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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE PATERNITY OF K.I., by Grandmother and Next Friend, JUANITA IVERS,	)	
Appellant-Petitioner,	)	
vs.	)	No. 13A05-0706-JV-329
JEREMY HENSLEY,	)	
Appellee-Respondent.	)	

APPEAL FROM THE CRAWFORD CIRCUIT COURT
The Honorable Curtis Eskew, Special Judge
Cause No. 13C01-0403-JP-4

January 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The Crawford County Circuit Court modified custody of K.I. from Juanita Ivers ("Grandmother") to Jeremy Hensley ("Father") and awarded Grandmother visitation. Grandmother appeals and Father cross-appeals. We reverse and remand.

Issues

Grandmother presents two issues for review:

I. Whether the trial court applied an improper standard for custody modification from a third party to a natural parent; and

II. Whether the trial court abused its discretion because the modification order is unsupported by sufficient evidence.

Father cross-appeals, raising a single issue: whether the trial court abused its discretion by granting Grandmother visitation under the Indiana Parenting Time Guidelines ("Guidelines") as if she were a noncustodial parent.

Facts and Procedural History

On November 28, 2001, K.I. was born out-of-wedlock to Ellen Hughes ("Mother"), who is Grandmother's daughter. Approximately six weeks later, Hughes left K.I. in Grandmother's care full-time.

On September 17, 2002, Grandmother was appointed K.I.'s guardian. On September 13, 2004, Father's paternity of K.I. was established. At that time, Father and Grandmother executed an Agreed Entry whereby Grandmother would retain custody of K.I. and Father would pay child support.

On September 5, 2006, Father petitioned to modify K.I.'s custody from Grandmother to himself. At the conclusion of a hearing conducted on May 17, 2007, the trial court

transferred the physical custody of K.I. to Father. On June 15, 2007, the trial court entered its Findings of Fact, Conclusions of Law and Judgment awarding Father custody and awarding Grandmother visitation consistent with the Guidelines. Grandmother now appeals the custody decision, and Father cross-appeals the visitation decision.

I. A. Custody Modification Standard of Review

In general, we review custody modifications for an abuse of discretion, with a "preference for granting latitude and deference to our trial courts in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). Additionally, the trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. Thus, we must determine whether the evidence supports the findings and whether the findings support the judgment. Staresnick v. Staresnick, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005), reh'g. denied. The findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. Id. A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005).

I.B. Standard for Modification of Custody from Third Party to Parent

The trial court's commentary and order clearly expressed the trial court's understanding that the dispositive criteria for resolving child custody disputes between a parent and a third party is parental unfitness. According to the trial court's explanation of its decision, if the parent is not proved unfit, the parent must be given custody of his or her child. Grandmother contends that the trial court utilized an erroneous legal standard when it focused solely upon parental fitness.

There is an important and strong presumption that a child's best interests are served by placement in the custody of the natural parent. Allen v. Proksch, 832 N.E.2d 1080, 1099 (Ind. Ct. App. 2005). The presumption provides a measure of protection for the rights of the natural parent, but more critically, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests. Id.

In the context of an appeal from an initial placement decision resolving a dispute between a parent and a third-party, our Supreme Court clarified the evidentiary burden of one seeking to overcome the parental presumption:

> To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this presumption, we hold that, 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. 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. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." Hendrickson, 161 Ind.App. at 396, 316 N.E.2d at 381. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving 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).

More recently, a separate panel of this Court differentiated the legal analysis to be applied in cases involving initial custody placements with a third party from cases involving

the modification of an existing third party custody arrangement and adopted a burden-shifting approach in the latter. In re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005). Where a natural parent seeks to modify custody granted to a third party, as in the case before us, the third party must first rebut the parental presumption with '"evidence establishing the natural parent's unfitness or acquiescence, or [by] demonstrating that a strong emotional bond has formed between the child and the third party."' Id. at 252 (quoting In re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002)). If the third party is able to rebut the parental presumption with clear and convincing evidence, the third party is then essentially in the same position as any custodial parent objecting to the modification of custody. In re Z.T.H., 839 N.E.2d at 252. In other words, the third party is placed on a level playing field with the parent, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child's best interests and that there has been a substantial change in one or more of the enumerated factors of Indiana Code Section 31-17-2-8. Id. at 252-53.

