

Children's Law Center of Indiana



Custody and Parenting Time

11/20/13

In **In Re Paternity of B.B.**, 1 N.E. 3d 151 (Ind. Ct. App. 2013), the Court affirmed the trial court's order modifying custody, visitation, and support of the parents' four-year-old child to Mother. The child was born on July 30, 2008, and the parents signed a paternity affidavit the next day. At the time of the child's birth, Father was eighteen years old, Mother was seventeen years old, and both were living in Kokomo. Father filed a petition to establish paternity on August 20, 2010. After hearings on March 4 and on April 11, 2011, the court issued its order awarding joint legal custody of the child, with shared physical custody in which the parents exercised equal parenting time. In October of 2011, Father filed a notice of intent to relocate and Mother filed an affidavit for contempt/petition to modify custody and an objection to notice of intent to move. Father relocated his residence to Westfield, approximately thirty-six miles from Kokomo, in October 2011. Father advised Mother of his intent to relocate approximately two weeks in advance of the move. The court held a hearing and on January 17, 2012, entered an order in which it: (1) noted that Father had enrolled the child in preschool at St. Joan of Arc in Kokomo in the summer of 2011 to which Mother finally agreed; (2) noted that Father, in anticipation of his move and without consulting Mother, withdrew the child from St. Joan of Arc and enrolled him in preschool at St. Maria Goretti School in Westfield; (3) admonished Father for his actions in enrolling the child in school twice without consulting Mother; (4) ordered Father to consult with Mother on all major discussions affecting the child; (5) modified the custody and parenting time provisions so that the child could continue to attend St. Joan of Arc in Kokomo but continued the joint legal and physical custody arrangement.

On May 25, 2012, Mother petitioned to modify custody, alleging that Father had a life-style involving alcohol which impeded his ability to drive and to properly care for the child, Father had told Mother not to call or communicate with him any further, Father had lost interest in the child after the birth of another child born to his girlfriend/wife, and the child had grown older and could begin the Headstart Program, a five day per week school, in August. Mediation was attempted but was unsuccessful. In January of 2013 both Mother and Father filed affidavits of citation for contempt, alleging that the other parent had denied them parenting time in violation of previous court orders. After holding hearings on January 17 and January 30, 2013, the court issued an order on February 25, 2013, which awarded legal and physical custody to Mother and parenting time to Father per the Indiana Parenting Time Guidelines with an additional overnight on alternate weekends. Among the court's findings were that Father failed to arrange for the child's transportation to the first day of school on August 20, 2012 at St. Joan of Arc, Mother and Father have a contentious relationship and fail to communicate constructively, Father denied Mother's requests to speak with the child and contacted law enforcement alleging that Mother

was harassing him, each parent alleged the other had violated the parenting time agreement which divided parenting time with the child during the period from December 15 through December 31, 2012, the parents have a mutual dislike and distrust of each other, and Father is the more negative of the two in terms of his language, demeanor, and attitude toward Mother.

The Court found that sufficient evidence was presented to support a finding that the text messages between the parents, which Mother offered as an exhibit, and which the trial court admitted into evidence, were what Mother claimed them to be. The Court found that a sufficient foundation was laid for the admission of the text messages into evidence and concluded that the trial court did not abuse its discretion when it admitted the text messages into evidence. *Id.* at 159. The Court first observed that the trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion, and the Court will not reverse the decision to admit evidence if that decision is sustainable on any ground (multiple citations omitted). *Id.* at 155. Mother testified that her exhibit, a document containing text messages, consisted of the text messages “sent to [her] or by [her] her on the date specified in the document.” Mother indicated that she had created the “document by plugging [her] phone into a computer program which “transcribed” the text messages into the computer. On cross-examination by Father’s counsel, Mother could not give the name of the computer program she had used, but said that she did not “pick and choose” the texts and “[e]very text should be there.” When presented with the exhibit containing the text messages, Father indicated that the two phone numbers featured on the document belonged to him and Mother, and that he did not doubt that the text messages were his. On the second day of the hearing, Father testified that he believed the exhibit to be inaccurate because “there’s stuff missing out of them and of course, it’s [Mother’s] stuff.” Father’s counsel objected to the exhibit for lack of a proper foundation, arguing that there was not certification that it was an accurate or true copy. The trial court said that the exhibit was a communication between Father and Mother that would otherwise come into evidence as the declarant being the opposing party, and that as long as Mother said under oath that this is what she texted or what she received from Father as a text, the exhibit should come into evidence.

The Court said that Father’s main challenge to the admission of the text messages was his general belief that Mother must have deleted certain text messages in order to make her appear to be the more sympathetic figure. *Id.* at 158. The Court noted that: (1) Father never directed the trial court’s attention to a specific part of the document where he believed that content was missing, nor did he attempt to admit evidence of any deleted text messages; (2) as a party to the text messages, Father could have obtained a copy of the text message exchange between him and Mother on his phone, and he did not testify that a record of the text messages was unavailable to him; (3) Father offered no evidence to support his claim. *Id.* The Court observed that Father’s argument appeared to be little more than an argument to apply the doctrine of completeness, a common law doctrine incorporated into the Indiana Evidence Rules as Evidence Rule 106 (multiple citations omitted). *Id.* at 158-59. The Court quoted Evidence Rule 106, which states:

“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.”

Id. at 159. The Court said that the purpose of the doctrine of completeness is to allow the introduction of additional material to place incomplete, misleading evidence in its full context. Id. The Court said that Father's objection was not an attempt to have the purported remainder introduced into evidence, but rather an effort to wholly exclude the text messages. Id.

The Court could not say that the trial court's findings or conclusions were clearly erroneous, and concluded that the trial court did not abuse its discretion in granting Mother's petition to modify custody. Id. at 164. Quoting Kirk v. Kirk, 770 N.E. 2d 304, 307 (Ind. 2002), the Court observed that custody modifications are reviewed for an abuse of discretion, and the Court has a "preference for granting latitude and deference to our trial judges in family law matters." B.B. at 159. The Court "set[s] aside judgments only when they are clearly erroneous and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." Kirk at 307. B.B. at 159. Father argued that the trial court had improperly weighed and considered the evidence presented and that the trial court had made conclusions of law based on erroneous findings. The Court noted that Father's arguments were essentially a request to reweigh the evidence and judge the credibility of witnesses, which the Court may not do. Id. at 162. The Court observed that the crux of the trial court's conclusions is that the shared custody arrangement was no longer viable because Mother and Father have demonstrated an inability to communicate for any prolonged period of time, their inability to communicate has impacted the child's behaviors and development, the child is approaching the age at which he will be attending school five days per week and needs a primary residence, and, of the two parents, Mother is more likely not to interfere or diminish Father's role with the child. Id. at 163. The Court said that the parents were in agreement that, because they lived in different cities, it was in the child's best interest that a primary residence be established for him. Id. The Court noted that the trial court was able to listen to the testimony and evidence presented, including evidence regarding the parents' communication with one another, Father's recent OWI conviction, and that Father filed a CPS report implicating Mother's boyfriend, which was unsubstantiated. Id. at 164.