

IN THE INDIANA SUPREME COURT
CASE NO.: _____

JOSHUA ANSELM,
Appellant,

) Appeal from the Indiana Court of Appeals

)

) Case No.: 19A-DC-02728

)

) Appeal from the Jasper Superior Court

v.

)

) Trial Court Case No. 37D01-1803-DC-205

ASHLEY ANSELM,
Appellee.

)

) Hon. Russell D. Bailey, Judge

PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

I. Whether the Court of Appeals Erred in Affirming the Trial Court's Award of Physical Custody to Mother When the Trial Court's Findings Failed to Support its Judgment?

In this matter, the trial court, *sua sponte*, entered Findings of Fact and Conclusions of Law for Order of Final Hearing as to Custody, Support, and Property Settlement, which awarded Mother primary physical custody of the Minor Children. The Court of Appeals' decision, in relevant part, affirmed the trial court's award of primary physical custody to Mother, specifically holding the trial court's findings were sufficient to support its judgment.

The Court of Appeals' decision in this matter is in direct conflict to prior, reported decisions made by the Court of Appeals. Moreover, the Court of Appeals' decision in this matter is in direct conflict with the Indiana Supreme Court precedent. Finally, the Court of Appeals' decision highlights the need for this Court to clarify ruling precedent.

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BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

The nature of this case relates to the appeal of the trial court's Findings of Facts and Conclusions of Law for Order of Final Hearing as to Custody, Support, and Property Settlement (hereafter, "Findings") entered on or about November 5, 2019. Appellant's App. Vol. II, pp. 11. The Appellant, Joshua Anselm, (hereafter, "Father" or "Josh") submits these Findings are clearly erroneous.

Appellee, Ashley Anselm (hereafter, "Mother" or "Ashley")¹ and Josh were married in May of 2014. Appellant's App. Vol. II, pp. 11. The Parties subsequently had two (2) children, namely, V.A., presently four (4) years old, and G.A., presently three (3) years old (collectively, "Minor Children"). Tr. Vol. II, p. 28; Appellant's App. Vol. II, pp. 11. The Parties separated on the 16th day of March 2018. Appellant's App. Vol. II, pp. 11. On March 20, 2018, Mother filed her Petition for Legal Separation. Appellant's App. Vol. II, pp. 18.

Three (3) days later, on or about March 23, 2018, Father filed, in the Jasper Circuit Court, a Petition for Dissolution of Marriage as a new action, under cause number 37C01-1803-DC-000220. Appellant's App. Vol. II, pp. 26. Father, on or about March 24, 2018, filed a Motion for Provisional Order and for Restraining Order. Appellant's App. Vol. II, pp. 28. Father also submitted an Affidavit in Support of Motion for Provisional Hearing and for Restraining Order, detailing, in part, physical assault committed against Father by Mother. Appellant's App. Vol. II, pp. 29-30. The trial court judge in the circuit court entered its Order Granting Temporary Restraining and Setting Hearing on Motions for Restraining Order and Provisional Order on March 27, 2018, granting Father's request for a temporary restraining order. Appellant's App. Vol. II, pp. 31.

¹ Appellant and Appellee are collectively referred to herein as the "Parties."

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On or about April 13, 2018, Mother filed her Motion to Dismiss Dissolution under cause number 37C01-1803-DC-000220. Appellant's App. Vol. II, pp. 32. Father subsequently filed a Motion to Combine the matters on April 13, 2018. Appellant's App. Vol. II, pp. 34. On April 18, 2018, Honorable John D. Potter, of Jasper Circuit Court, entered an Order transferring the case to the Jasper Superior Court to be consolidated with this current matter. Appellant's App. Vol. II, pp. 37.

Once the matters were consolidated, several filings were made by both Parties as detailed in the Statement of the Case. Appellant's App. Vol. II, pp. 4-10. A hearing was held on May 17, 2018 on Mother's Petition for Provisional Order. Appellant's App. Vol. II, pp. 5. Following said hearing, an Agreed Provisional Orders was entered into and approved by the trial court on May 21, 2018. Appellant's App. Vol. II, pp. 40-42. Pursuant to the Agreed Provisional Orders, Mother was awarded "temporary custody of the parties' minor children, with liberal visitation to Father as agreed upon by the parties, with the Indiana Parenting-Time Guidelines as a minimum." Appellant's App. Vol. II, pp. 40.

