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STATE OF INDIANA **IN THE RIPLEY CIRCUIT COURT**

SS: **2009 TERM**

COUNTY OF RIPLEY

CAUSE NO.: 69CO1-0608-JP-038

In re the Paternity of
Landon Joseph Smith:
Martha A. Strassell,
Petitioner,

and

Michael W. Smith
Respondent

AMENDED MEMORANDUM OF LAW

ISSUES

Issue 1. Does de facto custodian status change the presumption favoring parents over third parties?

Answer: No

Indiana law prefers custody of children be with their parents. *Huss v. Huss*, 888 N.E.2d 1238, 1245 (Ind. 2008); *Guardianship of B.H*, 770 N.E.2d 283, 287 (Ind. 2002); *Blasius v. Wilhoff*, 863 N.E.2d 1223, 1229, (Ind.App., 2007); *Harris v. Smith*, 752 N.E.2d 1283, 1288 (Ind.App., 2001); Ind.App., 2001; and *Froelich v. Clark*, 745 N.E.2d 222, 228 (Ind. Ct. App. 2001). Moreover, federal constitutional requires a presumption favoring natural parents. See Troxel v. Granville, 530 U.S. 57, 65-66 (2000).–The de facto custodian statute applies only after the third party rebuts the presumption favoring the natural parent.

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Intervenors' counsel relied on the *Huss* decision. Either Intervenors' counsel misread or misunderstood the *Huss* decision. While the *Huss* decision addresses a de facto custodian scenario the Indiana Supreme Court makes clear that a de facto custodian remains a third party:

> After reviewing the approaches used in several cases in more recent years, we observed that in considering a request for child custody by a non-parent, a trial court must consider "the important and strong presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent." ... Not only does this presumption provide a measure of protection for the rights of the natural parent, but "more importantly, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests." .... We then concluded:
>
> > To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this presumption, we hold that, *before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement.* The trial court must be convinced that placement with a person other than a natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course, be important, but the trial court is not limited to those criteria. The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence that the child's best interests are substantially and significantly served by placement with another person.

Huss at 1245. (Internal citations omitted and emphasis added).

Huss has no requirement of a de facto custodian status as a basis for a third party custody proceeding. In *Huss*, the mother did not argue that de facto status was a prerequisite to a third party custody proceeding. The following footnote from the Indiana Supreme Court makes the Intervenors' status as de facto custodians superfluous to the issue of their burden of proof and the presumption favoring the natural parent.

> Although not raised by the wife, there is an unresolved issue regarding whether "de facto custodian" status is a necessary prerequisite in a dissolution proceeding to a spouse receiving custody of a child for whom the spouse is not the biological parent. Several non-dissolution cases have held that a party who is not a natural parent need not allege or claim status as a de facto custodian in order to pursue custody. Allen v. Proksch, 832 N.E.2d 1080 (Ind. Ct. App. 2005) *trans. not sought*; In re the Custody of G.J., 796 N.E.2d 756, 761 (Ind. Ct. App. 2003), *trans. denied; see also* Nunn v. Nunn, 791 N.E.2d 779, 784-85 (Ind. Ct. App. 2003) *trans. not sought*. In dicta, however, the Court of Appeals in Custody of G.J. suggested that in a dissolution proceeding, the award custody of a child to a non-biological parent may be restricted only to a person who qualifies as a de facto custodian. Custody of G.J., 796 N.E.2d at 762. This conclusion is not expressly stated in the language of the de facto custody statutes, which define the term "de facto" *and designate additional factors to be considered when considering a claim for custody by a de facto custodian.*

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Huss at 1248, footnote 3. (Emphasis added). The presumption favoring the parent remains intact regardless of the third party's status as de facto custodians.

The *Huss* decision retails at some length the trial court's judgment. *Huss* at 1245 - 46. The trial court found Mrs. Huss to be unfit. *Id.*. The court may also find instructive the facts of *Blasius* at 1229- 30:

> There is evidence supporting the trial court's findings. A.B. refers to the Wilhoffs as mom and dad and has lived with them her entire life. Further, Higi's girlfriend testified that Blasius went to the home in which Higi resided many times, that the two went into and spent time in a room in which marijuana was stored, and that Blasius borrowed from Higi a scale used to weigh marijuana. Higi's girlfriend also testified that Blasius maintained a key to the attic in which the stolen motorcycle was found. Finally, Blasius and his wife have a combined monthly income of approximately $1,625, and monthly expenses of approximately $3,500. Although there was evidence that A.B. refers to Blasius as papa and dad, that Blasius has rehabilitated himself and acquired parenting skills, and that he is seeking more lucrative employment, there is evidence to support the trial court's findings and, therefore, its findings are not clearly erroneous.

