



This Case Law Update Provided by:

The Children's Law Center of Indiana

Guardianship

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In Re Guardianship of L.L., 745 N.E. 2d 222 (Ind. Ct. App. 2001)

In **In Re Guardianship of L.L.**, 745 N.E. 2d 222 (Ind. Ct. App. 2001), the Court reversed the trial court's decision denying the mother's petition to terminate the paternal grandmother's guardianship of the child. The Court instructed the trial court to terminate the guardianship and provided that the trial court could enter necessary orders for counseling and other related matters. The paternal grandmother had served as guardian of the mother's younger child for eight years. The child and his older brother, whose ages were eight months old and three years old at the time the guardian was initially appointed, had needed a guardian due to the parents' tumultuous lifestyles, including substance and alcohol abuse. The older child had been returned to the mother's care two years after guardianship had been established, but the younger child had remained with the guardian.

In custody disputes between parents and third parties, the third party must overcome the presumption that the natural parent should have custody of the child. The Court discussed Indiana case law and statutory law and delineated the following standard for third party custodians: the third party bears the burden of overcoming the natural parent's presumption by clear and cogent evidence; evidence may consist of the parent's present unfitness, or past abandonment of the child such that the affection of the child and third party have become so interwoven that to sever them would seriously mar and endanger the child's future happiness; a general finding of best interests is not sufficient to rebut the presumption. *Id.* at 230-231.

Best interests findings must be specifically delineated, compelling, and in child's real and permanent best interests. The Court concluded that the trial court's findings were insufficient to rebut the presumption in a favor of the mother's obtaining custody of the child. The Court noted the following: there was no indication that the mother was an unfit parent; the mother had been sober for six years; the mother had successfully cared for the child's older brother for six years; the stepfather was successful and genuinely concerned and involved with both children; four persons professed their belief that the mother and stepfather were good parents; the custody evaluator, who recommended that the child remain with the guardian, did not deny the favorable findings concerning the mother and stepfather. The Court opined that it was the guardian's burden to prove the mother's unfitness at the present time, not at some time in the past. *Id.* at 231. The Court also noted that there was no finding that the mother had abandoned the child or acquiesced in the continued guardianship. The evidence that the mother had filed three previous petitions to terminate the guardianship showed that she had not acquiesced in the continued guardianship. *Id.* at 232.

Custody evaluations in third party situations, which are performed without considering the presumption in favor of the natural parent, should be looked at differently and with less deference. The court ordered custody evaluator did not consider the preference to be given to the mother in making the evaluation. The Court opined that, in such situations, the trial court should look beyond the evaluator's ultimate custody recommendation and examine



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whether the evaluator's report and/or accompanying testimony contains evidence of parental unfitness, abandonment or other wrongdoing, or of compelling, real and permanent interest of the child that require his or her custody with a third party. *Id.* at 232. The evaluator's report contained no such evidence. The evaluator was concerned that the child's separation from the guardian would have a short-term negative effect on the child because of his emotional attachment to the guardian. The evaluator also agreed, however, that the negative impact could be alleviated by counseling. The Court stated that the child's and guardian's mutual love and the child's desire to remain with the guardian were important. The Court stated that the upheaval that the change in custody would cause was an unfortunate consequence of every situation in which a court must enter an order changing custody. An upheaval where only potential short-term effects would occur was insufficient to deny the parent custody of the child, and therefore the trial court's judgment was clearly erroneous. *Id.* at 233.