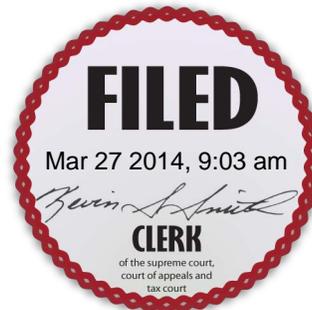


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE ADOPTION OF )  
L.T.: )  
 )  
J.M. and S.M., )  
 )  
Appellants, )  
 )  
vs. )  
 )  
C.T., )  
 )  
Appellee. )

No. 49A05-1310-AD-493

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Gerald S. Zore, Judge  
Cause No. 49D08-1302-AD-7019

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**March 27, 2014**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

L.T. was born to C.M. (Mother) on October 2, 2010. Paternity was established in C.T. (Father) via a paternity action filed in Marion Circuit Court, Paternity Division (the Paternity Court) under Cause No. 49C01-1110-JP-38708. Mother died on October 25, 2012. On November 5, 2012, Mother's parents, S.M. and J.M. (Maternal Grandparents), filed a Petition for Appointment of Co-Guardians over Minor Person's Estate in Hamilton Superior Court 1 under Cause No. 29D01-1211-GU-161. That petition was granted on the same day. On October 8, 2013, following numerous filings, which will be set out more fully below, the Marion Superior Court, Probate Division (the Probate Court) entered an order terminating the guardianship on grounds that Hamilton Superior Court 1 lacked subject-matter jurisdiction over L.T.'s guardianship. In this appeal, Maternal Grandparents contend the trial court erred in doing so. Maternal Grandparents present the following restated issues for review:

1. Did the Probate Court err in determining that Hamilton Superior Court 1 lacked subject-matter jurisdiction over the guardianship of L.T.?
2. Did the Probate Court err in transferring custody of L.T. to Father without conducting an evidentiary hearing?

We affirm and remand with instructions.

After L.T. was born, Mother initiated a paternity action against Father in the Paternity Court. Father was adjudged to be L.T.'s biological father. Mother was named the custodial parent, while Father was ordered to pay \$100 per week in child support and was granted parenting time pursuant to the Indiana Parenting Time Guidelines. Father exercised parenting time every weekend and regularly paid his child support obligation. At the time of Mother's death on October 25, 2012, Father worked the second shift for his employer and did

not have medical insurance that would cover L.T.

On October 28, 2012, Father signed consent forms for his father, Ca.T., to either adopt L.T. or become her guardian. On November 5, 2012, Maternal Grandparents filed a Petition for Appointment of Co-guardians Over Minor's Person and Estate in Hamilton Superior Court 1. Because of his work schedule and the lack of medical coverage for L.T., on November 2, 2012, Father signed a Waiver of Notice of Hearing and Consent to Guardianship, which was filed with Maternal Grandparents' guardianship petition. On November 5, 2012, Hamilton Superior Court 1 entered an order appointing Maternal Grandparents as co-guardians over L.T.'s person and estate. Commencing approximately one month after the guardianship was established and continuing thereafter, Maternal Grandparents refused to allow L.T. to have contact with Father or his parents, Ca.T. and M.T. (Paternal Grandparents).

On January 3, 2013, Father filed in Hamilton Superior Court 1 a Combined Motion to Set Aside and Dismiss Due to Lack of Subject Matter and Personal Jurisdiction. In this motion, Father claimed that Hamilton Superior Court 1 did not have subject-matter jurisdiction because none of the parties involved lived in Hamilton County, and because the paternity action filed in the Paternity Court had given that court exclusive jurisdiction over matters involving L.T.'s custody. Hamilton Superior Court 1 granted the motion and ordered that the matters before it be consolidated and transferred to the Paternity Court.

On January 30, 2013, Paternal Grandparents filed a Verified Emergency Petition to Intervene in the Paternity Court. The court granted the petition the same date. In the same

court, on January 31, 2013, Paternal Grandparents filed a Verified Petition for Emergency and Permanent Custody of a Minor Child to a Third Party. On the same day, Paternal Grandparents filed a petition asking the Paternity Court to transfer the Hamilton County guardianship action to the Paternity Court and consolidate it with the Paternity Court proceeding (i.e., the original paternity action). On February 1, 2013, the Paternity Court issued an order transferring the Hamilton County action to the Paternity Court and consolidating those two actions.

