

Children's Law Center of Indiana



Guardianship and Third Party Custody

4/17/14

In **Fry v. Fry**, 8 N.E.3d 209 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which modified custody of Mother's daughter (Daughter) to Mother's former husband (Husband). Mother married Husband when Daughter was three years old. Husband was not the father of Daughter. When Mother and Husband divorced, the trial court awarded joint legal custody of the parties' son of the marriage (Son), with Mother having primary physical custody of Son and Husband having "reasonable, liberal, and flexible" parenting time with Son pursuant to the parties' settlement agreement. In addition, the parties' agreement included that all of Husband's parenting time rights with Son may include Daughter at Husband's option. In the ensuing years, Husband included Daughter when he exercised parenting time with Son whenever possible. About seven years after the divorce, Husband filed an emergency petition for modification of custody and parenting time, in which he requested physical custody of both Son and Daughter because Mother's diagnosis of Huntington's Disease had progressively diminished her ability to care for the children physically, mentally and emotionally. The trial court conducted a hearing on the motion and also held an in camera interview with Daughter. Among the evidence submitted to the court was a letter from Mother's doctor stating that Mother had abnormal cognitive function and poor judgment and was unable to parent her children safely and effectively, her condition was progressive and untreatable, and no appreciable improvement could be expected. The trial court found that Husband was not Daughter's biological or legal father, but he had acted in the capacity of her father with Mother's encouragement and consent for many years, and the dissolution decree had granted him parenting time with Daughter. The trial court modified physical custody of both children to Husband and ordered supervised parenting time for Mother. Nine months after the trial court's order was issued, Mother filed a Trial Rule 60 motion seeking to declare the court's orders relating to Daughter void because Daughter is not a child of the marriage and the trial court had no jurisdiction to award custody of Daughter to Husband. The trial court held a hearing and denied Mother's motion, and she appealed.

The Court concluded that the trial court did not commit any legal error in considering Husband's emergency petition and affirmed the order awarding custody of Daughter to Husband. *Id.* at 217. The Court, quoting *K.S. v. State*, 849 N.E. 2d 538, 540 (Ind. 2006), observed that the Indiana Supreme Court explained, "[l]ike the rest of the nation's courts, Indiana trial courts possess two kinds of 'jurisdiction.' Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs.

Personal jurisdiction requires that appropriate process be effected over the parties.” Fry at 214-15. The Court opined that if a claim falls within the general scope of authority conferred on a court by the Indiana Constitution or statute, the court has subject matter jurisdiction over that claim. Id. at 215. The Court said that courts of general jurisdiction are presumed to have subject matter jurisdiction. Id. Quoting L.M.A. v. M.L.A., 755 N.E. 2d 1172, 1175 (Ind. Ct. App. 2001), the Court noted that “Title 31 of Indiana Code grants trial courts the incidental... specific authority to decide child custody matters within the general grant of subject matter jurisdiction to hear actions for dissolution and child support.” Fry at 215. The Court opined that the trial court not only has subject matter jurisdiction over a child custody determination for a child of the marriage, but also over a child custody determination involving a third party outside the marriage. Id. Noting that Mother had raised no issue over the trial court’s personal jurisdiction over the parties, the Court concluded that the trial court therefore possessed the two forms of jurisdiction required to render a valid judgment. Id. The Court opined that Mother’s claim was not a true jurisdictional one, and the judgment was not void for lack of jurisdiction. Id.

The Court disagreed for several reasons with Mother’s argument that she was otherwise entitled to relief because Husband had no legal right to pursue custody of Daughter and the trial court was therefore not permitted to hear the issue. Id. The Court stated the following reasons for its disagreement with Mother’s argument: (1) IC 31-17-2-25 allows for emergency placement of a child with a person other than a parent; therefore, Husband has a legal right pursuant to this statute to seek such relief; (2) a trial court adjudicating a dissolution may award custody to a de facto custodian, citing In Re Custody of G.J., 796 N.E.2d 756, 762 (Ind. Ct. App. 2003), *trans. denied*, and IC 31-9-2-35.5 (definition of de facto custodian); (3) Husband was entitled to consideration in custody matters as a de facto custodian; (4) instead of appealing the trial court’s order which gave emergency custody to Husband as erroneous, Mother had acquiesced in the custody order, seeking only to exercise parenting time as the court ordered. Id. at 215-16.