

Children's Law Center of Indiana



Guardianship and Third Party Custody

12/18/2015

In T.H. v. R.J., 23 N.E.3d 776 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's denial of Grandparent's requests for custody of the child and for continued court-ordered visitation. The Court held that the trial court did not err in its findings, that it applied the correct legal standard in reaching its decision, that it did not err in its determination that Grandparents had failed to overcome the presumption in favor of the natural parent, and that the de facto custodian statutes could not be extended to include visitation rights with the child.

Mother and Father, who were not married, had a child in November 2007. Before Mother gave birth, Grandparents insisted that Mother move into her own apartment. After the child was born, Mother and the child first went home to her apartment, but shortly thereafter, Mother and the child moved in with Grandparents. Mother and the child eventually returned to Mother's apartment, and while Mother worked, she left the child with Grandparents. Due to Mother's unpredictable work schedule, she began leaving the child with Grandparents overnight, so that the child would have a more consistent schedule. Mother eventually let the child stay with Grandparents full time so that Mother could work and go to school, and so that the child could have a consistent schedule. Paternity was established in February 2008, and Mother was given custody, but continued to leave the child with Maternal Grandparents. Father continued to have no relationship with the child. In 2008, Mother met Stepfather, an Iraq war veteran, and began dating him. They married in 2010 when Mother became pregnant, and they began keeping the child for at least one overnight per week. When Stepfather mentioned to Grandparents that he had a job opportunity in Georgia and that they wanted to take the child, the Grandparents objected. Mother and Stepfather did not move, and they continued to split time with the child with Grandparents. Stepfather and Mother initiated proceedings for Stepfather to adopt the child, which resulted in the Indiana Supreme Court Case, In The Matter of the Adoption of B.C.H., 22 N.E.3d 580 (Ind. 2014). After Mother gave birth to their child, Mother and Stepfather did not visit the child for about four weeks, while Mother recovered, but then resumed visits. In September 2011, Grandparents witnessed a pillow fight between Stepfather and the child, and believed it was too rough, although the child was not hurt and was laughing. Grandparents took the child to a chiropractor, who diagnosed the child with whiplash. Stepfather, Mother, and Grandparents argued over this incident and the diagnosis when Mother and Stepfather arrived to pick up the child, and Grandmother eventually locked herself and the child in the bathroom and would not let Mother and Stepfather take the child. When parents were supposed to pick up the child the next day, Grandparents had taken the child and went to Owen County. Mother and

Stepfather called the police, who required Grandparents to return the child. Stepfather and Mother took the child to the emergency room, and the hospital found no injuries resulting from the pillow fight. The child began living with Mother and Stepfather full time.

Grandparents filed a petition to establish custody, alleging that Mother had abandoned the child and to remove the child from their custody would cause the child harm. They also requested a bonding assessment, which was granted and performed by Dr. John Ehrman. Dr. Ehrman concluded that the child was very bonded to Grandparents, but did not obtain information from any sources other than from Grandparents, and had never met or talked to Mother or Stepfather. The trial court determined that Grandparents qualified as de facto custodians, but left the child with Mother and Stepfather, granted Grandparents visitation, and ordered a custody evaluation. In October 2012, Dr. Joni Gonso completed the custody evaluation, recommending that Mother and Stepfather have custody of the child. Dr. Gonso noted very little concerns about Mother and Stepfather, while indicating that she had concerns about Grandparents and their behavior, boundaries, and their fears about “losing” the child. Grandparents then filed new pleading raising issues about Stepfather’s mental health, citing Stepfather’s PTSD and an incident involving a gun that led to his admission to the Veteran’s Hospital and his PTSD diagnosis. Stepfather submitted to a psychological evaluation with Dr. Bart Ferraro, and the doctor concluded that Stepfather no longer exhibited PTSD symptoms, that Stepfather’s life had changed significantly since his original diagnosis, and that Father had developed adequate coping mechanisms. In September 2013, after a trial, the court issued an order determining that Grandparents had not overcome the parental presumption in favor of the natural parents, granted Mother and Stepfather sole legal and physical custody, and ended all court ordered visitation for Grandparents.

The Court held that the evidence supported the trial court’s findings regarding both Stepfather’s mental health and the medical attention given to the child. Id. at 784-5.

