Custody and Parenting Time
7/23/2020

In **Madden v. Phelps**, 152 N.E.3d 602 (Ind. Ct. App. 2020), the Court held that the trial court abused its discretion when it modified legal custody without a request to do so from either party, but the trial court's order modifying physical custody was not in error.

The child was born to Mother and Father in 2011 and Father established paternity in 2012 after their relationship ended. Father resided in Bloomington, while Mother resided at a home on Prairie Knoll Drive in New Castle. Mother was given primary custody of the child and they shared joint legal custody. The child was diagnosed with a language disorder and eventually with autism spectrum disorder. Specialists and therapists recommended that the child receive more intensive school services, outpatient occupational and speech therapy, and other services both in and outside school to assist with social development. Mother and Father had difficulty coparenting and filed motions for contempt against each other. One parenting coordinator was appointed but withdrew after Mother failed to pay her fees. Dr. Kane was appointed as a parenting coordinator in 2018 and was directed to make binding recommendations but that she was not to serve as a custody evaluator and could not offer binding recommendations for changes in physical custody. The parties were to share equally in her fees, but the appointment order provided that Dr. Kane could change that structure of the fees. Father filed an intent to relocate to New Castle and asked to modify his parenting time. Mother objected to the modification of his parenting time. The parties disagreed over sports, and Dr. Kane issued a binding recommendation have the child participate but Mother refused to take him to sports when the child was with her. Mother moved out of her Prairie Knoll residence but did not notify Father or the trial court. In June 2018, DCS substantiated a report of neglect against Mother due to bruising on the child after one of Mother's other children shoved the child while in Mother's care. Mother and Father participated in an informal adjustment until January 2019. Parenting continued their disagreements and reported each other to DCS eleven other times. Dr. Kane made bindings recommendations about summer parenting time for 2018; at the end of summer, Father filed a motion for contempt regarding summer parenting time that Mother withheld, Mother's moving without proper notice, and her failure to communicate. Mother was held in contempt but given the chance to purge herself of the contempt. After several other motions for contempt, where Mother alleged that she was living at the Prairie Knoll house, Father also moved and did not file a notice of intent to relocate. Parents continued to disagree over sports, parenting time, and services for the child. Mother filed a motion to have Dr. Kane removed as parenting coordinator, and the trial court held a hearing on this. Dr. Kane indicated that she had a personal bias against Mother as a result of things Mother stated in her petition to remove Dr. Kane, and the trial court allowed Dr. Kane to file a final report and withdraw. Dr. Kane's final report laid forth Mother's lack of communication, her non-compliance, her failure to participate in the child's therapy or other services, and Parent's collective inability to coparent even with a parenting coordinator. Dr. Kane included a recommendation that Father be given custody. At

trial, the trial court reviewed the issues to be addressed, and joint legal custody was not mentioned. The trial court ultimately awarded Father sole legal custody, physical custody, held Mother in contempt, and ordered her to pay certain fees.

The trial court erred in awarding Father sole legal custody, because the issue of legal custody was not properly before the trial court through pleadings or motions. Id. at 612. Mother argued that trial court erred in awarding Father legal custody of the child; the parties had not agreed that legal custody was an issue that would tried before the court, and neither party had filed any kind of motion requesting that the standing order of joint legal custody be modified. Id. at 611. Father asserted that legal custody was placed at issued through the open-ended requests to modify custody, and relied on Higginbotham v. Higginbotham, 822 N.E.2d 609, 610 (Ind. Ct. App. 2014) (holding the trial court did not err in addressing legal custody, because the father's motion had requested an open-ended modification of custody after a custody evaluation, and the parties had agreed to the evaluator's recommendations about legal custody). Id. The Court noted that in the present case, unlike in Higginbotham, the parties never mentioned legal custody, and all their motions pertained only to physical custody. Id. at 611-12. At the final hearing, neither party nor the trial court identified legal custody as a matter which needed to be addressed. Id. at 612.

The Court further found that the issue of legal custody was not tried by consent. Id. at 612. Indiana case law permits issues to be tried by the consent of the parties, even when these issues were not raised in pleadings. Id., citing Bailey v. Bailey, 7 N.E.3d 340, 344 (Ind. Ct. App. 2014). The Court noted that during the hearing, Father indicated that he wanted to change legal custody, but agreed to assertion that Mother would still have joint legal custody even if Father received primary physical custody. Id. The Court opined that this indicated that Mother did not believe legal custody was an issue in play, and that Father did not believe he was currently seeking sole legal custody. Id. Neither party submitted findings of fact which addressed sole legal custody. Id.

