

Children's Law Center of Indiana



Guardianship/Third Party Custody

1/29/10

In **In Re Paternity of T.P.**, 920 N.E.2d 726 (Ind. Ct. App. 2010), the Court affirmed the trial court's conclusion that Intervenor (Caretakers) did not qualify as the child's de facto custodians. *Id.* at 731. The Court also affirmed the trial court's denial of Caretakers' petition seeking joint legal custody and permanent physical custody of the child. *Id.* at 736. The child was born on September 1, 2004. When the child was an infant, her Mother and Father worked for Caretakers' restaurant. On June 17, 2004, Mother and Father asked Caretakers to care for the child temporarily until Mother, who was homeless, could better provide for the child. On August 9, 2004, Mother reported the child missing to authorities, who found the child at Caretakers' home. Caretakers showed authorities a notarized statement indicating Mother's and Father's consent that Caretakers care for the child. The child was found to be a Child in Need of Services (CHINS) on August 11, 2004, pursuant to a CHINS proceeding filed by Marion County Office of Family and Children. The child was ordered placed with Caretakers. On October 25, 2004, Mother filed a paternity action against Father. On November 8, 2004, the trial court established Father's paternity, granted him visitation, and ordered him to pay child support. On October 26, 2005, the CHINS proceeding was closed, and the child was placed in Mother's care. Caretakers continued to care for the child "many days out of the month" with Mother's permission. Caretakers provided Mother and child with food and money. Beginning in the summer of 2007, according to Caretakers, Mother moved multiple times and lacked proper housing. Caretakers cared for the child for a total of 244 days between May, 2007 and September 10, 2008. Mother admitted to having used drugs, including crack, in the summer of 2008. On August 24, 2008 Mother and her brother were involved in a physical altercation and arrested.

On September 10, 2008, Caretakers filed an emergency petition to intervene in the paternity case, seeking temporary and permanent modification of custody due to substantial change in circumstances. Caretakers alleged that (1) they were the child's de facto custodians in terms of her financial and physical needs since June 17, 2004; (2) Mother had been in and out of jail, jeopardizing the child's mental and physical well-being; (3) Mother continued to use illegal drugs and exposed the child to sex and multiple persons in her home; (4) Mother's transience, poor housing conditions, and unemployment rendered her incapable of supporting the child without their assistance. The trial court held hearings on Caretakers' petition on February 12, 2009 and April 21, 2009. At the hearings, the Domestic Relations Counseling Bureau social worker recommended that Caretakers and Mother share joint custody with Caretakers having primary physical custody of the child. The volunteer Guardian ad Litem recommended that Caretakers have physical custody of the child during the week, with Mother having custody one

The Derelle Watson-Duvall Children's Law Center of Indiana - A Program of Kids' Voice of Indiana
9150 Harrison Park Court, Suite C • Indianapolis, IN 46216 • Ph: (317) 558-2870 • Fax (317) 558-2945
Web Site: <http://www.kidsvoicein.org> • Email: info@kidsvoicein.org

day per week and every other weekend. The Guardian ad Litem based her recommendation largely upon the child's educational difficulties, which the Guardian ad Litem believed the Caretakers were better able to address. The Guardian ad Litem was also concerned about the safety of Mother's neighborhood because Mother's boyfriend was apparently stabbed three blocks from Mother's home. By the time of the hearing Mother's house had adequate electricity, running water, and standard appliances such as a refrigerator and stove. Mother had made improved efforts regarding the child's education, a medical examination did not suggest that the child suffered from medical problems, Mother and her live-in boyfriend tested negative for drug use in November, 2008, and Mother had begun escorting the child to and from school daily to ensure the child's safety. As of the April 21, 2009 hearing Mother was unemployed and relied upon her boyfriend, who received unemployment and worked for a temporary employment agency to pay her rent. On July 24, 2009, the trial court denied Caretakers' petition seeking modification of custody and awarded Caretakers visitation with the child, permitting them one overnight visit per month. The trial court entered findings and conclusions, among them that Caretakers were not de facto custodians. The trial court further acknowledged the recommendations of the Domestic Relations Counseling Bureau social worker and the volunteer Guardian ad Litem, but determined that these recommendations were made without regard for the presumption in favor of the natural parent. Caretakers appealed.

The Appellate Court reviews the trial court's custody modification order for abuse of discretion with a "preference for granting latitude and deference to our trial judges in family law matters." *Id.* at 730, quoting *In Re Paternity of K.I.*, 903 N.E.2d 453, 457 (Ind. 2009). In reviewing findings made pursuant to Indiana Trial Rule 52, the Court will not set aside the findings or judgment unless clearly erroneous. *T.P.* at 730. A judgment is clearly erroneous when there is no evidence to support the findings or the findings fail to support the judgment. *Id.* A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. *Id.*

The Court held that Caretakers failed to demonstrate clear error in the trial court's conclusion that they were not the child's primary caregivers and de facto custodians. *Id.* at 731. The Court cited IC 31-9-2-35.5, which states that a person is a "de facto custodian" if he has been the primary caregiver for, and financial support of, a child who has resided with the person for a period of at least one year if the child is at least three years old. *Id.* Caretakers claimed that they had cared for the child for 244 days during the time period of May, 2007, to September, 2008, but the Court noted that this was not a majority, much less a significant majority, of the time. The Court observed that, while there was evidence that Caretakers provided basic needs and financial support for the child, Caretakers point to no evidence demonstrating that this constituted a majority of the child's total needs and support. *Id.* The Court also observed that, even if they qualified as de facto custodians, Caretakers were still required to overcome the natural parent presumption in order to gain custody of the child. *Id.*

