

Children's Law Center of Indiana



Custody and Parenting Time

9/8/16

In **Montgomery v. Montgomery**, 59 N.E.3d 343 (Ind. Ct. App. 2016), the Court reversed the trial court's order which modified custody of the parties' six-year-old child from Father to Mother. *Id.* at 355. The Court remanded for primary physical custody and sole legal custody of the child to be returned to Father, with parenting time for Mother in accordance with the Indiana Parenting Time Guidelines. *Id.* The Court also found the trial court abused its discretion in requiring Father to pay \$7,500 towards Mother's attorney fees, and reversed that order. *Id.*

During the parties' marriage they had one child, who was born in November 2008. In November 2009, Father petitioned for divorce in Clark County, based on the parties' residence in Clarksville. Mother moved to Minnesota and was granted provisional primary custody of the child but frequently interfered with Father's parenting time. In August 2011, the trial court entered an emergency order transferring custody of the child to Father, but the child remained in Minnesota with Mother. On June 19, 2012, the trial court entered a final dissolution decree in which Father was granted sole legal and physical custody of the child. The court ordered Mother to deliver the child to Father immediately. Mother was not granted any parenting time due to her failure to appear at the final dissolution hearing and her prior interference with Father's parenting time. In July 2012, Mother appeared before the trial court and filed a request for parenting time. In November 2012, the parties agreed to a parenting time schedule under which Mother was granted parenting time in accordance with the Guidelines when distance is a factor. At some point, Mother moved to Wisconsin and began living with Gary Best (Boyfriend). On August 23, 2013, Father filed a motion to modify parenting time which stated that Mother was living with Boyfriend, who had at least two convictions for battery in Wisconsin and/or Minnesota, and this warranted an alteration of Mother's parenting time. On December 17, 2013, Father filed an "Emergency Motion to Modify Parenting Time", in which he alleged that the child feared Boyfriend and she had told Father that Boyfriend had struck her and Mother. Father's motion also stated that the child's counselor believed the child had not fabricated the battery incident or her fears of Boyfriend. On December 27, 2013, the parties' parenting time coordinator filed an entry with the court stating Mother should have parenting time with the child from December 28, 2013 through January 4, 2014. The parenting coordinator stated that Child Protective Services had investigated the incident and found no reason to be involved or to supervise any contact between the child and Boyfriend. Father refused to deliver the child to Mother.

On January 14, 2014, the trial court held a telephonic pretrial conference, during which Mother denied any physical abuse or threat of abuse by Boyfriend against the child. The trial court

appointed a guardian ad litem (GAL) to investigate the case and submit a report to the court. The court also granted Mother makeup visitation time for a two week period beginning on January 18, 2014. On January 16, 2014, Father filed a “Renewed Motion for Modification of Order for Parenting Time or in the Alternative Motion for an Amended Parenting Order to Include a Safety Plan.” The trial court entered an ex parte order preventing Boyfriend from being present for any parenting time between Mother and the child. After a hearing, the trial court entered an order granting Mother two weeks of parenting time beginning February 1, 2014, without any restrictions on Boyfriend’s presence during the parenting time. Mother had her two weeks of parenting time in February. Mother was granted another week of parenting time in April 2014.

During her April 2014 parenting time, Mother took the child to the office of her attorney and arranged for a video recording to be made, without the child’s knowledge, of the child interacting with Mother, Boyfriend, and Mother’s attorney. The child sat next to Boyfriend, freely interacted with him without apparent fear, and referred to Boyfriend as “dad” or “daddy.” The child said she loved Boyfriend. Mother’s attorney had a conversation with the child during which the child said: (1) it was her “dream” to stay with Mother and Boyfriend had told her that dream would come true; (2) she was not afraid of Boyfriend, although Father, whom she referred to as “Carl” wanted her to believe she was afraid; (3) she denied or did not remember having ever talked to the counselor; (4) she did not tell the GAL she wanted to live with Mother because she was afraid of making the GAL mad; (5) she was sad that she was going back to Father’s house that day; and (6) Boyfriend had never hurt her.

Mother’s attorney sent a copy of the video to the GAL, who viewed it before submitting a report to the trial court on May 15, 2014. The GAL noted in her report: (1) there was a recent criminal case against Boyfriend in Wisconsin for third degree felony assault resulting in serious bodily injury against a co-worker; (2) the assault by Boyfriend troubled the GAL; (3) Father had been improperly withholding information from Mother regarding the child’s education, health care, and other issues, and he needed to stop doing so; (4) Mother was attempting to portray Boyfriend to the child as the child’s real father, while referring to Father as “Carl.” In her report, the GAL recommended in part that Mother should continue to have her court ordered parenting time but that Boyfriend should not be present for any of Mother’s parenting time.

