Paternity Establishment and Grandparent Visitation

10/13/17

In **In Re Paternity of S.A.M.**, 85 N.E.3d 879 (Ind. Ct. App. 2017), the Court vacated the trial court's order which enforced the mediated agreement for grandparent visitation and remanded the case so the trial court could decide a reasonable amount of attorney fees to award to Father. Id. at 891. Mother had sexual relations with both Father and B.H. when she became pregnant with the child. The child was born out of wedlock on May 8, 2007. Mother and Father signed a paternity affidavit on the day of the child's birth, and Father thereby became the child's legal father. Father is listed on the child's birth certificate. Since the child's birth, Father and Mother have shared custody and Father has held himself out as the child's father. The child refers to Father as "Dad." On January 19, 2011, B.H. passed away. At the time of his death, B.H.'s paternity of the child had not been established. At some point, the parties came to believe that B.H. was the child's biological father.

M.H., the father of B.H, filed a paternity petition as the child's next friend on July 29, 2013. In the petition, M.H. alleged that his deceased son, B.H., was the child's biological father. Mother was served with the paternity petition, but Father was not served. On August 28, 2013, M.H. filed a "Request for Custody or in the Alternative Request for Grandparent Visitation" of the child. Father intervened in the paternity case, and was appointed a public defender by the court. On October 30, 2013, Father filed an Amended Motion to Dismiss the paternity case, claiming that M.H. was not a person who may file a paternity petition pursuant to IC 31-14-4-1. The court denied Father's motion. M.H. filed a motion for mediation, and the court ordered the parties to agree on a mediator and conduct mediation. On March 19, 2014, Father and M.H. entered into a Mediated Agreement, which stipulated that: (1) B.H. was the biological father of the child; (2) Father and Mother had been "actively involved in the care and raising of [the child]" since the child's birth and Father had been the child's "de facto custodian"; (3) Father and Mother should have joint custody of the child; (4) Father should have primary physical custody of the child; (5) neither Mother nor Father would have child support obligations to one another; (6) M.H. is the biological paternal grandparent of the child; and (7) M.H. and his wife should have "grandparent visitation" with the child on dates set out in the agreement. The parties also agreed to a "mutual restraining order." This order required that M.H. should not disclose, discuss, or communicate in any manner with the child information about the biological relationships of the parties and/or the identity of the biological father without the express written authorization of Mother and Father, and that M.H. should take all steps necessary to ensure that third parties, including his wife, adhered to and honored this provision. Father learned that,

during a visit, M.H. told the child that B.H. was his father, so Father stopped honoring the Mediation Agreement's provisions regarding visitation.
On August 15, 2014, M.H. filed an "Affidavit for Citation and Motion to Enforce Grandparent Visitation." On August 29, 2014, the court held a hearing on M.H.'s motion and affidavit, and set out specific dates over the course of the next year for M.H. to have visitation with the child. The court noted that, if Father denied M.H. visitation, law enforcement authorities could assist in enforcing visitation. On July 15, 2016, M.H. filed a second Affidavit for Citation and Motion to Enforce Grandparent Visitation, alleging that Father and Mother had failed and refused to allow Grandparent Visitation with the child per the Mediated Agreement. M.H. also filed a "Request for Custody" of the child and requested the court appoint a Guardian ad Litem (GAL) for the child. On July 26, 2016, the court appointed a Guardian ad Litem. On July 29, 2016, Father filed a "Verified Petition to Terminate Grandparent Visitation," alleging that M.H. lacked standing under the Grandparent Visitation Statute to bring a petition for visitation. On September 30, 2016, the court held a hearing, took Father's petition under advisement, and ordered the GAL to complete her report and recommendations.

On February 20, 2017, Father and Mother jointly filed an "Agreed Entry Establishing Paternity" in Father. Mother filed an affidavit in which she stated that Father had been a wonderful father to the child and that she believed M.H. and his wife had detrimentally injured the child emotionally and mentally by stating that the child's father was dead and that Father was not his father. On March 23, 2017, Father filed a "Petition to Dismiss Grandparent Visitation, to establish Paternity, Motion for Order on the Pleadings, and Motion for Attorney Fees." Attached to the petition was a copy of the paternity affidavit signed by Mother and Father the day the child was born. The GAL filed her report on March 29, 2017. Among her recommendations were that Father should continue to have custody of the child, that M.H. should be entitled to visitation, that the child should have a mental health evaluation within 60 days, that Father should follow all recommendations from the evaluation, and that the child should be informed about his biological father through the help of a therapist. The trial court held a hearing on April 7, 2017, which Father, Mother, and M.H. attended. The court denied Father's motion to set aside the Mediated Agreement and found that M.H. had standing. The court ordered the parties to abide by the agreement, specifically emphasizing that the parties must follow the visitation orders, and denied Father's motion for attorney fees. Father appealed, claiming that: (1) M.H. lacked standing to have brought the paternity action as the child's next friend; (2) the Mediated Agreement was void *ab initio*; and (3) the trial court abused its discretion in declining to award him attorney fees.

