Guardianship/Third Party Custody

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In **Allen v. Proksch**, 832 N.E.2d 1080 (Ind. Ct. App. 2005), the Court of Appeals affirmed the trial court's judgment granting legal and physical custody of the ten year old child to the maternal grandmother. On appeal, the father argued that the maternal grandmother did not present clear and convincing evidence to overcome father's strong constitutionally protected presumption to have custody of his son. The father maintained that the trial court's findings were clearly erroneous because there was no finding that the father was unfit, that he had abandoned the child, or that he had voluntarily relinquished custody of the child to grandmother. The father contended that the grandmother should not have been awarded custody because she hampered the father's ability to see his son and establish a relationship with him. The Court found that the trial court did not err by denying the father's petition to transfer jurisdiction to another county. The Court reversed the trial court's sua sponte order requiring the grandmother to pay $4500 of the father's attorney fees.

The parents separated when the child was six months old. The marriage was dissolved in July 1995, and an agreed entry of joint legal custody with the mother having physical custody was submitted to the court. The father saw the child sporadically until December 21, 1999, when the father began seeing the child. every other weekend until late spring or early summer 2001. The father stated that he was not aware of the child's location was after 2001. From the summer of 2001 until the court ordered supervised visitation on May 29, 2003, the father had not seen the child and the child had resisted the father's attempts to re-establish a relationship since May of 2003. The child was "permanently" left by his mother with his maternal grandmother in June of 2002 when the child was approximately 8 years old. In November 2002, the child attempted to commit suicide at which time he was diagnosed with Attention Deficit Disorder with Hyperactivity (ADHD) and Oppositional Defiant Disorder (ODD) and depression. The child in an in camera interview with the judge and the guardian ad litem stated that he wanted to remain living with his maternal grandmother.

The Court held that grandmother had presented clear and convincing evidence sufficient to overcome the presumption that placement of the child with the natural father was in the best interest of the child, held that the father was barred from challenging jurisdiction of the child custody case, and that the trial court could not

order the grandmother to pay attorney fees without an evidentiary hearing. Id. at 832 N.E.2d at 1080.

Ind. Code 31-17-2-21(a)(2004) governs the modification of a child custody order and provides, in part, that "[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind.Code 31-17-2-8 (2004)] . . ." In disputes between natural parents and third parties, a presumption exists that it is in the best interest of the child to be place in the custody of the natural parent. In re Guardianship of R.B., 619 N.E.2d 952, 954 (Ind. Ct. App. 1993). "Indiana law has traditionally recognized that 'natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control, and education.'" Allen at 1098 citing In re Guardianship of B.H., 770 N.E.2d 283, 285 (Ind. 2002)(quoting Gilmore v. Kitson, 74 N.E.1083, 1084(1905)). In B.H., the Indiana Supreme Court articulated the standard to be applied in custody disputes between a natural parent and a third party:

> Despite the difference among Indiana's appellate court decisions confronting child placement disputes between natural parents and other persons, most of the cases generally recognize the importance and strong presumption that the child's best interest are ordinarily served by placement in the custody of the natural parent. This presumption does provide a measure of protection for the rights of the natural parent, but more importantly, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests.

Allen at 1099 quoting B.H., 770 N.E.2d at 287.

> [W]e 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 interest of the child requires 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.

Allen at 1100 quoting Hendrickson v. Binkley, 316 N.E.2d 376, 381 [(1974), cert. denied, 423 U.S. 868, 96 S. Ct. 131, 46 L.Ed.2d 98 (1975)] [emphasis in italics in the original].

> 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.

Allen at 1100 quoting In re Marriage of Huber, 723 N.E.2d 973, 976 (Ind. Ct. App. 2000)[emphasis in italics in the original]. "[A] generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required." Allen at1100 quoting Huber at 976. In Hendrickson the Court held that when determining custody between a natural parent and a third party, the trial court should use a "three step approach[:]"

First, there is a presumption that it will be in the best interests of the child to be placed in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is; (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment 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. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party. Allen at 1100 n.6 citing to Hendrickson at 380.

The trial court's findings and conclusions indicate that it relied on various factors in determining that the grandmother should be granted custody of the child.: (1) the father's "sporadic" contact with the child from the time of the marriage dissolution when the child was less than one year old until the time when the child was approximately five years old; (2) the father's act of telling mother that the child should not stay with him during the summer of 2001; (3) the father's "abandon[ment of] any personal contact" with the child in the summer of 2001 until 2003, when the mother petitioned the trial court to modify child support; (4) the father's minimal effort to contact the mother or the child; (5) allegations that the father had hit the child when the child had stayed with him prior to 2001; (6) the child's special behavioral and emotional needs and his need to be in a stable environment; (7) the grandmother's ability to provide the child with stability and her involvement with the child's mental health treatment and school activities; and (8) the child's attachment to the grandmother and his desire to remain with the grandmother. Furthermore, the guardian ad litem recommended that, despite the presumption in favor of the natural parent, custody of the child should remain with the grandmother with a future goal of reunification with the father. A social worker testified that he had concerns about the child's mental health declining if the child had an abrupt change in his living conditions and that it would be better to have the child ease into a relationship with the father. The social worker also testified that it was important for the child to have a stable environment and that the grandmother had been a stable influence but that the father did not have stability with the child. In addition, despite his recommendation that the father should have custody, the psychologist hired by the father testified that the grandmother had provided stability to the child, had possibly even saved his life, and that an abrupt change of custody of the child from the grandmother to the father would cause "more chaos" for the child and potentially create more emotional damage.

The father argued that the grandmother should be punished for her alleged misconduct by not getting custody of the child and cited to Owensby v. Lepper, 666 N.E.2d 1251 (Ind. Ct. App.1996), and In re Marriage of Ferguson, 519 N.E.2d 735 (Ind. Ct. App. 1988), in support of his argument. However, in both Owensby and Ferguson, the Court held that a trial court may not issue or change a custody order for the purpose of punishing a parent and that it is the child's welfare, not the parents', that controls the actions of the trial court. Owensby, 666 N.E.2d at 1256; Ferguson, 519 N.E.2d at 736. Furthermore, the trial court addressed the alleged shortcomings of the grandmother in its findings and conclusions; yet it still determined that she had overcome the father's presumption and that it was in the best interest of the child to remain in her custody. Allen at 1102 n.7.