

# Children's Law Center of Indiana



## Guardianship/Third Party Custody

11/10/15

In **Matter of Guardianship of B.W.**, 45 N.E.3d 860 (Ind. Ct. App. 2015), the Court reversed the trial court's order awarding custody of five-year-old B.W. to Great Aunt. *Id.* at 867. The Court remanded with instructions to vacate the trial court's order. *Id.* B.W. was born in 2009 and tested positive for methadone at birth. In January, 2010, Mother consented to Grandmother's petition to be appointed guardian of B.W. B.W. lived with Grandmother, as well as Great Aunt and Great Grandmother, until May, 2010. In May, 2010, Great Aunt and Great Grandmother moved out of Grandmother's home, and, with Grandmother's consent, took B.W. to live with them. From May, 2010, to May, 2014, B.W. lived primarily with Great Aunt. Mother visited B.W. only ten to fifteen times, and continued to struggle with substance abuse. In 2012, Mother was convicted of operating a vehicle while intoxicated, and admitted she used hydrocodone and methamphetamine from 2012 to 2013. Mother agreed that Great Aunt "took good care of B.W., loved B.W. very much, and formed a bond with B.W." during this period. In mid-2013, Mother stopped using drugs because she became pregnant with a second child, K.W., who was born without drugs in her system. Great Aunt did not allow Mother to increase contact with B.W. even after Mother had been "clean for a number of months". Great Aunt told Grandmother, "I'm [the child]'s mother." In May, 2014, Grandmother took B.W. back from Great Aunt; Grandmother, Mother, B.W., and K.W. lived together until September, 2014. In June, 2014, Great Aunt petitioned for guardianship over B.W. In July, 2014, Grandmother petitioned to have her guardianship over B.W. terminated because Grandmother believed Mother was capable of caring for the child. Mother had completed certified nurse's aide training and obtained a job that required random drug screens. Mother moved in with her boyfriend and took K.W. and B.W. with her, but maintained contact between B.W. and Great Aunt. On December 4, 2014, the trial court granted Grandmother's petition to terminate her guardianship over the child, but took Great Aunt's guardianship petition under advisement. At the time of the hearing, Mother had been working as a certified nurse's aide (CNA) for five months, had a place to live, had no criminal charges pending, and had passed the last random drug screen administered by her employer in September 2014. After hearing evidence, the trial court found that severing the relationship between Great Aunt and B.W. was not in the child's best interests, and granted Great Aunt custody of B.W. Mother appealed.

**The Court held that Great Aunt had not overcome the strong presumption in favor of a child's placement with her natural parent.** *Id.* at 867. Quoting **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002), the Court said that to overcome the presumption in favor of a natural parent, the trial court must be convinced that a placement with a third party "represents a

substantial and significant advantage to the child.” B.W. at 866. The Court noted that sufficient evidence to rebut this presumption may, but need not necessarily include the parent’s present unfitness, long acquiescence, or past abandonment of the child “such that the affections of the child and the third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.” B.H. at 287. B.W. at 866. The Court observed that, if a decision to place custody of a child in a third party, rather than a parent, is based solely upon the child’s “best interests,” as opposed to a finding of parental unfitness, abandonment, or other wrongdoing, “such interests should be specifically delineated, as well as compelling and in the real and permanent interests of the child.” B.H. at 287. B.W. at 866. The Court opined that the trial court’s findings were inadequate to rebut the presumption in favor of the natural parent because the findings did not specifically state: (1) why placement with Great Aunt was necessary or (2) how B.W.’s best interests would be substantially and significantly served by placement with Great Aunt. Id. at 866. The Court noted that, although the character of Great Aunt’s relationship with the child would undoubtedly change, this fact alone did not mean that their bond would be severed because Mother wants Great Aunt to have a relationship with the child. Id. at 867.

**The Court held that the record did not support a finding that Mother was unfit at the time of the hearing.** Id. at 866. The Court said the trial court’s findings that Mother did not attend regular religious services and that Mother could not identify K.W.’s father were not relevant in the determination of parental fitness. Id. at 866 n.5. The Court said that none of the trial court’s findings suggested that Mother was presently unfit, noting: (1) Mother said she had been clean for one year; and (2) Mother had found a place to live, was employed as a CNA, and had been caring for K.W. without intervention from family members or DCS. Id. at 866-67.