

FAMILY LAW FOCUS

Dad Fled Jurisdiction with His Son

Every so often, a situation arises begging for the wisdom of Solomon . . . where each party is a little bit right, and each is a little bit wrong.

In this case, Dad and Mom are the parents of one son, Brandon, who was born in 1985. They divorced when the child was four.

First, the parties agreed to joint custody. Then Dad made allegations against Mom requiring an investigation that slowed the process.

Dad Ordered to Pay \$47 Weekly

Finally, the trial court gave sole custody to Mom, effective March 22, 1992, and "liberal visitation" to Dad. It also ordered him to pay child support of \$47 weekly.

Prior to March 22, though, Dad took Brandon and disappeared.

Charged with a crime for taking the boy, Dad was a fugitive until he



Dad disappeared with son for 16 years, and his child support accrued.

appeared in court in 2008 to answer the pending criminal charges.

It was then Mom filed in civil court, asking for back support.

Dad argued she was not entitled to it as the boy had been in his care and custody since March of 1992.

Mom Prevailed at Trial Court

But the trial court was not impressed and granted Mom's motion.

On appeal, Dad claimed because their son had been with him, she would be unjustly enriched by an award of support arrearage.

But that's not really the case, suggested the Court of Appeals.

"The non-custodial parent has an ongoing obligation to pay child support and the custodian has an ongoing obligation to care for the child," observed the Court.

Furthermore, "a custodial parent who has advanced his or her own funds to provide food, clothing

and shelter to the child . . . is entitled to collect the arrears from the non-custodian."

What is particularly puzzling, though, is who should get it?

Dad Grabbed Son for 16 Years

Even though he supported the boy, Dad "is clearly not entitled to have the arrearage forgiven because of his wrongdoing in taking custody of Brandon in willful violation of a court order."

And, just as clearly, Mom did not support him. But "being unaware of his whereabouts, [she] did not have the option" to do so, the Court concluded.

"Presumably, she maintained a home for [him] should he be returned to her custody and made decisions for sixteen years based upon the possibility of his return."

No Abuse of Discretion Present

Because a decision about child support is within the sound discretion of the trial court, explained the Court, it will be reversed only if there has been an abuse of discretion or the decision is contrary to law. Such was not the case here.

Affirmed with dissent.

See *Hicks v. Smith*, 919 N.E.2d 1169 (Ind.App. 2010).♦

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REALITY CHECKS:

If you're squeezed between raising children and taking care of parents, welcome to the ranks of the "sandwich generation."

You can lessen that stress, though, by having the legal documents of "your seniors" available or, at least, know where they are.

✓ Work with your older adults to put together a list of their attorneys and accountants, physicians and financial planners.

✓ Make sure they have a Last Will & Testament and/or estate and trust documents.

✓ Ask them to put a Health Care Power of Attorney in place.

✓ Suggest they do a General Durable Power of Attorney to address their financial matters.

✓ Whether or not they are legally competent is crucial in the preparation of such documents.

✓ Keep up-to-date on their Social Security information.

✓ Know if — and where — they have any bank accounts and retirement / investment accounts.

✓ Check with them to make sure beneficiaries on any such accounts are updated.

✓ Have copies of real estate papers and mortgages.

SEE: "Investment and Estate Planning," *Indiana Lawyer*, May 14-27, 2008. ♦

CHINS Tied to Child's Care — Not Culpability of Parent



Grandpa had outstanding warrant for arrest for violating probation.

N.E. was born in early 2004 to a mother with three other children. All had different fathers whose paternities were never established.

In late 2007, the Department of Child Services ("State") filed a petition, alleging each was a Child in Need of Services ("CHINS").

Domestic Abuse Flared in Home

The record showed Mom could not protect them from the domestic violence at the hands of N.E.'s Dad. The kids were taken out of her home and put in foster care.

In February, 2008, Mom admitted they were CHINS, and the four became wards of the State.

But Dad went to court. When tests pegged him as N.E.'s dad, her custody went to him and Grandma, with whom he was living.

Within days, the girl was taken back into foster care when the court learned of grandpa's addiction to cocaine and Dad's conviction for a prior domestic battery.

At its dispositional hearing, the

court declared the girl was a CHINS — but it never made a finding as to Dad or its reasons for not placing N.E. with him.

On appeal, Dad argued she was not a CHINS as to him because there was no allegation or evidence to support that finding.

A divided Court of Appeals reversed, and the State appealed to the Supreme Court.

CHINS Tied to Status of Child

A CHINS hearing is about the status of a child, observed the Court. "[A] separate analysis as to each parent is not required in the CHINS determination stage."

As such, "the conduct of one parent can be enough for a child to be adjudicated a CHINS."

Once CHINS has been determined, a hearing is held to consider alternatives for care.

The findings from that hearing were "deficient with respect to N.E. and to Father," though.

The court's failure to address its reasons for not placing N.E. with him "may well have interfered with Father's rights in the upbringing of N.E."

The Court vacated, in part, and remanded for proceedings.

