

Children's Law Center of Indiana



Adoption

12/23/2014

In **In the Matter of the Adoption of B.C.H.**, 22 N.E.3d 580 (Ind. 2014), the Court vacated the trial court's order granting the adoption and remanded the matter, holding that: (1) the term lawful custodian encompasses individuals who meet the statutory definition of a de facto custodian at the time the adoption petition was filed, and (2) as lawful custodians of the child, Maternal Grandparents were entitled to notice of the adoption and the opportunity to consent to the adoption petition.

Mother and Father, who were not married, had a child in November 2007. The child stayed with Maternal Grandparents from the time the child was two weeks old until the child turned three months old. Mother then established paternity in February 2008, and was given custody, but continued to leave the child with Maternal Grandparents. In February 2010, Mother began to keep the child one night a week. Later in 2010, Mother married Stepfather. In November 2010, Stepfather petitioned to adopt the child. Although Maternal Grandparents were aware of the adoption petition, they were not given formal notice and did not consent to the adoption. After Mother gave birth to a second child, Mother and Stepfather began keeping the child at their home two days a week. In August 2011, Stepfather's petition to adopt the child was granted. In September 2011, Mother and Stepfather took custody of the child. Maternal Grandparents filed a motion seeking custody of the child in the paternity court where Mother had originally established paternity. In February 2012, the juvenile court granted Maternal Grandparents de facto custodian status, determined that this status gave them visitation rights according to the Indiana Parenting Time Guidelines, and set the matter for a custody hearing. In May 2012, Maternal Grandparents moved to reopen the adoption and intervene, arguing that the trial court abused its discretion in granting the adoption without providing notice to Maternal Grandparents or obtaining Maternal Grandparents' consent. Maternal Grandparents maintained that according to IC 31-19-9-1(a)(3), they had lawful custody, and as such, their consent was required. The trial court eventually denied Maternal Grandparents' motions, determining that Maternal Grandparents did not have lawful custody of the child as required by IC 31-19-9-1 in order to be required to be given notice and have their consent deemed necessary.

On appeal, Maternal Grandparents argued that they had lawful custody of the child during the adoption proceedings because they qualified as de facto custodians by statute, even though the juvenile court had not yet adjudicated them as such. The Court of Appeals affirmed the trial court's decision in **In the Matter of the Adoption of B.C.H.**, 7 N.E.3d 1000 (Ind. Ct. App. 2014), reasoning that because Maternal Grandparents had not been adjudicated as de facto custodians or

granted a formal court order giving them custody of the child, Maternal Grandparents were not entitled to notice of the adoption or to contest the adoption because they were not people with “lawful custody” of the child. The Indiana Supreme Court granted transfer, thereby vacating the Court of Appeals opinion.

The Court held that for purposes of IC 31-19-9-1(a)(3), “lawful custody” encompasses individuals who fit the statutory definition of a de facto custodian at the time a petition for adoption is filed. *Id.* at 585-586. Mother and Stepfather argued that “lawful custody” meant custody that stemmed from a court order, and the Court of Appeals had determined that lawful custody” was the equivalent of legal or court-ordered custody. *Id.* at 584-85. The Court noted that Judge Mathias dissented from this opinion, and opined that “lawful custody” meant being in accordance with or not contrary to the law. *Id.* at 585. The Court agreed with Judge Mathias’s dissent, and held that “lawful” simply means something that is not contrary to law, and therefore, “lawful custody means custody that is not unlawful.” *Id.* The Court noted that IC 31-19-9-1(a)(3) is the only section in the Indiana Code which uses the phrase “lawful custody” instead of legal custody, and therefore, the Court presumed that the legislature deliberately used different words to convey a different meaning. *Id.* The Court opined that the General Assembly used the more expansive and inclusive term “lawful custody” to exclude persons who illegally absconded with a child, but to still include other common custodial arrangements, such as de facto custodianships and informal caretaking arrangements. *Id.* The Court further stated that the use of this language likely reflected the General Assembly’s policy decision that adoption trial courts should be able to hear, and want to be able to hear from a party “with care, custody, and control of the child in question—regardless of whether the party’s responsibility derives from a court order.” *Id.* at 585-86.

Maternal Grandparents were lawful custodians of the child, and as such, were entitled to notice and an opportunity to consent to the adoption proceedings. *Id.* at 586. The Court first noted that it would not consider Maternal Grandparents’ court-adjudicated status as de facto custodians, since that status was not recognized and ordered by the juvenile court until after the adoption petition had already been granted. *Id.* Instead, the Court looked at the circumstances surrounding Maternal Grandparents’ caregiving to the child, and noted the following: (1) Maternal Grandparents had cared for and financially supported the child every day and night for the first forty-five months of her life; (2) they had formed a strong bond with the child; and (3) they continued to act as primary care givers even after the adoption was granted, an adoption which they had no notice of or chance to participate in. *Id.* at 586-7. The Court concluded that “[b]ased on these circumstances, we believe that [Maternal] Grandparents were *exactly* the type of caregivers the General Assembly had in mind when they chose the term ‘lawful custody’ ... in IC 31-19-9-1(a)(3).” *Id.* at 587. As the child’s lawful custodians, Maternal Grandparents needed to be given notice of the adoption and the opportunity to grant or withhold their consent to the adoption. *Id.* The Court noted that although it did not reach its conclusion that Maternal Grandparents were “lawful” custodians of the child by apply the factors listed in IC 31-9-2-35.5, it believed that trial judges would find these factors to be instructive and helpful. *Id.* at 587 n.8. In vacating the adoption, the Court noted that Maternal Grandparents’ opportunity to withhold consent was not the same as a chance to veto the adoption for any reason; the trial court could find that their reasons for withholding consent were not in the child’s best interests, and grant the adoption if it is in the child’s best interests, pursuant to IC 31-19-9-8(a)(10). *Id.*