

# Children's Law Center of Indiana



## Guardianship/Third Party Custody

3/16/10

In **In Re Paternity of L.J.S.**, 923 N.E.2d 458 (Ind. Ct. App. 2010), the Court reversed the trial court's February 27, 2009 order which modified custody of the child from Mother to Grandparents. The Court remanded the case with instructions to the trial court to grant sole custody to Father and to order appropriate visitation and child support. The child was born on January 3, 2006, and lived with Mother at Grandparents' home for the first fifteen months of the child's life. On September 8, 2006, Mother filed a petition to establish paternity and child support. That same day, Mother and Father entered into an Agreed Judgment of Paternity which granted custody to Mother and Indiana Parenting Time Guideline visitation to Father. Father was ordered to pay \$192 weekly child support and to reimburse Medicaid and Mother for the child's birth expenses. In September 2006, Father began regular visitation with the child, first for day visits and later for every other weekend visits. Father moved and changed jobs four times between September 2006 and the custody hearing on January 15, 2009, but visited the child consistently except for the period from June 2, 2008, to July 11, 2008, when he attended job training in Oklahoma. Father's child support payments were made through employer withholdings. On August 29, 2007, the State filed a contempt petition against Father, alleging he was \$1,398.05 in arrears in child support. In April 2007, Mother and child moved out of Grandparents' home in Holton, Indiana to live in Madison, Indiana with Mother's new boyfriend. Grandparents and Mother agreed that the child would continue to stay at Grandparents' home three nights per week because the child was "imbedded" in Grandparents' home and because it was convenient for Mother's work schedule and the child's daycare schedule. This arrangement continued until Mother and the child moved back to Grandparents' house on January 1, 2008. In June 2008, Mother moved to Kentucky, but the child remained with Grandparents. Grandfather informed Father, while Father was attending job training in Oklahoma, that Mother had moved to Kentucky, leaving the child in Grandparents' care. Mother had signed papers for Grandparents to be the child's guardians, but Father did not sign the papers agreeing to the guardianship. After Father returned from Oklahoma, he contacted his attorney, who prepared a stipulation to: (1) grant Father sole legal and physical custody of the child; (2) preclude Mother from having any parenting time; (3) forgive Father's arrearage; (4) remove Mother's future obligation to pay child support. Father traveled to Kentucky and obtained Mother's signature on the stipulation. Believing he had the right to have the child in his care, Father picked the child up from Grandparents' home on August 3, 2008, and took the child to visit Father's family in Tennessee. On August 8, 2008, the trial court declined to approve the stipulation because it "provide[d] for no visitation and no child support without evidence to

substantiate a deviation from the child support and parenting time guidelines.” After learning that, without the stipulation, Father had no right to keep the child in his care, Father returned the child to Grandparents and paid the \$1,635.00 in delinquent child support. Grandparents filed petitions on August 13, 2008, requesting that they be named the child’s defacto custodians and granted legal custody of the child. Father filed his own petition for custody of the child. Mother did not object to her custody being modified. On January 15, 2009, the trial court conducted a hearing on all pending motions and on February 27, 2009, issued its findings of fact, conclusions thereon, and order modifying custody from Mother to Grandparents. Parents were granted reasonable visitation pursuant to the Indiana Parenting Time Guidelines. On March 19, 2009, the trial court granted Grandparents’ petition that the findings be amended nunc pro tunc to reflect that Grandparents’ petitions for recognition as defacto custodians and for change of custody had been granted. Although Father’s notice of appeal was timely filed, Father’s counsel failed to file an appellate brief, and the appeal was dismissed. The Court granted Father’s petition for rehearing and allowed the appeal to be reinstated on September 24, 2009.