We also observe that Indiana Code Section 31-17-2-8.5, applicable to actions for child custody and modification of child custody orders, provides that "if the court finds by clear and convincing evidence that the child has been cared for by a de facto custodian" the trial court shall consider, in addition to the factors of Section 8, the following:

> (1) The wishes of the child's de facto custodian.
> (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
> (3) The intent of the child's parent in placing the child with the de facto custodian.

(4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent now seeking custody to:
    (A) seek employment;
    (B) work; or
    (C) attend school.

Here, Grandmother had custody of K.I. pursuant to an agreement between the parties. Thus, the trial court was asked to make a decision regarding modification rather than an initial placement. The trial court rejected the analytical framework of In re Z.T.H., proffered by Grandmother, and instead recited the criteria of Hendrickson v. Binkley, 316 N.E.2d 376 (Ind. 1974), cert. denied, 423 U.S. 868 (1975) (abrogation recognized by Allen v. Proksch, 832 N.E.2d 1080 (Ind. Ct. App. 2005)). The factors relevant to overcome the parental presumption recognized in Hendrickson included parental unfitness, long acquiescence in a third party's custody or voluntary relinquishment such that the affections of the child and third party became so interwoven that severance would seriously mar and endanger the future happiness of the child. 316 N.E.2d at 376.

Our Supreme Court in In re B.H. specifically stated that a trial court is not restricted to the Hendrickson criteria. Here, the trial court acknowledged the Hendrickson criteria, and then took an even more restrictive approach and treated parental fitness as wholly dispositive, in essence a factor to trump all others. This is inconsistent with the rationale of In re B.H. and In re Z.T.H. Moreover, there is no indication that the trial court considered the de facto custodian factors of Indiana Code Section 31-17-2-8.5.

As the instant matter involves a request for custody modification where the child has been in the custody of a third party for five years, the framework of Z.T.H. is appropriate.

We remand to the trial court for a determination of whether the parental presumption has been overcome and, if so, whether a modification is in the best interests of K.I. and whether there has been a change in one or more of the relevant statutory factors.

II. Evidence Supporting Custody Modification

Because of our disposition of the issue regarding the appropriate legal standard, and the necessity for remand, we need not reach the issue of whether there existed sufficient evidence to support the custody modification.

III. Grandparent Visitation

Because it may arise on remand, we briefly address the issue of visitation. Father requested that Grandmother be awarded alternate weekends, one week of summer vacation, and a portion of spring break. However, the trial court awarded Grandmother "visitation pursuant to the non-custodial parent's visitation provided under the Indiana Parenting Time Guidelines." (App. 12.) Father argues that the time ordered is overly expansive as he also permits K.I.'s Mother (via an informal agreement) to spend time with K.I. Implicitly, he contends that K.I.'s visitation with Grandmother should be at his discretion.

The record clearly discloses that Grandmother was K.I.'s long-term guardian and not her adoptive parent. Nevertheless, Grandmother clearly falls within the purview of the Grandparent Visitation statutes, Indiana Code Section 31-17-5-1 et seq., as she is the grandparent of a child born out of wedlock. Indiana Code Section 31-14-14-3 provides in relevant part: "An order granting or denying visitation rights to a noncustodial parent does not affect visitation rights granted to a grandparent[.]"

Grandmother also contends that she is a "De facto custodian" as defined in Indiana

Code Section 31-9-2-35.5. The record discloses that Grandmother was a primary caregiver with whom K.I. resided for more than one year. Thus, the statutory critera are satisfied, and Grandmother may also be awarded visitation time as a de facto custodian. See Nunn v. Nunn, 791 N.E.2d 779, 785 (Ind. Ct. App. 2003) (finding that visitation with a third party may be in the child's best interests where the third party acted as a custodian of the child).

On remand, should Father be awarded custody of K.I. and the parties do not agree upon Grandmother's visitation, we instruct the trial court to determine if Grandmother should be granted grandparent or de facto custodian visitation regardless of Mother's parenting time with K.I., if any.

Conclusion

We reverse the custody modification order and remand for a determination of whether the parental presumption has been overcome and, if so, whether a modification is in the best interests of K.I. and whether there has been a change in one or more of the relevant statutory factors.

Reversed and remanded.

NAJAM, J., and CRONE, J., concur.