



## **Custody and Parenting Time** **Third Party Custody**

4/6/20

In **Paternity of M.S.**, 146 N.E.3d 951 (Ind. Ct. App. 2020), the Court held that the trial court erred in finding Alleged Paternal Grandmother to be a de facto custodian; consequently, the trial court erred in not allowing her to intervene, and in not considering other relevant custody modification factors.

Father and Mother are the parents of M.S., born 2009, L.S., born 2010, and S.S., born 2012. Mother and Father never married. Father established paternity by paternity affidavit, and his paternity was confirmed in court proceedings for child support in 2011. Despite Father having established paternity for L.S., there was a possibility that the father was another man, and the mother of that man was Alleged Paternal Grandmother. Mother left L.S. with Alleged Paternal Grandmother in 2011, and L.S. has since remained there. In March 2018, Father filed a petition to modify custody and child support for all the children, alleged that L.S. was in the care of a third party but should be with a parent, and made other allegations about the children missing school in Mother's care, Mother's convictions for drug related felonies, Mother's moving four times in one year, Father's ongoing care of the children, and M.S.'s reports of being inappropriately touched by Mother's brother. The Court appointed a GAL, gave Father provisional custody of M.S. and S.S., and continued L.S.'s placement with Alleged Paternal Grandmother. Alleged Paternal Grandmother intervened, alleging that she was a de facto custodian. The GAL initially recommended that L.S. remain with Alleged Paternal Grandmother; but at one point Alleged Paternal Grandmother indicated that L.S. should be with Mother. The GAL ultimately recommended that all the children be with Father.

Testimony and evidence at hearing included: (1) Mother and Alleged Paternal Grandmother alleged that Father was involved in gangs and used drugs; (2) there was video and photographic evidence, but the GAL did not use it because it was unclear; (3) Alleged Paternal Grandmother entered the photos into evidence but not the video, and did not ask the GAL why he did not offer the video into evidence himself; (4) the GAL recommended that L.S. remain with her siblings and that Father have custody of all three children; (5) Alleged Paternal Grandmother had L.S. since birth and would take all three children; (6) Alleged Paternal Grandmother later testified Mother should have all three children; (7) Alleged Paternal Grandmother thought all the children should be together; and (8) Mother wanted Alleged Paternal Grandmother to have custody if Mother did not. Alleged Paternal Grandmother's counsel argued that things should be left as is, or that all children should be together with either Alleged Paternal Grandmother or Mother. One month after the hearing, Alleged Paternal Grandmother sought to admit the video evidence, and the trial court denied the motion.

The trial court issued an order granting Father custody. The trial court denied Alleged Paternal Grandmother's motion to intervene and it determined that she was not a defacto custodian. In so finding, the trial court examined the definition of a defacto custodian and determined that the proceeding commenced in 2011, so no time after that 2011 date could count towards Alleged Paternal Grandmother's time to qualify as a de facto custodian. Mother was granted supervised parenting time and did not grant Alleged Paternal Grandmother any visitation. Alleged Paternal Grandmother filed a motion to reconsider which was denied; she then filed a motion to correct error so the trial court could consider "newly discovered evidence" of the recording and alleged that the GAL failed to fulfill his duty when he did not present the recording. The trial court denied this motion.

**The trial court did not err in denying Alleged Paternal Grandmother's motion to reopen the evidence, as it plainly could have been offered earlier. Id. at 957.** Alleged Paternal Grandmother sought to reopen the evidence to introduce the video recording of Father which allegedly dealt with drugs and gang activity; it was taken by M.S. and given to the GAL by Mother, and the contents of the records were discussed in the GAL report, and at trial. Id. The Court noted that evidence must be offered during the course of a trial, and it is a matter of discretion as to whether a trial court will permit more evidence after the close of trial. Id. "We have held that a trial court does not abuse its discretion in refusing to reopen the evidence 'when it plainly appears that such evidence could have been offered earlier.'" Id. (internal citations omitted). The recording could have been offered earlier, and it was not. Id. The Court also noted that it was not provided a copy of the recording, but it appears it would have been cumulative from other evidence. Id.

**Alleged Paternal Grandmother waived the argument that the GAL failed in his statutory duties by failing to cite to any authority indicating the GAL was required to introduce a copy of the recording into evidence. Id. at 957 n. 7.** Alleged Paternal Grandmother argued that the GAL failed in his duties by failing to introduce a copy of the recording into evidence, provide a transcript of the recording, go into detail regarding the contents of the recording, and provide a copy of the recording to any of the other interested parties in the case. Id. She argued that the only remedy for this was reopening the evidence. Id. The Court noted that Alleged Paternal Grandmother cited no authority indicating that the GAL had any such duty. Id.

