

Children's Law Center of Indiana



Custody and Parenting Time

1/25/18

In **Wills v. Gregory**, 92 N.E.3d 1133 (Ind. Ct. App. 2018), the Court affirmed the trial court's order which modified physical custody of the child from Mother to Father. *Id.* at 1142. The child was born to unmarried parents in April, 2009. Father established paternity in March 2010 and entered into an agreed paternity order with Mother. The order granted Mother primary physical custody of the child, with Father exercising parenting time every other weekend and on Wednesdays from after school until 7:00 p.m. Mother and Father shared joint legal custody of the child. Mother lived alone with the child and has been the child's primary caregiver since birth. Father has lived with his fiancée, their son, and his soon-to-be stepson. In October 2013, Mother suffered a stroke and was hospitalized for a little over two months. The child stayed primarily with her maternal grandmother (Grandmother). As a result of the stroke, Mother has some disabilities, including aphasia and apraxia. Aphasia affects Mother's ability to express herself, and apraxia impacts her motor programming. Mother receives speech therapy, and Ms. Essig, the clinical supervisor who oversees her therapy, noted that Mother was currently reading at "a paragraph level". After Mother's stroke, Father's communications concerning the child took place primarily through Grandmother and the child's Aunt. Throughout 2014 and 2015, Mother and Father had several disagreements about scheduling parenting time and which versions of the Indiana Parenting Time Guidelines should be followed. On April 13, 2016, Father signed a petition to modify custody, which was filed on April 19, 2016. On April 18, 2016, Mother filed a petition asking the trial court to clarify parenting time and which set of the Indiana Parenting Time Guidelines the parents should follow.

The trial court heard evidence on December 8, 2016, including testimony from Mother, Father, Father's fiancée, Grandmother, Grandmother's friend, Mother's co-worker, and Ms. Essig. During the hearing, Grandmother explained that Mother can respond to texts, saying yes, no, or okay, but if a long sentence response is needed, Grandmother types Mother's response. Grandmother explained that Mother can write out more than a few sentences, but might need help depending on the complexity of the words.

The child was in preschool when Mother suffered her stroke, and was in second grade at the time of the custody hearing. Mother found a tutor when the child was attending first grade, and the child's reading grades improved to "mastery" or "exceeds mastery" by the end of the school year. At the end of first grade, the child's math grades ranged from "needs improvement" to "exceeds mastery." Mother decided not to keep the child in tutoring for second grade. The child's second grade report card from the first grading period reflected the child had "mastery" over all reading and math concepts but she "need[ed] improvement" in all writing concepts. The

child scored below the national average in standardized reading, language usage, and math assessments.

Father testified about his concerns regarding the child's academic progress, and personal hygiene, including that the child had gum in her hair when he picked her up from school and typically arrived for parenting time wearing stained clothing. Father explained the child had her own room at his house, his house had a swingset and a large fenced-in back yard, the child had a close relationship with Father's fiancée, and that he and his fiancée helped the child and his soon-to-be stepson with their homework. Father was also concerned that the child's schoolwork would become more complex as she became older, and stated that the child's needs for help with homework would be met by himself and his fiancée.

The trial court did not err when it concluded that there had been a substantial change in circumstances which adversely affected Mother's ability to be the child's primary custodian and that modification of the child's physical custody from Mother, who had suffered a stroke, to Father was in the child's best interests. *Id.* at 1142. Quoting Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002), the Court stated: (1) the Court reviews custody modifications for an abuse of discretion, granting latitude and deference to the trial court; (2) judgments will be set aside only when they are clearly erroneous; and (3) the Court "will not substitute its own judgment if any evidence or legitimate inferences support the trial court's judgment." Wills at 1136. The Court looked to IC 31-14-13-6, which provides that a trial court may not modify an existing custody order unless: (1) the modification is in the best interests of the child; and (2) there has been a substantial change in one or more of the statutory factors which are outlined in IC 31-17-2-8. *Id.* Citing In Re Paternity of P.R., 940 N.E.2d 346, 351 (Ind. Ct. App. 2010), the Court observed that all that is required to support a custody modification is a finding by a trial court that: (1) change would be in the child's best interests; (2) a consideration of the factors listed at IC 31-17-2-8; and (3) a finding that there has been a substantial change in one of the factors. Wills at 1136.

Mother conceded her stroke was a "substantial change in circumstances", but contended the change had not adversely affected her ability to be the primary physical custodian and that custody modification was not in the child's best interests. On the issue of the child's best interests, Mother argued that: (1) the child would be forced to live in the home of a person with whom she had never lived; (2) the child would be moving from a two person household to a five person household; (3) the child would be forced to change school systems; (4) the child would be cared for during the summer by the mother of Father's fiancée, with whom the child did not have a relationship; (5) the child would be moved to a home where physical discipline was used. The Court recognized Mother's valid concerns, but found their potential effect on the child overstated. *Id.* at 1141. The Court noted that: (1) Mother and Father had shared joint custody of the child since 2010; (2) the child had stayed with Father on Wednesday evenings, every other weekend, and certain holidays; (3) the child had a close relationship with Father's fiancée; (4) the mother of Father's fiancée was a special education teacher at the school where the child would attend, and the record was silent on her relationship with the child; and (5) Father testified that he spanked the child "when she gets out of control," but he had not done so for over a year.

Id. The Court opined that probative evidence supported the trial court's findings that it was in the child's best interests for physical custody to change to Father. Id. at 1142.