On May 13, 2014, Mother filed a petition to modify child custody in Mother’s favor. Father and his attorney did not cooperate with the parenting time coordinator to schedule Mother’s summer 2014 parenting time with the child, and no parenting time took place until October 2014. According to the Guidelines, based on the child’s age and the distance between the parties, Mother was entitled to six weeks of parenting time in 2013 but only received four weeks. In 2014, Mother was entitled to nine weeks of parenting time but only received six weeks.

During the custody modification hearing on May 18, 2015, Mother presented her testimony and the parenting coordinator’s testimony. Mother denied any history of violence between herself and Boyfriend or between Boyfriend and the child, and the April 2014 video was played. Mother admitted to Boyfriend’s felony battery conviction in Wisconsin, and also testified about Father’s lack of cooperation with providing her information on the child’s medical care, education, and

correct address. The parenting time coordinator testified as to past difficulty in working with Father but stated that, after Father told her to communicate directly with him and after he obtained a new attorney, the communication issues improved. Mother presented no evidence on her current housing arrangements in Wisconsin, where the child would attend school, or extracurricular activities in which the child could participate. The GAL's report was introduced into evidence, but the GAL could not definitively say whether her recommendation from May 2014 was still valid, as she had not spoken to the child or parties since then. At the conclusion of the hearing, the trial court entered a summer parenting order for the child and Mother, and Father did not attempt to interfere with that order. The custody modification hearing was continued to June 15, 2015. Father, the child's godmother, a family friend, and Father's sister testified. Father presented evidence on his employment and day care arrangements, his appropriate household and positive relationship with the child, the child's participation in dancing and tumbling classes, her friends from church and school, and the fact that the child was preparing to enter first grade in the fall. Mother did not dispute any of the evidence that the child had been well cared for by Father, aside from his interference with Mother's parenting time in 2013 and 2014. In addition to custody matters, Mother also presented evidence that she had incurred nearly \$18,000 in attorney fees in the past two years in fighting Father's attempts to limit her parenting time and in moving to modify custody.

On October 9, 2015, the trial court entered an order granting Mother's petition to modify custody. The court found that: (1) Father had fabricated the allegation that Boyfriend assaulted the child in order to disrupt the child's frequent, meaningful, and continuing contact with Mother; and (2) Father had deliberately concealed the child's school, medical, counseling, daycare, and dental records, and even his and the child's address from Mother, all in violation of court orders. The court granted Mother legal and physical custody of the child, with Father having distance-related parenting time under the Guidelines. The court also ordered Father to pay \$7,500.00 towards Mother's attorney fees.

The Court could not say there was evidence of a substantial change in circumstances that would support a modification of custody. *Id.* at 352. The Court cited IC 31-17-2-21, which states that a trial court may not modify a child custody order unless a noncustodial parent shows both that modification is in the best interest of the child, and that there has been a substantial change in one or more of the factors listed under IC 31-17-2-8. *Id.* at 350. Citing Steele-Giri v. Steele, 51 N.E.3d 119, 124 (Ind. 2016), the Court noted that a parent seeking modification of custody bears the burden of providing that the existing custody order should be altered. Montgomery at 350. The Court observed that, generally, cooperation or lack thereof with custody and parenting time orders is not an appropriate basis for modifying custody. *Id.* The Court noted: (1) it is improper to use a custody modification to punish a parent for noncompliance with a custody order; however, (2) if one parent can demonstrate that the other has committed misconduct so egregious that it places a child's mental and physical welfare at stake, the trial court may modify the custody order (multiple citations omitted). *Id.*

The Court found that the primary reasons identified by the trial court for modifying custody in favor of Mother were: (1) Father's denial of some of Mother's parenting time in 2013 and 2014;

and (2) Father's allegation that Boyfriend had assaulted the child, which the trial court found to be fabricated. Id. at 351. The Court noted Father conceded that in 2013 and 2014, Mother was entitled to a total of fifteen weeks of parenting time, but received only ten weeks of parenting time. Id. The Court observed that Father did not concede that he fabricated the assault allegation against Boyfriend, but the Court said it could not second-guess the trial court's determination that Boyfriend did not assault the child. Id.

