

Children's Law Center of Indiana



Custody and Parenting Time

10/31/13

In **A.C. v. N.J.**, 1 N.E. 3d 685 (Ind. Ct. App. 2013), the Court affirmed the trial court's denial of former Domestic Partner's (Partner's) request for joint custody of the child conceived during Partner's same-sex relationship with Mother. The Court found that the trial court did not err in declining to enforce the parties' agreement that Partner would be a parent to the child. The Court reversed the trial court's conclusion that Partner lacked standing to seek visitation with the child and remanded with instructions to reconsider Partner's request for visitation under the standard set forth in third-party visitation cases. Mother and Partner lived together in a same-sex domestic relationship, and had a commitment ceremony in August 2007, when they had been together for two years. They also decided to have a child via artificial insemination with donor semen, and they agreed that Mother would carry the child. Mother gave birth to the child in April, 2008. After the child's birth, Mother, Partner, and the child lived together as a family unit for over two years, with the exception of a two month period shortly after the child's birth when Partner moved out due to difficulties in her relationship with Mother. Mother was the child's primary caregiver and did not consistently work outside the home. Partner worked and provided financial support for the family for the majority of this time. Mother provided financial support in the form of wages when she was working, unemployment compensation and short-term disability benefits when she was not working, student loans, and a small inheritance. The child referred to Mother as "Mama" and to Partner as "Mommy." When the child attended preschool, Mother listed Partner as the co-parent and emergency contact with the school. Mother and Partner discussed the possibility of Partner adopting the child, but no adoption proceedings were ever commenced. Mother and Partner ended their relationship and ceased living together in August 2010. Mother maintained custody of the child, and, for the next nine months, allowed Partner to spend two or three overnights per week with the child. According to Mother, Partner did not provide financial support for the child during this time, with the exception of a few packages of diapers and about \$80. Mother ended all contact between Partner and the child in July 2011 due to concerns about instability in Partner's living arrangements and possible drug use. Partner last saw the child in October 2011 at his daycare. Partner petitioned for custody of the child on January 18, 2012, arguing that it was always the parties' intent that both Partner and Mother would be considered the child's parents, that Partner was a de facto custodian, and that it was in the child's best interests for Partner to have custody. At the trial on October 30, 2012, Partner clarified that she was seeking joint custody and visitation rather than sole custody. The trial court denied Partner's requests for joint custody and visitation on December 31, 2012, and Partner appealed.

The Court could not conclude that the trial court erred in declining to enforce the agreement between Mother and Partner that Partner would also be the child's parent. *Id.* at 693. The Court noted that Mother does not dispute that she agreed to raise the child with Partner but Mother argued that such agreements are unenforceable in Indiana. The Court looked to the Indiana Supreme Court decision involving a similar situation to this case, King v. S.B., 837 N.E. 2d 965 (Ind. 2005). In King, the mother's former domestic partner, who was also the child's biological aunt, filed a declaratory judgment seeking to be recognized as the child's legal parent, with all the rights and obligations of that status. The mother filed a motion to dismiss the complaint pursuant to Ind. Trial Rule 12(b)(6) for failure to state a claim on which relief may be granted. The trial court granted the mother's motion. In King v. S.B. at 967, the Indiana Supreme Court agreed that dismissal for failure to state a claim was inappropriate, but declined to comment further on the facts of the particular case or the partner's entitlement to the relief sought. A.C. v. N.J. at 690-91. The Court said that, since King, the status of the law surrounding a lesbian partner's right, if any, to enjoy the rights of a legal parent of a child born to her partner remains uncertain, and the General Assembly has not provided guidance. A.C. v. N.J. at 692. The Court observed that the existing statutory framework does not contemplate the increased use of assisted reproductive technologies. *Id.* The Court also distinguished the instant case from M.S. v. C.S., 938 N.E. 2d 278 (Ind. Ct. App. 2010), in which the Court held that a biological mother's former same-sex partner had waived any claim that she was the child's legal parent by failing to raise the issue before the trial court. A.C. v. N.J. at 692 n.5. The Court said that M.S. v. C.S. stands for the proposition that a parent and third party *who is not a legal parent* may not circumvent the adoption laws by entering into a co-parenting agreement (emphasis in opinion). A.C. v. N.J. at 692 n.5. The Court explained that application of the waiver rule in M.S. v. C.S. obviated the need for the Court to address the issue in the instant case, namely, whether a same-sex domestic partner may claim the rights of a parent. A.C. v. N.J. at 692 n.5. The Court said that, in the absence of a legislative directive, if full parental rights are to be recognized in a former same-sex partner under the circumstances presented here, that recognition must come from the Indiana Supreme Court. *Id.* at 693.

The Court affirmed the trial court's denial of Partner's request for joint custody. *Id.* at 694. Partner argued that the trial court erred by applying the wrong legal standard to her request for joint custody, but the Court disagreed. *Id.* at 693. The Court found that the trial court cited In Re Guardianship of B.H., 770 N.E. 2d 283 (Ind. 2002), and articulated the standard for third-party custody therein. A.C. v. N.J. at 694. The Court noted Partner did not argue that the trial court's ultimate conclusion that Partner failed to rebut the presumption in favor of Mother as the natural parent was clearly erroneous. *Id.*

The Court reversed the trial court's conclusion that Partner lacked standing to seek visitation with the child and remanded with instructions to reconsider Partner's request for visitation under the standard set forth in third-party visitation cases. *Id.* at 697. The Court cited Indiana cases on visitation requests by stepparents, relatives, and the mother's former boyfriend (multiple citations omitted). *Id.* at 695. Citing Worrell v. Elkhart Cnty. Office of Family & Children 704 N.E. 2d 1027, (Ind. 1998), the Court noted that the Indiana Supreme Court expressed agreement "with the prior holdings limiting standing to step-parents" and held "that the right does not extend to foster parents." A.C. v. N.J. at 695-96. The Court recognized that there are good reasons to limit the class of individuals with standing to seek third-party

visitation. Id. at 697. The Court said that, by recognizing a right to third-party visitation, the Court has acknowledged that a child’s interest in maintaining relationships with those who have acted in a parental capacity will sometimes trump a natural parent’s right to direct the child’s upbringing. Id. The Court further said that custodial and parental relationships may exist with third parties, other than stepparents. Id. The Court opined that the situation in this case was “characterized by an even stronger indicia of a custodial and parental relationship” because the parties originally intended for Partner to fulfill the role of the child’s second parent and actively encouraged the development of a parental bond between Partner and the child. Id. The Court believed that the Indiana Supreme Court’s decision in King v. S.B. “signaled its amenability to expanding the class of petitioners with standing to seek third-party visitation to include individuals similar to Partner.” A.C. v. N.J. at 697. The Court said that a former domestic partner is not automatically entitled to visitation in these circumstances; it must still be established that visitation is in the child’s best interests. Id.