



## **Custody and Parenting Time**

11/16/21

In **In Re the Paternity of W.M.T.**, 180 N.E.3d 290 (Ind. Ct. App. 2021), the Court held that the trial court did not abuse its discretion when it determined that Grandmother was the child's de facto custodian, that it was in the best interests of the child for Grandmother to have third-party custody, and when it excluded the child's Social Security Survivor's Benefits from Mother's child support calculation. (The issue of attorney's fees has been excluded in this summary).

One year after Mother gave birth to Child, Father filed a paternity action and was awarded primary physical custody and Mother was awarded parenting time. Since this custody award, Child resided with Paternal Grandmother. Ten years later, Father passed away and Grandmother filed an emergency petition for custody of the Child and then a motion to intervene in the paternity case. The trial court held hearings on Grandmother's petition for non-party custody and determined that Child has resided with Grandmother for the majority, if not all, of his life and Grandmother was the Child's primary caregiver. She made all medical, educational, and religious choices for Child. The court granted sole legal and primary physical custody to Grandmother with an award of parenting time to Mother. Mother was ordered to pay \$46.00 per week in child support. Mother appealed.

**The trial court did not err when it found Grandmother to be a de facto custodian because Grandmother was the Child's primary caregiver and financial support for at least one year preceding her petition for non-party custody. Id. at 13.** A de facto custodian is "a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least...one year if the child is at least three years of age." Ind. Code 31-9-2-35.5. Evidence was presented to show that Child lived in Grandmother's home, she took Child to school and athletic practices, and provided all food and shelter. Id. at 13. Mother argued that upon Father's death, she was Child's custodian, but offered no evidence to show that she cared for Child in any way. Id. at 14. Because the Court cannot reweigh evidence, it concluded the trial court did not err in finding Grandmother to be a de facto custodian.

**The evidence clearly and convincingly supports that it is in Child's best interest to remain under Grandmother's care and custody. Id. at 18.** Indiana Code section 31-14-13-2 sets forth the best interests factors, including: age and sex of the child, wishes of the child's parents, wishes of the child, interactions between the child with parents, siblings, and any other person who may significantly affect the child's best interest, the child's adjustment to home, school, and community, the mental and physical health of all individuals involved, pattern of domestic or physical abuse by either parent, and the wishes of any de facto custodian. Id. at 13-19. The Court weighed each of these factors and found that Child spent nine out of the 11 years of his life in the same school district and community where Grandmother lived, both Mother and deceased Father allowed Grandmother to maintain physical custody and financial responsibility for Child for all these years, and the Child wished to remain with Grandmother. Id. The Court stated that

“there is no doubt that the evidence in this matter clearly and convincingly supports” that it is Child’s best interest to remain under Grandmother’s case and custody. *Id.* at 18.

**The trial court did not err when it excluded Child’s Survivor Benefits from the child support calculation. *Id.* at 26.** Mother argued that the trial court’s order requiring her to pay \$46.00 per week in child support was erroneous because the calculation did not consider the survivor’s benefits Child receives as a result of Father’s death. *Id.* at 22. Precedent for this issue of survivor’s benefits in the context of child support calculations was set in *Martinez v. Deeter*, 968 N.E.2d 799 (Ind. Ct. App. 2012). *Id.* at 26. The Court found that the same logic in *Martinez* applies here. *Id.* Specifically, Child receives \$729.00 per month in Survivor's Benefits as a result of Father's death. *Id.* As in *Martinez*, the reason Child is receiving survivor's benefits, Father's death, is independent of either party, Mother or Grandmother, in the custody and child support matter. *Id.* As in *Martinez*, the trial court imputed income to Grandmother based on the income sources listed in the Guidelines. *Id.* As in *Martinez*, the inclusion of Child's survivor's benefits in Grandmother's weekly gross income would result in a windfall for Mother. *Id.* Should the additional \$729.00 be imputed to Grandmother as income, Mother would then essentially be deriving a benefit from Father's survivor's benefits meant for Child in the form of a reduction of her child support obligation.

**Mother failed to support her argument that the evidence was inadmissible with any citation to a case, rule, or statute; therefore, she waived her arguments. *Id.* at 298.** Mother argued that testimony from a teacher was improper, letters from Mother’s family’s should have been excluded, and a series of text messages, poems, and photographs should have been excluded. Waiver notwithstanding, the Court presumes the trial court knows the rules of evidence and disregards any inadmissible evidence. *Id.* 1t 299.