

Children's Law Center of Indiana



Custody and Parenting Time

4/22/2014

In Bailey v. Bailey, 7 N.E.3d 340 (Ind. Ct. App. 2014), the Court reversed the trial court's decision modifying custody of Mother's and Father's two children, remanded the matter, and held that the trial court had abused its discretion when it modified custody on its own motion, without either party expressly or implicitly asking for a modification of custody.

Mother and Father had two children together and divorced in 2010. Mother was granted primary physical custody of the children, Father was given parenting time, and they shared joint legal custody. The parties had many disputes regarding their children and mediation failed. Father filed a petition to modify custody, which was denied. In December 2012, Mother began denying Father visitation, alleging that Father's behavior was negatively impacting the children's behavior. Mother filed a motion to restrict Father's parenting time. Father filed two petitions for contempt. At a hearing, the parties presented evidence on the motion to restrict Father's parenting time and the motions for contempt. Father did not testify or present any evidence that he wanted any modification of the existing physical custody arrangement. The trial court asked the attorneys whether it had the ability to enter a Parallel Parenting Time Order based on the pleadings before the Court, and Mother's counsel agreed that the trial court had that ability. The trial court issued an order with findings that gave Mother and Father joint physical and legal custody of the children, and directed that the parties share physical custody by alternating weeks. The order also determined that Mother and Father were high conflict parents as defined in the Indiana Parenting Time Guidelines, and made provisions as outlined in the Parallel Parenting Time section of the Guidelines. Mother appealed, arguing that the trial court should not have modified custody in the absence of any request by either party to do so.

A trial court must follow proper procedure when modifying a child custody order; a party must file a petition to modify custody, the other party must receive notice of the petition to modify custody, a proper evidentiary hearing must be held, and the trial court must determine whether there was a substantial change in one or more of the statutory factors that it may consider, and whether the modification is in the child's best interests. *Id.* at 344. The Court opined that a trial court may abuse its discretion if it does not follow proper procedure in issuing an order that modifies custody. *Id.* at 343 (citing Wilson v. Myers, 997 N.E.2d 338, 341-42 (Ind. 2013) (trial court abused its discretion when it modified custody without finding that there had been a substantial change in circumstances, and it had conducted "a summary hearing that was devoid of any sworn testimony or any semblance of formal courtroom procedure.")). Indiana case law provides that a trial court cannot modify custody on its own

motion; a modification can only occur when a party files a petition to modify custody, the other party receives notice of the petition, and a proper evidentiary hearing is held upon the motion to modify custody. Bailey at 344 (internal citations omitted). IC 31-17-2-21(a) and Indiana case law provide that trial courts are not able to modify a child custody order unless the modification is in the child's best interests, and there is a substantial change in one or more of the statutory factors that the court may consider. Id. at 344 (citing Wilson v. Myers, 997 N.E.2d 338, 339-40 (Ind. 2013)). The Bailey Court found that the trial court's order modifying custody was fundamentally flawed because neither Father nor Mother ever requested a change of custody; while there may be certain circumstances where it is acceptable to deviate from accepted procedure on modifying custody, a party is still entitled to notice, and the parties must actually litigate the custody matter. Id. at 344. Mother had no notice that modification of custody was at issue, neither party implicitly or expressly indicated that they were seeking a modification of custody, and neither party presented evidence on whether there was a substantial change in circumstances or the best interests factors. Id. at 345. The trial court's order and findings made no mention of any substantial change in circumstances or best interests factors. Id. The Court opined that by modifying custody without following proper procedure, the trial court had improperly relieved Father of his burden of showing that a modification of custody was warranted. Id.

Mother's agreement that the trial court could enter a Parallel Parenting Order was not a concession that the trial court could modify custody of the children. Id. at 345. The Court noted that there may be instances when it is appropriate to modify custody in favor of a parent who has not requested a custody modification, such as modifying custody in favor of a parent who did not cross-petition to modify custody when it is clear during the hearing that the parent desires a modification, or when the parties impliedly or expressly consent to new issues being tried. Id. at 344 (citing Glover v. Torrence, 723 N.E.2d 924, 934 (Ind. Ct. App. 2000)). Despite these potential exceptions, the Court also noted that a party is still entitled to notice that these issues may be determined, and both parties must actually litigate the issue. Id. Father argued that Mother had notice that the trial court was considering modifying custody, and that she consented to such consideration, because Mother agreed that the trial court could enter a Parallel Parenting Order. Id. The Court opined that notice of a Parallel Parenting Order was not akin to notice of a potential modification of custody. Id. at 345. Parallel Parenting Orders, added to the Indiana Parenting Time Guidelines in March 2013, are orders which are intended to reduce contact between high conflict parents. Id. at 344. To accomplish this goal, Parallel Parenting Orders provide that while a child is with a parent, that parent makes day to day decisions about the child, and limits contact between the parents to emergency contact only; nothing in the new Parallel Parenting provisions demonstrates "any intent that it should affect the *amount* of parenting time awarded, except for possible elimination of mid week parenting time, makeup parenting time, and opportunities for additional parenting time that appear elsewhere in the Parenting Time Guidelines." (Emphasis in opinion.) Id. at 345. The Court opined that these provisions are not the same thing as an order of joint physical custody or an order of 50/50 visitation, and that Father had confused these concepts in his argument; in so reasoning, the Court noted that that the Parallel Parenting provisions provided that joint legal custody would generally be inappropriate in parallel parenting situations, due to the high conflict between the parents. Id. The Court determined that this was consistent with previous Indiana case law, which held that joint legal custody should not be awarded when parents make child rearing a "battleground." Id. (citing Carmichael v. Siegel, 754 N.E.2d 619, 635 (Ind. Ct. App. 2001)).