**The Court held that "the six-month required minimum period under Indiana Code Section 31-9-2-35.5 can be established either before a child custody proceeding has been commenced or after such an initial proceeding has been concluded." Id. at 959.** The trial court erred when it determined Alleged Paternal Grandmother was not L.S.'s de facto custodian. Id. IC 31-9-2-35.5 defines de facto custodian as a:

person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:

- (1) six (6) months if the child is less than three (3) years of age; or
- (2) one (1) year if the child is at least three (3) years of age.

Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required minimum

period. The term does not include a person providing care for a child in a foster family home (as defined in IC 31-9-2-46.9)

The Court noted that the State sought a paternity action for L.S., and paternity was confirmed in a court proceeding in April 2011; L.S. began living with Alleged Paternal Grandmother in June 2011. *Id.* at 958. L.S. was still living with Alleged Paternal Grandmother in March 2018 when Father filed his petitions to modify; the trial court determined that the proceeding commenced in 2011 rather than 2018, which meant that Alleged Paternal Grandmother could not meet the burden of showing that the child had lived with her for the required minimum amount of time before any proceedings commenced. *Id.* The Court opined that this implied that the six-month minimum can only run before any custody determination and can never run after a custody determination; the Court determined that this did not account for the fact that the 2011 cases began in February, and a custody order issued in April, thus concluding that particular custody determination. *Id.* “The trial court’s finding would mean that, after a child custody proceeding has been commenced, the required minimum period for a de facto custodian determination is forever tolled and cannot be restarted. Under that interpretation, once a child is subject to an initial custody determination, the child could never have a de facto custodian.” *Id.* at 958-59.

The Court noted that the evidence was undisputed that L.S. lived with Alleged Paternal Grandmother from June 2011 to present; that the State filed a petition for child support in February 2011, which resulted in Mother being granted custody in April 2011 when the case was closed; and that the child custody proceeding had concluded by the time Mother gave L.S. to Alleged Paternal Grandmother. *Id.* at 959. “We conclude that the time period relevant to establishing a de facto custodianship excludes any period of time after a child custody proceeding has been commenced and while it is pending. After a child custody proceeding has been commenced and has concluded, however, the calculation of the time relevant to a de facto custodian determination is not tolled.” *Id.*

**Because the trial court erred in determining Alleged Paternal Grandmother was not a de facto custodian, it also erred in not allowing her to intervene and in not making her a party to the proceedings. *Id.* at 962.** IC 31-14-13-2.5(c) provides that is a court determines “a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding.” Thus, the trial court abused its discretion by not allowing Alleged Paternal Grandmother to intervene. *Id.* at 960. The Court determined that this was not a harmless error; the trial court then proceeded to not follow the applicable custody modification laws with respect to de facto custodians, tainting the proceedings and harming Alleged Paternal Grandmother. *Id.* IC 31-14-13-6 provides that a modification of custody may only occur when it is in the child’s best interests, and there is a substantial change in one or more of the best interests factors at IC 31-14-13-2 and if applicable, 2.5. Among other factors, IC 31-14-13-2 lists the following as a factor a trial court must consider: “Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter. IC 31-14-13-2.5 provides

(a) This section applies only if the court finds by clear and convincing evidence that the child has been cared for by a de facto custodian.

(b) In addition to the factors listed in section 2 of this chapter, the court shall consider the following factors in determining custody:

(1) The wishes of the child's de facto custodian.

(2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.

(3) The intent of the child's parent in placing the child with the de facto custodian.

(4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:

(A) seek employment;

(B) work; or

(C) attend school.

(c) If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding.

(d) The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child.

(e) If the court awards custody of the child to the child's de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law.

The Court also noted other case law which should have guided the trial court: In re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002), and K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453 (Ind. 2009). Id. at 961. The Court opined that the trial court's failure to label Alleged Paternal Grandmother as a de facto custodian resulted in her not being made a party to the case, and in the trial court failing to examine relevant de fact custodian statutes, factors, and case law. Id. at 962. This prejudiced her rights in a substantial way. Id.

**Judge Vadik dissented**, agreeing with the majority that the trial court did not err in denying the motion to reopen the evidence, but opining that the majority addressed issues on appeal that were not actually raised by Alleged Paternal Grandmother, and noting that the only argument truly raised by her was that Father was likely not the biological father. Id. at 962-63.