Mother subsequently filed her Verified Motion to Convert Legal Separation to Dissolution of Marriage on August 17, 2018. Appellant's App. Vol. II, pp. 43. The final hearing took place on June 27, 2019, and both Parties presented evidence and offered exhibits on the record. Appellant's App. Vol. II, pp. 9; 54. The trial court, after taking several issues under advisement, entered its Findings on or about November 5, 2019, awarding Mother primary physical custody. Appellant's App. Vol. II, pp. 11-17.

Father timely filed his Notice of Appeal on or about November 20, 2019. Appellant's App. Vol. II, pp. 56. The Court of Appeals issued its Opinion on or about April 22, 2020. *Anselm v. Anselm*, 19A-DC-2728, April 22, 2020. In relevant part, the Court of Appeals held that the trial

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court entered sufficient findings to support its award of primary physical custody to Mother.
Opinion, pp. 10.

Additional facts are provided in briefing as necessary.

ARGUMENT

II. The Court of Appeals Erred in Affirming the Trial Court's Award of Physical Custody to Mother because the Trial Court's Findings Failed to Support its Judgment.

A. Standard of Review.

In this matter, the trial court entered Findings *sua sponte*. Appellant's App. Vol. II, pp. 11-17. "[w]here a trial court enters findings *sua sponte*, the appellate court reviews issues covered by the findings with a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment." *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016) (citing, *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014)). This Court "review[s] the remaining issues under the general judgment standard, under which a judgment 'will be affirmed if it can be sustained on any legal theory supported by the evidence.'" *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014).

B. Controlling Law.

Indiana Trial Procedure Rule 52 governs special findings of fact and conclusions of law. Specifically, Indiana Trial Procedure Rule 52(D)(1) provides, "[t]he court may make special findings of fact upon less than all the issues in a case when: (1) special findings of fact are made but are not required under this rule." Moreover, Rule 52(D) mandates that "[t]he court's failure to find upon a material issue upon which a finding of fact is required by this subdivision or this rule shall not be resolved by any presumption and may be challenged under subdivision (B) of this rule".

Thus, once the trial court makes findings of fact, regardless of whether it was done *sua sponte*, the trial court is mandated at that point to make findings necessary and sufficient to support the issue decided. This is best evidenced by the fact Indiana Trial Rule 52(D) clearly states that a

trial court's failure to make sufficient findings on the issues covered "**shall not be resolved by any presumption** and may be challenged under subdivision (B) of this rule." (emphasis added).

Moreover, while the trial court's *sua sponte* findings are not required to be complete, meaning they do not have to cover every single issue raised at trial; findings made as to a particular issue must be sufficient to support the conclusion reached on that issue by the trial court. *See In re C.M.*, 963 N.E.2d 528, 529 (Ind. Ct. App. 2012) ("once the trial court walks down the path of making findings, it is bound under Indiana Rule 52(A) to make findings that support the judgment.").

Thus, "though the specific findings were entered *sua sponte*, they will not be set aside unless clearly erroneous, just as though a party had requested the findings pursuant to Ind. Trial Rule 52(A)." *J.S. Sweet Co., Inc. v. White County Bridge Com'n*, 714 N.E.2d 219, 224 (Ind. Ct. App. 1999). This Court has held that "[t]he trial court's findings and judgment will be set aside only if they are clearly erroneous." *In re Adoption of O.R.*, 16 N.E.3d 965, 973 (Ind. 2014) (citing, *In re Paternity of K.I.*, 903 N.E.2d 453, 457 (Ind. 2009)). "A **judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment.**" *Id.* (emphasis added).

C. Analysis.

As addressed *supra*, in this present matter, the trial court entered Findings *sua sponte*. Appellant's App. Vol. II, pp. 11-17. One of the specific issues covered by the trial court's Findings was the issue of custody of the Minor Children. Appellant's App. Vol. II, pp. 11. As Father asserted on appeal, the trial court's award of primary physical custody to Mother is clearly erroneous because the trial court's findings of fact are insufficient to support its judgment that awarding

Mother primary physical custody was in the Minor Children's best interests. Appellant's App. Vol. II, pp. 11-13.

The trial court made only two (2) findings that relate to the physical custody of the Minor Children. Appellant's App. Vol. II, pp. 11-12. Specifically, the trial court found:

"2 Mother and Father shall have joint legal custody with Mother having primary physical custody, control and supervision of the parties' unemancipated minor children, namely; [V.A.], d/o/b: 3/12/2015 and [G.A.], d/o/b: 10/23/2016 ("minor children"), until said children are each, individually and respectively, deemed emancipated, graduate from college, or reach the age of nineteen (19) years or until further Order of this Court, whichever occurs first." Appellant's App. Vol. II, pp. 11.

