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GUARDIANSHIP CASES

In **In Re Guardianship of B.H.**, 730 N.E. 2d 743 (Ind. Ct. App. 2000), the Court reversed the trial court's order granting permanent guardianship of the children to the stepfather and remanded the cause with instructions to terminate the guardianship. The children's parents were divorced in 1996, and the decree gave the mother primary physical custody of the children. The father, who at that time lived outside the state of Indiana, was granted visitation with forty-eight hours advance notice to the mother. The mother remarried and the children lived with the mother and stepfather for sixteen months until the mother's death. The stepfather filed an emergency petition for temporary guardianship on the day after the mother's death. The temporary guardianship petition was granted without a hearing. Three weeks later, the father, who had settled in Houston, Texas after his retirement from the army, petitioned to terminate the guardianship and moved for visitation. The stepfather petitioned for permanent guardianship, which the father moved to dismiss. The court granted the father's motion for visitation. After hearing evidence, the court granted the stepfather's petition for permanent guardianship, finding that the father was unfit to care for his children and had abandoned them. The father appealed.

Findings and orders in guardianship proceedings are within trial court's discretion. In guardianship proceedings, the trial court's findings under Ind. Trial Rule 52(A) are reviewed under an abuse of discretion standard. *Id.* at 745. The Appellate Court must determine whether the evidence supports the findings and whether the findings support the judgment. *Id.* The Court considers only the evidence most favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* The Court must accept the ultimate facts as stated by the trial court if there is evidence to sustain them. *Id.* at 745, 746.

Stepfather guardianship petitioner failed to rebut presumption of parental custody and prove father's current unfitness. The Court cited IC 29-3-3-6 for the principle that a parent has a presumptive right to custody of his minor children absent evidence of unfitness or abandonment. *Id.* at 746. The Court held that the stepfather guardianship petitioner had the burden to rebut that presumption by showing that the father was unfit, had long acquiesced in the current custody arrangement, or had voluntarily relinquished custody of the children or such other circumstances that demonstrated the best interests of the children would be best served in the stepfather's care. *Id.* at 747. The Court acknowledged the trial court's findings that, prior to the parents' separation in 1991, the father had been known to be abusive to the mother, had abused alcohol, and had been verbally abusive to one of the children, but the Court opined that the stepfather had not met his burden to prove the father's unfitness at the present time. *Id.* The Court characterized the incidents of father's alcohol and anger control problems ten years in the past as not relevant without specific evidence that the father had continued to have these problems. *Id.* The Court found the following significant: the father's testimony concerning attendance at Alcoholics Anonymous meetings in Germany; the father's current minimal drinking; the father's testimony that he had not allowed inappropriate behavior to occur again. The Court also did not believe the father had long acquiesced in another's custody or abandoned the children because the father had done the following: visited as time and circumstances permitted; attempted contact by phone and e-mail; paid child support. *Id.* The Court found that the mere fact that the stepfather and children loved each other and that the children wished to remain with the stepfather was not sufficient to support the trial court's findings that the father was unfit and had abandoned his children. *Id.* at 748. The Court had reservations about relying too heavily on those findings which reflected poorly on the father's character and past activities because it appeared from a review of the transcript that the father was not given a full opportunity to present his case.

In **E.N. Ex Rel. Nesbitt v. Rising Sun-Ohio**, 720 N.E. 2d 447 (Ind. Ct. App. 1999), the Court reversed the order appointing a limited guardian over the sixteen-year-old developmentally delayed child for the purpose of making educational decisions on her behalf. The child had a history of behavior problems, seizures, and difficulty attending and functioning in school. The child's mother disagreed with the child's proposed special education plan, refused to attend several case conference meetings, refused to provide the school a copy of the child's medical records, and refused to comply with discovery orders made by the State Department of Education's independent hearing officer. The school petitioned for the appointment of a limited educational guardian to represent the child in the special education process.

Trial court properly included best interest standard in determining whether it was necessary to appoint guardian. The Court opined that the best interest of the child or incapacitated person is implicit in the guardianship statutes, regardless of whether the guardianship is custodial or non-custodial. The Court also noted that IC 29-3-5-3(a) states that the trial court must find that the appointment of a guardian is necessary. Because the term "necessary" is not defined by the guardianship statute, the Court looked to the American Heritage College Dictionary, which defined "necessary" as "absolutely essential" and "needed to achieve a certain result or effect."

