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Guardianship/Third Party Custody

9/30/2003

In **In Re Custody of G.J.**, 796 N.E.2d 756 (Ind. Ct. App. 2003), *trans. denied*, the Court reversed and remanded the trial court's dismissal of the paternal uncle's petition seeking custody of the child. The mother and father were married when the child was born. They later filed for divorce, but before the dissolution proceedings were final, the father died. Within a matter of weeks of the father's death, the mother remarried and brought the child into that marriage. The paternal uncle filed a "Petition for Custody" of the child which asserted that the paternal uncle was entitled to file the petition pursuant to IC 31-17-2-3(2) and alleged that the mother's new husband was a convicted child molester who also collected child pornography, that a court order in the dissolution action had prohibited the mother from allowing the child to have any contact with the new husband, and that in the past the mother had lost custody of other children to the Office of Family and Children. The mother moved to dismiss the uncle's petition for lack of standing "to pursue custody in this cause." The trial court granted the motion, concluding that IC 31-17-2-3 was "relative only to dissolutions of marriage," and suggesting that the uncle "would properly file under the guardianship statute." The paternal uncle appealed.

An allegation that a party lacks standing is treated as a motion to dismiss under Indiana Trial Rule 12(B)(6) and review of such a dismissal is de novo, and thus deference to the court's decision is not required. See Rayle v. Bolin, 782 N.E.2d 1063, 1064 (Ind. Ct. App. 2003) and Schulz v. State, 731 N.E.2d 1041, 1043-1044 (Ind. Ct. App. 2000).

IC 31-17-2-3(2) means that any person "other than a parent" may seek custody of a child by initiating an independent cause of action for custody that is not incidental to a marital dissolution, legal separation, or child support action. *Id.* at 762. The Court arrived at this conclusion through statutory construction. IC 31-17-2-3 provides:

A child custody proceeding is commenced in the court by:

- (1) a parent by filing a –petition under IC 31-15-2-4 [governing commencement of dissolution actions], IC 31-15-3-4 [governing commencement of legal separation actions], or IC 31-16-2-3 [governing commencement of child support actions]; or
- (2) a person other than a parent by filing a petition seeking a determination of custody of the child.

The Court opined that IC 31-17-2-3 appeared unambiguous on its face, but was rendered ambiguous by other parts of Title 31 and cases in the area. *Id.* at 760. IC 31-9-2-13 defines "'Child', for the purposes of ... IC 31-17, [as] a child or children of both parties

to the marriage.” Indiana courts construed the predecessor to this section in conjunction with the predecessor to IC 31-17-2-3, as meaning that a court in a dissolution action had no jurisdiction to award custody of a child to one who is not the child’s parent. See Russell v. Russell, 682 N.E.2d 513, 515-516 (Ind. 1997). The Court observed that the placement of Section 31-17-2-3(2) in the child custody article, with no mention of marital dissolution in subsection (2), suggested that it is relevant not just to dissolution proceedings. G.J., at 762. The Court also observed that a “child” with respect to a person “other than a parent” is not a “child” as defined in IC 31-9-2-13(a) or Russell. But, if a trial court lacked jurisdiction at all times to award custody to someone other than a parent under Chapter 31-17-2, the Section 31-17-2-3(2) would appear to be entirely meaningless. Such a construction of the statute would be absurd and would effectively amount to ignoring the existence and plain language of Section 31-17-2-3(2). Id.

The Court opined that its conclusion with regard to the meaning of IC 31-17-2-3(2) did not conflict with Russell which did not address the predecessor to Section 31-17-2-3(2) and solely dealt with the child custody proceeding that was incidental to a marital dissolution action. Id. It further observed that it would seem to make more sense to file an action that is truly a child custody action under the child custody statutes set forth in the family law code that to seek a guardianship under the probate code. Id. at 763. Accordingly, the Court concluded that the uncle had standing to file a direct action for custody of G.J, under IC 31-17-2-3(2). Id. at 764.