Further, the trial court found:

"3 The Father and Mother shall have joint legal custody of the minor children with Mother awarded physical custody of the minor children. The Court finds that it is in the best interest of the minor children that they remain in physical custody of the Mother as she is the primary caregiver of the minor children and it is important that the children have consistent routine."² Appellant's App. Vol. II, pp. 12.

This ends the trial court's Findings as it relates to the physical custody of the Minor Children.

Precedent dictates that "[i]n an initial custody determination there is no presumption favoring either parent." *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992). Instead, "[t]he court assumes that the parties are equally entitled to custody." *Id.* Furthermore, "an initial custody order is determined 'in accordance with the best interests of the child.'" *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008) (citing, Ind. Code § 31-17-2-8). In interpreting statutory code, the Court of Appeals has held that, "[i]n determining the child's best interest, the trial court must consider all relevant factors, including specifically" those factors enumerated in Indiana Code section 31-17-

² For clarity, language notwithstanding, this is an initial custody determination, not a modification. Therefore, the trial court's statement of "remain in physical custody of the Mother" should not be interpreted as Mother previously being awarded custody of the Minor Children, as again, this is an initial custody determination.

2-8. *Purnell v. Purnell*, 131 N.E.3d 622, 626 (Ind. Ct. App. 2019). The specific factors that must be considered are as follows:

“(1) The age and sex of the child; (2) the wishes of the 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 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.”

Ind. Code § 31-17-2-8³ (hereafter, “Statutory Factors”). Relying on this Court’s precedent, the Court of Appeals has held, “[i]nitial custody determinations are to be based on an analysis of the [Statutory Factors].” *Jarrell v. Jarrell*, 5 N.E.3d 1186, 1191 (Ind. Ct. App. 2014) (citing, *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008)).

Yet, a review of the trial court’s Findings in this present matter reveal that there was no consideration of the Statutory Factors or any other relevant factors, as required in an initial custody determination. Appellant’s App. Vol. II, pp. 11-17. Clearly, the trial court failed to consider the Statutory Factors as evidenced by the fact the trial court does not even make one (1) reference to Indiana Code section 31-17-2-8 or its factual considerations. Appellant’s App. Vol. II, pp. 11-17. Furthermore, a review of the trial court’s Findings reveals there is no enumeration of any other consideration the trial court made in deciding physical custody.⁴ Appellant’s App. Vol. II, pp. 11-17.

As this Court has previously stated, “[t]he purpose of special findings is to provide the parties and the reviewing court with the theory upon which the trial judge decided the case in order

³ Factors 8 and 9 are not listed as they are inapplicable to this current matter.

⁴ While the trial court noted “Mother’s concerns and the evidence presented regarding alcohol use by Father” this obviously did not impact the trial court’s decision to award physical custody of the Minor Children to Mother because the trial court specifically followed this statement up with stating, “it does not impair his ability to care for the minor children or make him unfit as a parent in any way.” Appellant’s App. Vol. II, pp. 12.

that the right of review for error may be effectively preserved.” *Carmichael v. Siegel*, 670 N.E.2d 890, 891 (Ind. 1996) (citing, *McGinley-Ellis v. Ellis*, 638 N.E.2d 1249, 1252 (Ind. 1994)). Here, the purpose of Trial Rule 52(A) is not met because the trial court provides no theory upon which it made its physical custody determination.

In this matter, the Court of Appeals erred, first, in its determination that “the dissolution court was not required to enter a finding as to each statutory factor it considered in making its custody determination.” Opinion pp. 8. The Court of Appeals cites to their newly decided case of *Hecht v. Hecht*, 142 N.E.3d 1022 (Ind. Ct. App. 2020) in support of such determination. *Id.* However, a review of *Hecht* reveals that the Court of Appeals relied on this Court’s decision in *Russell v. Russell*, 682 N.E.2d 513, 515 (1997). *Hecht*, 142 N.E.3d at 1031.

