

Children's Law Center of Indiana



Guardianship and Third Party Custody

10/22/14

In Re Paternity of B.J.N., 19 N.E.3d 765 (Ind. Ct. App. 2014), is a consolidated appeal arising from orders issued by the Decatur Circuit Court (Decatur Court) and the Hendricks Circuit Court (Hendricks Court). The Court of Appeals affirmed the Decatur Court's judgment and affirmed the Hendricks Court's judgment in part. The Court of Appeals reversed the Hendricks Court's award of attorney fees. The child was born in January 2009, and remained in Mother's custody until March 2010, when she was made a ward of the State of Illinois and placed in foster care. In September 2010, Father was released from incarceration and began visiting with the child. Father filed a paternity action, and was adjudicated to be the child's father by the Kankakee Circuit Court (Kankakee Court) in Illinois in February 2011. On March 29, 2013, Mother brought the child to Greensburg, Decatur County, Indiana where the child was to live with Guardian, who was a friend of Father. Father lived in Hendricks County at the time, and wanted the child to live with Guardian so that Father could be closer to the child. On April 16, 2013, Guardian filed a petition in the Decatur Court requesting that the court appoint her as the child's guardian. Father and Mother consented to the guardianship. The Decatur Court granted the guardianship petition on April 16, 2013.

On October 23, 2013, Father petitioned the Hendricks Court to register the order of the Kankakee Court recognizing his paternity. The next day, Father filed a motion in the Decatur Court to vacate its guardianship order, alleging that the Decatur Court lacked jurisdiction when it awarded custody to Guardian on April 16, 2013. On November 8, 2013, following a hearing, the Decatur Court issued an order requiring that Father's parenting time be supervised. On December 11, 2013, Father filed a Verified Petition to Modify Custody, Parenting Time, and Support in the Hendricks Court. On January 2, 2014, Guardian filed a motion to dismiss Father's petition in the Hendricks Court. On January 8, 2014, the Decatur Court denied Father's motion to vacate the guardianship for lack of jurisdiction. On February 4, 2014, the Hendricks Court granted Guardian's motion to dismiss Father's custody modification petition. Father appealed the orders of the Decatur Court and the Hendricks Court.

The Court of Appeals found that the Decatur Court had subject matter jurisdiction over the guardianship action. *Id.* at 769. Father appeared to argue that, because he registered his paternity order with the Hendricks Court, that court had exclusive jurisdiction over the "paternity action". Father therefore argued that the Decatur Court lacked jurisdiction to determine who would receive custody of the child at the time the Decatur Court issued its guardianship order. Citing **In Re B.C.**, 9 N.E.3d 745, 751 (Ind. Ct. App. 2014), the Court observed that the question

of jurisdiction is a question of law, and the Court affords no deference to the trial court's conclusion. Id. B.J.N. at 767. The Court noted that there are three types of jurisdiction, namely, personal jurisdiction, subject matter jurisdiction, and jurisdiction over the particular case. Id. Since Father did not argue that the Decatur Court lacked personal jurisdiction over him, the Court analyzed subject matter jurisdiction and jurisdiction over this particular case. The Court said that: (1) courts in Indiana obtain subject matter jurisdiction only through the Indiana Constitution or by statute; (2) subject matter jurisdiction refers to the power of a court to hear and decide a particular class of cases; (3) a judgment rendered by a court lacking subject matter jurisdiction is void and may be attacked at any time. Id. at 767-68. The Court pointed to IC 33-28-1-2, which states that circuit courts are courts of general jurisdiction, empowered to hear all types of cases, including guardianships and IC 29-3-2-1(a)(1), which states that Indiana courts that have probate jurisdiction also have jurisdiction over "[t]he business affairs, physical person, and property of every incapacitated person and minor residing in Indiana." Id. at 768.

Because Father conceded that he had consented to Guardian being appointed as the child's guardian in the Decatur Court, the Court of Appeals held that Father had therefore waived any objection to the Decatur Court's exercise of jurisdiction over this particular matter. Id. at 769. The Court, commenting on Father's argument that the Decatur Court lacked jurisdiction over this particular case, noted that a judgment rendered by a court lacking jurisdiction over a particular case is not void, but only voidable, and must be timely objected to, or it is waived. Id. The Court noted Father's allusion to the Uniform Child Custody Jurisdiction Act (UCCJA , IC 31-21), that the Kankakee Court, having made an initial child custody determination, would have continuing jurisdiction over the case unless it determined that it no longer had such jurisdiction or that Indiana would be a more convenient forum. Id. at 768. The Court found that Father was incorrect, to the extent that he asserted this made the Decatur Court's order void. Id. Quoting Williams v. Williams, 555 N.E.2d 142, 144-45 (Ind. 1990), the Court noted that the Indiana Supreme Court has held that Jurisdiction for UCCJA purposes does not amount to subject matter jurisdiction. B.J.N. at 768. The Court said that, because judgments rendered by courts lacking this type of jurisdiction are only voidable, Father waived his challenge when he consented to the Decatur Court's jurisdiction. Id. at 769. The Court also noted that the Decatur Court could have claimed jurisdiction upon finding that neither the child's parents, nor any person acting as the child's parents, continued to reside in Illinois. Id.

