

# Children's Law Center of Indiana



## Custody and Parenting Time

7/7/17

In **Paternity of J.W. v. Piersimoni**, 79 N.E.3d 975 (Ind. Ct. App. 2017), the Court reversed the trial court's order of contempt against Mother, finding it was an abuse of discretion. *Id.* at 982. The Court opined that the trial court infringed upon the custodial rights of Mother, who is the child's sole custodial parent, by delegating decision-making on the child's need for therapy to a service provider. *Id.* Mother gave birth to the child on December 22, 2009. Father's paternity was established on November 13, 2012 when Father was in prison after pleading guilty to battery of Mother. Mother was granted full custody of the child and Father was not ordered to pay child support. After Father's release from prison, he sought parenting time with the child. Mother opposed parenting time for Father, but argued that if Father was granted parenting time, it should be supervised. On May 17, 2016, the trial court granted Father limited parenting time under the control and supervision of the Community Anti-Violence Alliance Family Ties Program (Family Ties) in Angola. Pursuant to the order, Father was to have fifteen one-hour supervised visits with the child followed by twenty two-hour visits (so long as the Family Ties Supervised Visitation Program could accommodate the parties). Father was to arrange and pay for the parenting time sessions; Mother was to respond and cooperate. Both parents were to abide by the rules of the program. The order specified that the actual day for the parenting time should be arranged to fit the Family Ties Program's schedule, but parties might, by mutual agreement, alter the days and times. Father was ordered to participate in any program of counseling recommended by Family Ties for the child's protection. Upon completion of the thirty-five supervised parenting time sessions and any recommended counseling, Father was to have seven hours of unsupervised parenting time on alternate Saturdays. Father was to begin exercising Guideline parenting time after June 3, 2017, contingent upon establishing a home of his own for overnight parenting time. The parenting time order was not appealed. Father began individual counseling with Jeremy Lewis, a Family Ties therapist. Because the child had not seen Father for several years, Family Ties scheduled parenting time as therapeutic sessions with Mr. Lewis. During the third parenting time, the child used a code word to indicate that she was uncomfortable and wanted to leave. Mr. Lewis learned that Mother had told the child that Father had pushed Mother and the child down stairs. Mr. Lewis confronted Mother and accused her of "sabotaging" parenting time. Mother expressed her disagreement with the child receiving therapeutic sessions at Family Ties, and advised that the child already had a counselor.

Mother's attorney sent a letter to Family Ties' Executive Director Lee David requesting that future visits between the child and Father be supervised by anyone other than Mr. Lewis. The letter also stated that Mother understood the visits would not be therapeutic but only supervised. Mother's attorney filed a motion on July 27, 2016, to have parenting time relocated to the Children First Center. By that time, neither parent lived in Angola, the child was in elementary

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school, and travel to Family Ties involved a two-hour round trip. Ms. David offered Mother a Wednesday evening time with a therapist other than Mr. Lewis, but Mother advised that the child had gymnastics on Wednesdays. Mother requested a Friday evening time, but the therapist available for assignment did not work on Friday evenings. Mother notified Family Ties that the child would not attend the first scheduled Wednesday evening session. Ms. David wrote a letter to the trial court alleging that Mother was non-compliant.

