

Children's Law Center of Indiana



Guardianship/Third Party Custody

06/26/2008

In **Marriage of Huss**, 888 N.E.2d 1238 (Ind. 2008), the Court affirmed the trial court's dissolution and custody judgment, and summarily affirmed the Court of Appeals determination, at **Huss v. Huss**, 870 N.E.2d 588 (Ind. Ct. App. 2007) (unpublished and noncitatable), *trans. granted* 878 N.E.2d 218 (Ind. 2007), of Wife's appellate allegations of improper denial of her Trial Rule 53.1 request and of fundamental unfairness and violation of due process. *Id.* at 1248-49. During the first nine years of their marriage, Husband and Wife had three children. They then separated for eight months, but subsequently reconciled when Wife was four to five months pregnant with another man's child. When the fourth child was born, Wife listed Husband as the father on the birth certificate and gave the child Husband's last name. Four years later, Husband and Wife sought dissolution of their marriage in the Adams Circuit Court (hereinafter dissolution trial court). During pendency of the dissolution proceeding, Mother filed for, and received a judgment in Wells Circuit Court (hereinafter paternity court) establishing paternity of the fourth child in a man other than Husband and awarding her custody of the fourth child. The case's procedural history and additional facts are given below. The dissolution trial court granted the divorce and, among other things, awarded custody of all four children to Husband. Wife appealed.

Dissolution trial court did not err by failing to give effect to the intervening paternity judgment by a different court, where the subject matter of child custody of all four children, including the child who was the subject of the paternity judgment, was before the dissolution court from the inception of the dissolution action which was pending prior to Wife's initiation of the paternity proceedings. *Id.* at 1241-42. Contrary to Wife's contention on appeal, the Court opined that the determinative issue was whether the paternity court was authorized to adjudicate a custody issue that was already pending before another court, rather than whether the dissolution court had improperly failed to honor a judgment of a sister court. The Court concluded: "Because the subject of child custody was first properly before the Adams Circuit Court in the dissolution proceeding, we conclude that the Wells Circuit Court was precluded from making a custody determination regarding the same child in the subsequently filed paternity action." *Id.* at 1241. The Court cited and quoted IC 33-28-1-6 and **In Re Paternity of Fox**, 514 N.E.2d 638 (Ind. Ct. App. 1987), *trans. denied*, in support of this conclusion. The Court reviewed the procedural history here: (1) Husband's petition for dissolution of marriage, filed in the Adams Circuit Court on April 21, 2005, asserted that there were four unemancipated children born of the marriage, named each of them, and expressly requested that a provision be made with respect to the custody and support of these children; (2) Wife's counter-petition identified the same four children as "born to this marriage;" (3) each party moved for a provisional order requesting custody of the children; (4) following a contested hearing, the dissolution trial court awarded temporary custody of all four children to Husband; (5) Wife, as mother and next friend of the child, thereafter filed a separate paternity action in

Wells Circuit Court as to the youngest of the four children; (6) Wife prosecuted the paternity action to its conclusion during pendency of the dissolution action and obtained a paternity judgment that another man was the child's biological father, limiting his visitation rights, and awarding her custody; (7) Wife notified the dissolution trial court of the paternity judgment and filed a motion to dismiss the subject child from the dissolution case, attaching a copy of the paternity judgment; and (8) the dissolution trial court took Wife's motion under advisement and proceeded to a contested final hearing, after which it denied Wife's motion and entered the final decree which, among other things, awarded custody of all four children to Husband. *Id.* at 1242. In reaching its conclusion, the Court observed that (1) the subject matter of child custody of all four children was unquestionably before the dissolution court from the dissolution action's inception; (2) Wife could have, but did not, seek a determination in the dissolution proceeding that Husband was not the biological father of the child; (3) Wife's subsequent prosecution of a separate paternity action in the different court could not, and did not, operate to interrupt or supersede the authority of the dissolution court to determine the custody of all four children, including the child who became the subject of the paternity action; and (4) the dissolution trial court was entitled to complete its handling of the previously filed dissolution action, including its determination of custody of all four children. *Id.*

Dissolution trial court had jurisdiction over the child of which Husband was not the biological father. *Id.* at 1242-43. The Court distinguished *Russell v. Russell*, 682 N.E.2d 513, 517 (Ind. 1997) which holds that a dissolution court does not have jurisdiction to enter a custody order regarding children born during a marriage but whose biological father was not the husband. The Court pointed out that *Russell* at 518 observed that in cases where the parties "stipulate or otherwise explicitly or implicitly agree that the child is a child of the marriage," and there is a determination that a child is a child of the marriage, the divorcing husband and wife "will be precluded from challenging that determination, except in extraordinary circumstances." The Court opined, "While *Russell* imposed limits on a dissolution court's power to consider such a child as a child of the marriage, *Russell* did not involve a non-biological father's request for custody predicated on the child's best interests..." which determination was actually the ultimate basis for the dissolution trial court's decision in this case to award Husband custody of the child he did not father. *Huss* at 1242-43.

