

Children's Law Center of Indiana



Adoption

2/7/11

In **In Re Marriage of J.S. and J.D.**, 941 N.E.2d 1107 (Ind. Ct. App. 2011) (Crone, J. concurring in result), the Court reversed the dissolution court's order granting Birth Father visitation with his child who had been adopted by Adoptive Parents. The Court remanded the case with instructions to vacate the visitation order. The child was born on January 23, 2002, to Birth Father and Birth Mother, who were in high school and unmarried. The child's grandparents (Adoptive Parents) adopted the child on February 6, 2002. The child has a congenital heart defect requiring medical care and expense. Adoptive Parents provided medical insurance and child care for the child, along with the other support, including financial support. Birth Father contends that he consented to the child's adoption by Adoptive Parents due to their ability to provide insurance and their alleged reassurances that he would continue to be "daddy" to the child. Birth Father and Birth Mother married in May 2005, and thereafter resided with the child at Adoptive Parents' home. Adoptive Parents built a home and rented it to Birth Father and Birth Mother, who moved to the home with the child. The child's younger sibling was born on January 18, 2007. On July 16, 2007, Birth Father and Birth Mother filed a petition to adopt the child, to which Adoptive Parents consented. This adoption was never finalized. The adoption petition was later dismissed without Birth Father's knowledge or consent after Birth Mother filed a dissolution action against Birth Father. The child was not named in the dissolution petition. During the pendency of the dissolution proceedings, Birth Father exercised regular visitation at the same time with the child and the child's younger sibling. At some later point, one of the Adoptive Parents restricted Birth Father's access to the child and threatened to terminate it if Birth Father did not sign the divorce decree. The marriage of Birth Father and Birth Mother was dissolved on March 10, 2009, pursuant to a settlement agreement that did not mention or provide for Birth Father to have visitation with the child. Birth Father continued to exercise visitation with the child, generally when he visited with the child's younger sibling. Birth Mother married Stepfather in 2009. Shortly after Birth Mother's and Stepfather's marriage, Birth Mother and Stepfather filed a petition for the adoption of the child to which Adoptive Parents consented. The adoption petition was still pending at the time of the trial court's judgment in the instant case. Birth Father's visitation with the child has been limited since Birth Mother's and Stepfather's marriage.

On August 10, 2009, Birth Father filed a petition to establish visitation with the child and a petition to join Adoptive Parents as necessary parties to his visitation petition. On August 13, 2009, Birth Mother moved to dismiss Birth Father's petitions on the grounds that the trial court

lacked authority in the dissolution proceeding to issue orders pertaining to the child, who is the legal adoptee of Adoptive Parents. The trial court granted Birth Father's petition to join Adoptive Parents as necessary parties. The trial court held a December 30, 2009, hearing on the merits of the visitation petition. On March 30, 2010, the court issued a judgment granting Birth Father's visitation petition on the grounds that, pursuant to Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980), Birth Father qualified as a third-party nonparent custodian whose court-ordered visitation with the child was in her best interests. The trial court specifically declined to address the merits of the adoption decree, which was apparently the subject of a separate pending action. Birth Mother and Adoptive Parents appealed the trial court's grant of visitation to Birth Father.

The Court concluded that IC 31-19-16-2 (the postadoption visitation statute) is the exclusive means for asserting visitation rights and Birth Father did not follow the procedures listed therein. Id. at 1108. The Court quoted IC 31-19-16-2, which provides the means for a birth parent to obtain postadoption visitation privileges and In Re Visitation of A.R., 723 N.E.2d 476, 479 (Ind. Ct. App. 2000). J.S. and J.D. at 1110-1111. The Court said that the A.R. Court specifically rejected the argument that the birth parent should be permitted to petition for visitation as a nonparent third party. A.R. at 479. J.S. and J.D. at 1111. Noting that the plain language of IC 31-19-16-2 clearly applied to the instant case, the Court observed that the child was adopted, her birth parent was Birth Father, and Birth Father wished to establish postadoption visitation. Id. at 1110. The Court said, "[t]hese are the very circumstances for which section 31-19-16-2 provides." Id. The Court said that the judgment in the instant case grants Birth Father visitation pursuant to Collins, which is not an available avenue of relief given the clear statutory procedures for postadoption visitation by a birth parent. J.S. and J.D. at 1111.

Judge Crone, reluctantly concurring in the reversal of the trial court's order, believed that the Indiana Supreme Court's decision in In Re Paternity of K.I., 903 N.E.2d 453 (Ind. 2009) compels the reversal of the trial court's order. J.S. and J.D. at 1112. Quoting K.I., Judge Crone noted that the de facto custodian statute is silent on the question of visitation, and in a modification proceeding, once the trial court determines that it is in the child's best interest that custody be granted to the natural parent, the Court must look elsewhere for guidance on whether and to what extent a third party may be granted visitation. K.I. at 461-62. J.S. and J.D. at 1112. Judge Crone found no basis for granting Birth Father visitation under Indiana law. Id. at 1113. Judge Crone believes that our legislature should review Indiana's visitation statutes and the Indiana Supreme Court should reconsider its pronouncements in K.I. to avoid equally unjust results in future cases. Id.