

# Children's Law Center of Indiana



## Guardianship/Third Party Custody

5/30/17

In **Matter of Guardianship of I.R.**, 77 N.E.3d 810 (Ind. Ct. App. 2017), the Court affirmed the trial court's order which terminated the guardianship of Mother's child by Mother's aunt and uncle (Guardians). *Id.* at 815. When the child was two years old, Mother was arrested for neglect of a dependent. On January 27, 2015, Guardians filed a petition for temporary guardianship of the child, to which Mother consented. The trial court granted the guardianship on February 24, 2015. On May 12, 2015, a review hearing was held, and the trial court granted Guardians permanent guardianship of the child. In the order granting permanent guardianship, the trial court ordered that Mother must meet the following conditions to the satisfaction of the court prior to modifying or terminating the guardianship: (1) show that she has safe and stable housing for the child; (2) show she has stable income for a reasonable period of time to support and financially care for the child; (3) show that she has been evaluated for substance abuse and mental health that she is receiving regular treatment for substance abuse and mental health, and has a reasonable plan to continue treatment as recommended; (4) show that she is making progress and is healthy for a reasonable period of time, including showing that she is sober, mentally stable, and not a danger to herself or the child; and (5) must show that she is committed to staying healthy and is able to care for and offer a stable environment for the child. Mother consented to the trial court's conditions and to the guardianship of the child.

On November 25, 2015, Mother filed a "Verified Petition to Modify and/or Terminate Guardianship and Request for Expedited Hearing." A hearing was held on September 9, 2016, after the trial court granted three motions for continuances which were requested by Guardians. At the hearing, Mother testified that she: (1) was living in a two bedroom apartment, where the child had his own bedroom; (2) had resided in the apartment for over four years; (3) had been employed at McDonald's for a year and had worked her way up to being a manager; (4) had almost completed her probation period for the neglect of a dependent charge and was set to be released from probation on October 8, 2016; (5) was subject to random drug screening as part of her probation and had passed all of the screens; (6) underwent a substance abuse evaluation through Delaware County Community Corrections, met with a substance abuse counselor every two weeks, and was being treated by a doctor concerning her substance abuse issues; (7) had sought a mental health evaluation and had been treated for her mental health issues by a doctor since March 2016; and (8) was still seeing her doctor and was taking antidepressant medication for depression and anxiety. Mother had supervised visitation with the child once per week for two hours and later visited the child for one day per week from 8:00 a.m. to 7:00 p.m. Mother never missed any visitations.

Guardians had taken the child to Dr. Davis in November 2015 when he displayed behavioral issues at school. Dr. Davis treated the child for his issues involving interaction with his classmates and testified that the child was diagnosed with post-traumatic stress disorder, attention deficit disorder, and disruptive attachment issues. At the hearing, Dr. Davis testified that: (1) she believed it was in the child's best interest for Mother to participate in his therapy; (2) Mother participated in the child's therapy sessions when allowed; (3) the child had difficulty with transitions, and a transition plan should be implemented to prepare the child to transition from Guardians to Mother. The child also required an Individualized Educational Plan (IEP), and Dr. Davis and the child's pre-school teacher both testified the Plan could be transitioned to another school if the child was placed with Mother.

The trial court ordered that the guardianship be terminated, and found that Mother had satisfied all of the conditions set forth in the order granting permanent guardianship. The trial court also found that Guardians failed to carry their burden to overcome the presumption in Mother's favor that she should raise the child. The trial court ordered a transition period to return the child to Mother's care. Guardians appealed, contending that it was in the child's best interests to be left in their care, the trial court did not consider the passage of time and its effect on their bond with the child, and the trial court did not give proper consideration to Mother's alleged lack of appreciation of and preparation for the child's psychological and behavioral issues.

**The Court opined that the standard of review in guardianship proceedings is an abuse of discretion by the trial court.** *Id.* at 813. Citing *In Re M.N.S.*, 23 N.E.3d 759, 766 (Ind. Ct. App. 2014), the Court explained that in determining whether the trial court abused its discretion, the Court will review the trial court's findings and conclusions, which may not be set aside unless they are clearly erroneous. *Guardianship of I.R.* at 813. The Court noted that it will consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment, and the Court will not reweigh the evidence nor reassess the credibility of witnesses. *M.N.S.* at 766. *Guardianship of I.R.* at 813.

**The Court concluded that sufficient evidence was presented to show that Mother had met the conditions set forth in the order granting permanent guardianship.** *Id.* at 814. Guardians contended that Mother failed to make a sufficient showing that she met all of the conditions ordered by the trial court in the permanent guardianship order. Guardians maintained that the only evidence Mother presented was her own self-serving testimony. Quoting *K.I. Ex Rel. J.I. v. J.H.*, 903 N.E.2d 453, 460 (Ind. 2009), the Court noted, "Indiana courts have long held that '[e]ven when a parent initiates an action to reobtain custody of a child that has been in the custody of another, the burden of proof does not shift to the parent...[r]ather, the burden of proof is always on the third party.'" *Guardianship of I.R.* at 813. Quoting *In Re M.N.S.*, 23 N.E.3d at 766, the Court explained that a parent's burden to show a modification of custody is justified is "minimal," and after meeting "this 'minimal' burden of persuasion to terminate the guardianship, the third party has the burden to prove 'by clear and convincing evidence that the child's best interests are substantially and significantly served by placement with another.'" *Guardianship of I.R.* at 813. The Court reviewed Mother's evidence that she had met each of the trial court's

conditions and found that Guardians' arguments to the contrary were merely requests for the Court to reweigh the evidence which the Court cannot do. Id. at 814.

**The Court concluded that Guardians did not carry their burden to overcome the presumption in Mother's favor that the child's best interests were served by placement with Mother.** Id. at 815. In support of their contention that the child's best interests would be served by leaving the child in their care, Guardians contended that removing him from their care would be traumatic and pointed to Dr. Davis's testimony it would be a "trauma" to terminate the guardianship. The Court found that: (1) Guardians misstated Dr. Davis's testimony because she did not testify that a gradual transition would be traumatic; (2) in its order terminating the guardianship, the trial court ordered a transition plan to gradually increase Mother's parenting time until she had full-time care of the child; and (3) there was no testimony that transitioning the child back to Mother's care would be harmful because of his bond with Guardians. Id. at 814-15. In response to Guardians' assertions that the trial court did not consider the passage of time and its effect on their bond with the child, the Court said that: (1) Mother filed her petition to terminate the guardianship within one year of the child being placed with Guardians; (2) Mother consistently had visitation with the child; and (3) Guardians filed three motions to continue proceedings which may have added to the length of the proceedings. Id. at 815. Although Guardians contended the trial court did not give proper consideration to Mother's alleged lack of understanding of and preparation for the child's psychological and behavioral issues, the Court noted the trial court's findings that: (1) the evidence did not establish that Mother could not address the child's special needs; (2) the fact that the child had special needs did not preclude Mother from the opportunity and the right to parent her child; (3) because Guardians had limited Mother's parenting time with the child, it was difficult to determine whether Mother had the ability to care for the child; and (4) Guardians had not given Mother the opportunity to demonstrate her ability to care for the child. Id.