On February 15, 2013, Paternal Grandparents simultaneously filed two motions in Hamilton Superior Court 1. One was a Verified Petition to Intervene, in which they sought to intervene in the guardianship action. They stated in the petition that Father did not object to their intervention. In the other motion, a Motion to Set Aside Guardianship/Motion to Dismiss Guardianship, Paternal Grandparents asked the court to dissolve the guardianship on the basis of lack of subject-matter jurisdiction. On February 19, 2013, Maternal Grandparents filed a motion to intervene in the Paternity Court. That motion was granted on the same day.

On February 22, 2013, Maternal Grandparents filed a Petition for Adoption in the Probate Court under Cause No. 49D09-1302-AD-7019, i.e., the present action. On March 21, 2013, the Paternity Court entered an order transferring the matters before it to the Probate Court on grounds that the Paternity Court lacked jurisdiction upon the filing of the petition to adopt in the Probate Court. On March 12, 2013, the Probate Court granted Father's motion to consolidate the guardianship cause into the adoption cause. On October 8, 2013, the

Probate Court granted a motion to terminate the guardianship upon grounds that Hamilton Superior Court 1 lacked subject-matter jurisdiction to enter any orders relating to the guardianship action filed by Maternal Grandparents. The court also ordered that L.T. “shall immediately be returned to her father[.]”<sup>1</sup> *Appellee’s Appendix* at 137. Maternal Grandparents appeal this order.

1.

Although not so designated, Father’s motion to dismiss for lack of subject-matter jurisdiction arises under Indiana Trial Rule 12(B)(1). Subject-matter jurisdiction refers to the power of a court to hear and decide the general class of actions to which a particular case belongs. *Parkview Hosp., Inc. v. Geico Gen. Ins. Co.*, 977 N.E.2d 369 (Ind. Ct. App. 2012), *trans. denied*. A motion challenging subject-matter jurisdiction thus presents a threshold question concerning the trial court’s power to act. *Hood’s Gardens, Inc. v. Young*, 976 N.E.2d 80 (Ind. Ct. App. 2012). Subject-matter jurisdiction cannot be waived or conferred by agreement and the issue can be presented at any time. *Parkview Hosp., Inc. v. Geico Gen. Ins. Co.*, 977 N.E.2d 369. “When a court lacks subject matter jurisdiction, its actions are *void ab initio* and have no effect whatsoever.” *Id.* at 371. The appropriate standard for reviewing a ruling on such motions is dependent upon what happened at the trial level. Where, as here, the trial court ruled on a paper record without conducting an evidentiary hearing, our standard of review is *de novo*. *Parkview Hosp., Inc. v. Geico Gen. Ins. Co.*, 977

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<sup>1</sup> On October 11, 2013, a different panel of this court granted Maternal Grandparents' Motion for Emergency Stay with respect to this order.

N.E.2d 369.

An Indiana court obtains subject-matter jurisdiction only through the Indiana Constitution or a statute. *Id.* Ind. Code Ann. § 29–3–2–1 (West, Westlaw current through 2013 1st Reg. Sess. & 1st Reg. Technical Sess.) establishes the jurisdiction of Indiana courts to hear guardianship actions. Pertinent to this appeal, this statute provides that Indiana courts have jurisdiction over “[t]he business affairs, physical person, and property of every incapacitated person and minor residing in Indiana.” I.C. § 29–3–2–1(a)(1). Subsection (b), however, sets out exceptions to the general rule that courts have jurisdiction over guardianship actions. One such exception relevant in the present case provides that a juvenile court has exclusive original jurisdiction over matters relating to “[g]uardianship of the person proceedings for a child [.]” Ind. Code Ann. § 31-30-1-1(10) (West, Westlaw current through 2013 1st Reg. Sess. & 1st Reg. Technical Sess.). Therefore, reading these two provisions together, Indiana trial courts generally have original jurisdiction over guardianship actions, but they do not have jurisdiction over proceedings concerning the guardianship of a child, for which exclusive original jurisdiction vests in juvenile courts.

Hamilton Superior Court No. 1 is not a juvenile court, and thus lacked subject-matter jurisdiction over an action to establish guardianship of L.T., a child. In the absence of subject-matter jurisdiction, its order establishing Maternal Grandparents’ guardianship over L.T. was void *ab initio* and the Probate Court did not err in dismissing the guardianship action filed in Hamilton Superior Court No. 1, thus nullifying the November 5, 2012 order establishing guardianship of L.T. in Maternal Grandparents. We further conclude that this

determination was properly made without conducting an evidentiary hearing, because the undisputed facts necessary to make this decision were discernible in the written materials in the record.

2.

