Custody and Parenting Time

11/9/16

In **Brown v. Lunsford**, 63 N.E.3d 1057 (Ind. Ct. App. 2016), the Court reversed the trial court's order which granted Adrian Lunsford (Lunsford) visitation with S.B., the child of Amy Brown (Mother). Id. at 1065. Lunsford is Mother's former boyfriend, and he is not related to S.B. S.B. was born in January 2007, and her birth father is neither involved in her life nor listed on her birth certificate. Mother and S.B. moved into Lunsford's house in Kentucky when S.B. was sixteen months old. When S.B. was two years old, Mother gave birth to A.L., who is Lunsford's child. Mother and Lunsford separated when S.B. was four years old. Mother and both of her children moved to Vanderburgh County, Indiana. After Mother and Lunsford separated, S.B. visited Lunsford when he had parenting time with A.L. S.B. visited Lunsford for six months, and later visited Lunsford for about a year. S.B. does not want to visit Lunsford. Mother discontinued S.B.'s visits with Lunsford because Mother noticed that S.B. cried a lot, was very confused, and was getting into trouble at school. After the visits were discontinued, Mother testified that S.B.'s school issues and other issues ceased.

In June 2015, Mother and the children relocated to Tennessee. In September 2015, Lunsford filed a "Petition to Modify" in the paternity case for A.L. In his petition, Lunsford requested an order granting him parenting time with S.B. Neither Lunsford nor Mother moved to join S.B. as a party to the paternity action for A.L. The trial court did not appoint a guardian ad litem for S.B. and did not interview S.B. At the time of the hearing on Lunsford's petition, Mother and Lunsford had been separated for over four years and S.B. had not visited Lunsford for a year. On December 10, 2015, the trial court granted Lunsford visitation with S.B. one weekend per month during Lunsford's parenting time with A.L. The court also heard evidence on custody, child support, and parenting time for A.L., and on Mother's request to relocate. Mother did not challenge the trial court's orders about A.L.'s custody, parenting time, and child support or the order on her request to relocate. Mother filed motions to correct error and for reconsideration or rehearing on the trial court's visitation order for S.B. In her motion to correct error, Mother raised arguments for the first time on improper forum, lack of jurisdiction, improper venue, and lack of standing. The trial court heard arguments on Mother's motions and denied them on February 3, 2016. Mother appealed the court's order which awarded Lunsford parenting time with S.B.

The Court found that Mother's arguments were waived because she did not lodge her claims of procedural error, which she incorrectly framed as "jurisdiction issues" in a

timely manner, but waited until she filed her motion to correct error to raise them. Id. at 1061. Mother contended the trial court lacked "jurisdiction" over S.B. because the child was not a resident of Indiana and because "no action has been formally commenced." Mother did not argue that the trial court lacked either subject matter or personal jurisdiction to hear the matter, but cited to Indiana's codification of the Uniform Child Custody Jurisdiction Ace to support her argument. In response to Mother's argument, the Court noted: (1) the Indiana supreme Court held in 1990 that the jurisdictional limitations imposed by the UCCJA are not those of subject matter jurisdiction, but are refinements of the ancillary capacity of a trial court to exercise authority over a particular case; (2) this exercise of authority is waivable; (3) the Indiana supreme Court has clarified the nature of jurisdiction in Indiana trial courts, holding that the concept of jurisdiction over a particular case has been abolished; (4) attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension; (5) the fact that a trial court may have erred along the course of adjudicating a dispute does not mean it lacked jurisdiction (multiple citations omitted). Id. at 1060-61. Quoting R.L. Turner Corp. v. Town of Brownsburg, 963 N.E.2d 453, 457 (Ind. 2012), the Court observed that "[A] party who was asleep at the wheel has a powerful incentive to couch a claim of procedural error as a jurisdictional defect either to circumvent the doctrine of waiver or to open up an avenue of collateral attack." Brown at 1060-61.

The Court found Mother's argument that the trial court's judgment was void or invalid because Lunsford did not join S.B. as a necessary party to the paternity action he used to request visitation with S.B. was waived because Mother did not raise this issue in a timely manner. Id. at 1061. The Court looked to K.S. v. R.S., 669 N.E.2d 399, 405 (Ind. 1996), in which the Indiana Supreme Court held, "failure to name a child as a party in a paternity action does not necessarily render the judgment or agreement void, but merely voidable." Brown at 1061. The Court opined that it need not determine how or if Lunsford's failure to join S.B. in this matter affected the validity of the trial court's judgment. Id. The Court explained that Mother could have raised this issue during or even prior to the evidentiary hearing, but instead waited until she filed her post-trial motion to correct error to do so. Id.

The Court concluded the trial court abused its discretion when it ordered visitation between S.B. and Lunsford. Id. at 1065. Quoting Collins v. Gilbreath, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980), the Court observed that Indiana courts have been cautious not to "open the door and permit the granting of visitation rights to a myriad of unrelated third persons…who happen to feel affection for the child." Brown at 1062. Quoting Worrell v. Elkhart Cnty. Office of Family and Children, 704 N.E.2d 1027, 1028 (Ind. 1989), the Court noted that "[b]efore a court may proceed to the substance of a visitation request, the party seeking visitation must satisfy the threshold requisite of a custodial and parental relationship." Brown at 1062. The Court said that, pursuant to Collins, the Court has declined to extend standing to third parties who had not acted in a custodial or parental capacity. Brown at 1062. The Court looked to A.C. v. N.J., 1 N.E.3d 685, 687 (Ind. Ct. App. 2013), in which the Court held, for the first time, that a same-sex partner who was not the child's biological parent had standing to seek visitation with the child. Brown at 1064. The Court concluded that the A.C. opinion was inapplicable to Brown; therefore, A.C. was not controlling. Brown at 1064. The Court noted its opinion in A.C. was an effort to

resolve the legal issues of same-sex partner's rights before the U.S. Supreme Court decided in Obergfell v. Hodges, 135 S. Ct. 2584 (2015) that same-sex partners may marry. Brown at 1065. The Court did not believe that the A.C. holding or rationale could be extended to the Brown v. Lunsford case in light of the unique factual circumstances and particular legal landscape in which A.C. was decided. Brown at 1065. The Court opined that the trial court's order did not take into consideration the decision that Mother, a fit parent, made to deny Lunsford visitation with S.B. Id. The Court found no indication that Lunsford presented evidence compelling enough to overcome the presumption that Mother's decision to terminate S.B.'s visitation with Lunsford was in S.B.'s best interest. Id.