

Children's Law Center of Indiana



Guardianship/Third Party Custody

5/22/2014

In **In Re B.C.**, 9 N.E.3d 745 (Ind. Ct. App. 2014), the Court reversed the Montgomery Circuit Court's paternity custody order, the Marion Superior Court, Probate Division's order dismissing the guardianship, and the Marion Superior Court's order dismissing Guardians' petition for adoption, and remanded for proceedings consistent with the opinion. The child was born out of wedlock on August 25, 2010. On March 5, 2012, the child's maternal grandfather and his significant other (Guardians), who were the child's caregivers, filed a Verified Petition for Appointment of Guardianship of the child in the Marion Superior Court, Probate Division. Guardians alleged that there was no father listed on the child's birth certificate, that they did not know the identity of the child's biological father, that Mother had a history of arrests and had signed a temporary guardianship agreement, and that the child had resided with them for the majority of his life, after Mother left him in their care. On July 31, 2012, the Marion Superior Court, Probate Division, approved an agreed entry which appointed the maternal grandfather and his significant other as guardians of the child. On December 19, 2012, the alleged father filed a Verified Petition to Establish Paternity, Custody, Support, and Parenting Time in the Montgomery Circuit Court. The case was pending on the juvenile docket of the Montgomery Circuit Court. On December 20, 2012, the Montgomery Circuit Court approved an agreed paternity order submitted by alleged Father and Mother, finding that alleged Father was the child's biological father. On February 12, 2013, adjudicated Father filed a Verified Motion to Dismiss the guardianship in the Marion Superior Court, Probate Division, alleging that the guardianship was no longer needed and that Guardians had refused him any visitation with the child and advised him that he would be arrested for trespass if he came to their property. On February 25, 2013, Guardians filed a Verified Motion to Intervene, Set Aside the Agreed Paternity Order, and Request for DNA Testing in the Montgomery Circuit Court. Guardians alleged that Father was not the child's biological father and that all issues should be combined before the Marion Superior Court, Probate Division. On May 13, 2013, the Montgomery Circuit Court entered an order granting Guardians' motion to intervene, and denying their motions to set aside the paternity judgment and request for DNA testing. On May 20, 2013, Guardians filed a Verified Petition for Adoption in the Marion Superior Court, Probate Division, under an adoption cause number, which was different from the guardianship cause number. Both the adoption petition and the guardianship proceeding were before the same trial court judge.

On June 13, 2013, Father filed a Petition to Establish Custody in the Montgomery Circuit Court. On June 20, 2013, Guardians filed a Motion for Consolidation and Transfer to the Marion Superior Court, Probate Division, in the Montgomery Circuit Court, alleging that the paternity action should be transferred and consolidated with the guardianship proceeding. On June 21, 2013, Father filed an objection to the Guardians' motion for consolidation and transfer. The Montgomery Circuit Court referred Guardians' Motion to Marion Superior Court, Probate Division, opined that the Montgomery Circuit Court had jurisdiction because it was a juvenile matter, and denied Guardians' motion. After hearing evidence, including that Guardians had filed a petition to adopt the child, the Montgomery Circuit Court continued the hearing to July 2, 2013, at which additional evidence, including evidence about the pending adoption petition was heard. On July 5, 2013, the Montgomery Circuit Court entered an order finding by clear and convincing evidence that Guardians would retain physical custody of the child, that Father and the maternal grandfather would share joint legal custody of the child, that Father would have parenting time with the child, and that Mother, who had been incarcerated since February 2013, would have parenting time upon her release from incarceration. In August 2013, Guardians filed a motion to correct error in the Montgomery Circuit Court which the court later denied.

Meanwhile, on July 3, 2013, Father filed an Objection to Petition for Adoption and Motion to Dismiss Adoption in the Marion Superior Court, Probate Division. On July 22, 2013, Guardians filed a brief on the issue of jurisdiction in the Marion Superior Court, Probate Division under the guardianship cause number and argued that the Montgomery Circuit Court should have relinquished jurisdiction upon their motion or upon the filing of the adoption petition, both of which occurred before any final order was entered in Montgomery Circuit Court on the child's custody. Father and the Guardian ad Litem (GAL) also filed briefs that same day. On July 25, 2013, the GAL filed a Motion to Consolidate Paternity and Guardianship Proceedings and Request to Send Montgomery Circuit Court File to the Marion Superior Court, Probate Division because the Marion Superior Court took initial cognizance of the child's custody and because Father agreed to submit himself to the Marion Superior Court's jurisdiction. On August 6, 2013, the Marion Superior Court, Probate Division, granted Father's motion to dismiss, ordered that the child's guardianship be dismissed, and dismiss Guardians' petition for adoption. Guardians filed a motion to correct error, which the Marion Superior Court, Probate Division, denied on September 24, 2013. Guardians filed notices of appeal from the paternity custody order in Montgomery Circuit Court and the guardianship and adoption orders in the Motion Superior Court, Probate Division, and the appeals were consolidated.

The Court observed that the question of a court's jurisdiction is a question of law, and that appellate courts independently evaluate issues of law. *Id.* at 751. The Court noted that this case required it to interpret the relevant statutory provisions addressing jurisdiction. *Id.* The Court said: (1) when interpreting a statute, the Court independently reviews its meaning and applies it to the facts of the case under review; (2) if a statute is susceptible to multiple interpretations, the Court must try to ascertain the legislature's intent and interpret it to effectuate that intent; (3) a statute should be examined as a whole, avoiding excessive reliance upon a strict literal meaning or the selective reading of individual words (multiple citations omitted). *Id.* The Court also noted that, to render a valid judgment, a court must have both subject matter

jurisdiction and personal jurisdiction; Indiana courts obtain subject matter jurisdiction only through the Indiana Constitution or a statute; and, when a court lacks subject matter jurisdiction, its actions are void ab initio and have no effect (multiple citations omitted). Id.

