

Children's Law Center of Indiana



Guardianship/Third Party Custody

05/23/2007

In **Christian v. Durm**, 866 N.E.2d 826 (Ind. Ct. App. 2007), the Court affirmed the trial court's award of custody of the child to the third party custodian (custodian) rather than the parents. On March 30, 2006, Mother was arrested for committing battery upon Father. On April 6, 2006, Father filed a petition to dissolve the marriage and requested custody of the only child of the marriage who was seven months old. On April 2, 2006, Father left the child in the custodian's around-the-clock care. He told the custodian he needed to look for work and he did not want to leave the child in his home "with ants all over the floor." The child weighed only thirteen pounds, exhibited a "blank stare," did not attempt to crawl, stank, and suffered from a severe diaper rash that was "raw and red." Father told the custodian to feed the child 2% milk and that the child did not like water. After being fed infant formula, baby foods, and cereal, the child began to thrive, gained approximately six pounds in six weeks, and began to smile, laugh and crawl. Father signed a document giving custodian guardianship of the child for the purpose of seeking medical attention. On June 23, 2006, the custodian petitioned to intervene in the dissolution action and sought custody of the child; on June 26, the trial court scheduled a hearing on the custody petition for July 6, 2006; on June 27 and 28, respectively, Father and Mother filed motions advising that they had reconciled, and requesting dismissal of the dissolution petition; and on June 29, the trial court dismissed the dissolution petition. On July 6, at the custody hearing, after the presentation of the custodian's witnesses, Father and Mother moved for dismissal of the custody petition on grounds that custody was not properly at issue because the dissolution petition had been dismissed. The trial court denied the motion and on July 7, 2006, granted custody of the child to the third party custodian. Father and Mother appealed.

The trial court did not err by proceeding with the merits of custodian's claim despite the dismissal of the underlying dissolution petition. *Id.* at 829. Father and Mother asserted that the trial court "lacked jurisdiction" to hear the custody petition because the petition for marital dissolution had been dismissed. The Court noted: "The question of subject matter jurisdiction entails a determination of whether a court has jurisdiction over the general class of actions to which a particular case belongs," and personal jurisdiction requires submission of the individual parties to the authority of the court. **K.S. v. State**, 849 N.E.2d 538, 542 (Ind. 2006). Here, both subject matter and personal jurisdiction are satisfied, thus the issue is not "jurisdictional," but rather whether the trial court committed legal error by refusing to dismiss the intervenor's claim after the presentation of her case because the underlying claim had been voluntarily dismissed. **Christian** at 829. As an intervenor, the custodian enjoyed equal standing with the other parties, Father and Mother, and had a pending claim to pursue. *Id.*

There was clear and convincing evidence that the child's best interests were substantially served by placement with the third party custodian. *Id.* at 830. The Court related the standard for granting third party custody as set forth in In Re Guardianship of B.H., 770 N.E.2d 283, 287, including the tenet that, before 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. *Id.* at 829-30. In reaching the conclusion that there was such clear and convincing evidence, the Court noted: (1) the conditions of the home from which the child was removed were deplorable; (2) the child was underweight, smelled, and suffered from a bad diaper rash; (3) neither parent had full-time employment; (4) Father's efforts to obtain employment were hindered by the lack of a vehicle; (5) the parents had chronic problems paying their rent and, prior to the hearing, their landlord had given them notice to vacate their apartment; (6) Mother was taking court-ordered anger management classes, but failed to control her son's aggression against the child; and (7) in the custodian's home, the child thrived, gained weight and attained age-appropriate motor skills. The Court also noted that the trial court was not required, as Father and Mother suggested, to make a specific finding of unfitness or abandonment. *Id.* at 830.