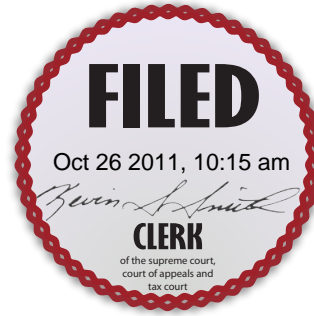


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JON P. MCCARTY
Covington, Indiana

ATTORNEY FOR APPELLEE:

JEFFREY A. BOGCESS
Greencastle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE PATERNITY)
OF J.W. AND A.W.,)
) 67A04-1103-JP-147
)
)

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0010-JP-0061
67C01-0010-JP-0062

October 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

J.W. (“Father”) had custody of J. and A. (collectively “the Children”) until Father was incarcerated for various convictions. P.H. (“Mother”) petitioned to modify child support and custody. J.L. (“Aunt”), Father’s sister, filed a motion to intervene and a motion for change of custody of the Children, seeking custody herself. The trial court awarded custody to Aunt. Mother raises three issues for our review, which we restate as: 1) whether the trial court abused its discretion by allowing Aunt to intervene; 2) whether the trial court abused its discretion by denying Mother’s motion for continuance; and 3) whether the trial court abused its discretion by awarding custody of the Children to Aunt. Concluding the trial court did not abuse its discretion by allowing Aunt to intervene, denying Mother’s motion for continuance, or awarding custody to Aunt, we affirm the trial court’s custody determination.

Facts and Procedural History

Mother and Father are the biological parents of J., now fourteen years old, and A., now thirteen years old. Father has had custody of the children since approximately 1998, and Mother has exercised parenting time regularly pursuant to the Indiana Parenting Time Guidelines. Mother and Father were never married. Father was convicted of various crimes in 2010 and incarcerated. Mother filed an emergency petition to modify custody and support, seeking custody of the Children due to Father’s incarceration. The trial court awarded temporary custody to Mother in December of 2010, and it set the cause for further hearing on January 7, 2011. On January 5, 2011, Aunt filed a motion to intervene, and on January 6, 2011, she filed a motion for change of custody seeking custody of the Children. On January

7, 2011, after Mother moved to continue, a telephonic pre-trial conference was held rather than the originally scheduled custody hearing. On January 28, 2011, the trial court conducted a custody hearing. At the beginning of the hearing, Mother orally moved the trial court for a continuance, which it denied. The trial court made the following findings of fact and conclusions of law:

1. Mother now lives in a house with her husband, three other children between them, and the two children subject to this action.
2. Mother receives approximately \$650.00 per month from social security.
3. The reason that [M]other receives social security is due to a diagnosis of Bi-Polar and/or Post Traumatic Stress.
4. Mother's husband is working, earning \$400.00 per week.
5. Mother and her husband have rent of \$650.00 per month now. Just months previous, [M]other and her husband lived in a home with [M]other's mother and approximately 15 related people.
6. Mother has a 9th grade education.
7. Mother is on probation for felony non-support of these children, with an arrearage of approximately \$21,000.00.
8. Mother has prior felony conviction(s) for forgery/theft.
9. [Aunt] has had a steady job for several years with the [United States Postal Service].
10. [Aunt] has lived with a long time boyfriend. They have a small child together, and [Aunt] has two children, approximately 5 and 10 years of age.
11. The [C]hildren lived at [Aunt's] house (along with their father) for approximately one year prior to this most recent development.
12. [Aunt] had to step into the care giving role for the children due to father's deteriorating physical condition.
13. [Aunt] has no criminal convictions for dishonesty or against children.
14. [Aunt] assisted the children with homework, ate dinner, normal activities with the children [sic] and has a close bond with the children.
15. [Aunt] has not been diagnosed with any mental health issues.

* * *

Court concludes by clear and convincing evidence that there is a substantial and significant advantage for the children to be in the custody of their [Aunt]. [Aunt] is stable, is employed, has home ownership, has no legal related issues, and has mental stability. Mother does not. In both homes, the physical arrangements are tight, however the track record of the parties clearly shows

that [Aunt's] home will provide a substantial and significant advantage for the children.

Court awards custody to [Aunt].

Appendix to Brief of Appellant at 28-29.

