

Children's Law Center of Indiana



Guardianship/Third Party Custody

07/07/2009

In In Re Custody of J.V., 913 N.E.2d 207 (Ind. Ct. App. 2009), the Court remanded the case with instructions. The child was born out of wedlock July 18, 2005. The paternal grandmother's son (Father) was believed by all parties to be the biological father although he never established paternity. Between August 2005 and May 2006, Mother, Father, and the child resided in the home of the paternal grandmother (Grandmother) and Grandmother was the child's primary caretaker. In May 2006, the three moved in with Grandmother's daughter who lives three houses down from Grandmother, where they remained for about a year. During this year, Grandmother cared for the child three to four days per week, provided all basic necessities for the child while the child was in her home, including diapers, food, and clothing, and paid a babysitter if she had to work while the child was in her care and if the child's aunt was unable to care for the child. On November 15, 2007, when the aunt picked the child up from Mother's home, she observed a cigarette burn to the child's eye and called Grandmother who took the child to the emergency room. Mother did not go to the hospital with Grandmother and the child. On that same day, Grandmother filed her Petition to Establish De Facto Custodian and Motion for Custody of the child. A hearing was held shortly thereafter and the court appointed a GAL to evaluate the custody situation. Counsel was appointed for Mother on April 11, 2008. At an August 15, 2008, hearing, the GAL's report recommending custody be awarded to Grandmother was admitted into evidence. On November 14, 2008, the trial court issued an order finding Grandmother to be the child's "Defacto Custodian" and awarding legal and physical custody to her. Mother appealed.

The evidence supports the trial court's conclusion that Grandmother is the child's "de facto custodian." *Id.* at 210-11. The Court stated that In Re L.L. & J.L., 745 N.E.2d 222 (Ind. Ct. App. 2001), "provides a framework for trial courts to apply when considering a custody dispute between a natural parent and a third-party," and quoted extensively from it:

First, there is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.

However, a general finding that it would be in the child's "best interest" to be placed in the third party's custody is not sufficient to rebut the presumption. If the presumption is rebutted, then the court engages in a general "best interests" analysis. The court may, but is not required to, be guided by the "best interests" factors listed in [IC] 31-14-13-2, [IC] 31-14-13-2.5, [IC] 31-17-2-8, and [IC] 31-17-2-8.5, if the proceeding is not one explicitly governed by those sections.

If a decision to leave or place custody of a child in a third party, rather than a parent, is to be based solely upon the child's "best interests," as opposed to a finding of parental unfitness, abandonment, or other wrongdoing, such interests should be specifically delineated, as well as be compelling and in the "*real and permanent*" interests of the child.

If the "best interest rule" was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents. In other words, a child might be taken away from the natural parents and given to a third party simply by showing that a third party could provide the better things in life for the child and therefore the "best interest" of the child would be satisfied by being placed with a third party.

This observation is entirely consistent with the views of the Supreme Court, which has state that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."

Id. at 230-31 (citation omitted and emphasis in the original). J.V. at 209-10. The Court then reviewed the definition of a de facto custodian at IC 31-9-2-35.5, and opined that (1) a "de facto custodian" must be made a party to a custody proceeding following a paternity determination pursuant to IC 31-14-13-2.5(c), or in a marital dissolution action, pursuant to IC 31-17-2-8.5(c); (2) once a court determines a "de facto custodian" exists and the individual has been made a party to the custody proceeding, in addition to the usual "best interests" of the child factors contained in IC 31-14-13-2 and IC 31-17-2-8, the court shall consider the following factors contained in IC 31-14-13-2.5(b) and IC 31-17-2-8,5(b): the wishes of the child's de facto custodian; the extent to which the child has been cared for, nurtured, and supported by the de facto custodian; the intent of the child's parent in placing the child with the de facto custodian; and the circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to seek employment, work, or attend school; (3) and, according to IC 31-14-13-2.5(d) and IC 31-17-2-8.5(d), "The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child." Id. at 210.

In its order awarding custody of the child to Grandmother, the trial court failed to make the required determination that awarding custody of the child to Grandmother was in the child's best interests. Id. at 211. Citing In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) ([B]efore 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 interest of the child require such a placement.... [The issue] is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person"), the Court opined that, although there was evidence in the record suggesting that awarding custody of the child to Grandmother was in the child's best interest, making the finding to that effect was particularly important in this case given the significant burden a third party must overcome to rebut the presumption that the natural parent should have custody of his or her child. J.V. at 211.