Custody and Parenting Time
(Parenting Time)

8/26/14

In **Meisberger v. Bishop**, 15 N.E.3d 653 (Ind. Ct. App. 2014), the Court remanded the case to the trial court to determine and make one or more findings on whether the child's physical health or safety would be endangered or whether there would be significant impairment of the child's emotional development by allowing Father, who was incarcerated for murder and theft, to have parenting time. Id. at 660. The Court also remanded the case for the trial court, in its discretion, to conduct other proceedings consistent with this opinion. Id. In the early 1990's, Father was sentenced to forty-eight years in the Department of Correction (DOC) for convictions of murder and theft that occurred in Bloomington, Indiana. Father was placed on probation on September 7, 2007, fathered the child, who was born on July 31, 2008 to Mother, and then married Mother. On April 21, 2009, Mother petitioned for dissolution of her marriage to Father. Mother and Father were divorced on November 30, 2009. On October 3, 2011, the dissolution court issued an Agreed Order which gave Father parenting time pursuant to the Indiana Parenting Time Guidelines. On May 20, 2012, the State filed a Petition to Revoke Father's suspended sentence, alleging that he had violated the terms of his probation by failing to appear for a meeting with his probation officers and failing to notify the probation department of a change of residence. On August 6, 2012, the criminal court revoked Father's probation and ordered that he serve the remainder of his sentence executed in the DOC. Father's earliest possible release date is July 16, 2021.

Father sent two letters to the dissolution court in August, 2013. Father requested an order to transport him to court and a hearing. On August 15, 2013, the dissolution court issued an Order Denying Request for Order of Visitation and Request for Transport. The trial court subsequently set a hearing on December 10, 2013, after Father had filed a *pro se* motion to correct error, which was denied, and a second Motion to Modify Parenting Time and Set Hearing. Father was transported to the December 13 hearing. Mother and Father appeared in person, but without counsel, for the hearing. After hearing evidence, the trial court issued its Order on All Pending Issues, which included the following findings: (1) Mother is opposed to transporting the child to DOC and indicated that Father's parents, who were present at the hearing, do not want to transport the child to DOC; (2) of the child's five years of life, Father has been a consistent part for only one year; thus, it is not in the child's best interest to have in person parenting time within the confines of a prison facility; (3) Father may send mail to his son via his parents, who are authorized to "screen" it before turning it over to Mother; (4) Father may telephone his son, at his expense, while the child is visiting his paternal grandparents, but the grandparents must

screen and monitor the calls, which shall be limited to seven minutes; (5) Mother shall provide a yearly school picture to Father. Father filed a motion to correct error on January 24, 2014, which was denied. Father appealed.

The Court found that, because Father presented issues which required review of the evidence or testimony presented at the hearing but failed to provide either a transcript of the hearing or a statement of the evidence, such issues were waived. Id. at 659. Father argued that there was no evidence that he posed a threat to the child's physical or mental health; therefore, the ruling terminating his visitation was an abuse of discretion. In response, the Court noted that it did not have a transcript of the hearing because Father did not pay to have the hearing transcribed or otherwise provide a record of proceedings. Id. The Court observed that, because there was no transcript, the Court had no specific information regarding the evidence presented to support the findings in the trial court's order. Id. at 657. The Court said that Father's failure to submit a transcript was in contravention of Indiana Appellate Rule 9(F)(5), which provides that, "[if] the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence." Id.

Citing In Re Walker, 665 N.E.2d 586, 588 (Ind. 1996), the Court noted the Indiana Supreme Court's holding on an appellant's failure to include a transcript on appeal when factual issues are presented. Meisberger at 657. The Walker Court said that "[a]lthough not fatal to the appeal, failure to include a transcript works a waiver of any specifications of error which depend upon the evidence." Walker at 588. Meisberger at 657. The Court recognized that, in addition to his motion to proceed in *forma pauperis*, Father had filed a Motion to Compel Trial Court Clerk to Provide Clerk's Record and Transcript to Appellant and Waiver of all Fees with the Court of Appeals, and that the Court had granted his motion to proceed in *forma pauperis*, but denied the motion to compel the transcript and record. Id. The Court looked to the Indiana Supreme Court's opinion in Campbell v. Criterion Grp., 605 N.E. 2d 150 (Ind. 1992), in which the Court discussed the entitlement of an indigent to a transcript on appeal. Meisberger at 657-58. The Campbell Court: (1) recognized the costs of preparing transcripts of proceedings below "often runs in the hundreds or thousands of dollars, thereby exceeding even the appellate filing fee," ; (2) said that "[c]learly, costs of this magnitude could be prohibitive to most indigent appellants"; and (3) agreed "that the failure to accommodate paupers in this regard would be tantamount to denying them, by reason of their indigency, access to process upon which they would otherwise have a claim." Campbell at 160. Meisberger at 658. The Campbell Court did not dictate that indigent civil appellants are entitled to have a complete record of the proceedings, including a transcript, prepared for them at public expense. Campbell at 160. Meisberger at 658. Instead, the Campbell Court held that the Appellate Rules afford "a narrowly tailored solution" by way of a statement of the evidence. Campbell at 160. Meisberger at 658. The Meisberger Court looked to Ind. Appellate Rule 31, which provides that, if no transcript of the evidence is available: (1) a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection; (2) the party shall then file a motion to certify the statement of the evidence with the trial court; and (3) the statement of the evidence shall be attached to the motion. Meisberger at 658 n.5. The Court said

that Father had not demonstrated that preparing a statement of the evidence pursuant to App. R. 31would be inadequate for the Court's purposes to review the issues raised. Id. at 659.

The Court remanded for the trial court to determine and make one or more findings as to whether the child's physical health or safety would be endangered or whether there would be significant impairment of the child's emotional development by allowing Father parenting time, or, in its discretion, to conduct other proceedings consistent with this opinion. Id. at 660. The Court said that, although some of Father's arguments are waived, his challenge as to whether the court made the requisite findings pursuant to IC 31-17-4-2 presented the Court with a question of law. Id. at 559. The Court observed that IC 31-17-4-2 governs the modification, denial, and restriction of parenting time rights and provides that "the court shall not restrict a parent's parenting time unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development." The Court noted that the trial court did not make a finding that providing Father with parenting time might endanger the child's physical health or significantly impair the child's emotional development. Id. The Court said that the trial court found only that Father had been a part of the child's life for one year, and that it was not in the child's best interest to have in-person parenting time at the DOC facility. Id. The Court observed that the trial court at least implied that its decision was based in part on the reluctance of Mother and grandparents to transport the child to Father. Id. The Court said that it had addressed a similar issue in Rickman v. Rickman, 993 N.E.2d 1166 (Ind. Ct. App. 2013). In Rickman, Father had been sentenced to an aggregate term of fifty years for eight counts of child molesting as class A felonies, child molesting as a class C felony, and criminal confinement as a class C felony, and filed a verified petition for modification of visitation order twelve years after his sentencing requesting that the court grant him telephone and mail privileges with his child. Rickman at 1167. Meisberger at 159-160. The Rickman Court observed at 1169-1170 that it was "necessary" that the trial court discuss its factual basis and make findings on potential endangerment of the child's physical health or safety or significant impairment of the child's emotional development. Meisberger at 160.