Limited educational guardian not necessary to facilitate child's special education. The Court further found that the mother's failure to provide the child's medical records to the school, her failure to sign the educational plan, and her obstruction of the school regarding the child's education were insufficient to show that it was absolutely essential to appoint a limited guardian for the child. The Court opined that the school had the ability under the special education law to provide a free and appropriate education for the child without parental cooperation. Despite the school's understandable frustration, obtaining a limited guardianship over the parent's objection was going too far. Id. at 453.

In **Wells v. Guardianship of Wells**, 731 N.E. 2d 1047 (Ind. Ct. App. 2000), the Court affirmed the order appointing the eldest daughter of an eighty-eight year old incapacitated woman as the woman's temporary and permanent guardian despite the objections of one of the woman's sons who intervened in the proceeding. The intervener alleged the following errors: the temporary guardianship appointment was invalid because the eldest daughter guardianship petitioner did not comply with the notice provisions of IC 29-3-6-1; the eldest daughter exhibited dishonesty in failing to notify or list him and some of the other siblings on the guardianship petition; the court's order authorizing another sibling to move his mobile home onto the elderly woman's property was not in the woman's best interests.

Temporary guardianship notice provisions were met. The facts showed that the intervener had lived with the woman in her home until three years prior to the guardianship proceeding. He moved out of home to another town and refused to give his street address to the eldest daughter who later petitioned for temporary and permanent guardianship. When the woman was hospitalized with stroke symptoms, a doctor told several of the siblings, including the intervener, that the woman should have a guardian appointed for her very soon to make critical medical decisions. After hearing this information, the intervener immediately left the room and did not attend subsequent meetings with the woman's doctors.

The eldest daughter and three other siblings followed the doctor's advice. After seeking the concurrence via telephone calls of other siblings who lived out of state, the eldest daughter went to the office of a nearby attorney and petitioned for an emergency guardianship appointment. The eldest daughter telephoned the intervener and left a message at his business to inform him of the situation. The eldest daughter listed only herself and three other siblings on the emergency petition, explaining that these were the only siblings for whom home addresses were known. Six other siblings, including the intervener, were not listed on the petition. The eldest daughter was appointed temporary guardian of the woman. The intervener contended that the court erred in appointing the eldest daughter temporary guardian, alleging failure to comply with the guardianship notice provisions at IC 29-3-6-1. The Court opined that IC 29-3-3-4 governed notice provisions for a temporary guardianship and that the statute lacked specific guidelines because the legislature intended to grant trial courts wide discretion to allow them to deal with diverse and exigent circumstances. *Id.* at 1050. The Court said that temporary or emergency guardianships are typically sought when time is of the essence and immediate action is required. *Id.* The Court found that the temporary guardianship notice provisions imply that the subject of the guardianship petition is the person to whom notice must be given, and concluded that the notice provisions required by IC 29-3-3-4 for temporary guardianship had been met. *Id.*

No prejudicial error in permanent guardianship notice when intervener attended and fully participated in proceedings. The Court concluded that even if there was a notice deficiency regarding the permanent guardianship, the intervener was not prejudiced thereby because he attended and fully participated with counsel in the guardianship proceeding. The Court also noted that all of the woman's other children except for the intervener consented to guardianship by the eldest daughter, and only one issue, discussed below, had been raised regarding the guardian's discharge of her duties.

Trial court's consideration of nonfinancial benefits to ward was in her best interests. The intervener sought to limit the guardian's power to allow another sibling to move his mobile home onto the incapacitated woman's property. The court authorized the son to move his mobile home because it would benefit the incapacitated woman to have a child nearby to monitor her situation and assist her. The court had protected the woman's financial interests by requiring that the sibling could not hook up to the woman's utilities not connect to her septic system unless approved by the county board of health. The court further ordered that no ground could be deeded to the mobile home and that the home must be moved if the woman no longer maintained her residence on the property. Noting that "best interest" of a ward is not to be understood as exclusively synonymous with pecuniary gain, the Court opined that the trial court's decision regarding moving the mobile home with restrictions was in the ward's best interest.