

# Children's Law Center of Indiana



## Custody and Parenting Time

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In **F.M. v. N.B.**, 979 N.E.2d 1036 (Ind. Ct. App. 2012), the Court reversed the trial court's custody modification order, finding that the trial court erred in denying Mother's motion for continuance and in allowing Mother's counsel to withdraw his appearance. The Court remanded the case for a new hearing. The child was born on April 8, 2009. In April 2010, the trial court established Father's paternity, granted Mother physical custody, required Father to pay child support, recognized that Mother and the child were residents of the state of Minnesota, and allowed Father parenting time. Father owned a home in South Bend. In August 2010, the court entered an order on transporting the child between the parties in response to contempt allegations filed by Father. In May 2011, Father filed a Rule to Show Cause against Mother. On July 26, 2011, Father filed a Verified Petition to Modify Custody, Parenting Time, and Child Support, in which he requested primary physical custody of the child, an appropriate parenting time for Mother, modification of child support, and an award of attorney's fees and also alleged that Mother had intentionally and willfully refused to follow the court's August 2010 order regarding parenting time.

On August 22, 2011, attorney Mario Zappia filed an appearance as Mother's counsel. Zappia requested a continuance of the August 24, 2011, custody modification hearing because he had just entered his appearance on the case, and the hearing was continued by agreement. A show cause hearing was held on February 8, 2012, and the court found Mother in contempt and sentenced her to thirty days in the St. Joseph County Jail until Mother posted a \$1000 bond as security for the exercise of Father's parenting time. The court also scheduled a contested custody hearing on April 30, 2012, at 9 a.m.

On April 30, 2012, Zappia filed a motion to withdraw his appearance. Zappia informed the court that: (1) he had explained to Mother that he could not continue to represent her unless she paid his fees; (2) Mother indicated that she could not pay his fees and asked him if he could obtain a continuance of the court date; (3) Zappia had called Father's attorney, who did not agree to a continuance; (4) he did not think the court would grant a continuance and he had attempted to email Mother a motion or a consent to withdraw. Mother appeared for this portion of the hearing via phone because she had been caught in traffic in Chicago. The court granted Zappia's motion to withdraw and delayed the hearing for one hour to give Mother time to arrive at court. Mother

arrived at the hearing late after the court had resumed the hearing and after the court had made some initial comments and Father's counsel had begun his opening statement. Mother asked if she could have some time to hire an attorney or if an attorney could be appointed for her. The court declined to appoint an attorney for Mother and proceeded with the hearing on Father's petition on April 30 and May 2, 2012. On May 4, 2012, the court entered an Order Determining Custody, Parenting Time and Related Matters, which in part ordered that Mother and Father would have physical custody for alternate two-month intervals, established guidelines for the transfer of the child between Mother and Father, and ordered Mother to pay \$1,500 to Father's attorney.

**The Court concluded that Mother demonstrated good cause for a continuance of the hearing. Id. at 1041.** The Court observed that: (1) the decision to grant or deny a motion for continuance is within the sound discretion of the trial court; (2) the trial court will be reversed only for an abuse of discretion; (3) an abuse of discretion may be found on the denial of a motion for continuance when the moving party has shown good cause for granting the motion; (4) no abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial; (5) the unexpected and untimely withdrawal of counsel does not necessarily entitle a party to a continuance; (6) on appeal from a denial of a continuance, the Court must consider whether the denial resulted in the deprivation of counsel at a crucial state in the proceedings; (7) the Court must consider whether the record demonstrates dilatory tactics on the part of the movant designed to delay coming to trial; (8) the Court must consider whether a delay would have prejudiced the opposing party to an extent sufficient to justify denial of the continuance (multiple citations omitted). Id. at 1039-41. The Court concluded that Mother demonstrated good cause for a continuance of the hearing and that a delay would not have prejudiced Father to an extent to justify the denial of the continuance. Id. at 1041. The Court observed that "a parent's interest in the care, custody, and control of his or her children is 'perhaps the oldest of the fundamental liberty interests,'" quoting Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005) (quoting Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). F.M. at 1041. The Court also noted that the case required comprehension of the law with respect to the modification of custody as well as the rules of evidence and trial procedure. Id.

**The Court concluded that the trial court's granting of Zappia's motion to withdraw filed the morning of the hearing was an abuse of discretion and contrary to St. Joseph County Local Rules 204.2 and 204.3 and Ind. Trial Rule 3.1(H). Id. at 1041.** The Court noted that Ind. Trial Rule 3.1(H) provides in part that an attorney may file a motion to withdraw representation of the party "upon a showing that the attorney has sent written notice of intent to withdraw to the party at least ten (10) days before filing a motion to withdraw representation." Id. The Court also noted the requirements of St. Joseph County Local Rule 204.2, namely that an attorney will be permitted to withdraw his appearance only after filing a Motion to Withdraw and setting the matter for hearing not fewer than fourteen (14) days from the date of filing, and that an attorney's motion to withdraw appearance must be filed at least thirty (30) days prior to a

previously scheduled trial date unless the attorney has leave of court to file in a shorter amount of time. Id. at 1041-42. The Court also noted that St. Joseph County Local Rule 204.3 provides that an attorney who seeks to withdraw his appearance must present adequate proof of notice to his client of the intent to withdraw and that the notice shall be by postage prepaid, certified mail, return receipt requested and received or returned. Id. at 1042. The Court concluded that Mother has established *prima facie* error in that the withdrawal of her attorney deprived her of counsel at a “critical stage of the proceedings” in a case involving at least some complexity and that Mother was prejudiced by the denial of her motion to continue. Id.