



## Kids' Voice of Indiana

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### Custody and Parenting Time

3/31/22

In **Sanford v. Wilburn**, 185 N.E.3d 451 (Ind. Ct. App. 2022), the Court held that the trial court erred in granting Mother's motion for change of judge and changing primary physical custody from Father to Mother, because there was no substantial change in circumstances.

Child was born to Mother and Father 4 years before they divorced. They shared joint legal custody and Mother had primary physical custody. Father filed a motion to modify custody for primary physical custody of Child. The trial court granted Father's motion, concluding there was a substantial change in circumstances while Child was in Mother's custody including 1) Child struggling in school with multiple absences, 2) Mother changing Child's school without notifying Father or considering the impact of the move on Child, and 3) Mother sending Child to a therapist without telling Father any of the provider's information. Shortly after the trial court awarded physical custody to Father, Mother filed two DCS reports alleging neglect by Father and Stepmother and a petition for order of protection on Child's behalf against Stepmother. A week after these filings, Mother and Child were filmed keying a car in a parking lot and both were charged for the incident. Mother then filed a Motion for change of judge without stating any bias. The motion was granted, and the same day Mother dismissed her petition for a protective order and filed a motion for modification of custody requesting primary physical custody of Child. At the hearing on Mother's motion, she testified that Child was spiraling out of control and unhappy living with Father and Stepmother, and that teenage girls need to be with their Mothers. Father testified that Child was initially upset when she moved in with him and Stepmother but had since improved and transitioned well to her new school and home. The trial court interviewed Child in camera and issued its order granting Mother's motion to change primary physical custody to Mother. Father appealed.

**There was no substantial change in circumstances to support the custody modification. Id. at 455-57.** A parent cannot undo a custody modification order by simply waiting a few weeks and filing a new modification petition in front of a new judge. There must be substantially changed circumstances related to the statutory considerations for child custody when compared to those reflected in the previous modification order, and the second judge's findings here do not support such a conclusion. Here, only forty-five days after the trial court modified primary custody of the child to Father due to Father's ability to provide a more structured environment, Mother motioned for a new judge in the divorce matter and motioned to change primary physical custody back to herself. Mother failed to appeal the original modification order. The motion for a new judge was granted, and after a hearing on the issue of modification which included an in-camera with the child, the second judge modified primary custody back to Mother.

Although all custody determinations are to be made according to the child's best interests, initial child custody decisions are determined differently than custody modification decisions. For an initial custody determination, there is no presumption favoring either parent, and the best interests of the child will be determined by the court weighing all relevant factors as outlined in IC 31-17-2-8. For custody modifications, there needs to be a substantial change regarding the best interests factors as there is a presumption of maintaining the status quo as permanency and stability are regarded to be best for a child. Here, when the first judge found there was a substantial change in circumstances and modified custody in favor of Father, the trial court made specific findings that included recognition that the transition would not be easy for the child, but ultimately, it would be best for the child's long-term health and ability to thrive. The second judge modified custody back to mother due to the child being extremely homesick after the move to her Father's home, but that judge did not explain how the child's current circumstance was a substantial change from the first judge's order. Furthermore, the second judge even noted that Mother did not appeal the first modification order, the matter seemed to be judge shopping, and that Father presented substantial evidence of his ability to provide for the child's physical, educational, medical, and supervisory needs and also provided evidence regarding Mother's noncompliance with joint custody. With all the evidence being considered, there was not a substantial change in circumstances related to the first modification order that would warrant modification of custody back to Mother; and therefore, the trial court erred.