

# Children's Law Center of Indiana



## Guardianship/Third Party Custody

12/31/2009

In **In Re Guardianship of S.M.**, 918 N.E.2d 746 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's order appointing Aunt permanent guardian of two children. The children's parents had divorced in Vermillion County, Illinois (Illinois court), in 2002. The Illinois court granted custody of the children to Father, but in 2007, the Illinois court modified custody to Mother, who lived in Indiana. The children spent much of their time with Aunt while Mother worked during the evenings. The children moved into Aunt's home when Mother became ill with cancer. Mother died on November 1, 2008, when the children were ages ten and eight.

Two days after Mother's death, Aunt petitioned for and was granted an emergency temporary guardianship of the children by Madison Superior Court (trial court). The trial court held an evidentiary hearing in January, 2009. Father appeared at the January hearing and informed the trial court that the parents' divorce and all proceedings regarding the children had been handled in the Illinois court. The trial court appointed Aunt the children's permanent guardian and granted parenting time to the Father, who continued to reside in Illinois. The trial court also said that the Illinois court could determine jurisdiction, but the purpose of the January, 2009, guardianship hearing was to determine the children's best interests until a jurisdiction determination was made.

**If a court lacks subject matter jurisdiction, its actions are void ab initio and have no effect.** Id. at 748. The Court opined that the parties did not dispute that the Illinois court made a child custody determination in 2002 and modified its order in 2007. The Court said that if the facts are not in dispute, then the question of subject matter jurisdiction is purely one of law, to be reviewed de novo. Id., citing Novatny v. Novatny, 872 N.E.2d 673, 679 (Ind. Ct. App. 2007). A claim that the tribunal lacked subject matter jurisdiction cannot be waived. Id., citing Ind. Dep't of Env'tl. Mgmt. v. Raybestos Products Co., 897 N.E.2d 469, 474 (Ind. 2008).

**The trial court lacked subject matter jurisdiction to modify the Illinois court's child custody order; therefore, its order appointing Aunt the children's permanent guardian was void ab initio.** Id. at 749. Because the courts of two states are involved in the matter, a critical determination is whether the trial court had jurisdiction under the Uniform Child Custody Jurisdiction Law (UCCJL) codified at IC 31-21. Id. at 748. The Court said that the UCCJL's "primary aim is to reduce court conflicts among states" and cited Stewart v. Vulliet, 888 N.E.2d 761, 765-68 (Ind. 2008), in which the Indiana Supreme Court referred repeatedly to a determination under the UCCJL as one of subject matter jurisdiction. S.M. at 749. The Court

discussed IC 31-21-5-3, which controls whether an Indiana trial court may modify another state's existing child custody order. IC 31-21-5-3 states that, except as provided in IC 31-21-5-4, an Indiana court may not modify a child custody determination made by a court of another state unless (1) the court of the other state determines that: (A) it no longer has exclusive, continuing jurisdiction under IC 31-21-5-2; or (B) an Indiana court would be a more convenient forum under IC 31-21-5-8; or (2) an Indiana court or a court of the other state determines that: (A) the child; (B) the child's parents; and (C) any person acting as a parent; do not presently reside in the other state. The Court found that IC 31-21-5-3(1) did not apply because neither party suggested that the Illinois court has determined that it lacks jurisdiction or that Indiana would be a more convenient forum. Id. The Court found that IC 31-21-5-3(2) did not apply because it requires a determination that the parents and others "do not presently reside in the other state" and it was undisputed that Father resides in Illinois. Id.

**The trial court lacked subject matter jurisdiction to issue a temporary emergency order; therefore the temporary emergency order was void ab initio** Id. at 750. The Court discussed IC 31-21-5-4, which provides an Indiana trial court with temporary emergency jurisdiction if the children are present in Indiana and the children have been abandoned or it is necessary to protect them because they are "subjected to or threatened with mistreatment or abuse." Under the UCCJL, "abandoned" means "left without provision for reasonable and necessary care or supervision." IC 31-21-2-2. The Court opined that a surviving parent has the right to custody of children, unless otherwise determined in a dissolution decree or in another proceeding authorized by law. Id., citing In Re Guardianship of B.H., 770 N.E.2d 283, 285 (Ind. 2002) and IC 29-3-3-3. The Court opined that Father was entitled to custody of the children as a matter of law upon Mother's death. S.M. at 750. The Court noted that the issue of subject matter jurisdiction cannot be waived, and absent a showing of abandonment or the threat of mistreatment or abuse, no guardianship can be established under Title 31. Id. The Court referenced IC 31-17-2-25 as the specific statute providing for emergency placement of a child if the child's custodial parent dies, and opined that, had this case not had an inter-state dimension, this statute would have been the proper avenue for Aunt to seek relief if she thought it necessary rather than seeking a guardianship. Id. n.6. The Court instructed the trial court to issue an order denying the petition for guardianship and directing that custody be with Father. Id. at 750.