The Court observed that the trial court made no finding as to what circumstance substantially changed under IC 31-17-2-8 that warranted a modification of custody. Id. The Court said: (1) it is true that in some cases a custodial parent's interference with a noncustodial parent's visitation rights may be of such a degree that it represents a substantial change in the parties' relationship and the parties' relationship with their children under IC 31-17-2-8(4); (2) on the other hand, it is well-settled that in order to support a modification of custody, such interference must be continuing and substantial (multiple citations omitted). Id. Quoting Johnson v. Nation, 615 N.E. 2d 141, 147 (Ind. Ct. App. 1993), the Court said it accepts that any interference with a noncustodial parent's visitation rights "is a serious matter and in some cases may be a factor relevant to the issues of both a change in circumstances and the child's best interests," but not all such interference justifies a modification of custody. Montgomery at 351. In Johnson, the Court reversed a modification of custody which had been based upon the custodial father's purported interference with the mother's parenting time, where the mother nonetheless was able to have "regular meaningful visitation with her children" and there was no evidence that the father's interference "had a harmful physical or emotional effect on the children." Montgomery at 351. The Court noted that Parents have had a highly acrimonious relationship when it comes to their child, but this was not a recent development or a changed circumstance. Id. The Court found that the primary reason Father was granted custody of the child in the original dissolution decree was because of Mother's complete denial of parenting time to Father for long periods of time while the dissolution was pending. Id. The Court said that Father's actions deprived Mother of five out of the fifteen weeks of parenting time to which she was entitled, which was not ideal, but was not a complete cessation of the relationship between Mother and the child. Id. at 352. The Court also noted that beginning in October 2014, regular parenting time between Mother and the child had resumed, and in spring of 2015 the parties agreed between themselves, without the assistance of the parenting time coordinator, to Mother having a week of parenting time over spring break. Id. The Court observed that there was no evidence that Father's interference with Mother's parenting time had any detrimental effect upon the child's mental or physical health, and there was no evidence that the child's relationship with Mother was substantially affected. Id. The Court said that, to the extent Mother argued that Father attempted to instill fear of Boyfriend in the child, by Mother's own account Father failed in this regard. Id. The Court noted there was no evidence that Father had repeated his claims that Boyfriend assaulted the child or did so in front of the child for over a year prior to the modification hearing. Id.

In light of the uncontradicted evidence of the child's positive living situation with Father, the complete dearth of evidence of what the child's living situation with Mother would be like, and the lack of evidence that Father's interference with Mother's visitation substantially or continually impacted Mother's relationship with the child or affected the

child’s mental or physical health, the Court opined there was insufficient evidence that modifying custody was in the child’s best interests. *Id.* at 353. The Court concluded there was scant evidence that modification of custody was in the child’s best interests. *Id.* at 352. The Court quoted Kirk v. Kirk, 770 N.E.2d 304, 308 (Ind. 2002), which states that when deciding whether to modify custody, courts must bear in mind, “[c]hildren will normally prosper and mature...under a standard of consistency better than they will otherwise, even though at any given point in time the noncustodial parent may appear capable of offering ‘better’ surroundings, either emotional or physical.” Montgomery at 353.

Given the lack of any evidence of a significant economic disparity between the parties or that the trial court considered the parties’ respective economic resources, the Court concluded it was an abuse of discretion to require Father to pay \$7,500 towards Mother’s attorney fees. *Id.* at 355. Father also challenged the trial court’s order requiring him to pay \$7,500 towards Mother’s attorney fees. The Court noted that the trial court relied on two statutes, IC 34-52-1-1(b) the General Recovery Statute, and IC 31-17-7-1, which permits a court to order one parent to pay reasonable attorney fees to the other parent related to maintaining or defending custody and parenting time proceedings. *Id.* at 354. The Court found that, given their reversal of the trial court’s custody order, Mother could not be deemed a “prevailing party” under the General Recovery Statute. *Id.* In looking to IC 31-17-2-12, the Court noted the trial court must consider the parties’ resources, their economic condition, their ability to engage in gainful employment and earn adequate income, and any other factors bearing on the reasonableness of the award. *Id.* Quoting Allen v. Proksch, 832 N.E.2d 1080, 1102 (Ind. Ct. App. 2005), the Court observed “[m]isconduct that directly results in additional litigation expenses may properly be taken into account in the trial court’s decision to award attorney fees.” Montgomery at 354. The Court noted that, if a trial court does not receive evidence regarding the parties’ respective incomes, economic condition, income and ability to work, and other factors related to the reasonableness of an award, it is an abuse of discretion to award fees under IC 31-17-7-1. Allen at 1102. Montgomery at 354. The Court declined to affirm the award of fees, and noted the following in support of its opinion: (1) the only evidence presented showed that Mother earns \$15 per hour, while Father earns \$17 per hour; (2) Mother had not presented evidence of a significant disparity in income that would justify shifting the payment of attorney fees from Father to Mother; (3) there was no evidence of savings or other assets the parties had available to them; (4) Father’s 2013 contempt petition asserting Mother had failed to pay him attorney fees, a judgment, and child support owed under the original dissolution decree was never ruled upon nor mentioned by the trial court, which would be a relevant condition assessing the parties’ respective situations; (5) as for Father’s alleged misconduct on parenting time interference, the evidence presented by Mother did not differentiate between fees related to such alleged misconduct and fees generally related to her motion to modify custody. *Id.* at 355.