Paternity

12/06/2007

In **J.R.W. ex rel. Jemerson v. Watterson**, 877 N.E.2d 487 (Ind. Ct. App. 2007), the Court affirmed the trial court's dismissal of the paternity petition filed by Maternal Aunt and Uncle as the child's next friends. Mother began a relationship with Father when she was already pregnant with the child who was born December 25, 1995. Father executed a paternity affidavit. Mother and Father were married in April 1996. They had a second child and were divorced October 28, 2002. The oldest child's paternity was not litigated in the divorce proceeding and the dissolution decree identified both children as children of the marriage. Mother was awarded custody of both children. Father was granted visitation rights and was ordered to pay child support. Mother and Father each remarried. In the fall of 2005, Mother was diagnosed with terminal cancer and wrote a will expressing her strong desire that Maternal Aunt and Uncle become guardians of the children. Maternal Aunt and Uncle filed for guardianship of the children which was granted temporarily on April 7, 2006, and permanently on June 2, 2006. Father was granted visitation and ordered to pay child support. Mother died in March 2006. Pursuant to Father's appeal, on April 16, 2007, the grant of guardianship to Maternal Aunt and Uncle was reversed and Father was given custody of the children. In the meantime, a paternity test administered on January 26, 2007, determined that another man was the child's biological father. On March 2, 2007, Maternal Aunt and Uncle filed a petition on the oldest child's behalf to establish paternity in the man determined by the paternity test to be the biological father and to set aside the paternity affidavit of Father. Father moved to dismiss the paternity petition. Subsequent to the Court's April 16, 2007 reversal of the grant of guardianship, Father argued that Maternal Aunt and Uncle lacked standing to bring a paternity action on the child's behalf because their guardianship had been dismissed. On May 25, 2007, the trial court dismissed the paternity action for lack of standing. Maternal Aunt and Uncle appealed.

Because both Father and the biological father bear the duty of acting on behalf of the child, no proper basis existed upon which Maternal Aunt and Uncle (Petitioners) might assert standing as the child's next friends, and accordingly Petitioners could not be granted relief under any set of facts. Id. at 492. Petitioners argued that they had standing as the child's next friends to bring the paternity action on his behalf. The Court noted that the child was one of the individuals identified in IC 31-14-4-1 as being permitted to bring a paternity action and:

> A person less than eighteen (18) years of age may file a petition if the person is competent except for the person's age. *A person who is otherwise incompetent may file a petition through the person's guardian, guardian ad litem, or next friend.*

IC 31-14-5-2 (emphasis added). Id. at 490-91. The Petitioners argued "[c]aselaw directs … that anyone can act as the child's next friend without limitation," Id. at 491. To the contrary, Father argued that only parents, guardians, and prosecutors may bring paternity actions as next friends of children and that each of the prior Court of Appeals cases known to discuss the right to file on behalf of the child as next friend "show that only a parent, prosecutor, or guardian may act as a child's next friend. Id. The Court noted that its own research supported the view "that only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children." Id. The Court "[did] not find that a next friend is required under the facts and circumstances surrounding this case." Id. at 492. In this regard the Court quoted:

> As a general rule, a next friend for an infant plaintiff is required only when the infant is without a parent or general guardian, since ordinarily it is the duty of the parent or general guardian of an infant to institute and prosecute an action on behalf of the infant for the protection of his rights.

42 Am.Jur.2d Infants §158 (2000). The Court opined that under the circumstances, Petitioners could not reasonably argue that the child was without a parent, inasmuch as Father had been previously treated by the Court as a natural parent, and the Petitioners "have advanced proof to a near certainty that [the biological father] is the child's biological father." Id.