

# Children's Law Center of Indiana



## Custody and Parenting Time

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In Miller v. Carpenter, 965 N.E.2d 104 (Ind. Ct. App. 2012), the Court held that Father failed to show a substantial change in circumstances supporting a modification of legal custody, and reversed the trial court on that issue. Id. at 106. The Court also held that the trial court did not make a de facto modification of physical custody, but instead, only modified parenting time according to the best interests standard, and the Court affirmed the trial court's order on this point. Id. The Court reversed the trial court in part, and affirmed in part. Id.

Pursuant to their dissolution of marriage agreement, Mother had sole legal and physical custody, while Father had parenting time pursuant to the Indiana Parenting Time Guidelines. Mother also let Father have the children every year for spring break. When Mother filed a notice that she was relocating a short distance away, Father filed a "Motion for Modification of Legal Custody, Parenting Time, and Child Support Orders." Father asserted he was not seeking to prevent Mother from relocating, but wished to share joint legal custody with Mother and more parenting time with the children. During the evidentiary hearing, Father testified that he was more stable, had better parenting skills, and had a better relationship with the children than at the time of the dissolution settlement agreement. Father felt it would be better for the children and himself if they had a complete weekend, instead of a short weekend where they returned to Mother's home on Sundays. With regards to legal custody, Father testified that he felt "out of the loop" and felt that "two heads are better than one." Id. at 107. Although Father was entitled by statute to obtain the children's medical and school records, he testified he felt he did not get sufficient school and medical information. He felt communication had improved after being difficult and denied that he was nonresponsive. Mother testified that she allowed Father to have spring breaks because she was a teacher, and her spring break did not line up with the children's spring break; however, this year, it would. Mother also testified that Father was nonresponsive to her emails, and they argued over small things. When the trial court issued its order, it did not make specific findings regarding each factor in IC 31-17-2-15 [Joint legal custody; matters considered in making award], but it ordered that legal custody was to be shared between Mother and Father, and found that the parties were able to cooperate and communicate. The trial court also increased Father's parenting time by granting him overnights on Sundays; in doing so, it noted Father's "closer bonds with the children, their advancing maturity, and greater Sunday continuity and cheer without exchange." Id. at 108. On appeal, Mother argued that the trial court abused its discretion in granting Father joint legal custody, that the trial court had made a de facto modification of custody, and that the trial court had abused its discretion in modifying Father's parenting time.

**The Court held that the trial court abused its discretion, and that Father failed to show that there was such a substantial change in the relevant factors that a change in legal custody would be warranted.** *Id.* at 110. When modifying legal custody, trial courts must consider three statutes: IC 31-17-2-8 [Custody order], IC 31-17-2-15 [Joint legal custody; matters considered in making award], and IC 31-17-2-21 [Modification of child custody order]. IC 31-17-2-21 states that “(a) a court may not modify a child custody order unless (1) the modification is in the best interests of the child; and (2) there is a substantial change in one or more of the factors that the court may consider under section 8 [of the same chapter]. (b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.” *Id.* at 109 (quoting IC 31-17-2-21). IC 31-17-2-8 contains the factors that the court must consider when modifying a child custody order: “(1) The age and sex of the child; (2) The wishes of the child’s parent or parents; (3) The wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age; (4) The interaction and interrelationship of the child with: (A) the child’s parent or parents; (B) the child’s sibling; and (C) any other person who may significantly affect the child’s best interests; (5) The child’s adjustment to the child’s: (A) home; (B) school; and (C) community; (6) The mental and physical health of all individuals involved; (7) Evidence of a pattern of domestic or family violence by either parent; and (8) Evidence that the child has been cared for by a de facto custodian.” *Id.* (quoting IC 31-17-2-8). Lastly, IC 31-17-2-15 provides factors relating only to joint legal custody: “(1) the fitness and suitability of each of the persons awarded joint custody; (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare; (3) the wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age; (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody; (5) whether the persons awarded joint custody: (A) live in close proximity to each other; and (B) plan to continue to do so; and (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.” *Id.* (quoting IC 31-17-2-15). The Court felt that Father’s testimony regarding his desire for joint legal custody was “largely conclusory and self-serving,” and it did not support a conclusion that there was a substantial change in circumstances that justified a modification of legal custody. *Id.* at 110.

**The Court held that a modification of parenting time from approximately 35% to 40% of the overnights was not so substantial or so close to an even division of parenting time that it should be viewed as a de facto modification of custody.** *Id.* at 111. Mother argued on appeal that the modification of Father’s parenting time was so substantial that it was essentially a de facto modification of physical custody. *Id.* at 110. In support of her argument, Mother cited Julie C. v. Andrew C., 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010) (holding that “when the trial court increased Father’s parenting time to seven overnight stays during any given two-week period, it ordered a *de facto* modification of custody to joint physical custody”). *Id.* Although her own case did not involve a modification resulting in both parents having equal parenting time, Mother argued that any substantial increase in parenting time was essentially a modification of physical custody. *Id.* Mother estimated that Father was now entitled to 46% of the overnights with the children, while Father asserted he was entitled to 40% of the overnights. *Id.* The Court also noted that Mother did not cite any legal authority that defined joint physical custody, and that the Julie C. decision appeared to suggest that only a fifty-fifty split of time

constitutes joint physical custody. Id. at 111. Thus, the Court determined that a modification of Father's parenting time from 35% to 40% of overnights with the children was not so substantial, or so close to an even division of parenting time, that it could be viewed as a de facto modification of custody. Id.

**The evidence that was presented on Father's parenting time with the children supported the trial court's conclusion that a modification would be in the best interests of the children.** Id. at 111. Parenting time may be modified "whenever modification would serve the best interests of the child." Id. (quoting IC 31-17-4-2). The Court noted that the evidence presented by Father supported the trial court's conclusion that a modification of parenting time was in the children's best interests. Id. This evidence included testimony that if Father had the children overnight on Sundays, they would spend less time in a car, or on a bus, or in child care, and more time with a parent. Id.