The trial court did not err in finding that there had been a substantial and continuing change in circumstances, and that modifying custody to Father was in the child's best interests; trial court are not limited to the statutory best interests factors. Id. at 613. IC 31-14-13-6 provides that after a custody order has been issued in a paternity case, a trial court cannot modify the custody order unless there is a substantial change in one or more of the best interests factors, and the modification is in the child's best interests. The best interests factors are enumerated at IC 31-14-13-2. The trial court concluded that it was in the child's best interests to modify custody to Father because of a substantial and continuing change of circumstances in several of the factors, including Father's wishes, Mother's refusal to act in the child's best interests, Mother's credibility at the hearing, Mother's refusal to adhere to binding recommendations or the advice of the child's counselor, and Mother's unstable housing. Id. at 612-13. The Court found the evidence in the record to be ample evidence supporting the trial court's order. Id. at 613. Mother argued that there was no substantial change in the factor addressing Father's wishes, because Father had always wanted custody of the child, and this was the only factor which the trial court explicitly named from the list of factors at IC 31-14-13-2. Id. The Court noted that a trial court is directed to consider all factors in the child's best interests, and the factors enumerated in the statute are not exhaustive or exclusive. Id. The Court opined that the trial court found a change in one statutorily-enumerated factor, Father's wishes, and

several non-statutory factors. Id. The Court further noted that custody was established in 2012, and Father filed a motion to modify custody in 2018, indicating that Father had indeed changed his wishes. Id.

Mother's arguments about the custody recommendation and Father's shortcomings were against the Court's standard of review, which does not permit the reweighing of evidence or the reassessment of the credibility of witnesses. Id. at 614. The Court first began its opinion by reiterating the standard of review for appellate courts, laid forth recently in Hecht v. Hecht, 142 N.E.3d 1022, 1028-29 (Ind. Ct. App. 2020) (noting that the latitude is granted to family law courts because they observe the demeanor and conduct of parties; that appellate courts do not reweigh the evidence or reassess the credibility of witnesses). Mother argued that trial court erred in considering Dr. Kane's recommendation because, in offering a recommendation about custody, Dr. Kane went against the trial court's order about the scope of her duties. Id. at 613. The Court called Mother's argument without merit, because the trial court's order said Dr. Kane was not permitted to serve a custody evaluator and could not offer binding recommendations about a change in the child's residence, not that she could offer no opinions on the topic. Id. The Court noted there was no evidence that Dr. Kane acted as a formal custody evaluator, or that the trial court considered Dr. Kane's opinion in the report to be a binding recommendation. Id. at 613-14. The Court noted that the trial court was well aware of the interactions and relationship between Mother and Dr. Kane, and it was within the trial court's discretion to credit or discredit Dr. Kane's recommendations. Id. at 614. Mother also argued that Father had unstable living arrangements, that he had a pattern of domestic violence, and that the trial court discredited Father's testimony about his mental health struggles. Id. The Court noted that these arguments mischaracterized the record and were against the standard of review. Id.

The Court also found that the trial court did not hold Mother in contempt for failing to file a notice of relocation; rather, the trial court held Mother in contempt for failing to produce to Father the utility bill and proof of payment in her name for the Prairie Knoll residence as she had been required to do by the trial court. Id. at 614. The Court stated Mother's arguments that she was being held in contempt for failing to file a notice of intent to relocate when Father failed to do so as well and was not being held in contempt as a mischaracterization of the trial court's ruling. Id.

The Court agreed with Mother that there was no evidence to support an award of attorneys fees against Mother in the amount of $1,000. Id. at 615. The Court also held that the order directing Mother to pay $3,645.50 in parenting coordination fees was not in error, since the parenting coordination appointment order provided that Dr. Kane had the ability to charge one party more than the other. Id.

Judge Tavitas concurred in the result and wrote separately to opine that Dr. Kane had exceeded the scope of her duties as outlined in the trial court's order by recommending that the child live with Father. Id. at 616. Judge Tavitas noted that Dr. Kane had become an advocate in making such a recommendation, rather than remaining a neutral person assisting with resolving disputes. Id.