he was a fit parent. In support of his argument, Father directs us to testimony from Grandmother and contends the "evidence presented during the hearing is inconclusive as to Father's fitness." (Br. of Appellant at 11.) During the hearing, when asked if Father was, in her opinion, a fit parent, Grandmother responded:

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[2] The trial court did not make a specific finding as to this *McCune* factor in this portion of its order, but the trial court made findings in other parts of the order to address this factor.

> I would never say that [Father] is an . . is an unfit parent, but I .. I would say that a parent's fitness is based on a family inclusion. And .. and keeping a child from their family is .. is not .. is not fit for the child emotionally or psychologically.

(Tr. Vol. II at 34.) This was the only testimony regarding Father's fitness, and Grandmother stated she did not think Father was unfit. In a grandparent visitation matter, when the fitness of a parent is not at issue, that parent is presumed fit. *Crafton v. Gibson*, 752 N.E.2d 78, 96 (Ind. Ct. App. 2001). Thus, because Father's fitness as a parent was never challenged, Father's fitness as a parent was presumed and we conclude the trial court did not err when it chose not to make an explicit finding that Father was a fit parent.

[12] As to Father's second argument, that the trial court did not give special weight to his reasons for denying or limiting visitation, Father focuses on the trial court's first finding on the issue - "Father acknowledges that unspecified visitation with Grandmother is in [Child]'s best interest." (App. Vol. II at 19.) However, his argument ignores the trial court's other findings regarding Father's decisions to limit Child's visitation with Grandmother:

> 8. Father raises two issues. While stating that he is not adverse to grandparent visitation, he does not want the visitation regularly established as he asserts that it should be subject to his discretion and control. Second, he expresses concern that [Child]'s court order visitation could effect [sic] his own parenting time and the time that his family spends with [Child].
>
> 9. In the related case of *In Re the Adoption of [Child] Hudson,* the Court noted the "adversarial relationship" between Father and

Mother. The Court notes that Father and Grandmother have not enjoyed a close relationship here. Grandmother's communications were through Mother. Even when strains appeared in the relationship between Father and Mother, Grandmother continued to use Mother as a conduit for information to and from Father. Presumably, the failure to develop a direct relationship stems from events in the past. Grandmother recounted that she was prohibited from seeing [Child] after birth by Father, or at least that was what Grandmother was told by Mother. . . .

10. The Court is dealing with an aspect of the relationship between Father and Grandmother that prompts Father to resist establishing grandparent rights in favor of Grandmother and compels Grandmother to want the rights established. Clearly, in the event that the petition for adoption of [Child] had been granted without establishment of grandparent rights, Grandmother would be without visitation. The Court would conclude that Father's position is simply a request to deny visitation in a situation where the *Romero v. McKey*, 167 N.E.3d 361, 366 (Ind. Ct. App. 2021) decision would compel entry of a visitation order. The visitation order must be specified so as to be enforceable.

11. Father's second issue is a valid concern. Mother has visitation on alternating Saturdays from the Order following the November 9, 2021 hearing, but is subject to future amendment. [Grandfather] has been awarded grandparent visitation to include one night during the month. Visitation is maintained with a former step-grandparent. Grandmother noted in her request that [Child's] "dance card can get pretty full". The visitation should not undermine Father's parenting time rights.

12. Grandmother requests one overnight per month. Father has been granting Grandmother one overnight per month. Assuming that the Indiana Parenting Time Guidelines is the basis for the

> division of parenting time between a custodial parent and a non-custodial parent, Mother's restricted parenting time provides a basis for granting maternal grandparent visitation during times when [Child] would be with Mother under the Indiana Parenting Guidelines. In short, visitation could be accommodated without impinging upon Father's parenting time. In the event that Mother's visitation changes, the grandparent visitation will have to [be] adjusted to minimize the disruption to Father's parenting time.

(*Id*. at 19-20) (emphasis added).

[13] The trial court noted Father's reasons for limiting Grandmother's grandparent visitation which was primarily a possible interference with his parenting time and his desire to grant the amount of time at his discretion. The trial court considered the situation that prompted Grandmother's petition for grandparent visitation, that is, Stepmother's petition to adopt Child. The trial court then noted the many other demands on Child's time, specifically grandparent visitation with Father's former step-grandfather, Mother's father, and Grandmother. To remedy some of that situation, the trial court ordered a portion of Grandmother's grandparent visitation to occur during what would have been Mother's parenting time and ordered other grandparent visitation to be at Father's discretion, such as the day Grandmother is to visit with Child during winter break and the summer weekend visit. Based thereon, we conclude the trial court properly gave Father's decision to limit Grandmother's visitation with Child "special weight" when determining the amount of visitation granted to Grandmother. Therefore, the trial court did not err in ordering visitation for Grandmother. *See*, *e.g.*, *Hicks v. Larson*, 884 N.E.2d 869,

875 (Ind. Ct. App. 2008) (trial court considered "special weight" given to parent's decision to deny or limit visitation but could ultimately decide to grant grandparent visitation in conformance therewith), *trans. denied*.

Conclusion

[14] The trial court did not err when it granted Grandmother's petition for grandparent visitation. Based thereon, we affirm the trial court's decision.

[15] Affirmed.

Bailey, J., and Tavitas, J., concur.