Upon the grandparents fell the burden of proving facts similar to those described above about the father. Regarding the grandparents' case against their daughter, this poses a different issue. *Harris v. Smith* makes clear that a parent voluntarily placing a child with a third party is not per se unfitness but whether this is relinquishment was not an issue in either case. They provided nothing bearing upon the father.

It may be that Intervenors rely upon the third option of *B.H.*. That is, evidence showing a strong emotional bond has formed between the child and the third person. Respondent's counsel does not read this as being any different in content than the older formulation of relinquishment. ("...[V]oluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child." *Froelich* at 228.) Again, Respondent emphasizes distinguishing between Petitioner and Respondent. Respondent-Father never voluntarily relinquished his parental rights to the Intervenors while Petitioner-Mother did voluntarily relinquish her parental relationship to her parents. Intervenors presented no evidence of any such relinquishment by Father. Indeed, the Intervenors telephoning Father during the Father's trip to Tennessee belie any notion that they thought Father had relinquished his parental relationship with Landon.

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When the grandparents closed their case-in-chief, their evidence presented a pretty picture of two very concerned and loving grandparents. They presented no evidence showing any parental flaws in the child's father of unfit or acquiescence approaching *Huss*; or *Blasius*. Any evidence supporting a relinquishment theory failed to show Father's voluntary relinquishment. They failed to prove their case against the father. As the court has taken under advisement Respondent's motion for judgment on the evidence, that motion should be granted now.

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Issue 2: What effect does the de facto custodian statute have on third party cases.

Short Answer: It applies only after the third party rebuts the parental presumption.

The statute does not change the Intervenor's status as third parties. *Huss* made that point clearly. Those cases make equally clear that the de facto custodian statute applies only after the third party has rebutted the presumption favoring the natural parent. See *Huss* at 1248, footnote 3.

Respondent does not concede that the presumption has been rebutted by the Intervenors. However, if it had been, then the de facto custodian statute only adds to the other factors which the court is to refer to in making a decision regarding the best interests of the child.

The Intervenors did not need de facto status to have standing in this case. The Court of Appeals dealt with this issue in *Re: the Custody of G.J.*, 796 N.E.2d 756, 761 (Ind. Ct. App. 2003), trans. denied:

> First and foremost, we conclude that Godbey's construction of the statute would render it effectively meaningless or place words in the statute that are not currently there. Again, Section 31-17-2-3(2) allows "a person other than a parent" to commence a child custody proceeding. If the legislature had intended to allow only de facto custodians to file a direct child custody action, it would have been a simple matter to amend Section 31-17-2-3(2) at the time the de facto custodian statutes were added in 1999 to expressly provide that a de facto custodian, rather than "a person other than a parent," could file a child custody petition. The fact that the de facto custodian statutes were only added in 1999, while the language in Section 31-17-2-3(2) existed well before then, also indicates that "a person other than a parent" is not limited to de facto custodians. Otherwise, Section 31-17-2-3(2) would have had no meaning or effect whatsoever prior to 1999, and we presume that the legislature does not enact useless provisions.

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Issue No. 3: Were the Intervenors also de facto custodians?

Short answer: No.

IC 31-9-2-35.5 defines de facto custodian as follows:

> "De facto custodian", for purposes of IC 31-14-13, IC 31-17-2, and IC 31-34-4, means a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:
>
> (1) six (6) months if the child is less than three (3) years of age; or
>
> (2) one (1) year if the child is at least three (3) years of age.
>
> Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required minimum period. The term does not include a person providing care for a child in a foster family home (as defined in IC 31-9-2-46.9)

Since Landon was less than three (3) years of age until January 3, 2009, then the period of time must be six (6) months. That six months had to exist some time before August 18, 2008 - the first date a custody proceeding began in this matter. Mother having left Landon with her parents in June of 2008, Landon had not resided with the Intervenors for the required length of time with them as the primary caregivers. Intervenors testimony was that Mother was just as involved in taking care of her son as were the Intervenors.

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CONCLUSIONS

The evidence does not support a finding that the grandparents have sufficiently rebutted father's presumption to have custody of his child. The grandparents failed in showing father as being unfits, or having a long acquiescence in placement with Intervenors, or having voluntary relinquished his child such that the affections of the child and Intervenors have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.

The Intervenors were not de facto custodians but that status is not a prerequisite to bringing a custody petition as they have done in this matter. De facto status only bears upon the consideration of the child's best interests. As the Intervenors did not rebut the parental presumption as that presumption applies to the Respondent, this is a moot issue.

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Certificate of Service

I hereby certify that a copy of the foregoing has been furnished to Merritt K. Alcorn, attorney for Petitioner, fax on January 30, 2009.

Samuel C. Hasler