Maternal Grandparents contend the Probate Court erred in transferring custody of L.T. to Father without conducting an evidentiary hearing. They contend that this action is governed by Ind. Code Ann. § 31-14-13-6 (West, Westlaw current through 2013 1st Reg. Sess. & 1st Reg. Technical Sess.), which provides that a court may not modify a child custody order unless it determines that modification is in the best interests of the child and there is a substantial change in one or more of the factors listed in I.C. § 31-14-13-2 (West, Westlaw current through 2013 1st Reg. Sess. & 1st Reg. Technical Sess.) and, if applicable, I.C. § 31-14-13-2.5 (West, Westlaw current through 2013 1st Reg. Sess. & 1st Reg. Technical Sess.). They contend that these determinations, in turn, cannot be made without an evidentiary hearing.

We begin by observing that the “change” in custody upon which Maternal Grandparents’ argument is premised necessarily was occasioned by one of two things: (1) the October 8, 2013 dismissal of the guardianship action and consequent vacating of the award of custody to Maternal Grandparents in that proceeding; or (2) the October 25, 2012 death of the custodial parent, Mother. As we have already observed, Hamilton Superior Court No. 1 lacked subject-matter jurisdiction to issue its order granting guardianship in Maternal Grandparents. “When a court lacks jurisdiction of the subject matter, its actions are void *ab*

*initio* and have no effect whatsoever.” *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000). Thus, dismissal of the guardianship order cannot be said to have legally *changed* custody of L.T. because the order granting custody is regarded by law as having had “no effect whatsoever.” *Id.* Thus, dismissal of the order did not trigger the provisions of I.C. § 31-14-13-6.

This leaves Mother’s death as the legally significant event that necessitated a change in L.T.’s custodian. The question thus presented is whether, when a custodial parent dies, a court is required to hold an evidentiary hearing to determine whether the noncustodial parent, or some other party, should have custody of the surviving child. The short answer is – it depends.

Long ago, our Supreme Court stated:

Of the many ties that bind humanity, that which unites the parent and the child is the earliest and the most hallowed and in all civilized countries it is regarded as sacred. Therefore “parents have a natural right to the custody of the children,” and “where one parent is dead the surviving parent, if fit, has the right to their custody.”

*Duckworth v. Duckworth*, 203 Ind. 276, 179 N.E. 773, 774-75 (1932) (quoting 46 C. J. 1223, 1224) (internal citation omitted); *see also Gilmore v. Kitson*, 165 Ind. 402, 406, 74 N.E. 1083, 1084 (1905) (“[b]oth under the common law and the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control and education”). Indeed, as a general rule, upon the death of the custodial parent, “custody automatically inures to the surviving parent.” *In re Marriage of Hilton*, 459 N.E.2d 744, 745 (Ind. Ct. App. 1984) (applying the rule in a

case where the parents were divorced and the custodial parent had died).

At the time the Probate Court issued its ruling, the only petitions before the court that addressed Father's fitness as a parent were Maternal Grandparents' separate petitions for guardianship and adoption. As we have indicated, because Hamilton Superior Court 1 lacked subject-matter jurisdiction, the guardianship proceeding was void and therefore of no effect here. As for the adoption petition, in it, Maternal Grandparents alleged that Father's consent was not required because he "failed to provide for the care and support of" L.T. or was unfit to be a parent. *Appellant's Appendix* at 46. Specific grounds for the latter allegation were not supplied. In his motion opposing adoption, Father attached documents generated by the Indiana Support Enforcement Tracking System reflecting that he had paid regular support since his paternity was established more than one year before the adoption petition was filed. He further alleged that Maternal Grandparents "refuse[d] to allow [Father] and his immediate family to parent, visit or communicate with [L.T.]." *Id.* at 57. Therefore, except for Maternal Grandparents' bare allegation that it was so, there was nothing before the Probate Court indicating that Father was an unfit parent. Under these circumstances, the Probate Court was not required to hold a hearing before vacating the guardianship and awarding custody of L.T. to Father. *See Hendrickson v. Binkley*, 161 Ind. App. 388, 391-96, 316 N.E.2d 376, 378-81 (1974) ("[b]eing entitled on the death of the mother, in the absence of any showing in a proper forum, that [the father] was an unsuitable person to have such care and custody, he would by operation of law, be entitled to have such care and custody"), *cert. denied*, 423 U.S. 868 (1975).

We note that our ruling does not finally resolve all contested matters between the parties in this case. Maternal Grandparents' petition to adopt is currently pending before the Probate Court. Upon remand, we presume the Probate Court will resolve that matter in due course. In the meantime, this court's emergency stay of the Probate Court's order vacating the guardianship is lifted, with instructions upon remand that the parties comply with the Probate Court's order to immediately place L.T. in Father's custody.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur.