

Children's Law Center of Indiana



Guardianship/Third Party Custody

03/25/2009

In **K.I. ex rel. J.I. v. J.H.**, 903 N.E.2d 453 (Ind. 2009), the Court affirmed in part, reversed in part, and remanded for further proceedings the trial court's judgment modifying the child's custody to Father and granting grandparent visitation to Grandmother in accordance with the Indiana Parenting Time Guidelines. In **Ivers v. Hensley**, 891 N.E.2d 46 (Ind. Apr. 30, 2008) (Table), the Court had previously granted transfer of the Court of Appeals' unpublished memorandum decision, **In Re the Matter of the Paternity of K.I.**, No. 13A05-0706-JV-329, slip op. at 7-8, 880 N.E.2d 335 (Ind. Ct. App. Jan. 29, 2008) ((1) concluding legal framework trial court used in awarding custody to Father was incorrect, reversing trial court on this issue, and remanding cause "for a determination of whether the parental presumption has been overcome and, if so, whether a modification is in the best interests of [the child] and whether there has been a change in one or more of the relevant statutory factors;" and (2) directing that, if Father should be granted custody on remand, trial court should determine whether Grandmother should be granted grandparent visitation under IC 31-17-5-1 or de facto custodian visitation under IC 31-9-2-35.5). The child was born out of wedlock on November 28, 2001. At the time the parties' relationship ended, Father was unaware that Mother was pregnant. About six weeks after the child's birth, Mother left the child in the custody of maternal grandmother (Grandmother) who, with her husband, filed for guardianship of the child which was granted September 17, 2002. Sometime in September or October of 2002, during a chance encounter between Mother and Father, Mother showed Father a picture of the child and told Father he might be the child's biological father. On March 12, 2004, acting as next friend of the child, Grandmother filed a petition to establish paternity in Father and sought an order also awarding custody to Grandmother, and directing Father to pay child support and reimbursement of medical and hospital expenses. Following a September 13, 2004 hearing, based on genetic testing results, the trial court entered an order declaring Father to be the child's biological father and memorializing the parties' agreement on the other issues which included leaving the child in Grandmother's custody. Over the next eighteen months, Father spent a significant amount of time with the child. On August 29, 2006, the State on behalf of the Grandmother filed a motion to modify child support. On September 25, 2006, Father filed a Petition for Change of Custody. After a hearing, on June 15, 2007, the trial court entered an order awarding custody of the child to Father and granting Grandmother visitation consistent with the Indiana Parenting Time Guidelines (Guidelines). Grandmother appealed the award of custody to Father. Father appealed the grant of visitation to Grandmother under the Guidelines as if she were a noncustodial parent.

The Court held that, when ruling on a parent's petition to modify custody of a child who is already in the custody of a third party, (1) although in a very technical sense, a natural parent seeking to modify custody has the burden of establishing the statutory requirements for modification by showing modification is in the child's best interest, and that there has been a substantial change in one or more of the enumerated factors, as a practical matter,

