



NOTE: Disapproved by **K.I. ex rel. J.I. v. J.H.**, 903 N.E.2d 453 (Ind. 2009).

Guardianship/Third Party Custody

12/20/2005

In **In Re Paternity of Z.T.H.**, 839 N.E.2d 246 (Ind. Ct. App. 2005), the Court reversed and remanded the trial court's order granting Father's petition to modify custody and awarding custody of child to father. Mother and Father were not married. In 1993, two years after the birth of the child, the maternal grandparents assumed custody of the child. About one and one-half year later, in 1994, Father filed a petition to establish paternity, custody, visitation, and child support, and the maternal grandparents (third party custodians) cross-petitioned. The Mother, Father, and third party custodians entered into an agreement that gave the custodians custody of the child, allowed Father and Mother visitation, obligated the custodians to maintain medical and dental insurance for the child, and required Father and Mother to pay child support. Thereafter, Father lived in Greene County and maintained regular telephone contact and visitation with the child who lived in Zionsville with the third party custodians. He also attended the child's sporting events and school activities. This continued without objection until April 16, 2003, when Father moved to Zionsville and petitioned to modify custody because the child's physician and the custodians placed the child on medication for attention deficit disorder without Father's approval. Later, Father agreed with the medication but did not withdraw his petition. The trial court directed a full custody evaluation and the custody evaluator recommended that the child stay with the custodians. On August 30, 2004, after a hearing, the trial court entered extensive findings of fact and conclusions thereon granting Father's petition and awarding him custody of the child. The third party custodian's appealed.

The Court held that, in addressing a parent's request to modify a third party's custody, a burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child. (1) First, when a parent seeks to modify the long-term permanent custody of a third party, the third party must rebut the parental presumption with clear and convincing "evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party[.]" In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002). (2) If the third party succeeds, then the third party is essentially in the same position as any custodial parent objecting to the modification of custody, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child's best interests and that there has been a substantial change in one or more of the enumerated factors. Z.T.H. at 252-53. In reaching this holding the Court analyzed B.H., In Re Paternity of V.M., 790 N.E.2d 1005 (Ind. Ct. App. 2003), and In Re Guardianship of L.L., 745 N.E.2d 222 (Ind. Ct. App. 2001), *trans. denied*, and found that, although they involved custody disputes between a parent and a third party, none of them

addressed the proper analysis where a parent seeks to modify a long-term permanent third party custody arrangement and there has not been a significant change in circumstances that led to the parent initially relinquishing custody. In developing its new approach, the Court (1) took from these cases that Indiana courts still recognize and strongly value the parental presumption; (2) recognized that the parental presumption and the stringent standards for modification at IC 31-14-13-6, are both important considerations in determining what custody arrangement is in the child's best interests; (3) reconciled the presumption that custody with the parent is in the child's best interest with the longstanding concept that "permanence and stability are considered best for the welfare and happiness of the child;" and, (4) merged these seemingly conflicting concepts when a parent seeks to modify a third party's custody. Z.T.H. at 249-52. The Court opined that its two-step approach protects a parent's constitutional rights and the best interests of a child who has been in the long-term permanent custody of a third party. It found that, here, the trial court erroneously concluded that cases involving an initial custody placement with a third party and cases involving the modification of an existing third party custody arrangement are always subject to the same legal analysis. Id. at 253, 258.

The Court found that, here, the third-party custodians had rebutted the parental presumption and remanded for a hearing at which Father "must establish that modification is proper," in that it is in the child's best interests and there has been substantial change in circumstances. IC 31-14-13-6. The Court noted that such a hearing also would give the third party custodians an opportunity to specifically rebut any evidence set forth by Father. Id. at 257, 259. The Court (1) reviewed the trial court's Findings of Fact and Conclusions of Law; (2) cited Hendrickson v. Binkley, 316 N.E.2d 376, 380 (1974), *cert. denied*, 423 U.S. 868 (1975), and B.H. at 286-87 for the proposition that Indiana courts have continuously recognized that the parental presumption may be rebutted with evidence of a parent's "long acquiescence" in a third party having custody of a child; and (3) held that, having found Father acquiesced to the third party custodians' custody of the child, the trial court's conclusion that the custodians failed to rebut the parental presumption was clearly erroneous. Id. at 253-57.

In explaining why the remand was not futile, the Court noted specific trial court's findings which indicated to the Court that the trial court improperly required the third party custodians both to rebut the parental presumption and to show that modifying custody was not in the child's best interests, where after rebutting the parental presumption, they were under no affirmative obligation to address the modification question because, Father, as the person seeking to modify custody, had that burden. The Court noted that, (1) because the third party custodians had rebutted the parental presumption, this case is like any other modification proceeding, in which "[t]he welfare of the child, not the wishes and desires of the parents, is the primary concern of the courts." In Re Paternity of M.J.M., 766 N.E.2d 1203, 1209 (Ind. Ct. App. 2002); (2) whether Father can establish that modification is proper under the parameters of the Court's decision is a matter for the trial court's determination on remand. Id. at 257-58.

Judge Crone dissented with a separate opinion in which he agreed with the majority that (1) a synthesis of the "parental presumption" and "best interests" standards is the proper means of protecting a parent's rights and a child's best interests where the parent seeks to modify the long-term permanent custody of a third party; (2) here, the third party custodians rebutted the parental presumption with evidence that Father acquiesced to their custody of the child; and, (3) here, the

trial court's conclusion to the contrary is clearly erroneous. He disagreed, however, with the majority's finding that the third party custodians were therefore not "in the same position as any custodial parent objecting to a petition to modify custody" and that the appropriate solution is to "remand for a hearing in which Father has the burden of establishing that the modification of custody is in the child's best interests and that there has been a substantial change in circumstances." Judge Crone (1) stated his belief that sufficient evidence exists to support the trial court's finding that Father had met the burden of establishing that modification is in the child's best interests and that there has been a substantial change in circumstances; and (2) discussed that evidence. He found that the trial court had made it clear that application of the standards set forth by the majority would not have changed the outcome, and accordingly, the Court should "give due deference to the trial court and affirm its decision in the interests of stability and finality." Id. at 259-60.