

Children's Law Center of Indiana



Guardianship/Third Party Custody

1/31/2013

In **In Re Paternity of A.S.**, 984 N.E.2d 646 (Ind. Ct. App. 2013), the Court reversed the trial court's decision granting Grandmother custody of the child, and held that Grandmother had not rebutted the parental presumption in favor of Mother. The Court remanded the matter with instructions to return physical custody of the child to Mother, determine what visitation Father should receive, and what visitation, if any, Grandmother should receive under the Grandparent Visitation Act.

After Mother gave birth to the child in February of 2002, Mother and the child moved into Grandmother's home. Mother suffered from postpartum depression, and Grandmother provided care to both Mother and the child. Grandmother provided the majority of the child's financial support. Mother and the child lived with Grandmother until April of 2007, when Mother married her husband ("Stepfather") and moved out of Grandmother's home. In August of 2007, Mother was convicted of operating a vehicle while intoxicated, and her driver's license was suspended. Mother, Stepfather, and Grandmother agreed that the child would live with Grandmother during the school week and with Mother and Stepfather on the weekends. This continued until May of 2008, at which point the child lived with Mother and Stepfather, and visited Grandmother on weekends. In April 2009, Mother gave birth to Av.S., her first child with Stepfather. Mother quickly became pregnant again, and on December 26, 2009, Mother was hospitalized with complications from her pregnancy with her second child with Stepfather. The child was visiting Grandmother, and Grandmother agreed to watch both children [A.S. and Av.S.]. On December 28, 2009, Stepfather attempted to pick up both children from Grandmother, but Grandmother and Stepfather disagreed about whether the child [A.S.] was supposed to remain with Grandmother. Stepfather left without the child, but with Av.S. Later, Stepfather pushed Grandmother in a confrontation at the hospital. On January 1, 2010, Mother picked up the child from Grandmother's house, and four days later, Stepfather filed a petition to adopt the child, and to be given temporary custody of the child, since Mother was being treated for a condition that precluded her from taking care of the child full time. The trial court granted the petition for temporary custody in light of the pending adoption petition. Because of the tension between the families, Mother refused to allow the child to see Grandmother, and Grandmother did not see the child again until January 2011.

The child's father ("Father") was notified about the pending adoption, and Father filed an objection to the adoption petition and a petition to establish paternity. Father had not ever seen the child because he believed that Mother had lost the child during her pregnancy due to complications. On February 5, 2010, Grandmother filed a petition to establish grandparent

visitation rights with the child, and on April 6, 2010, Grandmother filed a petition for custody of the child.

An agreement was reached in November 2010, and the trial court issued an order in December 2010 approving the following agreed on items: (1) Father was the child's biological father; (2) Stepfather had withdrawn his petition to adopt the child; (3) Mother was the custodial parent of the child; and (4) Father was to begin supervised visitation with the child. All other matters were reserved for trial. The trial court permitted Grandmother to have supervised visits starting January 2, 2011. After four sessions of supervised visitation, Grandmother began exercising unsupervised visitation with the child every other Sunday. This arrangement lasted until the custody hearing. A Guardian ad Litem was appointed for the child. The Guardian ad Litem recommended that Mother retain custody of the child, that Grandmother be granted visitation, and that Father initially receive supervised visitation, with the goal that he eventually have parenting time per the Indiana Parenting Time Guidelines. A hearing was held on October 11, 2011, and the trial court ordered that Grandmother should have physical custody of the child, and granted Mother and Father visitation. Mother appealed, arguing that the trial court erred in granting physical custody of the child to Grandmother, and that the evidence was insufficient to overcome the presumption that it is in the child's best interests to remain in the custody of her natural parent.

In custody disputes between a natural parent and a third party, a presumption exists that it is in the best interests of the child to be placed in the custody of the natural parent; a third party must overcome this presumption with clear and convincing evidence, and the trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. *Id.* at 651. The Court noted that there are constitutional implications to the parent-child relationship, namely, the fundamental right of a parent to make decisions regarding the care, custody, and control of their children. *Id.* at 651, citing *In re L.J.S.*, 923 N.E.2d at 462. In disputes between a natural parent and a third party, a presumption exists that it is in the best interests of the child to be placed in the custody of the natural parent. *A.S.* at 651, citing *Allen v. Proksch*, 832 N.E.2d 1080, 1098 (Ind. Ct. App. 2005). Natural parents have the right to custody of their children, except when the parents are unsuitable to be trusted with the care, custody, and education of children. *A.S.* at 651, citing *Allen* at 1098; *In re Guardianship of B.H.*, 770 N.E.2d 283, 285 (Ind. 2002). A trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. *A.S.* at 651, citing *In re Paternity of T.P.*, 920 N.E.2d 726, 731 (Ind. Ct. App. 2010). The factors that should be considered by a trial court before placing a child with a third party are: (1) the natural parent's unfitness; (2) the natural parent's long acquiescence in the third party's custody of the child; or (3) voluntary relinquishment of the child such that the affection 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. *A.S.* at 651, citing *In re K.I.*, 903 N.E.2d 453, 458-59 (Ind. 2009). These factors are not exclusive, and other factors can be considered. *A.S.* at 651. The presumption is not overcome just because a third party could provide for better things in life for the child. *A.S.* at 651, citing *T.P.* at 731 (Ind. Ct. App. 2010). The third party has the burden of rebutting the presumption in favor of the natural parent. *A.S.* at 651, citing *A.J.L. v. D.A.L.*, 912 N.E.2d 866, 873 (Ind. Ct. App. 2009).

Even when the evidence most favorable to the trial court’s judgment was considered by the Court, the Court determined that the evidence did not support the trial court’s conclusion that Grandmother overcame the presumption in favor of the natural parent. A.S. at 652-53. The trial court had determined that (1) Mother was essentially unfit, and (2) the relationship between the child and Grandmother was so “strong, compelling, and interwoven” that the child would be harmed if the relationship was not continued. Id. at 652. However, the Court held that the trial court’s judgment was not supported by clear and convincing evidence because (1) the trial court’s conclusion that Mother was essentially unfit to parent the child because of her schizoaffective disorder and its symptoms, past alcohol abuse, and past life choices was unsupported by the evidence and the trial court’s own findings, and (2) the trial court’s finding that the relationship between the child and Grandmother was so was “so strong, compelling, and interwoven” that the child would be harmed if the relationship was not continued was not supported by the evidence. Id.

The Court determined that the trial court’s conclusion that Mother was essentially unfit to parent the child because of her schizoaffective disorder and its symptoms, past alcohol abuse, and past life choices was unsupported by the evidence and the trial court’s own findings. Id. at 652. In coming to the conclusion that Mother was unfit to parent the child, the trial court first noted its concerns over Mother’s diagnosis of schizoaffective disorder and the effectiveness of controlling the disorder long term through medication. Id. However, the Court determined there was no evidence to support the trial court’s concern about the effectiveness of the medication in controlling Mother’s disorder, and in fact, the only evidence presented on the long term effectiveness of the medication was that Mother was taking the medication as prescribed and was willing and able to make any necessary adjustments to the medication. Id. The Court also noted that the evidence presented at the hearing indicated Mother’s disorder only caused her to have suicidal ideations once. Id. Although the trial court had also cited alcohol abuse and past suspect life choices in making its determination, the Court opined there was no evidence that anyone believed Mother would again abuse alcohol, and no evidence that Mother, now thirty-eight years old, would return to her life of gang-related activity that she led in her adolescent years. Id. The Court noted that the trial court’s findings that were supported by the evidence weighed in favor of Mother’s fitness to parent the child; those finding included findings that the child enjoyed life with Mother, that Mother and Stepfather had raised an above average student in the child, and that the child was well adjusted in Mother’s home. Id. After examining the evidence most favorable to the trial court’s judgment and findings, the Court held that the trial court’s judgment was not supported by the evidence. Id. at 652-53.

The Court held that the trial court’s finding that the relationship between the child and Grandmother was so was “so strong, compelling, and interwoven” that the child would be harmed if the relationship was not continued was not supported by the evidence. Id. at 652, 653. The Court noted that despite this finding by the trial court, the evidence on this finding pointed toward the opposite conclusion. Id. at 652. The evidence the Court noted in coming to this conclusion included: (1) evidence that although the child was sad and missed Grandmother, the child adjusted appropriately to the separation; (2) testimony from both Grandmother and Mother that from 2002 to 2007, they were joint caretakers of the child, and that the child formed a strong bond with both of them; and (3) that the trial court’s stated intention was to eventually

grant physical custody to Father, an intention that was inconsistent with the conclusion that the relationship between Grandmother and the child is so strong that it must not be severed or harm to the child would ensue. Id.

The issue of whether Grandmother was in fact a defacto custodian was not necessary for the Court to consider. Id. at 650 n.2. The Court determined that it was not required to address the issue of whether the trial court had erred in determining that Grandmother was a defacto custodian. Id. In coming to this conclusion, the Court cited In Re The Paternity of L.J.S., 923 N.E.2d 458, 461 n.1 (Ind. Ct. App. 2010), noting that previous case law held that even if Grandmother was a de facto custodian, she would still need to overcome the strong presumption in favor of the natural parent in order to gain custody of the child. Id. Therefore, it was more appropriate to answer the question of whether Grandmother had met her burden to receive custody of the child. Id.