

Children's Law Center of Indiana



Custody and Parenting Time

1/30/12

In **A.T. v. G.T.**, 960 N.E.2d 878 (Ind. Ct. App. 2012), the Court reversed the trial court's denial of Mother's petition for a change of judge in a dissolution custody modification action filed by Father. The Court opined that the trial court should not have held the custody modification hearing because the trial court was deprived of jurisdiction. The Court remanded with instructions that the judge grant Mother's request for change of judge and that the procedures for the selection of a new judge be immediately implemented. The parents were divorced on December 28, 2009, in Trimble County, Kentucky. The Kentucky court awarded joint custody of the two children to the parents, with Father to act as primary custodial parent. Later, the parents and children moved to Madison, Indiana, and on January 11, 2011, Jefferson Circuit Court assumed jurisdiction of the case. The most recent order of the Kentucky court before jurisdiction was transferred was joint custody and shared parenting time for Mother and Father. On May 4, 2011, Father, who had been found not guilty of felony domestic abuse charges against Mother, but who had been convicted of misdemeanor domestic battery, filed a petition to modify custody. Father sought sole physical custody with reasonable visitation rights to Mother. Father also requested a hearing on his petition to modify custody. Neither of Father's pleadings showed a certificate of service to Mother, who had moved to Bloomington.

On May 12, 2011, the Jefferson Circuit Court set a hearing for June 2, 2011; however, the order setting the hearing did not state the nature of the hearing. Mother received the trial court's order by regular mail on May 25, 2011. Mother received Father's petition to modify custody on May 27, 2011. On May 27, 2011, Mother filed a motion for continuance and a "Motion for Change of Venue and Motion for Change of Venue from Judge." Mother requested that there be a change of venue of county and alternatively requested a change of judge and that a special judge be appointed pursuant to Indiana Trial Rules 76 and 79. On June 1, 2011, the trial court denied Mother's motions without a hearing. On June 2, 2011, Mother, who appeared pro se because of difficulty in obtaining counsel, renewed her requests in open court at the hearing, but the trial court again denied them. After the hearing, the trial court awarded sole custody to Father, with Mother to receive visitation rights under the Indiana Parenting Time Guidelines.

The trial court erred in denying Mother's request for automatic change of judge and in ruling on Father's petition for modification. Id. at 881. The Court noted that Trial Rule 76(B)

provides that in civil actions, where a change may be taken from the judge, “such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefore by a party or [her] attorney.” *Id.* at 880-81. The Court said that a change may be taken from a judge in connection with a petition to modify a dissolution decree. *Id.* at 881. Citing *Bedree v. DeGroot*, 799 N.E.2d 1167, 1172 (Ind. Ct. App. 2003), *trans. denied*, the Court stated that when a party files a motion for a change of judge, the trial court is divested of jurisdiction except to grant the change or act on emergency matters. *A.T.* at 881. The Court stated that: (1) Mother filed an unverified motion specifically requesting either a change of venue to Monroe County, or, in the alternative, a change of judge in connection with Father’s petition to modify the dissolution decree; (2) Mother requested such changes under both Rules 76 and 79; (3) Mother listed the various factors that she believed warranted a change of venue from the county; (4) even though she was not required to do so, Mother also listed various factors that she believed warranted a change of judge. *Id.* The Court opined, “[w]e cannot conclude that an automatic change of judge available under Rule 76(B) without a statement of the grounds for such change, was lost when the party who requested the change went beyond the requirements of the rule and enumerated factors related to her request. *Id.*

The Court opined that, where the trial court did not hold a hearing and set a trial date at the hearing, the limitations of Trial Rule 76(C)(5) are not applicable; accordingly, Mother was not required to file her motion within three days after receiving notice that a trial date had been set. *Id.* at 882. Father argued that Mother’s motion for change of judge was untimely, citing *McClure v. Cooper*, 893 N.E.2d 337, 340 (Ind. Ct. App. 2008). The Court observed that Trial Rule 76(C)(5) provides:

[W]here a party has appeared at or received advance notice of a hearing prior to the expiration of the date within which a party may ask for a change of judge or county, and also where at said hearing a trial date is set which setting is promptly entered on the Chronological Case Summary, a party shall be deemed to have waived a request for change of judge or county unless within three days of the oral setting the party files a written objection to the trial setting and a written motion for change of judge or county[.] (Emphasis added).

The Court distinguished the *McClure* opinion, which involved a small claims case, nothing that the three-day requirement is premised upon an *oral setting* of the trial date. (Emphasis in original). *A.T.* at 882. The Court opined that in the present general jurisdiction case, the Court agreed with the *McClure* dissenting opinion of Judge Kirsch that Trial Rule 76(C)(5) clearly applies only when a hearing has been held and the trial date has been set at that hearing. *McClure* at 342. *A.T.* at 882.