

Children's Law Center of Indiana



Guardianship/Third Party Custody

12/7/10

In **M.S. v. C.S.**, 938 N.E.2d 278 (Ind. Ct. App. 2010), the Court affirmed the order of Bartholomew Superior Court (trial court) which vacated the trial court's previous order granting Domestic Partner joint legal custody of and parenting time with Mother's child. Domestic Partner and Mother lived together in a same-sex relationship for more than ten years. During the relationship, Mother gave birth to a child conceived through artificial insemination with donor semen in 2003. In August 2007, Domestic Partner and Mother sought to establish a legal relationship between Domestic Partner and the child by filing a "Joint Petition to Determine Custody." In the petition, Mother and Domestic Partner agreed that they should have joint legal custody of the child, with Mother as the primary physical custodian and that Domestic Partner should have parenting time as agreed by the parties, or, in the event they could not agree, in accordance with the Indiana Parenting Time Guidelines. On September 5, 2007, the trial court entered an order providing for custody and parenting time as set forth in the petition. On April 21, 2009, Domestic Partner and Mother ended their relationship after a heated argument during which Domestic Partner physically attacked Mother and threatened Mother's life in the child's presence. At a hearing held on May 4, 2009, Mother filed a "Revocation of Any and All Consents to Joint Custody of Minor Child." Domestic Partner filed a motion to reinstate the September 5, 2007, order and a motion to certify the court's May 4, 2009, ruling for an interlocutory appeal. At a hearing on November 5, 2009, the trial court reinstated the September 5, 2007, order, suspended Domestic Partner's parenting time, and set the matter for an evidentiary hearing. At the conclusion of the evidentiary hearing on January 28, 2010, the trial court ordered that Domestic Partner's parenting time remain suspended. On February 26, 2010, after reviewing a trial brief from Domestic Partner and a response from Mother, the trial court issued an order vacating the September 5, 2007, order. Domestic Partner appealed.

The Court concluded that the September 5, 2007, order was void *ab initio* and without legal effect; therefore the trial court properly vacated the September 5, 2007, order. *Id.* at 287. The Court said that: (1) the interpretation of a statute is a pure question of law and is reviewed under a *de novo* standard; (2) in construing a statute, the Court's primary goal is to determine and effectuate legislative intent; (3) statutes which relate to the same general subject matter are in *pari materia* and should be construed with reference to each other so as to harmonize and give effect to the provisions of each (multiple citations omitted). *Id.* at 282. The Court quoted IC 31-17-2-3, which provides that a child custody proceeding is commenced by:

- (1) A parent by filing a petition under IC 31-15-2-4, IC 31-15-3-4, or IC 31-16-2-3; or

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- (2) A person other than a parent by filing a petition seeking a determination of custody of the child

The Court observed that Mother's and Domestic Partner's "Joint Petition to Determine Custody" sought to establish a shared custody arrangement. The Court concluded that IC 31-17-2-3 does not contemplate the creation of a shared custody arrangement between a parent and a nonparent, regardless of the consent of the parties. *Id.* The Court opined that the General Assembly did not intend to allow parents to establish joint custody with third parties by simply filing a joint petition with the trial court, because to do so would allow parents and third parties to circumvent the requirements of the Adoption Act. *Id.* The Court said: (1) adoption creates a parent-child relationship between individuals who would not otherwise share a relationship; (2) the Court has interpreted the stepparent adoption statute to allow a biological mother's children to be legally adopted by her same-sex partner without divesting biological mother of her parental rights; (3) the General Assembly has set forth specific procedural pre-requisites to adoption in the Indiana Code; (4) it is well established that adoption statutes are in derogation of the common law and must therefore be strictly construed as to all procedural requirements. *Id.* at 282-83. The Court concluded that the original entry of the September 5, 2007, order was clearly erroneous. *Id.* at 283.

The Court was not persuaded by Domestic Partner's second argument that the September 5, 2007, order was binding on the parties because they consented to its entry. In support of her second argument, Domestic Partner directed the Court's attention to dissolution of marriage cases, *Tirey v. Tirey*, 806 N.E.2d 360, 364 (Ind. Ct. App. 2004), *trans. denied*, and *Schueneman v. Schueneman*, 591 N.E.2d 603, 611 (Ind. Ct. App. 1992), for the general proposition that parties to a divorce are free to agree to the custody and support of their children, and an agreement is binding on the parties once it becomes part of a court order, even if the trial court would otherwise lack the authority to order the parties to do as they agree. *Id.* The Court found the cases inapplicable because they took place within the context of a divorce and relied on IC 31-15-2-17, which applies only in the context of a divorce, and provides that parties to a divorce may agree to child custody and support, and if the court approves the agreement, the parties are bound by it. *Id.* The Court declined Domestic Partner's invitation to extend IC 31-15-2-17 beyond its plain language. *Id.* at 284.

