



Guardianship/Third Party Custody

7/15/2003

In **Nunn v. Nunn**, 791 N.E.2d 779 (Ind. Ct. App. 2003), a marriage dissolution and custody case, the Court affirmed the trial court's custody determination as to E.N., the biological son of both parties to the marriage, but reversed and remanded regarding jurisdiction over the custody of, and determination as to the husband's visitation rights with B.A., the biological daughter of only the wife. The wife became pregnant and gave birth to B.A. prior to the marriage, but while the parties were dating. During the parties' marriage, the wife became pregnant and gave birth to E.N. Subsequently, the wife filed a petition for dissolution. The husband filed to establish the paternity of B.A., but a DNA test revealed that he was not her biological father. The trial court found that it did not have jurisdiction to consider awarding custody of B.A. to the husband because she was not a child of the marriage and that awarding the husband visitation with B.A. was not in her best interests. The trial court also awarded sole custody of E.N. to the wife, with visitation rights to the husband. The husband appealed whether the trial court properly: (1) determined that it did not have jurisdiction to decide if he was entitled to custody of his stepdaughter; (2) denied his request for visitation with his stepdaughter; and (3) granted the wife sole custody of their son.

The 1999 amendments to the child custody statutes were intended to vest a trial court with jurisdiction to determine whether a third-party is a de facto custodian entitled to consideration in a custody dispute. Thus, the trial court, in the dissolution proceeding, had jurisdiction to determine custody orders concerning mother's biological daughter even though she was not a child of the marriage. Id. at 784. The Court referred to its conclusion in In re L.L. & J.L., 745 N.E.2d 222, 230, (Ind. Ct. App. 2001), that the 1999 amendments were intended "to clarify that a third party may have standing in certain custody proceedings, and that it may be in the child's best interests to be placed in that party's custody." The Court remanded for a determination of whether the husband should be granted custody of his step-daughter, B.A., as a de facto custodian. Nunn at 785.

In cases involving a custody dispute between a natural parent and a third-party, there is a presumption that the natural parent should have custody of the child. The third-party bears the burden of overcoming this presumption by clear and cogent evidence. L.L., at 230-31. The Court remanded this issue to the trial court for consideration under the framework announced in L.L. Nunn at 784-85. Evidence the Court found tending to rebut the parental presumption included: (1) the step-father did

not know the child was not his biological child until the dissolution proceeding; (2) he had been a father figure to the child her entire life; and (3) he and the child had developed a deep father-daughter bond. The Court also alluded to evidence indicating that awarding custody to the step-father might be in the child's best interest which included testimony that he was instrumental in the child's daily care and financial support.

In determining whether to grant visitation to a non-parent third-party, the third-party must demonstrate the existence of a custodial and parental relationship and that visitation would be in the child's best interests. In re J.A.C., 734 N.E.2d 1057, 1060 (Ind. Ct. App. 2000). The Court held that, on remand, the trial court must provide findings that explain why continued visitation with the step-father was not in the child's best interests in light of the fact that the step-father had always had a father-daughter relationship with the child and demonstrated his desire to maintain that relationship by continuing visitation and support during the pendency of the dissolution proceeding. Nunn at 787.

It is the trial court's responsibility to determine custody in accordance with the child's best interests. The Court held that it could not conclude that the trial court erred in awarding sole custody of the parties' son, E.N., to the mother with visitation rights to the father. The Court noted that the evidence indicated that (1) both parties were involved in the child rearing and had developed strong bonds with their son; and (2) the parties had a difficult time communicating with each other making joint custody an unappealing option. Id. at 787.