The Court concluded the trial had no authority to allow M.H. to file a paternity action for the child since M.H. lacked standing to do so. Id. at 888. Citing J.R.W. ex rel. Jemerson v. Watterson, 877 N.E.2d 487, 490 (Ind. Ct. App. 2007), the Court noted that whether a party has standing is a question of law which the Court reviews *de novo*, and the Court offers no deference to the trial court's decision. S.A.M. at 886. The Court looked to IC 31-14-4-1, which provides that the following persons are permitted to bring a paternity action: (1) the mother or expectant mother; (2) a man alleging he is the child's biological father or he is the expectant father of an unborn child; (3) the mother and a man alleging that he is her child's biological father, filing

jointly; (4) the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly; (5) a child; (6) the Department of Child Services; and (6) the prosecuting attorney under IC 31-14-4-2. Id. The Court noted IC 31-14-5-2 provides that a person who is otherwise incompetent may file a petition through the person's guardian, guardian ad litem, or next friend. Id. Quoting R.J.S. v. Stockton, 886 N.E.2d 611, 614 (Ind. Ct. App. 2008), the Court observed that "[t]here is no statutory definition of 'next friend."' S.A.M. at 886.

The Court reviewed two cases in which the issue of standing to bring a paternity action was addressed. In J.R.W. ex rel. Jemerson v. Watterson, 877 N.E.2d 487 (Ind. Ct. App. 2007), the child's mother was deceased, and the child's maternal aunt filed a petition to establish paternity of the child in his biological father. Mother's former husband, who was not the child's biological father but who had executed a paternity affidavit, had legal custody of the child. The Jemerson Court affirmed the trial court's order dismissing maternal aunt's paternity action, and concluded "only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children." Jemerson at 491. S.A.M. at 887. In R.J.S. v. Stockton, 886 N.E.2d 611 (Ind. Ct. App. 2008), the child's alleged paternal grandparents, acting as the child's next friend, filed a petition to establish paternity of the child in their deceased son and a petition for grandparent visitation. The R.J.S. Court affirmed the trial court's dismissal of the alleged paternal grandparents' paternity action. R.J.S. at 615. S.A.M. at 888. The R.J.S. Court rejected the notion that "there is no limit on who may file a paternity petition as a child's next friend," and noted that the child had "a living mother and two court-appointed guardians, his maternal grandparents." R.J.S. at 615. S.A.M. at 888. The R.J.S. Court concluded that alleged paternal grandparents could not circumvent the authority entrusted in the child's natural and court-appointed guardians by filing a paternity action as his next friend. R.J.S. at 615. S.A.M. at 888.

The Court concluded that the rationale from the Jemerson and Stockton cases applied to the S.A.M. case. S.A.M. at 888. The Court opined that the child's Mother and Father are both alive and share joint custody of the child, so the law has entrusted safe-guarding of the child's interests to Mother and Father. Id. The Court said it was the duty of Father and Mother to act in the child's best interest, and it was up to them to decide whether to initiate a paternity proceeding for the child. Id. The Court noted that Father had been the legal father of the child since the child was born because Father executed a paternity affidavit, and the trial court's finding that Father had never established paternity for the child was clearly erroneous. Id. at 888 n.6. The Court found no persuasive reason to treat Father as anything other than the child's natural father. Id. at 889.

The Court concluded the Mediated Settlement was *void ab initio* and vacated the trial court's order which enforced the agreement. Id. at 889. Quoting Trook v. Lafayette Bank & Tr. Co., 581 N.E.2d 941, 944 (Ind. Ct. App. 1991), *trans. denied*, the Curt explained that the term void *ab initio* means "void from the beginning" and "denotes an act or action that never had any legal existence at all because of some infirmity in the action or process." S.A.M. at 889. Quoting M.S. v. C.S., 938 N.E.2d 278, 284 (Ind. Ct. App. 2010), the Court noted that "[A] void judgment is subject to direct or collateral attack at any time." S.A.M. at 889. Quoting Kitchen v. Kitchen, 953 N.E.2d 646, 651 (Ind. Ct. App. 2011), the Court also noted that "[a]n order is void

where the trial court lacks authority to act." S.A.M. at 889. The Court clarified that in the S.A.M. case: (1) the trial court lacked authority to order the parties into mediation because M.H. lacked standing to bring the paternity action; and (2) because a lack of standing cannot be cured, the trial court's order for the parties to conduct mediation, the resulting Mediated Agreement granting visitation rights to M.H., and the trial court's order approving the agreement, were void. Id. at 889. The Court opined that Father's and Mother's agreement to allow M.H. and his wife visitation with the child was not a basis for enforcing an otherwise void agreement. Id. at 890.

The Court remanded the case for the trial court to determine the proper amount of attorney fees which M.H. should pay to Father. Id. at 891. The Court observed that IC 31-14-18-2 provides that in a paternity action, the court may order a party to pay: (1) a reasonable amount for the cost to the other party of maintaining an action under this article; and (2) a reasonable amount for attorney's fees, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after the entry of judgment. Id. at 890. The Court noted the trial court denied Father's request that M.H. pay his attorney fees, but made no findings in support thereof. Id. The Court also noted that this action had been allowed to proceed for over four years without M.H. ever having had standing, during which time Father had been forced to obtain a public defender and two private attorneys to defend his interests as the child's legal father. Id.