**The Court opined that the findings do not support the trial court’s judgment which modified custody to Grandparents and do not clearly and convincingly overcome the strong presumption that the child should be placed in Father’s custody. Therefore, the trial court erred in granting custody of the child to Grandparents.** Id. at 465. The Court began its analysis by noting that a petitioner seeking custody modification bears the burden of demonstrating that the existing custody order should be altered, citing Kondamuri v. Kondamuri, 852 N.E.2d 939, 945 (Ind. Ct. App. 2006). L.J.S. at 461. All parties agreed that, under the circumstances, modification of custody from Mother was required; the only question presented is whether the trial court erred in granting custody to Grandparents. Id. Mother’s abandonment of custody of the child changes the custody analysis from one between parents to one between a natural parent and a third party; as a result “the focus is significantly different because the parties are not on par”, citing In Re Custody of McGuire, 487 N.E.2d 457, 460 (Ind. Ct. Ap. 1985). L.J.S. at 461. Citing In Re Paternity of K.I., 903 N.E.2d 453, 460 (Ind. 2009), the Court noted that in a custody dispute between a parent and a third party, the burden is always on the third party. L.J.S. at 461. The Court also reviewed numerous cases which state the following: (1) the relationship of a parent and a child is of a constitutional dimension; (2) the Fourteenth Amendment’s Due Process Clause protects the fundamental right of parents to make decisions concerning the care, custody, and control of the parent’s child; (3) the preference in favor of a parent having custody of his or her children, where the parent has not been shown to be unfit, is rooted in the U.S. Constitution; (4) a nonparent who seeks to displace the parent as custodian bears the burden of overcoming the parent’s presumptively superior right to custody. Id. at 462. The Court likened this case to the issue before the Indiana Supreme Court in In Re B.H., 770 N.E.2d 283, 287 (Ind. 2002), namely, whether the important and strong presumption that the child’s interests are best served by the placement with Father has been clearly and convincingly overcome by evidence proving that the child’s best interests are substantially and significantly served by placement with Grandparents. L.J.S. at 463. The Court considered the trial court’s eighty-nine findings, the first fifty-seven of which included, inter alia: (1) Father was temporarily delinquent in child support; (2) the child has asthma and should not be exposed to

tobacco smoke; (3) the child began living with Grandparents at birth and continues to reside with them; (4) the child has a special bond with Grandparents; (5) Mother's opinion that it would be in the child's best interests to live with Grandparents. The Court opined that these findings say nothing about Father's fitness as a parent nor do they suggest that Father abandoned the child, relinquished his rights, or otherwise abdicated his authority and were inadequate to clearly and convincingly overcome the important and strong presumption that the child's interests are best served by placement with Father. Id. at 464. The Court also reviewed and commented on findings fifty-eight through eighty-eight, which pertain more to Father. The Court commented that: (1) although Father did not have much contact with the child for the first nine months, Father testified that he refrained from visiting because he did not know the child was his son; (2) Father's employment changes did not reflect on Father's unfitness or instability because the employment changes were conscious changes to increase his salary and to enable him to live closer to the child; (3) the facts that Father works in Kentucky but lives three hours away in Indiana and that the child's visitation with Father requires extensive driving show that Father wanted to see the child enough to travel great distances; (4) although Father smokes, he does not smoke in the house or car when the child is present and there is no finding or showing that Father's smoking has exposed the child to harm; (5) Father's failure to attend parenting classes and to timely reimburse Mother for the child's birth do not, as the trial court concludes, establish Father's disregard for the child's welfare. Id. at 464-65. The Court stated that, while it appeared Grandparents have provided a stable and good home for the child, the issue before the Court was whether the strong presumption that the child's interests are best served by placement with Father were clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with Grandparents. Id. at 465. The Court opined that the specific findings of the trial court are nothing more than "[a] generalized finding that a placement other than with the natural parent is in [the] child's best interests", which our Supreme Court has held will "not be adequate to support such [a] determination." In Re B.H., 770 N.E.2d 283, 287. L.J.S. at 465. The Court concluded that the trial court's findings do not support the judgment and do not clearly and convincingly overcome the important and strong presumption that the child should be placed in Father's custody. L.J.S. at 465.