The Court of Appeals found that there was evidence in the record to support the Decatur Court's determination that Father posed a danger to the child's physical health, and that the Decatur Court did not abuse its discretion in ordering Father's parenting time to be supervised. Id. at 770. Father argued that the Decatur Court abused its discretion when it issued an order restricting his parenting time without finding that he posed a risk of harm to the child. Citing Hatmaker v. Hatmaker, 998 N.E.2d 758, 761 (Ind. Ct. App. 2013), the Court said that it reviews parenting time decisions for an abuse of discretion, and a trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances, or if the court has misinterpreted the law. B.J.N. at 769. Citing Bryant v. Bryant, 693 N.E.2d 976, 977 (Ind. Ct. App. 1998), the Court observed that, where the trial court did not enter specific findings of fact, a general judgment standard applies, and the Court may affirm a general judgment on any theory supported by the evidence at trial. B.J.N. at 769. The Court noted that findings are not

required by IC 31-17-4-1, which specifies that a noncustodial parent is entitled to reasonable parenting time rights unless the court finds that the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development. Id. The Court found that the following evidence supported the Decatur Court's determination that Father posed a danger to the child's physical health: (1) Father had a history of drug and alcohol addiction as well as a history of failing to take acceptable care of his other child; (2) Guardian testified that Father had once let the child, who was four years old at the time, ride a moped, which eventually fell on top of her. Id. at 769-770.

The Court of Appeals affirmed the Hendricks Court's order dismissing Father's paternity action. Id. at 771. After the Decatur Court denied Father's motion to vacate for lack of jurisdiction, Guardian filed a motion to dismiss Father's paternity action in Hendricks Court. The bases of Guardian's motion were: (1) failure to state a claim upon which relief can be granted, (2) improper service of process, (3) lack of jurisdiction, (4) incorrect venue, and (5) that another state court action was then pending, namely the Decatur Court guardianship. A hearing was held on Guardian's motion on January 28, 2014, and the Hendricks Court granted Guardian's motion to dismiss. The Hendricks Court's stated reason for granting Guardian's motion to dismiss was for failure to state a claim upon which relief can be granted based on Trial Rule 12 (B)(6), since Father had failed to join Guardian, who was a real party in interest.

The Court of Appeals, citing Charter One Mortg. Corp. v. Condra, 865 N.E.2d 602, 604 (Ind. 2007), noted that its review of a trial court's grant of a motion based on Trial Rule 12 (B)(6) is de novo. B.J.N. at 770. The Court found the issue of the Hendricks Court's jurisdiction to be dispositive. Id. The Court said that this case involves two actions, a guardianship action and a paternity action, commenced in two different courts, Decatur and Hendricks, concerning the same subject matter, namely the child's custody and parenting time. Id. The Court said that the question was whether the Decatur Court and the Hendricks Court could simultaneously exercise jurisdiction. Id. Quoting In Re Paternity of Fox, 514 N.E.2d 638, 641 (Ind. Ct. App. 1987), the Court observed that, "[i]t is well settled that two courts of concurrent jurisdiction cannot deal with the same subject matter at the same time....[o]nce 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." B.J.N. at 770-771. Citing In Re B.C., 9 N.E.3d 745, 753 (Ind. Ct. App. 2014), the Court opined that, because the subject of child custody and parenting time was properly before the Decatur Circuit Court in the guardianship action, the Hendricks Court was precluded from making a custody or parenting time determination in the subsequently filed paternity action. B.J.N. at 771.

The Court of Appeals found that the Hendricks Court erred in awarding Guardian \$1,660 in attorney fees. Id. at 771. The Hendricks Court awarded Guardian \$1,660 in attorney fees in addition to dismissing Father's paternity action. The Court of Appeals said that the Hendricks Court had authority under IC 31-17-4-3(a) to award reasonable attorney fees to Guardian. Id. The Court, quoting A.G.R. Ex Rel. Conflenti v. Huff, 815 N.E.2d 120, 127 (Ind. Ct. App. 2004), noted that "[w]hen making an award of attorney's fees, the trial court *must* consider the resources of the parties, their economic condition, and the ability of the parties to engage in gainful employment and to earn adequate income, and such factors that bear on the reasonableness of the

award.” B.J.N. at 771. The Court found that, during the hearing on Guardian’s motion to dismiss, the Hendricks Court heard no testimony concerning the parties’ income or their ability to engage in gainful employment. Id.