See *In Re N.E.*, 919 N.E.2d 102 (Ind. 2010). ♦

Farm's Bills Linked to Wife's Lien

Overdue house maintenance, buying a new car, a badly needed vacation — all are reasons folks get a line of credit from a bank.

But financing a divorce is another thing entirely.

In the case at hand, Husband agreed to pay Wife for her interest in a family farm during the course of settling their divorce.

The record indicated he had farmed with his father during the entire 15 years of their marriage.

Farm Used Lines of Credit

In 1992, he and his dad formed a partnership to run the farm. And from the start, they had used lines of credit to finance its operation.

In the spring, the farm would get a loan to finance such seasonal expenses as fuel, chemicals and rents. And, in the fall after the harvest sold, the loan would be repaid.

These lines of credit would be secured by security agreements on all the assets and personal guarantees from the farm's owners.

The bank required first position on all assets securing the debt.

Husband Was to Pay \$1 Million

In their settlement agreement — approved by the court and made part of its 2007 dissolution decree — Husband agreed to pay Wife about \$1 million in several phases.

In 2008, when he went to renew his line of credit and restruc-

ture the farm's debt to pay Wife, though, the bank required him to get her agreement that its lien would take priority over hers. She refused.

The Husband went to court, asking that her lien be put into second place behind the bank's lien.

Supreme Court Took Appeal

His motion was granted by the court and affirmed by the Court of Appeals. The Supreme Court, however, disagreed and reversed.

On appeal, both parties agreed that their settlement agreement and decree created a judgment lien under Ind. Code § 34-55-9-2.

They also agreed that the bank's lien, securing the 2007 credit line, had priority over Wife's lien because it had been entered earlier.

Their dispute focused on the liens for lines of credit entered after the date of her judgment lien.

Division of Property Is Contract

Because an agreement to divide property is economic in nature, it is a contract. As such, courts rely on contract principles to interpret them.

The parties herein never negotiated terms to resolve this dispute — thus, a court was asked to “divine their likely intent.”

By virtue of the Wife's knowledge of prior financing, the Court said she impliedly agreed to a subordinate position for her lien — but only to the extent of “ordinary, con-



Court okayed subordination of lien for expenses of operating farm.

tinuing business operations.”

But when the Husband sought a line of credit in excess of operational expenses, the Court said no.

The Wife “impliedly agreed,” it decided, “to subordinate her lien to the bank's in an amount sufficient to continue the *status quo* as respects operation of the farm but not to finance the divorce.”

Was Duress or Fraud Alleged?

Unlike spousal maintenance, the Court explained, “property distribution settlements approved as part of a dissolution may be modified only where both parties consent or where there is fraud, undue influence or duress, none of which is alleged here.”

A court directive that compels the Wife to do more than subordinate her lien “up to an amount necessary to maintain the farm's operation” is a modification — and, thereby, impermissible.

Reversed.

See *Johnson v. Johnson*, 920 N.E.2d 253 (Ind. 2010). ♦

Caretakers Failed to Get Custody



If the child got sick, Caretakers bought and gave her medicine.

If ever there was a case pointing up the problems of “he said/she said” evidence, this is the one.

Here, the Caretakers of a child appeal the denial of their petition for temporary and permanent modification of custody of the little girl.

When T.P., born in 2001, was a baby, Mom and Dad — a court declared paternity in 2004 — worked for the Caretakers’ restaurant.

When the child was two, Mom was homeless. She asked the Caretakers to care for T.P. temporarily until she could provide for her.

For the next five years, T.P. seesawed between Mom and the

Caretakers. During that time, they took care of T.P. and helped Mom with money, food and housing.

When the girl was seven, they sought custody. Denied by the trial court, the Caretakers appealed.

They said Mom had been in and out of jail, often was unemployed, lived in inadequate housing and was abusing illegal drugs.

She could not support T.P. without their help, they stressed.

Parent Won over Caretakers

But Mom was the biological parent, and they “failed to overcome the presumption that she . . . should maintain custody of T.P.”

The court “must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child,” noted the Court.

“The presumption will not be overcome merely because a third party could provide the better

things in life for the child.”

Undeniably, the record showed Mom had problems, but conflicting evidence indicated the positive steps she was taking to fix them.

In the final analysis, an appellate court relies on a trial court to judge the credibility of the witnesses. As such, it “will not reweigh the evidence” on appeal.

Affirmed.

See *In Re Paternity of T.P.*, 920 N.E.2d 726 (Ind.App. 2010).♦

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NEWTON BECKER BOUWKAMP PENDOSKI, PC

ATTORNEYS AT LAW

317 • 598 • 4529

<http://www.nbbplaw.com>

317 • 598 • 4530 (fax)

M. Kent Newton
Carl J. Becker
Alan A. Bouwkamp
Lana Pendoski
Judith Vale Newton
Leah Brownfield, Paralegal
Courtney Haines, Paralegal
Jane Callahan, Administrator

knewton@nbbplaw.com
cbecker@nbbplaw.com
abouwkamp@nbbplaw.com
lpendoski@nbbplaw.com
jnewton@nbbplaw.com
lbrownfield@nbbplaw.com
chaines@nbbplaw.com
jcallahan@nbbplaw.com

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