

Children's Law Center of Indiana



Custody and Parenting Time

8/28/17

In D.G. v. S.G., 82 N.E.3d 342 (Ind. Ct. App. 2017), the Court: (1) affirmed the trial court's dissolution decree awarding joint physical custody to Parents; (2) reversed and remanded the court's parenting time order with instructions; and (3) reversed and remanded the court's division of marital property with instructions. Id. at 353. Parents married and had two children. On January 22, 2015, Mother filed a petition to dissolve the marriage. At that time, the children were eleven years old and seven years old. The children initially remained in Mother's primary physical custody. Mother is a critical care flight nurse with a rotating work schedule of a twelve hour shift and a twenty-four hour shift. Father is a graphic designer who works regular daytime hours but is also responsible for maintenance and rent collection for the parties' five rental houses. The children were involved in multiple sports, including baseball, basketball, and football, with some traveling or All-Star teams. Both the maternal and the paternal grandparents assisted the parents with such tasks as dropping off the children at school, meeting the children's school bus after school, providing meals, and helping the children with homework. At first, Father cared for the children in the marital residence while Mother worked her two shifts per week. Later, Mother relied on the maternal grandmother, instead of Father, to stay in the marital home with the children when Mother worked overnight shifts. Father obtained a home in the children's school district and began relying on the paternal grandfather to regularly meet the school bus at the marital residence and bring the children to Father when his work day ended. It was not always clear who would be awaiting the children when the children came home from school. On at least one occasion, the younger child was left alone. On another occasion, the paternal grandfather and the maternal grandmother had a disagreement over who would take the children after school.

A Guardian ad Litem (GAL) was appointed for the children on May 29, 2015. The GAL made several recommendations to the court and interim orders were entered. Over the course of the interim orders, Father's parenting time progressed to Guideline-based parenting time plus one overnight during the week. Mother's twelve hour shift became a daytime shift. The final hearing commenced on September 29, 2015 and continued on January 14, 2016 and July 14, 2016. Mother's position was that she should have primary physical custody of the children, and Father should have the children during her work hours and alternate weekends. Father's position was that he should have physical custody of the children half of the time. The GAL recommended a 60/40 split of parenting time, with Mother having the children 60% of the time and Father having Parenting Time Guidelines plus one overnight with the children. The children's therapist: (1) acknowledged the bond between the children and both parents as well as between the children and the grandparents; (2) testified the older child expressed desires for a set schedule and the ability to see both parents regularly; (3) opined that both parents were meeting the

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children's emotional needs; and (4) further opined the children were over-extended by sports activities and needed a more balanced schedule. Immediately before the final hearing concluded on the third day, Mother testified that her twelve-hour work shift had changed to 6:00 a.m. until 6:00 p.m. in Indianapolis and she expected to arrive home at 6:30 p.m. Mother's twenty-four hour shift remained a rotating shift.

On December 27, 2016, the trial court issued the dissolution decree, which ordered that Mother and Father share joint legal and physical custody, with Mother having the children overnight on Mondays, Tuesdays, and alternate weekends beginning on Friday. The court ordered that Father was to have the children overnights on Wednesdays, Thursdays, and alternate weekends, beginning on Friday. Father was given additional parenting time based upon Mother's work schedule. Ancillary provisions of the Guidelines were to apply, except that the right-of-first refusal would not apply during the summer break to permit greater grandparent interaction with the children. Mother appealed.

The Court held that Mother was not deprived of the opportunity to present her case when the final hearing was ended without the testimony of the maternal grandparents. *Id.* at 347. Mother argued that the trial court violated her due process rights by denying her sufficient opportunity to present testimony from the children's maternal grandparents. Citing Morton v. Ivacic, 898 N.E.2d 1196, 1199 (Ind. 2008), the Court observed: (1) in general, due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses; and (2) whether a party was afforded an opportunity to be heard is a question of law, which is reviewed de novo. *D.G.* at 347. Mother claimed there was an abrupt end to the proceedings when the trial court terminated the hearing at noon on the third day of testimony. The Court disagreed, finding that the trial court repeatedly engaged Mother's counsel in discussions of timing issues. *Id.* The Court noted that Mother's counsel acquiesced to a three hour hearing on the final day of the hearing and chose to elicit other testimony in lieu of calling the children's maternal grandparents to testify. *Id.* The Court also noted: (1) Mother's counsel did not make an offer of proof on the grandparents' expected testimony; and (2) Mother had not identified any additional factual detail which would have been forthcoming from the grandparents. *Id.* Citing Trabucco v. Trabucco, 944 N.E.2d 544, 551 (Ind. Ct. App. 2011), *trans. denied*, the Court explained that under the invited error doctrine, a party may not take advantage of an error that she commits, invites, or which is the natural consequences of her own neglect or misconduct. *Id.*

The Court found the trial court's award of joint physical custody was not clearly erroneous. *Id.* at 353. Mother argued the award of joint physical custody was unsupported by the evidence. The trial court made many factual findings, including: (1) both parents love and prioritize the children; (2) Father has regular work hours and flexibility, but Mother's work schedule is rotating and lacks predictability; (3) both parents have been very involved with the children; (4) the maternal and paternal grandparents have been very involved with the children in a positive manner; (5) the parents live in close proximity to each other; and (6) the children needed substantial time with each parent. The Court found the factual findings had evidentiary support, and the order for joint physical custody had support. *Id.* at 349. The Court cited Bowling v. Poole, 756 N.E.2d 983, 988 (Ind. Ct. App. 2001), which indicates that findings are clearly

erroneous only when the record leaves the Court with a firm conviction that a mistake has been made. D.G. at 348. The Court also noted the longstanding policy that appellate courts should defer to the determination of the trial courts in family law matters, citing Gold v. Weather, 14 N.E.3d 836, 841 (Ind. Ct. App. 2014). D.G. at 348.

The Court reversed and remanded the trial court’s parenting time order for revision to reflect Mother’s updated work schedule and the preference for parental, as opposed to grandparental, access to the children. Id. at 353. Mother asserted that the trial court prioritized predictability over equal parenting time and gave Father more than one-half of the time with the children. Mother contended she would inevitably lose more time due to her work schedule, and she was deprived of the make-up time contemplated by the Guidelines. The Court did not read the custody and parenting time order as excluding the make-up provision of the Guidelines. Id. at 349-50. The Court noted the order expressly provided that ancillary provisions of the guidelines applied. Id. at 350. The Court looked to paragraph 5 of the Commentary to section II, Specific Parenting time Provisions, which states:

For parents with non-traditional work schedules, who may regularly work weekends, weekday parenting time should be substituted for the weekend time designated in these rules. Similar consideration should also be given to parents with other kinds of non-traditional work hours.

D.G. at 350. The Court explained that, without the Guideline-promoted make-up time for missed parenting time due to work schedule irregularity, the goal of roughly equal parenting time would not be achieved in this case. Id. The Court also noted the parents would have the benefit of a parenting time coordinator for two years. Id. The Court agreed with Mother’s contention that the summer break order allowing grandparents priority was contrary to the Guideline and her fundamental right to raise her children. Id. The Court noted that the family law statutes and Guidelines do not provide grandparents with access rights superior to those of parents who desire to spend additional time with the child. Id.