

Children's Law Center of Indiana



Guardianship and Third Party Custody

12/18/14

In **In Re Guardianship of M.N.S.**, 23 N.E.3d 759 (Ind. Ct. App. 2014), the Court affirmed the trial court's order granting Father's motion to terminate the guardianship over the child. *Id.* at 767. The child was born in October 2003 to Mother and Father, who were not married. Guardian was Father's former stepmother. When Mother was pregnant with the child, she lived with her mother (Maternal Grandmother). Guardian bought "a lot of stuff" for the child and "became really close to [Mother]." Mother moved in with Father when the child was a month old. In February 2004, Father went to prison after pleading guilty to theft. Mother and the child then moved to the home of Maternal Grandmother, who was guardian of Mother's oldest child. While Mother worked, Father's Mother (Paternal Grandmother) and Guardian helped to babysit the child and helped cover the costs of an additional babysitter. On February 23, 2004, Guardian had Mother sign a form granting Guardian temporary guardianship over the child. In April 2004, Guardian helped Mother to find an apartment and move out on her own. Mother then had difficulty caring for the child and told Father about it. Father, who was in prison, asked Guardian to help care for the child until his release from prison, and Guardian agreed. On April 30, 2004, Guardian filed a petition to be appointed permanent guardian of the child and attached Mother's written consent. At the time Guardian filed the petition, Father was still incarcerated, and Guardian did not tell him about the petition. On May 6, 2004, the trial court issued its order granting Guardian's petition for a permanent guardianship of the child. In January 2005, Father was released from prison, placed in a Community Transition Program, and put on house arrest. Father moved in with Paternal Grandmother, helped pay the child's babysitting costs, and had unsupervised visitations with the child. At the end of January 2005, Guardian filed a motion for child support, seeking support from Mother only. The trial court held a hearing on February 4, 2005, and appointed a guardian ad litem (GAL) to represent the child's interests. At the hearing, Mother agreed to pay \$50.00 per week to the clerk of the court, and Father voluntarily agreed to pay \$60.00 per week to Guardian. Father paid child support directly to Guardian between 2005 and 2010. The child's younger sister was born in 2006.

Animosity between Guardian and Father peaked in December 2009. During that month, Guardian filed a police report, alleging that Father had assaulted her. In February 2010, Father was charged with battery against Guardian. Guardian also filed for a protective order against Father on behalf of herself and the child. The trial court held a hearing in the protective order case in January 2010 and modified Father's parenting time to supervised visitations at a non-profit organization. This protective order prevented Father from seeing or talking to the child outside of his visitation time. The trial court held a review hearing on May 3, 2010. During this

hearing: (1) the GAL recommended that Father's visitation be moved to unsupervised visitation; and (2) Guardian tendered a petition to adopt the child and attached Mother's written consent to the adoption. On July 29, 2010, the trial court held a status conference on the GAL's report. Guardian requested that Father be required to submit to random drug testing before having any unsupervised visitation. Father admitted that he had recently smoked marijuana. The trial court ordered Father to submit to a hair follicle test within twenty four hours, and Father tested positive for marijuana. For the next year, the trial court ordered Father to submit to random drug screens, and these later tests indicated no drug use.

In April 2011, Father was granted custody of the child's younger sister, and also filed to modify his visitation with the child from supervised visitation to unsupervised visitation. On July 7, 2011, the trial court granted Father's petition and ordered that Father have unsupervised parenting time with the child once per week for four hours. In August 2011, the trial court held a bench trial on the battery charge against Father, during which the child testified, and Father was found not guilty of battering Guardian. On December 13, 2011, Father petitioned to terminate the guardianship over the child. In December 2011, Guardian reported to DCS that Father had left bruising on the child. DCS determined that the abuse allegation was unsubstantiated. Guardian then sought and received an ex parte protection order against Father on behalf of herself and the child. On January 23, 2012, the trial court held a status hearing, during which Father tendered a copy of the DCS report that unsubstantiated abuse of the child by him. The trial court ordered that Guardian and Father exchange the child at local police departments. In July 2012: (1) Father married; (2) the trial court entered a temporary order granting Father parenting time over night on alternate weekends; and (3) the trial court admonished the parties to fully cooperate with one another.