this burden is minimal; and (2) once this minimal burden is met, the third party must prove by clear and convincing evidence “that the child’s best interests are substantially and significantly served by placement with another person.” In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) **If the third party carries this burden, then custody of the child remains in the third party; otherwise, custody must be modified in favor of the child’s natural parent.** K.I. at 460-61. On appeal, Grandmother relied on In Re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005) *trans. not sought*, in which the court of appeals pointed out that B.H. involved an initial custody determination, noted the “stringent standards” for custody modifications, and concluded that, where a parent requests to modify a third party’s custody, “a burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child.” Z.T.H., 839 N.E. 2d at 252. K.I. at 459. Here, the Court explicitly disapproved the conclusion of the Z.T.H. court on this point. Id. The Court explained that: (1) the distinctions between the statutory factors required to obtain initial custody and those required for a subsequent custody modification are not significant enough to justify substantially different approaches in resolving custody disputes; (2) both require consideration of certain relevant factors; (3) importantly, Indiana courts have long held that even when a parent initiates an action to reobtain custody of a child that has been in the custody of another, the burden of proof does not shift to the parent, rather the burden of proof is always on the third party; (4) a burden shifting regime that places the third party and the parent on a level playing field, as does the one in Z.T.H., is inconsistent with this State’s long standing precedent; and (5) here, even though Father never had custody in the first place, he is the child’s natural parent and the underlying rationale is the same. Id. at 460 (citations omitted). The Court further noted that, even though, in accordance with IC 31-14-13-6, a party seeking a change of custody must persuade the trial court that modification is in the best interests of the child and that there is a substantial change in one or more of the factors that the court may consider “under section 2 and, if applicable, section 2.5 of this chapter,” (1) these are modest requirements where the party seeking to modify custody is the natural parent of a child who is in the custody of a third party; (2) inasmuch as, in accordance with B.H. at 287, the parent comes to the table with a “strong presumption that a child’s interests are best served by placement with the natural parent” the first statutory requirement is met from the outset; and (3) because a substantial change in any one of the statutory factors will suffice, “the interaction and interrelationship of the child with ... the child’s parents” – one of the grounds on which the trial court relied in this case – satisfies the second statutory requirement. K.I. at 460.

The Court held that Grandmother is not entitled to visitation pursuant to the Indiana Parenting Time Guidelines; the de facto custodian statute (IC 31-14-13-2.5), which speaks to custody rather than visitation, does not apply to the question of visitation; and inasmuch as the parties have already expended substantial time and resources litigating the matter of visitation for Grandmother, for the sake of judicial economy, the filing of a separate petition under the Grandparent Visitation Act is unnecessary in this case. Id. at 461-63 & n.8. The Court agreed with Father that Grandmother was not entitled to visitation pursuant to the Guidelines, and noted that (1) the Guidelines are based on the premise that it is usually in a child’s best interest to have frequent, meaningful and continuing contact with each parent; and (2) given this specificity and the repeated references to “parents” throughout the Guidelines, they have no mandatory application to grandparent visitation. Id. at 461 (citations omitted). The Court opined that the apparent intent of the defacto custodian statute is to clarify that a third party may have standing in certain custody proceedings, and that it may be in the child’s best

interests to be placed in that party's custody. Id. at 462 (citation omitted). The Court observed that, although grandparents do not have the legal rights or obligations of parents and do not possess a constitutional liberty interest with their grandchildren, (1) IC 31-17-5-1, the Grandparent Visitation Act (Act), represents a Legislative recognition that a child's best interest is often served by developing and maintaining contact with his or her grandparents; and (2) in drafting the Act, the Legislature balanced the two competing interests of the rights of the parents to raise their children as they see fit, and the rights of grandparents to participate in the lives of their grandchildren. Id. (citation omitted). The Court opined that (1) under the Act, a grandparent may seek visitation only if the child's parent is deceased, the child's parents are divorced, or the child was born out of wedlock and the child's father has established paternity; (2) the trial court may grant visitation if it determines that visitation rights are in the best interests of the child; (3) when a trial court enters a decree granting or denying grandparent visitation, it is required to set forth findings of fact and conclusions of law in which it must address the presumption that a fit parent acts in his or her child's best interests, the special weight that must be given to a fit parent's decision to deny or limit visitation, whether the grandparent has established that visitation is in the child's best interests, and whether the parent has denied visitation or has simply limited visitation; (4) although the amount of visitation is left to the sound discretion of the trial court, the Act contemplates only occasional temporary visitation that does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of their children. Id. (citations omitted). Inasmuch as the trial court erred by directing that Grandmother's visitation be pursuant to the Guidelines, the Court reversed the trial court on this point and remanded the cause with instructions to enter appropriate findings and conclusions consistent with this opinion and the Grandparent Visitation Act. Id. at 462-63. The Court also acknowledged that there is authority for the proposition that the only circumstance under which a grandparent may seek visitation rights is by filing a proper petition under the Act, but found that in this case, for the sake of judicial economy, the filing of a separate petition for grandparent visitation was unnecessary. Id. at 463 n.8.