This Court, in *Russell*, clearly stated “[a]lthough a court is required to consider all relevant factors in making its determination, it is not required to make specific findings.” 682 N.E.2d at 515. However, this Court made clear that, “[t]he trial court is required to make special findings where a party request such in writing.” *Id.* at 515 n.2. (emphasis added). As previously noted, the Court of Appeals has held that “though the specific findings were entered sua sponte, they will not be set aside unless clearly erroneous, **just as though a party had requested the findings pursuant to Ind. Trial Rule 52(A).**” *J.S. Sweet Co., Inc. v. White County Bridge Com’n*, 714 N.E.2d 219, 224 (Ind. Ct. App. 1999).⁵

Therefore, in this matter, the trial court entered Findings *sua sponte*, which covered the issue of physical custody. As such, the trial court was required to make sufficient findings to support its conclusion that primary custody with Mother is in the Minor Children’s best interest because *sua sponte* findings are treated just as though a party had requested the findings pursuant

⁵ While the Court of Appeals’ decision is not binding on this Court, it illustrates the ambiguity surrounding the sufficiency of findings entered *sua sponte*.

to Trial Rule 52(A). *J.S. Sweet Co., Inc.*, 714 N.E.2d at 224. Thus, because the *sua sponte* findings are treated as if they were requested by one of the Parties, pursuant to this Court's precedent, the trial court was required to make specific findings as to the relevant Statutory Factors. *Russell*, 682 N.E.2d at 515 n.2. Accordingly, the Court of Appeals erred in determining the trial court was not required to make specific findings as to the Statutory Factors. Opinion pp. 8.

Moreover, the Court of Appeals erred in determining that the trial "entered sufficient findings to describe the theory upon which the court decided the case." *Anselm v. Anselm*, 19A-DC-2728 (Ind. Ct. App. 2020). This is best illustrated by the fact that the Court of Appeals pointed to the trial court's finding that Mother was "the primary caregiver" to support its conclusion. *Id.* Yet, to make an initial custody determination based upon the parent that had temporary custody is improper, and fails to serve as a basis for the trial court's custody award in three significant ways.

First, it is not a Statutory Factor. While the trial court can consider all relevant factors, the trial court has a duty to consider the Statutory Factors in making an initial custody determination. Indiana Code § 31-17-2-8. There is no indication, from the trial court's Findings, that the trial court properly evaluated the Statutory Factors.

Second, the Court of Appeals determination is inconsistent with previous precedential law on point. That is, the Court of Appeals has previously held "it is permissible as part of a determination of the children's best interests for the court to consider the status and well-being of the children pending the final hearing." *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 511 (Ind. Ct. App. 2002). However, the Court of Appeals has made clear that "it would be improper for a trial court to award permanent custody to a parent simply because that parent had been awarded temporary custody." *Id.* Thus, the Court of Appeals determination in this present matter is in direct conflict with their own precedential law on point.

Third, statutory code dictates that “[t]he issuance of a provisional order is without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceedings.” Indiana Code § 31-15-4-13. Thus, to find that Mother was the “primary caregiver” as the basis for making an initial custody determination would be to prejudice Father’s rights, which are statutorily prohibited from being prejudiced based upon a temporary order. Indiana Code § 31-15-4-13. Moreover, to base an initial custody determination upon which parent had temporary custody would circumvent established law that there is “no presumption favoring either parent.” *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992). As such, the Court of Appeals’ determination is erroneous.

The trial court, in this matter, entered *sua sponte* Findings which specifically covered the issue of custody. Appellee’s Br., p. 9; Appellant’s App. Vol. II, pp. 11-17. As such, the trial court was “bound under Indiana Trial Rule 52(A) to make findings” that supported its award of primary physical custody to Mother. *In re C.M.*, 963 N.E.2d 528, 529 (Ind. Ct. App. 2012). The insufficiency of the trial court’s Findings is statutorily prohibited by being resolved by making presumptions. Indiana Trial Procedure Rule 52(D).

In summary, the trial court failed to make any findings relating to the Statutory Factors, or even reference Indiana Code section 31-17-2-8. Appellant’s App. Vol. II, pp. 11-17. Instead, it appears the trial court’s only basis for awarding physical custody to Mother was its preliminary order granting Mother temporary physical custody. As such, the trial court’s judgment is clearly erroneous because the Findings are insufficient to support this award and the trial court’s Findings, as it relates to physical custody, should be reversed.

CONCLUSION

For the reasons stated herein, this Court should accept transfer and reverse the trial court's Findings awarding Ashley primary physical custody of the Minor Children as clearly erroneous because the Findings fail to support the judgment. Moreover, this Court should accept transfer to clarify that there is no distinction between *sua sponte* findings as to the issues they cover and those requested by a party pursuant to Indiana Rule of Trial Procedure 52(A). Finally, this Court should accept transfer to clarify the distinction between special findings and a general judgment.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Petition to Transfer contains no more than 4,200 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010.

/s/ Alexander N. Moseley
Alexander N. Moseley

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following this
5th day of June, 2020 via the Court's electronic filing system:

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/s/ Alexander N. Moseley
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