Grandparents first contended that the evidence did not support many of the trial court’s findings, focusing on Stepfather’s mental health and Stepfather’s and Mother’s treatment of the child’s medical needs. Id. at 784. The trial court found that Stepfather did not pose a risk to himself or the child, and Grandparents challenged that finding by attempting to discount Dr. Ferraro’s evaluation of Stepfather. Id. The Court dismissed this an invitation to reweight the evidence, which it declined to do. Id. at 785. The Court also opined that there was ample evidence to support the trial court’s finding that Stepfather did not pose a danger to the child, noting that Dr. Ferraro was highly positive about Stepfather’s coping ability and recovery. Id. Regarding the alleged lack of medical attention given to the child, the Court noted the following findings of the trial court supported its decision: (1) Grandparents were unduly obsessive about the child’s health; and (2) Grandparents’ insistence that the child sustained whiplash while playing with Stepfather was not supported by the child’s behavior, and an emergency room physician found no injuries. Id. The Court opined that Grandparents’ other arguments regarding the alleged lack of medical attention were merely requests to reweigh the evidence. Id.

The Court determined that the trial court could not err by failing to apply the Hendrickson factors because it was not required to use those factors at all. Id. at 786, citing Hendrickson v. Brinkley, 316 N.E.2d 376 (Ind. Ct. App. 1974); In Re Guardianship of B.H., 770 N.E.2d 283

(Ind. 2002). Grandparents argued that the trial court applied an incorrect legal standard in reaching its conclusion that Mother and Stepfather should have custody of the child, in that the trial court did not address the factors listed in Hendrickson v. Brinkley, 316 N.E.2d 376 (Ind. Ct. App. 1974). Id. at 785. The Court determined that this argument failed, since the Indiana Supreme Court held in In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) that the Hendrickson factors, while useful, were not the only factors that a trial court could consider in determining whether or not a third party has rebutted the presumption in favor of the natural parent. Id. at 786. Since the trial court was not required to limit itself to those factors, it could not have erred in failing to analyze the evidence in light of those factors. Id.

The trial court did not err by not considering the best interests and de facto custodian factors provided at IC 31-14-13-2.5; since Grandparents were unable to overcome the presumption in favor of the natural parents, the trial court did not need to address best interests factors. Id. at 786. Grandparents argued that the de facto custodian statute played a role in determining whether or not a third party has overcome the presumption in favor of the natural parent. Id. at 786. IC 31-14-13-2.5 provides factors a court should consider in determining custody when a de facto custodian is involved with the custody proceeding. Id. The Court noted that these were all factors that played into a child's best interests; in cases where a third party seeks to obtain custody of a child, that third party must first overcome the presumption in favor of the natural parent by clear and convincing evidence, and *then* the third party must show that placement with the third party serves the child's best interests. Id. Since the trial court determined that Grandparents failed to overcome the presumption in favor of the natural parents by clear and convincing evidence, the trial court did not need to consider the factors listed at IC 31-14-13-2.5, since Grandparents did not carry their burden to reach the best interests part of the case. Id.

The Court held that the trial court did not err in concluding that Grandparents failed to overcome the presumption in favor of the natural parents. Id. at 787. Grandparents argued that Mother's and Stepfather's alleged acquiescence in the child's living with them, and the existence of a strong emotional bond between themselves and the child was sufficient to overcome the presumption in favor of the natural parents. Id. at 786. The Court noted that their arguments and the evidence supporting these arguments were largely self serving. Id. The Court also noted that in addition to showing that they overcame the parental presumption, Grandparents would also need to show that placing the child with them gave the child a substantial and significant advantage. Id. The Court opined that Grandparents had failed to do so, and noted testimony in the record where Grandfather admitted he did not believe that either Mother or Stepfather had ever abused the child, but rather, he thought he and Grandmother could do a better a job. Id. at 786-7. Such evidence is insufficient to support a finding that placement with a third party is a substantial and significant advantage to a child. Id.

Lastly, the Court declined to extend the de facto custodian statute to provide visitation rights with a child who has been removed from the custody of a de facto custodian; prior case law had determined that since the de facto custodian statute did not address visitation, it therefore did not provide for visitation between a child and the defacto custodian who

lost custody of that child. Id. at 787. The Court characterized Grandparents’ final argument regarding their visitation with the child as a request that the Court expand the de facto custodian statutes to give third parties visitation rights with children who have been removed from their care. Id. at 787. The Court noted that the Indiana Supreme Court has already spoken on this issue and determined that “[De facto custodian status] bears only on the question of custody. The apparent intent of the de facto custodian statute is to clarify that a third party may have standing in certain custody proceedings, and that it may be in a child’s best interests to be placed in that party’s custody. The statute is silent on the question of visitation.” Id. at 787, citing In Re Paternity of K.I., 903 N.E.2d 453, 459 (Ind. 2009). Since the Indiana Supreme Court had already determined that the de facto custodian statute did not address and thus could not provide for visitation to third parties who might qualify as de facto custodians, the Court determined that it was bound by this decision. T.H. at 787.