

# Children's Law Center of Indiana



## Custody and Parenting Time

11/27/13

In **Hatmaker v. Hatmaker**, 998 N.E. 2d 758 (Ind. Ct. App. 2013), the Court reversed the trial court's order requiring Father to have supervised parenting time, modifiable upon agreement of the parties. *Id.* at 763. The Court found that the order was contrary to law, and remanded for further proceedings consistent with this opinion. *Id.* Father and Mother married in 2003 and separated in February of 2010. Father was convicted of committing battery upon Mother. Mother and Father were divorced and Father was awarded supervised visitation with the child of the marriage, contingent upon the completion of domestic violence counseling. Father exercised supervised parenting time at a private agency. He also completed domestic violence counseling and parenting classes. Father completed a mental health evaluation, but no mental health care was recommended. On January 8, 2013, Father filed a motion requesting unsupervised parenting time, alleging that the private agency "no longer had time available," that the child was suffering from parent alienation syndrome, and that an order for supervised parenting time premised upon IC 31-14-14-5 (providing for a presumption of supervised visitation when a parent has been convicted of domestic violence) was not valid more than two years after the crime. At the hearing on February 19, 2013, Father testified that he worked two days per week at a law firm and typically saw the child only about two hours per month because the supervision fees were unaffordable. Mother testified that she was afraid of Father, that he had obtained her address and sent letters, and that he had visited the child's school and questioned the principal about the child's enrollment. Mother also said that, on the same day as the school visit, she had called the police, and an officer had discovered a decapitated rabbit on Mother's doorstep; Mother suspected Father as the source. On March 4, 2013, the trial court entered an order denying Father's motions and stating that parenting time shall be furnished to Father as previously ordered, and may be modified upon agreement of the parties at any time. Father appealed.

**The Court reversed the trial court's order denying Father access to the child except when supervised or upon agreement of Mother. The Court remanded with instructions to the trial court to either enter an order containing sufficient findings to support a parenting time restriction or enter an order which does not contain such a restriction.** *Id.* at 762. Father argued that the trial court's refusal to lift the supervised parenting time order and his inability to pay for supervised sessions effectively eliminated his parenting time, and that he is entitled to unsupervised time with the child. Quoting Appolon v. Faught, 796 N.E. 2d 297, 300 (Ind. Ct. App. 2003), the Court observed that "[t]he right of non-custodial parents to visit with

their children is a ‘sacred and precious privilege.’” Hatmaker at 761. The Court also considered IC 31-17-4-1(a), which governs restriction of parenting time, and provides:

“A parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child’s physical health or significantly impair the child’s emotional development.” Id.

The Court, citing D.B. v. M.B.V., 913 N.E. 2d 1271, 1274 (Ind. Ct. App. 2009), said that this language had previously been interpreted to mean that a court may not restrict parenting time unless that parenting time “would” endanger the child’s physical health or emotional development. Hatmaker at 761. The Court quoted IC 31-17-4-2, the statute which governs modification of an existing parenting time order, and states:

“The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However the court shall not restrict a parent’s parenting time rights unless the court finds that the parenting time might endanger the child’s physical health or significantly impair the child’s emotional development.” Id. at 761.

The Court said that in this case, the trial court made no finding of endangerment, and implicitly found that parenting time modification posed no likely danger to the child as the order provided for modification “upon agreement of the parties at any time.” Id. at 762. The Court found the order erroneous as it was internally inconsistent and in contravention of statutory authority. Id.

The Court also addressed Father’s claim that supervision fees are unaffordable in his economic circumstances and should be a factor militating toward an order for unsupervised parenting time. The Court opined that, if unsupervised parenting time would pose a danger to a child, the parent is not entitled to dispense with supervision because of the costs associated with supervisory programs. Id. The Court suggested that the parenting time statutes do not prohibit the trial court from exploring affordable option for low-income parents such as grandparent, relative, or child advocate volunteer supervision, or contribution toward the costs of supervision by the custodial parent. Id.