The Court held that Caretakers did not present clear and convincing evidence to overcome the presumption that the child's interests were best served by placement with Mother. *Id.* at 732-34. The Court cited *In Re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002), which

states the following: (1) before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement; (2) the trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child; and (3) the parental presumption will not be overcome merely because a third party could provide the better things in life for the child. T.P. at 731. The Court also cited Hendrickson v. Binkley, 161 Ind. App. 388, 394, 316 N.E.2d 376, 380 (1974) which endorsed the following non-exclusive factors for purposes of overcoming the natural parent presumption: (1) the natural parent's unfitness; (2) the natural parent's long acquiescence in the third party's custody of the child; or (3) the natural parent's voluntary relinquishment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. T.P. at 731. The Court found no clear error by the trial court based upon the factors of acquiescence and strong emotional bond. Id. at 732. The Court observed: (1) the trial court concluded Mother had permitted liberal visitation by Caretakers but had not acquiesced in their having custody of the child; and (2) the fact that the child and Caretakers have spent a great deal of time together and have a strong bond does not negate the finding that Mother and the child have similarly spent a great deal of time together and maintain a stronger bond. Id.

The Court found no clear error in the trial court's declining to use the factor of Mother's unfitness due to allegedly improper influences of drug use, sexual activity, and crime in Mother's neighborhood. Id. at 732-33. The Court noted the following evidence in support of the trial court's determination regarding these issues: (1) the child's difficulties in school were attributed to her possible learning disability and the late start to her school year rather than to alleged dangerous influences at her home; (2) there was no evidence that Mother's present behavior included ongoing drug use following Mother's summer of 2008 relapse; (3) sexual allegations were apparently deemed unsubstantiated by Child Protection Services; (4) medical evaluations did not raise concerns regarding Mother's care of the child; (5) Mother had taken steps to ensure the child's safety, including walking the child to and from school; (6) the child had adjusted to her community, and no community was immune from crime; (7) the child denied that Mother's drug use and sexual activity had occurred in front of the child. Id. The Court also found that Caretakers had not demonstrated clear error in the trial court's conclusion that Mother's housing was adequate and that Mother's frequent moves demonstrated her ability to address and resolve problems. Id. at 734. The Court noted the following evidence in support of the trial court's conclusion that Mother's history of unstable housing was largely justified and that her housing situation as of March, 2009 was fully adequate: (1) Mother's testimony that all of her homes had heat, working appliances, and, with the exception of one month-long residence, running water, and that the child was never required to sleep on the floor; (2) by the time of the February 12, 2009, hearing, the Guardian ad Litem reported that Mother's housing conditions were adequate; (3) while the pipes in Mother's residence apparently later burst, Mother found new housing which was fully adequate. Id. at 733-34.

The Court held that the trial court's failure to construe the best interests custody factors to overcome Mother's custodial presumption was not clearly erroneous. Id. at 734-36.

The Court recited the eight best interests factors relevant to custody determination at IC 31-14-13-2, which are:

- (1) The age and sex of the child.
- (2) The wishes of the child's parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parents;
 - (B) the child's siblings; and
 - (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) 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.

Specifically, the Court noted that: (1) with regard to factor (3), the trial court found and Caretakers do not dispute that the child expressed no preference for Caretakers and indicated that she loved Mother and liked living with her, which did not demonstrate clear error by the trial court. *Id.* at 734. The Court opined that with regard to factor (4), the trial court found that the child had positive interactions with both Mother and Mother's boyfriend, and that the child's activities while with Mother were "reasonably productive and suitable." *Id.* at 735. The Court noted Caretakers claim that Mother's boyfriend disciplined the child by "pound[ing] her little butt" and stated, "While this is arguably troublesome, we cannot say that this corporal punishment, claimed to be infrequent, renders erroneous the trial court's conclusion that [the child's] interaction with [Mother's boyfriend], whom she calls 'Dad' is 'good' ... In any event, it does not overcome Mother's custodial presumption." *Id.* at 735 n.14. With regard to factor (5), the Court opined that the child was adjusted to her home and community and found no clear error in the trial court's concluding that certain missed or reduced educational opportunities did not overcome Mother's custodial presumption. *Id.* at 735. The Court also stated that Caretakers point to no evidence to refute the trial court's conclusion that the child's teachers were not concerned about Mother's care and the Court was not "inclined to find a direct and necessary link between school performance and parental care." *Id.* at 735 n.16. Regarding factor (6), which addresses physical and mental health, the Court noted that the trial court concluded that both Mother and Caretakers had good mental and physical health and that Caretakers' challenge to this finding was "purely speculative and based on Mother's past behavior" thus; there was no clear error by the trial court. *Id.* at 735. The Court also found no clear error in the trial court's failure to construe factor (7), which addresses domestic or family violence, against Mother's custodial presumption, noting: (1) the trial court concluded that certain acts of alleged violence between Mother and her boyfriend in 2004 did not demonstrate a pattern of violence for purposes of the 2009 hearings; (2) the August 2008 incident between Mother and her boyfriend did not establish a pattern of present violence with determinable effect upon the child;

(3) Caretakers pointed to no evidence demonstrating the occurrence of additional violent incidents in the recent past and failed to demonstrate that the August 2008 incident occurred in the child's presence and had a detrimental effect upon her. Id. at 736.