On October 12 and 17, 2012, and on December 19, 2012, the trial court held evidentiary hearings on Father's petition to terminate the guardianship and Guardian's petition for a protective order. On October 26, 2012, the trial court also held a "lengthy" in-camera interview with the child, during which the child told the judge that she missed her older sister (who resided in the custody of Maternal Grandmother) and her younger sister (who resided in Father's custody) and wanted to spend more time with them. Over the three days of hearings, Father and Guardian presented testimony from witnesses, which revealed that the child had formed a bond with both Guardian and Father. Mother testified that she was in favor of Father's motion to terminate the guardianship. The GAL testified about her report and: (1) recommended that the child remain with Guardian based on the bond between the child and Guardian, whom the child considered as a mother; (2) testified that Father had "done a very good job turning his life around"; (3) testified that both Father and Guardian were "extremely important" to the child; and (4) opined that it would be "detrimental" to the child if one of them was not an "active part of her life."

The trial court issued an order on April 13, 2013, granting Father's petition to terminate the guardianship. The trial court made specific and extensive findings, thoroughly discussed the burden of Father as a natural parent and the burden of Guardian as a third party in guardianship proceeding, and concluded that Guardian ha[d] not met the burden of showing by clear and convincing evidence that the child's interest were significantly served in continuing Guardian's

primary custody of the child. The trial court determined that it was in the child's best interest to be placed in Father's custody, and terminated the guardianship. Guardian filed a motion to correct error, which the trial court denied after holding a hearing. Guardian appealed.

The Court affirmed the trial court's order granting Father's motion to terminate the guardianship over the child. *Id.* at 767. Citing *In Re Guardianship of J.K.*, 862 N.E.2d 686, 690-91 (Ind. Ct. App. 2007), the Court observed that: (1) it reviews the trial court's findings and conclusions in determining whether the trial court has abused its discretion, and (2) the findings or judgment may not be set aside unless they are clearly erroneous. *M.N.S.* at 766. Quoting *K.I. Ex Rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009), the Court noted "Indiana courts have long held that [e]ven when a parent initiates an action to reobtain custody of a child that has been in the custody of another, the burden of proof does not shift to the parent... [r]ather, the burden of proof is always on the third party." *M.N.S.* at 766. Citing IC 31-14-13-6, the Court noted that a parent wishing to terminate a guardianship has the burden of persuading the trial court that termination is in the child's best interests and that there is a substantial change in one or more of the child-custody factors. *Id.* Quoting *In Re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002), the Court said: (1) there is a "strong presumption that a child's interests are best served by placement with the natural parent"; (2) once the natural parent meets this "minimal" burden of persuasion, the third party... must prove "by clear and convincing evidence that the child's best interests are substantially and significantly served by placement with another person"; (3) if the third party fails to carry this burden, then custody of the child must be modified in favor of the natural parent. *M.N.S.* at 766. Guardian asserted she had met her burden of showing clear and convincing evidence that the child should remain in her care. Guardian argued that: (1) she showed there was a strong bond between her and the child; (2) Father "had acquiesced custody of [the child] for a long period of time"; and (3) "the trial court failed to take into account the potential harm that terminating the guardianship would have in severing the ties between Guardian and [the child]." The Court disagreed with Guardian's assertion of error. *Id.* at 767. The Court noted that, at the time of the hearings, Father was married, employed, and had custody of the child's younger sister. *Id.* at 767. The Court found that the court's order: (1) specifically recognized the bond between Guardian and the child and the resulting difficulty that would be involved in severing that bond; and (2) addressed and specifically rejected Guardian's argument that Father had voluntarily relinquished custody of the child to Guardian or had acquiesced to the current custody arrangement. *Id.* The Court found Guardian's argument that the trial court erred by terminating the guardianship was nothing more than a request to reweigh the evidence and reassess the credibility of the witnesses, which the Court will not do. *Id.*