The Court found that Marion Superior Court had jurisdiction to enter its July 31, 2012 order appointing Guardians as guardians of the child. Id. at 752. Quoting IC 33-29-1.5-2(1), the Court noted that, generally, all nonstandard superior courts have “original and concurrent jurisdiction in all civil cases...” Id. at 751. The Court also noted that IC 29-3-2-1(a)(1) provides that Indiana courts having probate jurisdiction have jurisdiction over “[t]he business affairs, physical person, and property of every incapacitated person and minor residing in Indiana.” Id. The Court observed that the exceptions set forth at IC 29-3-2-1, which include courts with child custody jurisdiction in paternity cases [IC 29-3-2-1(d)(1)], did not apply at the time Guardians filed their petition for guardianship or when the Marion Superior Court, Probate Division entered its July 31, 2012, order approving the agreed entry, because Father had not yet filed his petition to establish paternity. Id. at 751-52

The Court found that the Montgomery Circuit Court had jurisdiction to enter the agreed paternity order on December 20, 2012, which established Father’s paternity of the child. Id. at 752. The Court noted that a juvenile court has exclusive original jurisdiction in proceedings concerning the paternity of a child under IC 31-14 as set forth in the juvenile court jurisdiction statute IC 31-30-1-1(3). Id. The Court could not say that the issue of Father’s paternity of the child was an issue pending before the Marion Superior Court, Probate Division. Id. at 753.

The Court held that, because the subject of child custody was properly before the Marion Superior Court, Probate Division due to the guardianship action, the Montgomery Circuit Court was precluded from making a custody determination in the subsequently filed paternity action. Id. The Court said that the guardianship, paternity, and adoption proceedings all related to custody. Id. The Court quoted In Re Marriage of Huss, 888 N.E.2d 1238, 1241 (Ind. 2008), in which the Supreme Court said, “[t]he determinative issue, however, is not whether the dissolution court failed to honor a judgment of a sister court, but whether the paternity court was authorized to adjudicate a custody issue that was already pending before another court.” B.C. at 752. The B.C. Court at 752 further quoted the Supreme Court in Huss at 1241, which stated:

The applicable principles are stated in In Re Paternity of Fox, 514 N.E.2d 639 (Ind. Ct. App. 1987), *trans. denied*:

It is well settled that two courts of concurrent jurisdiction cannot deal with the same subject matter at the same time. Once jurisdiction over the parties and the subject matter has been secured, it is retained to the exclusion of other courts of equal competence until the case is resolved, and the rule applies where the subject matter before the separate courts is the same, but the actions are in different forms. Exclusive jurisdiction over a particular cause of action vests when the

compliant or the other equivalent pleading or document is filed. Fox, 514 N.E. 2d at 641 (internal citations omitted).

The Court held that, because the petition for adoption and the paternity action were pending at the same time, the Marion Superior Court, Probate Division, the court in which the petition for adoption had been filed, had exclusive jurisdiction over the child’s custody. Id. at 754. The Court looked to IC 31-19-2-14(a), which provides, “[i]f a petition for adoption and a petition to establish paternity are pending at the same time for a child sought to be adopted, the court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding.” Id. at 753. The Court found that IC 31-19-2-14 controls rather than IC 31-30-1-1(3), quoting U.S. Steel Corp. v. N. Ind. Pub. Serv. Co., 950 N.E. 2d 542, 560 (Ind. Ct. App. 2011) “When two statutes cover the same subject and one does so in general terms while the other does so in specific terms, the more specific statute should be applied,” *reh’g denied, trans denied*. The Court also quoted In Re Adoption of B.W., 908 N.E. 2d 586, 592-93 (Ind. 2009), in which the Supreme Court addressed IC 31-19-2-14(a), stating that

Where a putative father opts under 31-19-9-12(1) to file a paternity petition, the statute anticipates situations where an adoption petition is concurrently pending. In that circumstance, “the court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding.” Ind. Code 31-19-2-14(a) (emphasis added). This common sense requirement understand that such concurrent actions are best resolved in one forum – resolution of paternity is generally necessary prerequisite to completion of adoption proceedings since a legally proven biological father’s consent to an adoption is required.

B.C. at 754. Although Father argued that IC 31-19-2-14(a) was not applicable to this situation because the paternity action was filed before the filing of the adoption action, the Court opined that IC 31-19-2-14 does not limit its applicability to situations in which an adoption petition is filed prior to the filing of the paternity action. Id. Quoting In Re A.N.S., 741 N.E 2d 780, 785 at n.6. (Ind. Ct. App. 2001), which states that the paternity court “retains jurisdiction to the extent the judgment demands, *e.g.*, the court could modify custody, child support and visitation,” the Court said that, although paternity had already been established at the time Guardians filed their petition for adoption, the paternity action remained alive. B.C. at 754. The Court held that, accordingly, the Montgomery Circuit Court could not properly exercise jurisdiction to enter its July 5, 2013 order as the Marion Superior Court, Probate Division, had exclusive jurisdiction over the custody of the child. Id. at 754. The court also held that the Marion Superior Court, Probate Division, erred when it dismissed the guardianship and adoption proceedings. Id. at 755.