

Children's Law Center of Indiana



Guardianship/Third Party Custody

8/14/13

In ***In Re I.E.***, 997 N.E. 2d 358 (Ind. Ct. App. 2013), the Court affirmed the trial court's order terminating the guardianship of the child and granting custody of the child to Father. The Court reversed the trial court's order granting visitation rights to Guardians, and found that the trial court did not err in failing to award visitation to Mother. The child was born in September 2009, and Guardians took the child home from the hospital with Mother's consent. Mother was not married to Father at the time of the child's birth. On September 18, 2009, Guardians filed a petition to adopt the child. On October 6, 2009, Father filed a paternity action to establish paternity of the child. Guardians petitioned to intervene in the paternity action, and the court granted their petition. On November 6, 2009, Guardians filed a guardianship action, and the trial court granted Father's petition to intervene in the guardianship action. From that point on, the two cases were addressed at the same time. The trial court granted Guardians' petition to establish temporary guardianship of the child. Following a hearing on March 18, 2010, the trial court found that Father was the child's father. The child remained in the sole care and custody of Guardians until April 1, 2010, when Father was granted visitation pursuant to the Indiana Parenting Time Guidelines. On May 7, 2010, the parties reached a mediated agreement whereby: (1) Guardians had "joint legal and physical custody" of the child; (2) Mother and Guardians had parenting time with the child for eight days every two weeks; (3) Father had parenting time with the child for six days every two weeks. On December 15, 2011, Father filed petitions to terminate the guardianship and modify custody. The trial court appointed a guardian ad litem for the child and held hearings in August 2012 and November 2012. On December 4, 2012, the trial court issued an order terminating the guardianship, granting custody of the child to Father, granting Guideline Visitation to Guardians with the exception that they would have only one week of extended visitation in the summer, and denying Mother's alternative motion for custody of the child. The trial court specifically made no parenting time order for Mother because there was no formal motion before the court on her behalf for parenting time and her contact with the child had been limited and exercised at the home of the Guardians. Father appealed on the issue of whether the trial court erred in declining to grant reasonable visitation to Mother. Guardians and Mother cross-appealed on the issues of whether the trial court applied an incorrect standard in determining whether to grant Father's motion for change of custody, whether the court erred in granting Father's motion, and whether the court erred in granting visitation rights to Guardians.

The Court opined that the trial court did not abuse its discretion in concluding that Guardians failed to present evidence that clearly and convincingly established that the child's best interests would be substantially and significantly served by continued

placement with Guardians to overcome the strong presumption that Father should have custody of the child. *Id.* at 364. Guardians contended that the trial court applied an incorrect standard when ruling upon Father’s petition to modify custody, and that the trial court erred in granting his petition. The Court considered K.I. Ex Rel. J.J. v. J.H., 903 N.E. 2d 453 (Ind. 2009), a case that is factually similar to the present case, and said that “importantly, 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.’” K.I. at 460. I.E. at 362. The K.I. Court also indicated that this principle applied not only to parents seeking to reobtain custody, but also to parents who never had custody in the first place. K.I. at 460. I.E. at 362. The Court said that the trial court in the present case applied an incorrect standard, at least in a technical sense, and that Father was indeed required to prove that modification is in the child’s best interests, and that there is substantial change in one or more of the factors that the court may consider under IC 31-14-13-2(2). *Id.* at 363. The Court said that the “best interest” requirement is met from the outset because of the strong presumption that a child’s best interests are served by placement with the natural parent. *Id.* The Court opined that, in order to satisfy his burden with respect to the second elements, Father was required to establish that there had been a substantial change in any one of the factors listed in IC 31-14-13-2(2). *Id.* The Court said that the trial court’s findings were sufficient to permit the Court of Appeals to conclude that at least two of the factors had been established. Finding that the record clearly demonstrated that there had been a change with respect to Father’s wishes concerning custody of the child and that there had been a change with respect to the interaction and interrelationship between the child and Father, the Court concluded that, under the correct standard, Father carried his burden. *Id.* The Court said that, at that point, the burden shifted to Guardians to “prove by clear and convincing evidence ‘that the child’s best interests are substantially and significantly served by placement with another person.’” *Id.* at 363, quoting K.I. at 460 (quoting In Re Guardianship of B.H., 770 N.E. 2d 283, 287 (Ind. 2002)). The Court found that, although the trial court did not apply the correct test, the test it did apply included only factors that are properly considered under the test enunciated in B.H. I.E. at 364. The Court said that the evidence established that Father had suitable housing and was gainfully employed, and thus was both willing and able to provide for the child. *Id.*

Finding that the order was void, the Court reversed the trial court’s order granting visitation to Guardians. *Id.* at 366. Citing Worrell v. Elkhart Cnty. Office of Family & Children, 704 N.E. 2d 1027, 1029 (Ind. 1998), the Court observed that there is a two-part test for determining whether to grant visitation to nonparents, namely that the nonparent must demonstrate (1) the existence of a custodial and parental relationship and (2) that visitation would be in the child(ren)’s best interest. I.E. at 364. The Court also looked to Kitchen v. Kitchen, 953 N.E. 2d 646 (Ind.Ct.App. 2011), a case where the child’s aunt and uncle, who had been the child’s legal custodians after the mother’s death, were awarded supervised visitation with the child after the trial court eventually awarded legal custody of the child to the father. I.E. at 365. The Kitchen Court concluded that the trial court was without authority to grant visitation to the former custodian aunt and uncle, and reaffirmed that only parents, step-parents, and grandparents may be granted visitation rights. Kitchen at 649-50. I.E. at 365. The I.E. Court opined that the trial court erred in granting visitation rights to Guardians. *Id.* at 366.

The Court opined that the trial court did not err in failing to award visitation to Mother. Id. at 367. Guardians and Mother contended that the trial court erred in failing to grant visitation to Mother, arguing that the court's previous order, based on the mediated settlement, obligated the court to provide for such visits. The Court observed that Mother was a relatively passive participant in the change-of-custody proceeding, and that the only request she made at the hearing was for custody of the child. The Court said that a trial court cannot be said to err in failing to grant a request that was not made. Id.