The Court then discussed whether the September 5, 2007, order was void or voidable. The Court explained that a voidable judgment or order may be attacked only through a direct appeal, whereas a void judgment is subject to direct or collateral attack at any time. *Id.* The Court said that, if the September 5, 2007, order was merely voidable, Mother waived her right to challenge the order by failing to file a direct appeal. *Id.* The Court said that an order is "void" only "when the action or subject matter it describes is of no effect whatsoever, and is incapable of confirmation or ratification"; however, "voidable" "describes an action or subject matter which nonetheless operates to accomplish the thing sought to be accomplished, until the fatal flaw is judicially ascertained and declared." *Trook v. Lafayette Bank and Trust Co.*, 581 N.E.2d 941, 944 (Ind. Ct. App. 1991), *trans. denied*. *M.S.* at 284. The Court opined that the entry of the

September 5, 2007, order was no mere procedural error; rather, the trial court lacked the authority to grant the joint petition under IC 31-17-2-3 under any set of circumstances, and the error was therefore impossible to cure. Id.

The Court opined that, because the September 5, 2007, order was void; there was no legally effective custody or parenting time schedule to modify. Id. at 285.

The Court found that the facts amply support the trial court's finding that continued contact with the Domestic Partner was not in the child's best interests; therefore, the trial court's finding was not clearly erroneous. Id. at 287. Domestic Partner first argued that she is entitled to parenting time with the child because she contends she is the child's legal parent. In support of this appellate argument, Domestic Partner relied on Levin v. Levin, 645 N.E.2d 601, 604-605 (Ind. 1994), in which the Indiana Supreme Court held that by consenting to his wife's artificial insemination and inducing his wife to go forward with the procedure, husband had promised to be the legal father of the resulting child. M.S. at 285. The Court concluded that Domestic Partner has waived any claim that she is entitled to parenting time as the child's legal parent, because Domestic Partner failed to raise this argument before the trial court. Id. Domestic Partner's second argument is that the trial court erred in finding that she must be a de facto custodian in order to be granted parenting time. The Court observed that the trial court specifically found that even if Domestic Partner were a de facto custodian, that status would not entitle her to parenting time. (Emphasis in original). Id. at 286. The Court, citing K.I. Ex Rel J.I. v. J.H., 903 N.E.2d 452, 461-62 (Ind. 2009), stated that the Indiana Supreme Court has held that the de facto custodian statute bears only on the question of custody, not visitation. M.S. at 286. The Court further noted that "parenting time", as defined by IC 31-9-2-88.5, is "the time set aside by a court for a parent and child to spend together." (emphasis added in opinion). Id. The Court stated that when the General Assembly has defined a word, the Court is bound by that definition; therefore, the Court concluded that only parents may be awarded parenting time. Id. Because Domestic Partner has waived any claim that she is the child's legal parent, Domestic Partner is not entitled to parenting time with the child. Id.

The Court stated that Indiana case law permits third-party visitation, as opposed to parenting time, to be awarded to an unrelated adult under certain limited circumstances, citing Schaffer v. Schaffer, 884 N.E.2d 423, 425 (Ind. Ct. App. 2008), Francis v. Francis, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995), trans. denied, and other cases. M.S. at 286. The Court noted that the Indiana Supreme Court has expressed approval of a line of cases limiting standing to seek third-party visitation to former stepparents. Id. at 286. The Court opined that these cases would appear to preclude a visitation order in favor of Domestic Partner, because it is undisputed that Domestic Partner is not the child's former stepparent. Id. The Court also noted King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005), in which the Indiana Supreme Court reversed the trial court's grant of a mother's motion to dismiss her same-sex former domestic partner's lawsuit seeking to be recognized as the child's legal parent or to be awarded visitation. M.S. at 287. In King the Court held that the former domestic partner was not necessarily precluded from being awarded

“[a]t least some of the relief sought[.]” King at 967. M.S. at 287. The Court went on to say that, assuming without deciding that third-party visitation is not limited to former stepparents based on the King decision, the Court concluded that Domestic Partner is not entitled to visitation with the child. Id. The Court noted Domestic Partner conceded that visitation must be proven to be in the child’s best interests. Id. Domestic Partner argued that the trial court’s finding that continued contact with Domestic Partner was not in the child’s best interest is unsupported by the record. The Court disagreed, noting that: (1) the Court accords deference to the trial court’s determination of the best interests of the child; (2) the record establishes that Domestic Partner threw things at Mother and pushed her to the ground in the child’s presence; (3) Domestic Partner threatened Mother’s life and used obscenity in the child’s presence, telling the child that Domestic Partner planned to kill Mother; (4) Domestic Partner’s actions were so threatening that the six-year-old child tried to intervene by holding onto Domestic Partner and telling Mother to leave. Id. The Court concluded that these facts amply support the trial court’s finding that continued contact with Domestic Partner was not in the child’s best interests. Id.