

Children's Law Center of Indiana



Custody and Parenting Time (Custody Modification)

9/12/14

In **In Re Marriage of Sutton**, 16 N.E.3d 481 (Ind. Ct. App. 2014), the Court affirmed the trial court's order modifying primary physical and legal custody of the parties' fifteen-year-old son from Mother to Father. Mother and Father divorced in November of 1999. Mother had sole legal and physical custody of the child, and Father had parenting time in excess of the Guidelines until 2010, when Mother began denying his requests for additional parenting time. On June 18, 2013, Father filed his Verified Petition for Change of Custody, and on December 6, 2013, Father filed a motion for an *in camera* interview with the child. The trial court granted the motion for an *in camera* interview, and both parties submitted proposed questions for the interview.

A hearing on Father's custody modification petition was held on December 17, 2013, and the court conducted its interview with the child on the record on December 20, 2013. The trial court entered its order on January 7, 2014, awarding sole legal and physical of the child to Father.

Among the relevant findings in the court's order were: (1) the child's relationship with Father had changed over the years, becoming a more mature relationship; (2) the child has developed a serious interest in golf, which is also a serious interest of Father's, and this had allowed them to bond more significantly; (3) the child has a passion for computers which is Father's vocation; (4) the child had started initiating phone calls to Father; (5) the child has had some difficulty with his grades and Father, a trained teacher, can and has assisted the child with his studies; (6) Father has been more effective than Mother in assisting the child with homework and studying; (7) Father has remarried and his wife has two daughters that live with them; (8) the child fits in well with his stepsisters and he enjoys spending time in Father's household; (9) the child's relationship with Mother and Stepfather has become complicated and strained; (10) if the court modifies custody, the child would have to switch schools; (11) the child expressed his desire to live with Father to the court. The court concluded that the facts indicated a substantial change in circumstances and that modification of custody was in the child's best interests. Mother appealed, claiming the trial court's decision to modify custody was erroneous.

The Court concluded that the trial court's decision to modify custody from Mother to Father was not clearly erroneous. *Id.* at 487. The Court, citing Jarrell v. Jarrell, 5 N.E. 3d 1186, 1190 (Ind. Ct. App. 2014), observed that modification of custody is a determination that rests in the sound discretion of the trial court. Sutton at 484. Citing Julie C. v Andrew C., 924 N.E. 2d 1249, 1255 (Ind. Ct. App. 2010), the Court said that the trial court's findings or judgment will be set aside only if they are clearly erroneous. Sutton at 485. The Court also looked to IC 31-17-2-21, which states that the court may not modify a child custody order unless

the modification is in the child's best interests and there is a substantial change in one or more of the factors that the court may consider under IC 31-17-2-8. Id. The Court, quoting Jarrell, 5 N.E. 3d at 1193, said that "[A] change in circumstances must be judged in the context of the whole environment, and the effect on the child is what renders a change substantial or inconsequential." Sutton at 485. The Court observed that the trial court's order primarily relied on the child's desire to live with Father, and the child's interaction and interrelationship with Father, Mother, and siblings. Id. The Court noted that the most substantial change in circumstances was the child's wish to live with Father; and, because the child was fifteen years old at the time of the hearing, Indiana law mandated that his preference be given "more consideration" by the trial court. Id. at 486.

Although Mother argued that the trial court violated the long-standing principle that a change in the child's wishes cannot serve as a basis to modify custody, the Court opined that this argument was incorrect on its face, because the statutes clearly establish the "wishes of the child" as a factor on which a custody modification may be based. Id. The Court quoted In Re K.I., 903 N.E. 2d 453, 460 (Ind. 2009), which states that "[A] substantial change in any one of the statutory factors will suffice [to support a modification]." Sutton at 486. The Court said it is cognizant that there are certain inherent dangers in allowing custody modifications to occur solely at the behest of the child. Id. The Court observed that there is a host of potential factors and circumstances that would dictate whether a child's wishes constitute a *substantial* change in circumstances and whether a modification would be in the best interests of the child where the sole basis for modification is the child's preference (emphasis in opinion). Id. The Court said that, in this case, the child's wishes were reinforced by additional evidence, including: (1) the child had grown closer to Father in recent years, opening up to Father with details about his personal life and contacting Father to talk during the week; (2) the child has developed serious interests in computers and in golf, which are shared by Father; (3) the child enjoys spending time in Father's household, gets along with his half-siblings, and expressed the desire to be closer with his younger half-siblings and to act as a role model for them; (4) the child's relationship with Mother has become "complicated and strained;" (5) Mother is overbearing and has forced the child to participate in extracurricular activities in which he has little to no interest. Id. Mother took issue with the trial court's determination that modification was in the child's best interests. The Court, having found that the trial court's findings of changed circumstances, particularly with respect to the child's wishes and his interactions with parents and siblings, were supported by the record and not contrary to law, opined that Mother's best interests contentions were unavailing. Id. at 487. The Court, citing Dwyer v. Wynkoop, 684 N.E.2d 245, 248-49 (Ind. Ct. App. 1997), *trans. denied*, said that it did not discount the fact that stability is an important factor when considering whether a modification of custody is appropriate. Sutton at 487. The Court noted the trial court considered that the child would be required to change schools and adjust to a new environment, but the balance nonetheless fell in favor of modification of custody. Id.