



Custody and Parenting Time

4/27/2020

In **In re Paternity of A.J.**, 146 N.E.3d 1075 (Ind. Ct. App. 2020) *trans. denied*, the Court held: (1) the evidence supported the trial court's determination that Mother having custody was in the child's best interests; (2) Father was estopped from arguing that Mother was not the legal mother to the child because of the use of a surrogate; (3) the trial court did not err in ordering Father to pay support; and (4) the trial court did not abuse its discretion in declining to draw a serious negative inference against Mother over the issue of spoliation of evidence.

Mother and Father used a surrogate in order to become parents of the child. Evidence showed that although a surrogate was used to conceive the child, everyone looked on Mother as the child's Mother and everyone held Mother out to the world as the child's mother. The child knows Mother as Mother. Mother provided day to day care for the child, while Paternal Grandparents cared for the child on weekends. The child had a medical condition, and Mother handled all medical appointments, including the child's feedings. Father spent at least half of every week away from the child and did not maintain any contact with the child while gone. Parents dissolved their marriage, and through a separate paternity proceeding, established their rights regarding the child. Mother and Father attempted reconciliation in October 2016, but it failed within two weeks. From July 2016 to February 2017, Mother had exclusive care of the child, and continued to have care of the child via guardianship orders through September 2017. At a September 2017 guardianship hearing, Father presented a signed paternity affidavit, signed then the child was born, and the child was moved to Paternal Grandparents. There was an emergency hearing in the paternity case, giving temporary custody to Father. Father had not pursued any kind of custody or visitation with the child between October 2016 and September 2017, during which time he moved to Tennessee and moved in with another woman. The trial court determined that Father had abdicated most of his parental responsibilities, and he gave over care of the child to his new wife often. The trial court determined that despite the contempt petitions, the parties were mostly compliant with visitation orders, but that Father was less compliant than Mother. The trial court noted ways in which Father interfered with Mother's visits, and that his reasons were weak and not credible. The trial court also found that the child's only blood relative in Tennessee was Father, while with Mother, the child had Mother and other relatives, such as Paternal Grandparents. The child had made accusations of serious abuse against Mother, but the trial court concluded that the child was coached to do so but Father, his new wife, or both; in either event, there was no evidence to support the allegations. The Court credited Dr. Jonni Gonso's testimony regarding the bond between the child and Mother and the lack of relationship between the child and Father. Based on this and other evidence, the trial court awarded custody to Mother.

Father did not argue that the trial court applied the incorrect legal standard; as such, the evidence supported the trial court's decision that awarding Mother custody was in the

child's best interests. Id. at 1082. Father argued on appeal that since he was the only biological parent of the child, Mother's evidence could not overcome the presumption that he should have custody. Id. at 1082. However, Father did not argue that the trial court applied the wrong standard; instead, Father only argued that the trial court should have weighed the evidence differently, and the Court declined the request to reweigh the evidence. Id. A child's best interests is the controlling factor in custody cases, and the evidence most favorable to the trial court supported the judgment. Id. The Court noted the following evidence supported the trial court's judgment: (1) Father failed to prioritize the child; (2) Father abdicated his parental role and left caregiving to Mother; (3) Father interfered with Mother's role in the child's life as the child's only mother figure; (4) Father encouraged or permitted coaching of the child against Mother; (5) Mother and the child are well bonded; (6) Mother is very involve dint he child's life and development; and (7) awarding custody to Mother allowed the child to maintain important relationships, including with Paternal Grandparents.

The Court held that Father was estopped from arguing that Mother was not the legal mother to the child because of the use of a surrogate. Id. at 1082. Father was estopped from trying to argue that Mother was not the parent to the child; the child was a child of marriage, even if a surrogate was used. Id. at 1082. The Court noted the case of Levin v. Levin, 645 N.E.2d 601, 604-5 (Ind. 1994), where the Indiana Supreme Court held that the father was estopped from denying that a child conceived through artificial insemination was a child of the marriage, stating that "[t]o hold otherwise would be unjust." The Court opined that the same reasoning applied here; the parties agreed to use a surrogate, and the child was conceived and born during their marriage. Id. Mother was not required to adopt the child in order for her status as Mother to be recognized. Id.

The trial court did not err in ordering Father to pay support. Id. at 1083. Father argued that there was no evidence of anyone's income, but the trial court's findings took notice of and incorporated the dissolution record. Id. The Court noted that Father offered no argument that this notice and record was insufficient for the trial court to make a child support determination. Id.

The trial court did not abuse its discretion in declining to draw a serious negative inference against Mother over the issue of spoliation of evidence. Id. at 1084. The Court explained spoliation as a discovery abuse where evidence is intentionally or negligently destroyed, altered, or concealed. Id. at 1084. The trial court determined that while Father's arguments regarding spoliation had merit, the deleted posts would likely have highlighted even more unkind commentary about Father from Mother and would not have contributed in a significant way to the evidence. Id.

Lastly, the Court held that the trial court did not err in refusing to order Mother to pay Father's attorneys' fees. Id. at 1084. Father had argued that he was entitled to fees due to Mother's alleged falsehoods in pleadings, but the Court noted that Father was in position to critique Mother's behavior, given his own behavior, pleadings, and actions. Id.