On August 30, 2016, Father filed a Petition for Contempt Citation and Rule to Show Cause, alleging that Mother had failed to appear at parenting time or had left before the allotted time had expired. Mother filed a Motion for a Guardian ad Litem and an objection to ex parte communication by Ms. David. On October 4, 2016, the trial court conducted a hearing. Mother testified that she agreed with the existing court order for supervised parenting time but contended that she had “asked to reschedule” and Family Ties would not accommodate her. Ms. David testified: (1) she believed the court had entrusted Family Ties with “the authority to determine whether visits should be supervised or therapeutic”; (2) Mr. Lewis was the most suitable therapist for Father and the child and saved parental expense because he worked pursuant to a grant; (3) she had offered therapeutic sessions on Wednesday or Sunday, but Mother had agreed to neither day. Mr. Lewis testified he was providing counseling services to Father, Father was open to having supervised or therapeutic visits, and Mother’s conduct was part of a “parental alienation dynamic.” Mr. Lewis conceded he was aware that Father was facing new criminal charge related to violence. Father testified that: (1) the parenting time sessions had been going well before interruption; (2) he had slapped Mother, grabbed her hair, and thrown her across the room, but denied pushing her down a flight of stairs when the child was an infant; and (3) he was facing a new criminal charge. On October 14, 2016, the trial court issued an order denying Mother’s motion to move the parenting time location, her motion for a Guardian ad Litem, and her petition for attorney fees from Ms. David. The court found Mother in contempt of the parenting time order “for denying parenting time”, and sentenced her to thirty days in jail. The court ordered that Mother could purge herself of contempt by paying \$750.00 of Father’s attorney’s fees and filing proof of compliance that she “demonstrate[d] an immediate and sincere attempt to follow all mandates and requirements of the Court’s orders dated May 17, 2016.” Mother appealed.

**The Court noted that Father had not filed an appellate brief, so the Court would reverse the trial court’s judgment if Mother’s brief presented a case of prima facie error. Id. at 979.**

**The Court opined that the trial court infringed upon Mother’s custodial rights by delegating decision-making on the child’s need for therapy to a service provider. Id. at 982.** Mother argued that the trial court infringed upon her parental rights by delegating to Ms. David, Executive Director of Family Ties, the sole discretion as to whether parenting time would be therapeutic or supervised, which therapist would provide services if the parenting time was therapeutic, and when those sessions should occur. Mother observed that: (1) she was granted sole legal and physical custody of the child; and (2) IC 31-14-13-4 provides that “the custodial parent may determine the child’s upbringing which includes education, health care, and religious training, unless the court determines that the best interests of the child require a limitation on this

authority.” The Court found that: (1) the trial court made no explicit determination that it was in the child’s best interests that Mother’s authority be limited; (2) the orders did not explicitly state the child needed mental health treatment; (3) the order as enforced effectively limited Mother’s decision-making as to whether the child should receive mental health services and with whom. Id. at 980. The Court observed that Mother, as sole legal custodian, was to decide the child’s upbringing, including her mental health care and extracurricular activities, but the trial court ultimately enforced Ms. David’s assignment of Father’s individual therapist to provide additional services to the child despite the lack of a specific finding that it was in the child’s best interests to override Mother’s wishes. Id. at 981. The Court concluded that Mother had demonstrated prima facie error, the required standard of review in this case. Id.

**The Court found Mother met her burden, prima facie, of showing that her conduct did not amount to willful disobedience of the trial court’s parenting time order.** Id. at 982. Mother contended the basis for the trial court’s contempt finding was unclear and that there was insufficient evidence of her willful disregard of the court order. The Court noted: (1) whether a person is in contempt of a court order is within the trial court’s discretion; (2) the Court will reverse a contempt finding only where an abuse of discretion has been shown; (3) an abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before it; (4) Mother bears the burden of showing that her violation was not willful (multiple citations omitted). Id. at 981. The Court found: (1) the evidence against Mother was that she opposed having the child involved in therapeutic visits with Father’s counselor, at least after the first few visits; (2) Mother desired to have Father’s visits monitored by a supervisor, and, as the custodial parent, she was entitled to this preference; (3) based upon the service provider’s insistence that therapeutic sessions take place, Mother was offered only those time slots; (4) Mother continued to take the child to gymnastics and notified Family Ties that the child would not appear at a Wednesday night session. Id. at 981-82. The Court found Mother’s conduct short of willful disobedience given the broad and ambiguous language of the parenting time order. Id. at 982. The Court noted the trial court’s order, even as re-affirmed after hearing, did not mandate therapy for the child and contemplated schedule changes upon agreement. Id.