

Children's Law Center of Indiana



Custody and Parenting Time

10/14/2011

In **Tesfamariam v. Woldenhaimanot**, 956 N.E.2d 118 (Ind. Ct. App. 2011), the Court affirmed the trial court's decision, and held that due process required the trial court to establish that the wife's interpreter was qualified, and to administer an oath to the interpreter to provide accurate translation. Although the trial court failed to do so, the Court held there was no fundamental error, and Mother had waived her objections. *Id.* Mother and Father, natives of Africa whose native tongue is Tigrinya, needed a translator at a hearing regarding child custody and parenting time. Mother is a United States citizen and resided in the U.S. since 1987, but she did not speak English fluently. At the time of the hearing, Mother was taking English classes. Father, who arrived in the U.S. in 1995, spoke English fluently enough to communicate without the aid of an interpreter. In March 2010, Mother requested a final hearing regarding Father's Petition for Dissolution of Marriage, as well as for a translator to be present at the hearing. At the final dissolution hearing, the trial court utilized the services of Language Line, a telephone interpretation service that is funded by the Indiana Supreme Court. The trial court issued an order granting Father sole legal and physical custody of the children, and Mother appealed.

Mother's primary contention was that the trial court denied her due process because it failed to administer an oath to her interpreter, and failed to ensure that her interpreter was properly qualified as an expert. *Id.* at 121. Although this issue had been addressed in criminal cases, where case law mandates the use of an interpreter to translate court proceedings, it had never been addressed in a civil case. *Id.* The Court found that many of the due process concerns in a criminal case were also relevant in a civil case. *Id.* Because of the similar due process concerns, the Court found it appropriate to draw extensively from criminal jurisprudence in making its decision in this case. *Id.*

The trial court abused its discretion because it failed to qualify the translator as an expert, and because it failed to administer an oath to the translator to provide an accurate translation. *Id.* at 122. The Court reasoned that because both of these actions are necessary to protect a party's due process rights, and because the due process rights in a child custody case are substantial, it was appropriate to require the same procedural safeguards in a civil case as in a criminal case. *Id.*

The Court noted that previous case law had presented a list of fourteen questions that a trial court could ask to qualify an interpreter as an expert; they are as follows: "(1) Do you have any particular training or credentials as an interpreter? (2) What is your native language? (3) How did

you learn English? (4) How did you learn [the foreign language]? (5) What was the highest grade you completed in school? (6) Have you spent any time in a foreign country? (7) Did you formally study either language in school? To what extent? (8) How many times have you interpreted in court? (9) Have you interpreted for this type of hearing or trial before? (10) Are you a potential witness in this case? (11) Do you know or work for any of the parties? (12) Do you have any other potential conflicts of interest? (13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems? (14) Are you familiar with the dialect or idiomatic particularities of the witness?” *Id.* (quoting *Cruz Angeles v. State*, 751 N.E.2d 790, 795 (Ind. Ct. App. 2001)).

Although the Court determined that the trial court had abused its discretion in not qualifying the translator as an expert, and in not administering an oath to the translator translator to provide an accurate translation, the Court determined there was no fundamental error, and that Mother had waived her arguments. *Id.* at 123. Father had argued on appeal that Mother had waived her objections to the interpreter, and Mother replied that the trial court’s errors were fundamental and not subject to waiver. *Id.* at 122. The Court reasoned that the fundamental error exception to waiver is “extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” *Id.* at 122 (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)). The Court noted that previous case law in criminal matters had established that when the defendant failed to object to various problems involving an interpreter, the argument had been deemed waived, and there had been no fundamental error. *Id.* at 123 (citing *Mariscal v. State*, 687 N.E.2d 378, 382 (Ind. Ct. App. 1997) (holding that when a defendant fails to object to the use of an interpreter and one of defendant’s attorneys consents to use of interpreter, objections to the interpreter are waived); *Clark v. State*, 580 N.E.2d 708, 712 (Ind. Ct. App. 1991), and *Griffith v. State*, 898 N.E.2d 412, 414-15 (Ind. Ct. App. 2008) (holding that a party who does not object to an expert’s qualifications at trial or to the trial court’s failure to administer an oath to a witness waives those issues for appeal). Furthermore, as part of showing that a trial court committed fundamental error, Mother had to show that she was substantially harmed by the trial court’s error. The Court determined that Mother had failed to do so, as Mother had only cited instances where the problems the interpreter had related to volume, not content or translation problems. *Id.* at 123.