

Children's Law Center of Indiana



Custody and Parenting Time

7/29/16

In **In Re Paternity of P.B.**, 60 N.E.3d 1092 (Ind. Ct. App. 2016), the Court reversed the trial court's orders which: (1) denied Father's petition to enforce the court's previous parenting time and reunification orders; and (2) denied Father's contempt petition based on Mother's refusal to bring the child to counseling sessions and her refusal to provide parenting time. *Id.* at 1100. The Court remanded with instructions that the trial court enter a contempt sanction against Mother that will be sufficient to enforce its parenting time order. *Id.* The child was born in July 2001, and paternity was established by agreement between Mother and Father on November 20, 2001. Mother was granted primary physical custody of the child, and Father was granted parenting time and ordered to pay child support. The parties repeatedly litigated parenting time issues. In 2007, Mother was found in contempt for failing to comply with the court's parenting time order. In December of 2008, the parties again litigated parenting time and child support issues, and Father was given "make-up" parenting time. On March 4, 2009, Mother filed an emergency motion to modify and terminate Father's parenting time. Mother's petition alleged that Father had held a gun to the child's head and had masturbated in the child's presence on separate occasions in late 2008. These allegations were reported to Child Protection Services, which found them unsubstantiated. On March 17, 2009, Father filed a petition for contempt and a petition to modify parenting time. Father subsequently moved the trial court to: (1) appoint a guardian ad litem, (2) appoint a counselor to conduct a psychological evaluation, and (3) order all parties submit to counseling. The trial court denied Father's requests to appoint a guardian ad litem and an evaluative counselor.

After holding a hearing, the trial court concluded on December 11, 2009, that Mother needed to demonstrate by "clear and convincing" evidence that termination of Father's parenting time was in the child's best interest. The trial court applied this heightened evidentiary standard and concluded Mother did not meet that burden. The court ordered that Father have parenting time pursuant to the Indiana Parenting Time Guidelines. Mother appealed, and the Court of Appeals reversed the trial court's order which granted Father Guideline Parenting Time in **In Re Paternity of P.B.**, 932 N.E.2d 712 (Ind. Ct. App. 2010). The Court of Appeals held that, in order to modify Father's parenting time, Mother must prove her case by the preponderance of the evidence standard. **Paternity of P.B.**, 932 N.E.2d at 720. The Court remanded for the trial court to reconsider the matter, applying the proper standard.

On remand, the trial court held another hearing and, on December 8, 2010, ordered that Father's parenting time should be limited, but not eliminate or supervised "to allow for [Father] and [P.B.] to slowly reunify their relationship." The court granted Father six hours of parenting time

every Saturday in addition to Christmas Eve and New Year's Day. Mother again appealed, and the Court of Appeal, in a memorandum decision issued on December 20, 2011, held that the trial court's decision not to eliminate Father's parenting time was not an abuse of discretion. The Court concluded that the trial court "determined that Mother did not meet her burden of proof to establish by a preponderance of the evidence that parenting time with Father would endanger or impair P.B." On Mother's petition for rehearing, the Court granted rehearing for the limited purpose of awarding Father appellate attorney fees due to Mother's procedural bad faith in filing the petition. The trial court subsequently awarded Father \$1,024 in attorney fees and appointed a counselor to assist in the reunification of Father and the child.

Mother continued to refuse to allow the child to visit Father, and the child also began refusing to visit Father. Father filed a contempt citation against Mother. After a three day hearing on pending motions, the trial court appointed a reunification counselor to fashion a reunification schedule for the child and Father. On March 18, 2013, the counselor recommended to the court that the child continue therapy, that Father be introduced into the therapeutic setting when the child was ready, and that the child and Father have professionally supervised visitation when it was deemed appropriate. Father filed a contempt citation against Mother, claiming that she refused to bring the child to counseling sessions with the reunification counselor. On August 7, 2013, the trial court ordered both parents to cooperate and participate with the counselor. Thereafter, Father filed a contempt citation against Mother on October 30, 2014, alleging that Mother was still failing to cooperate with reunification and obstructing his parenting time. Father also filed petitions to enforce the trial court's December 8, 2010 reunification and parenting time order.

On June 1, 2015, the trial court held a hearing on pending matters. The court also held an *in camera* with the child. On July 15, 2015, the trial court issued the order which is the subject of the current appeal. The order provided, inter alia, that: (1) Father had not seen his son in a parenting time visit since December 2009; (2) the court had tried to implement a reunification plan, which failed for a host of reasons, most significantly by the child's refusing to see Father; (3) Mother had made it quite clear that she would not abide by any court order that forced the child to see Father; (4) the court declined to force parenting time upon a fourteen-year-old young man who is adamant about having no contact or relationship with Father; and (5) the court denied Father's petitions for contempt, to enforce parenting time, and to enforce the reunification order. Father filed a motion to correct error, which the trial court denied after a hearing. Father appealed.

The Court found the trial court abused its discretion when it concluded Mother was not in contempt for failing to abide by the trial court's previous parenting time and reunification orders. *Id.* at 1100. On appeal, Father contended that the effect of the trial court's ruling was to wholly deprive him of parenting time, which is improper without a finding that parenting time would endanger the child's physical or mental well-being. The Court cited Appolon v. Faight, 796 N.E.2d 297, 300 (Ind. Ct. App. 2003), which states the right of a non-custodial parent to visit with his or her child is a sacred and precious privilege, and, ideally, a child should have a well-founded relationship with both parents. P.B. at 1098. The Court also looked to Perkinson v. Perkinson, 989 N.E.2d 758, 765 (Ind. 2013), which states that extraordinary circumstances must exist to deny parenting time to a parent, and, if the trial court finds that such extraordinary

circumstances exist, then the trial court shall make specific findings regarding its conclusion that parenting time would endanger the child's physical health or significantly impair the child's emotional development. P.B. at 1098. The Court found that Father's request to hold Mother in contempt was an effort to enforce the *already existing* order that he have parenting time (emphasis in opinion). Id. at 1099. The Court addressed both the issues of parenting time and contempt. The Court noted it was apparent from the order that the trial court did *not* find that parenting time by Father would endanger the child's physical health or significantly impair his emotional development (emphasis in opinion). Id. The Court also noted the trial court's findings that: (1) Father had no parenting time since December 2009; (2) Father had no parenting time because of Mother's "frank admission" that she had not allowed it; (3) Mother would not abide by any court order that forced the child to visit Father. Id. The Court was "at a loss as to why the trial court found that Mother was not in contempt." Id. The Court said that, on remand, the trial court should "determine what sanction is appropriate to remedy Mother's obstinate disregard for the trial court's authority. Id. The Court sympathized with the dilemma with which the trial court was faced, but said the proper solution was not to refuse to enforce its orders. Id. The Court opined that the trial court should have used its authority to ensure that its orders are obeyed and not disregarded as mere suggestions. Id. The Court said that "[n]o one, especially not a parent, should be under the impression that compliance with the trial court's parenting time order is optional." Id.