

Children's Law Center of Indiana



Custody and Parenting Time

6/25/13

In **Perkinson v. Perkinson**, 989 N.E.2d 758 (Ind. 2013), the Court declared that an agreement to forego parenting time in exchange for relief from child support is void against public policy, and reversed and remanded the trial court's decision denying Father parenting time. Father and Mother married in October 2004, their child was born in August 2005, and in September 2005, Father filed a petition for dissolution of the marriage. Father exercised parenting time with the child during the dissolution proceeding. The dissolution decree entered in February 2006 distributed marital assets and debts and set out child support payments for the child. The agreement between Father and Mother, approved by the court in March 2006, provided that: (1) Father agreed to waive his parenting time rights in exchange for Mother assuming sole financial responsibility and waiving enforcement of Father's child support arrearage; and (2) if Father sought parenting time in the future, "he shall be obligated to pay any support arrearage through the date of the approval" of the agreement by the trial court. In February 2008, Father filed a verified petition for modification of parenting time, seeking to reestablish visitation with the child. The trial court denied Father's petition in April 2008 and denied Father's motion to correct error in July 2008. In December 2010, Father filed a second verified petition for modification of parenting time. A hearing was conducted on the petition, and the trial court denied the petition. In June 2011, the trial court denied Father's motion to correct error, and the Court of Appeals reversed and remanded. The Indiana Supreme Court granted transfer.

The Court opined that the concept of parents negotiating away parenting time as a means to eliminate the obligation to pay child support is repugnant and contrary to public policy. *Id.* at 760. The Court said that attorneys should refuse to be a part of such discussion and should advise their clients that any such discussion is unacceptable. *Id.* The Court found it "incomprehensible to imagine" that either parent would ever stipulate to give up parenting time in lieu of not paying child support. *Id.* at 762. The Court said that, "[e]very child deserves better than to be treated as nothing more than a bargaining chip." *Id.* at 765.

The Court said that even if it is not in a child's best interest to visit with a parent, it is still in that child's best interest to be financially supported by that parent. *Id.* Quoting Straub v. B.M.T., 645 N.E.2d 597, 600 (Ind. 2004), the Court said that it has long been established that "[a]ny agreement purporting to contract away these [child support] rights is directly contrary to this State's public policy of protecting the welfare of children." Perkinson at 762. The Court observed that: (1) the right to child support lies exclusively with the child and that a custodial parent holds the support payments in trust for the benefit of the child; (2) custodial parents who

receive child support funds act as a constructive trustee, and may not contract away the benefits of the trust; and (3) doing so would violate the fiduciary duty the custodial parent owes the child in relation to any child support funds (multiple citations omitted). Id. The Court noted that the clause of the agreement purporting to obligate Father to pay any support arrearage if he sought parenting time in the future acts to discourage Father's future involvement with his child. Id. Quoting Farmer v. Farmer, 735 N.E.2d 285, 288 (Ind. Ct. App. 2000), the Court observed that "[v]isitation rights and child support are separate issues, not to be comingled. A court cannot condition visitation upon the payment of child support if a custodial parent is not entitled to do so." Perkinson at 762.

The Court found that the evidence presented to the trial court was insufficient to deny parenting time to Father. Id. at 766. The Court noted the following evidence in the record: (1) for two years, Father was not in contact with the child, but for the past five years, Father has attempted to reenter the child's life; (2) Father has relocated, remarried, and is raising his third child who is younger than the child in the instant case; (3) Father was willing to pay the child support arrearages; (4) Father exercises parenting time with his older child, born before his marriage to Mother, from 6:00 p.m. on Friday until 8:00 a.m. on Tuesday; (5) there was no evidence that Father has a criminal record, or any abuse charges on any children. Id. at 765. The Court observed that the only evidence before the trial court regarding any endangerment to the child was Mother's testimony that Father was verbally abusive to Mother and to Father's oldest child in 2005, and that Father threatened to destroy the relationship between Mother and the child in the instant case. Id. The Court noted that there was no evidence presented by Mother from a guardian ad litem, DCS reports, a therapist, or expert testimony to show that parenting time would not be in the child's best interest. Id. at 766. The Court said that, while under the right circumstances, one parent's testimony alone could be sufficient, here the evidence was not sufficient to support Mother's belief that it would not be in the child's best interests to spend time with Father. Id. The Court emphasized that for twenty-five years our Courts have interpreted that the statutory standard for restriction of parenting time should be read that visitation by the noncustodial parent "would" endanger the child's physical health or significantly impair his emotional development (multiple citations omitted). Id. at 764. The Court also quoted Indiana Parenting Time Guideline section 1(E)(5), which states that "[a] child has the right to both support *and parenting time*..." (emphasis added by Court). Perkinson at 764. The Court opined that extraordinary circumstances must exist to deny parenting time to a parent which necessarily denies the same to the child. Id. at 765. The Court went on to state that, if the trial court finds such extraordinary circumstances do exist, then the trial court shall make specific findings regarding its conclusion that parenting time would endanger the child's physical health or significantly impair the child's emotional development. Id.

The Court observed that the trial court has a host of tools at its disposal in dealing with the challenges in parenting time cases, such as the instant case. Id. at 766. The Court said that the trial court could: (1) order phased in professionally supervised visitation at Father's expense; (2) require the testimony of a child psychiatrist or child psychologist to assist in determining how best to structure reunification; or (3) appoint a guardian ad litem or court appointed special advocate to investigate and make recommendations to the court. Id.