Custody and Parenting Time

8/21/15

In **Dillon v. Dillon**, 42 N.E.3d 165 (Ind. Ct. App. 2015), the Court affirmed the trial court's judgment granting custody of the parties' five-year-old daughter to Father. Id. at 171. Mother and Father married in 2010, and had one daughter, whom they raised in their home in Camby, Indiana. Mother filed for divorce on March 7, 2013, and both parties sought custody of the child. The trial court held a preliminary hearing on April 16, 2013. Father, who had moved to Arizona before Mother filed for divorce, did not attend the hearing. The trial court granted Mother temporary custody of the child pending a final custody determination, and Father was ordered to pay weekly child support. When the trial court held a final dissolution hearing in September 2013, Father was living permanently in California. On September 11, 2013, the trial court entered a degree dissolving the marriage, but reserved the issue of custody for a future determination, giving each parent a "test period" to demonstrate fitness and ability to be the primary custodian of the child. Pursuant to this order, the child spent several months residing in Indiana with Mother and then spent several months residing in California with Father. On June 6, 2014, the trial court held a final hearing to determine custody and, after considering the evidence presented and post hearing memoranda, the trial court issued its judgment granting Father primary physical custody of the child. Mother appealed.

The Court opined that the relocation statute (IC 31-17-2.2) was not implicated since Father moved before the dissolution proceedings began, and the trial court was not required to consider modification of an existing custody order. Id. at 168. Mother first argued that Father failed to comply with IC 31-17-2.2-1(a), which provides that "[a] relocating individual must file a notice of intent to move with the clerk of the court." The Court said that IC 31-9-2-107.5 defines "relocating individual" as "an individual who has or is seeking: (1) custody of a child; or (2) parenting time with child; and intends to move the individual's principal residence." Id. at 167. The Court observed that Father moved before Mother filed for divorce, did not have custody at the time he moved, and he could not have been "seeking custody" at the time he moved since he moved before the case came into being. Id. The Court found it clear that notice of Father's relocation pursuant to IC 31-17-2.2-1 would have been superfluous in this case because the notice requirement is meant to alert the trial court that a parent has relocated so that the trial court may modify an *existing* child custody order if necessary (emphasis in opinion). Id.

The Court held that, because the child's location was not fixed until the trial court entered its initial custody order on June 25, 2014, the preliminary joint custody order could not be viewed as an order permitting her relocation. Id. at 168. Mother argued that the trial court

erred in failing to comply with IC 31-17-2.2-6, which provides that when a court grants a "temporary order permitting the relocation of the child pending a final hearing", the court may not the base its final custody order solely on a consideration of the period during which the child was relocated. Mother also argued that the dissolution order which provided that Mother and Father were to have joint custody until a final custody order was made was a "temporary order permitting relocation of the child" subject to IC 31-17-2.2-6. The Court found Mother had not accurately characterized the trial court's preliminary joint custody order. Id. at 168. The Court said the preliminary joint custody order provided each parent with a custodial "test period" from which both the parents and the trial court could learn before taking a final position on who should have primary physical custody of the child. Id. The Court found that this preliminary order necessarily preceded the initial custody order, and reiterated that IC 31-17-2.2-6, like the rest of the relocation statute, clearly applies to situations where a parent seeks to relocate a child after an initial custody order has been entered. Id.

The Court found that, although Mother would incur travel expenses in exercising parenting time with the child, the trial court dealt with this problem in a just and reasonable manner. Id. at 170. The Court opined that the trial court's findings addressed the issue of long distance parenting time fully, noting that: (1) regardless of which parent were the child's primary physical custodian, the other parent would be incurring substantial costs in travel expenses for parenting time; (2) the child would need to be escorted by a parent during her plane travel to and from the other parent's home, thus incurring more expense for plane travel, hotel lodging, and car rentals by the escorting parent; and (3) Mother's and Father's respective incomes were nearly equal. Id. The Court observed that, with this in mind, the trial court entered a "zero support order," explaining that "[Mother] shall not be required to pay weekly child support to [Father] for the reason that [Mother] will be incurring significant travel expenses in exercising extended parenting time with [the child]…" Id.

The Court found the trial court's conclusion that the child's interests would be best served by Father being granted primary physical custody was certainly supported by substantial evidence. Id. at 171. The Court noted the following evidence in support of the trial court's conclusion: (1) Father returned to his home state of Arizona, where he resided with paternal grandmother; (2) Father then relocated to Riverside, California, for employment opportunities upon remarriage to his current wife, and lives in a four bedroom home owned by her; (3) the child's cross-country move would make it harder for her to see some family members while making it easier to see other family members; (4) the child's kindergarten teacher in California testified that the child was doing exceptionally well in her class, was on course to begin first grade next year, and Father was consistently involved in her education; (5) Father had seen that the child's development has been enhanced by involvement with normal childhood activities, including dance classes and Sunday school. Id. at 169-70.