

Children's Law Center of Indiana



Guardianship/Third Party Custody

7/7/10

In **Parks v. Grube**, 934 N.E.2d 111 (Ind. Ct. App. 2010), the Court affirmed the trial court's order granting custody of Mother's three children to Paternal Grandparents despite Mother's argument that there was insufficient evidence to support the order. When Mother's and Father's dissolution of marriage was granted on March 23, 2006, Father was awarded custody of the four children (ages 20, 17, 12, and 10 at the time of this appeal). Mother was granted visitation according to the Indiana Parenting Time Guidelines. On April 4, 2007, the trial court approved the parents' agreed modification of custody, granting custody of the oldest child (whose custody is not at issue in this appeal) to Mother. Father maintained custody of the three younger children. Mother remained very active in the children's lives, exercising her parenting time and attending parent/teacher conferences, doctor's appointments, and school activities. Because Father was a truck driver, Mother had physical custody of the children several days and nights during the week and for one-half of the summer. Father unexpectedly died on October 26, 2008, and the second oldest child found Father and called Mother. Mother arrived at Father's residence a short time later but did not stay very long before leaving the children with Paternal Grandparents. The children believe that Mother was intoxicated that night. The children returned to Mother's residence several days later, and the two youngest children remained with Mother. The second oldest child left Mother's residence in February 2009 to live with Paternal Grandparents. Father's will requested that Paternal Grandparents be granted custody of the children; the will was admitted to probate prior to the filing of the action herein. On November 7, 2008, Mother filed a Petition to Modify, seeking custody of the children. On November 10, 2008, Paternal Grandparents filed a Petition for Leave to Intervene and Petition for Modification of Custody. Hearings on the competing custody petitions were held on January 8, 2009, and July 23, 2009. Evidence of Mother's alcohol abuse was presented, along with pages from two of the children's journals. The trial court also conducted a modified in camera interview with two of the children. On October 14, 2009, the trial court entered findings of fact and conclusions of law and awarded custody of the children to Paternal Grandparents, and Mother appealed.

The Court opined that Paternal Grandparents were not required to prove that Mother is unfit. *Id.* at 115. The Court cited K.I. Ex Rel. J.I. v. J.H., 903 N.E.2d 453, 458 (Ind. 2009), stating that in custody disputes between natural parents and third parties, a presumption exists that it is in the best interest of the child to be placed in the custody of the natural parent. Parks at 114. Citing In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002), the Court said:

The Derelle Watson-Duvall Children's Law Center of Indiana - A Program of Kids' Voice of Indiana
9150 Harrison Park Court, Suite C • Indianapolis, IN 46216 • Ph: (317) 558-2870 • Fax (317) 558-2945
Web Site: <http://www.kidsvoicein.org> • Email: info@kidsvoicein.org

(1) third parties can rebut the parental presumption by presenting clear and convincing evidence that the best interests of the child will be served by placing the child in the custody of the third party; (2) the trial court must be convinced that placement with a third party represents a substantial and significant advantage to the child; (3) evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third parties is not limited to these criteria; (4) the issue is not merely the "fault" of the natural parent; rather it is whether the important and strong presumption that child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. Parks at 114-15. The Court went on to quote Francies v. Francies, 759 N.E.2d 1106, 1114 (Ind. Ct. App. 2001), which states that once a presumption in favor of the natural parent has been rebutted, "the trial court should then engage in a general best interest analysis, wherein it may, but is not required to, consider statutory best interest factors, if the proceeding is not specifically governed by such statutes." Parks at 115. The Court noted Mother's argument that Paternal Grandparents failed to prove that she was unfit at the time of the hearing and therefore the trial court's order is erroneous. The Court observed that, although evidence that a natural parent is unfit is important, it is not the only criteria the trial court may consider. Id.

The Court could not conclude that the trial court impermissibly relied on Mother's previous alcohol-related arrests or her history of alcohol abuse. Id. at 117. Mother argued that the trial court erroneously concluded that she "has been treated for alcoholism and, by all accounts, continues to have an issue with alcohol abuse, affecting not only her mental health, but the mental and physical health and well-being of her children." Id. at 115. Mother contended that this conclusion is erroneous because she was never treated for "alcoholism" but instead she "underwent counseling for alcohol abuse subsequent to her second alcohol related arrest during 2005." Id. The Court opined that, regardless of the label used by the trial court, it is clear that the trial court was convinced that Mother had, and continues to have, a problem with alcohol. Id. The Court declined to engage in senseless hair-splitting as a basis for error. Id.

Mother also contended the trial court erroneously concluded that she continues to abuse alcohol, affecting her mental health and the children's health and well-being. Id. at 115-16. Mother contended that expert testimony is required to prove that her alcohol consumption has affected the children. Id. at 116. The Court noted the following evidence in support of the trial court's conclusion: (1) Mother's former friend and neighbor testified that she used to care for the children because Mother was intoxicated and that Mother would "come home drunk with a stranger" during her parenting time with the children; (2) Mother's former boyfriend testified that Mother was intoxicated "a hundred out of a hundred and twenty" days that she lived with him in 2007; (3) two of the children stated in the in camera interview that Mother was intoxicated the day Father died and, after Father's death, one of the children found a beer can in Mother's purse and a bottle of vodka under Mother's trailer; (4) pages from two of the children's journals were presented on which they wrote that when Mother is intoxicated she yells at them,

calls them names, and tells them that she does not want to see them again. Id. The Court could not agree with Mother that there was no evidence supporting the trial court's conclusion that her continuing alcohol abuse affects her mental health. Id. The Court said that the cases Mother cited to support her argument that expert testimony was necessary are inapposite, inasmuch as the cases involve either medical malpractice or personal injury. Id. The Court characterized Mother's argument that two witnesses admitted they had not seen her since 2007 and the children's and Paternal Grandparents' admissions that they have not seen Mother drink alcohol since Father's death as a request by Mother to reweigh the evidence and judge the credibility of witnesses, which the Court will not do. Id.

Mother also argued that the trial court should not have considered any evidence of facts that occurred before the last custody order entered on April 16, 2007, including her prior alcohol-related arrests. The trial court observed that "[m]other has two (2) convictions for Operating a Vehicle While Intoxicated, one in 2003 and one in 2005;" and that "the children clearly are bitter about their belief that their mother drinks too much and gets drunk;" that "Mother's drinking problem has been, and currently is, more detrimental to the children than she is willing to admit or understand." Id. at 117. The Court opined that it is clear that the trial court considered Mother's history of alcohol abuse in the context of its continuing effect on the children (emphasis in opinion). Id. The Court said that these are relevant considerations when determining a child's best interests. Id.

The Court found that the trial court did not err when it considered the children's preference to live with Paternal Grandparents. Id. at 118. The Court did not agree with Mother's argument that the trial court based its decision solely on the preferences of the two older children. Id. at 117. The Court also cited IC 31-17-2-8(3), which states that "[t]he wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age," is a relevant factor when determining a child's best interests. Id. at 117-18.