Dissolution trial court's authority to determine custody of all four children, including the child of which Husband was not the biological father, was not impaired by the paternity statute's general presumption of sole custody for the biological mother; and, even if Wife were to be considered sole custodian of the child by reason of the paternity judgment or the operation of the paternity statute, the dissolution court in this case would be authorized to consider whether to make a superseding award of child custody to Husband as a non-biological parent of the child. *Id.* at 1244. Wife contended that, where both a wife and husband know that a child being born to the wife is not the husband's child, the child is deemed to be a child born out of wedlock, and that IC 31-14-13-1 requires that a biological mother is to have sole legal custody of a child born out of wedlock. The Court reviewed IC 31-14-13-1 noting that the provision relied on by Wife is subject to a number of exceptions, two of which apply to this dissolution case: "(3) IC 31-14 (custody of a child born outside of a marriage);" and "(8) an order by a court that has jurisdiction over the child." *Id.* at 1243. The Court concluded that, here, this statutory presumption did not compel an award of custody to Wife, inasmuch as "[e]ither the dissolution court is considering the award of custody of a child born outside the

marriage, as under Russell, or, if not, then it was a court that had jurisdiction over the child.” Id. The Court noted: (1) in the dissolution proceeding Wife affirmatively applied to the dissolution trial court for temporary and permanent custody and child support as to all four children born during the parties’ marriage, and she did not raise any issue of paternity until one week before the scheduled final dissolution hearing; (2) the issue of child custody was clearly before the dissolution court before the commencement of the paternity action, and the dissolution court was entitled to complete its handling of the previously filed dissolution action, including the determination of custody of all four children; and (3) the dissolution trial court did not err in failing to give effect to the intervening paternity and custody judgment of the paternity court. Id. at 1243-44.

The Evidence was not insufficient to support the dissolution trial court’s award of custody to Husband, a “non-parent third party,” rather than to Wife as the child’s biological mother. Id. at 1248. In making this determination, the Court noted the following facts:

(1) during the marriage, Husband was at home evenings and spent time helping the children with their homework; (2) Husband prepared meals and shared doing the laundry and shopping with Wife; (3) during the almost one year period following the provisional order granting him custody, Husband was primary caretaker for all four children; (4) Husband fully accepted the subject child as his own, and treated all four children equally; (5) Husband regularly made several trips to school each day to facilitate the children’s participation in extracurricular activities; (6) considerable testimony regarding the close relationship between the four children and both parties’ extended families nearby; (7) Wife’s mother’s testimony that what the children needed was stability, and they were getting that from being with Husband; (8) witnesses’ testimony about Wife’s plans to move with the subject child to Louisiana, and how this would negatively impact the child’s stability and family relationships; and (9) the dissolution trial court interviewed the children in chambers. Id. at 1247. The Court also observed that it could not reweigh the evidence as Wife urged. As to the dissolution trial court’s conclusion that the husband was and had been a de facto custodian of the child, the Court concluded that, inasmuch as Wife did not assert any appellate claim that such de facto status was a necessary prerequisite to the custody award, the correctness of this finding was not a determinative issue. Id. at 1248. The Court did observe in a footnote, however, that there is an unresolved issue “regarding whether ‘de facto custodian’ status is a necessary prerequisite in a dissolution proceeding to a spouse receiving custody of a child for whom the spouse is not the biological parent.” Id. at 1248 n.3. The Court (1) listed non-dissolution cases which have held that a party who is not a natural parent need not allege or claim status as a de facto custodian in order to pursue custody; (2) noted that dicta in Custody of G.J., 796 N.E.2d 756, 762, (Ind. Ct. App. 2003) suggested that, in a dissolution proceeding, the award of custody of a child to a non-biological parent may be restricted to a person who qualifies as a de facto custodian; and (3) this conclusion is not expressly stated in the language of the de facto custody statutes. Huss at 1248 n.3.