Discussion and Decision

I. The Trial Court's Grant of Aunt's Motion to Intervene

The trial court's determination on a motion to intervene is reviewed for an abuse of discretion. Heritage House of Salem, Inc. v. Bailey, 652 N.E.2d 69, 73 (Ind. Ct. App. 1995), trans. denied. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or reasonable and probable inferences to be drawn therefrom. Herdrich Petroleum Corp. v. Radford, 773 N.E.2d 319, 324 (Ind. Ct. App. 2002), trans. denied. Indiana Trial Rule 24(A) and (B) prescribe the standard for intervention as a matter of right and permissive intervention, respectively. Intervention as a matter of right shall be permitted:

- (1) when a statute confers an unconditional right to intervene; or
- (2) when the applicant claims an interest relating to a property, fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

T.R. 24(A).

Mother first argues Aunt's motion to intervene should have been denied because Aunt incorrectly relied on Indiana Trial Rules 19 and 20, rather than Indiana Trial Rule 24, in her motion to intervene. Although Aunt did incorrectly cite Trial Rules 19 and 20, the trial court's grant of Aunt's motion to intervene was not clearly against the logic and effect of the

circumstances before it because Indiana Code section 31-17-2-3(2) gives non-parents a right to seek custody of a child, making Aunt's intervention proper.

Mother next argues Aunt does not have a direct and substantial interest in the custody of the Children that is recognized by law, citing In re Paternity of E.M., 654 N.E.2d 890 (Ind. Ct. App. 1995) for this requirement. By providing non-parents with a right to seek custody of a child, however, Indiana Code section 31-17-2-3(2) recognizes Aunt's interest in the custody proceeding. The trial court did not abuse its discretion by allowing Aunt to assert a statutory right.

II. The Trial Court's Denial of Mother's Motion for Continuance

"Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence." T.R. 53.5. The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. Thompson v. Thompson, 811 N.E.2d 888, 907 (Ind. Ct. App. 2004), trans. denied. An abuse of discretion may be found in the denial of a motion for continuance when the moving party has shown good cause for granting the motion. Id. at 907-08. The moving party must also show that he or she was prejudiced by the denial. Id. at 908.

Mother contends the trial court abused its discretion by denying her motion for continuance because she did not have the opportunity to conduct discovery before the custody hearing. Mother did not file an affidavit; she orally moved for a continuance at the beginning of the January 28, 2011, custody hearing. The trial court denied Mother's motion

because the custody hearing was set at the pre-trial conference on January 7, 2011, and Mother had not taken any steps to conduct discovery prior to January 28, 2011. Mother contends this resulted in “trial by ambush.” Brief of Appellant at 9. Although the window of opportunity for discovery may have been small, we give deference to the decision of the trial court and conclude the trial court did not abuse its discretion in denying Mother’s motion for continuance.

III. The Custody Determination

A trial court’s findings of fact are afforded deferential review, and a challenger must show that the findings are clearly erroneous. In re Guardianship of B.H., 770 N.E.2d 283, 287-88 (Ind. 2002). Findings are clearly erroneous when there is no evidence supporting them. K.I. ex rel J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion. B.H., 770 N.E.2d at 288. A generalized finding that a placement other than with the natural parent is in a child’s best interests, however, will not be adequate to support such determination, and detailed and specific findings are required. Id. at 287.

“[B]efore placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement,” and the “trial court must be convinced that the placement . . . represents a substantial and significant advantage to the child.” Id. Evidence showing a parent’s unfitness or long acquiescence to the non-parent’s custodial role in the child’s life,

or demonstrating the child's close bond with the non-parent, are factors trial courts may use, but they are not limited to these criteria. Id.

We will not reweigh the evidence before the trial court, but instead, we examine the record to see if evidence exists to support the trial court's findings. See J.H., 903 N.E.2d at 457. The evidence presented at the January 28, 2011, hearing consisted of the testimony of Father, Mother, and Aunt. The Transcript reveals that all fifteen findings of the trial court, as well as the facts included in and relied upon in its conclusion, are at least minimally supported by the evidence. Although Mother contests the specificity of the trial court's findings, they are more than a generalized finding of the Children's best interest and adequately detail the trial court's reasons for concluding that Aunt's home will provide a substantial and significant advantage to the Children. Without reweighing the evidence, we conclude the trial court did not abuse its discretion in determining that placing the Children with Aunt would give them a substantial and significant advantage.

Conclusion

The trial court did not abuse its discretion in allowing Aunt to intervene, denying Mother's motion for continuance, or awarding custody of the Children to Aunt. Therefore, we affirm the trial court's custody determination.

Affirmed.

BARNES, J., and BRADFORD, J., concur.