

Children's Law Center of Indiana



Custody and Parenting Time

6/12/14

In **Pitcavage v. Pitcavage**, 11 N.E.3d 547 (Ind. Ct. App. 2014), the Court affirmed the trial court's award of legal and physical custody of the child to Father, found it was not an abuse of discretion for the trial court to order Mother to attend psychotherapy as a condition of her parenting time with the child, and found that the trial court did not abuse its discretion in ordering Mother to pay half of the court ordered custody evaluator's fees incurred by Father. The Court also found that the trial court did not abuse its discretion in requiring Father and Mother to each bear the costs of hiring his or her additional expert psychologist. Father and Mother were married on July 29, 2006 and relocated to Fishers, Indiana five months later. Mother is employed as a personal banker and investment advisor, and Father has a job in sales and marketing. Mother and Father had one child, born on March 19, 2008. Mother has two other children from a prior relationship. Conflicting parenting styles and financial strain contributed to the deterioration of the marriage. Mother quit her job in order to be a stay-at-home mother, and in January of 2009, Father was laid off from his job. Father struggled to find and maintain employment thereafter. When Mother returned to the workforce in May of 2009, Father became the child's primary caretaker, although he continued to work part-time and temporary jobs in an effort to stave off foreclosure of their home.

In addition to the financial stressors of the marriage, the hostility between Mother and her daughter, the child's sixteen-year-old half-sister (Sister), and Father and Sister created an increasingly volatile home environment. Sister had been subjected to repeated incidents of sexual abuse throughout her childhood and adolescence and experienced severe emotional and behavioral difficulties. Father disagreed with Mother's passivity to Sister's acts of defiance, violent outbursts, and run-ins with law enforcement; he feared that Sister would have a negative influence on the child. Mother's and Sister's arguments often escalated to screaming matches and even physical altercations. Sister's habitual stealing prompted Father and Mother to install a lock on their bedroom door. Father routinely locked the door to keep Sister out of the room while he bathed the child and when the child napped. In December of 2009, Sister reported to Mother that Father was locking the door because he was acting inappropriately with the child. Mother, who is a victim of rape and domestic violence, confronted Father about sexual abusing the child. Angered by the accusation, Father threatened divorce, contacted the child's pediatrician, and discussed the issue with their marriage counselor. Father was unable to find suitable employment in the Fishers area, and interviewed for a job in St. Louis, Missouri in February of 2010. Father suggested to Mother that, if hired, he could save the family money on rent and daycare by taking

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the child with him to reside with his sister and her husband (Aunt and Uncle) and their two teenage sons, who lived thirty miles from St. Louis in Waterloo, Illinois. Concerned that Father would relocate with the child, Mother filed a petition to dissolve the marriage on February 26, 2010. On March 4, 2010, Father accepted the St. Louis job, and then moved into Aunt's and Uncle's house.

In May 2010, Mother reported that Father had sexually abused the child. Fishers Police Department investigated, but, given the assessment of the child's pediatrician that there was no indication of sexual mistreatment and the fact that the alleged abuse was reported in the wake of the custody dispute, the complaint was dismissed as unfounded. On July 9, 2010, per Father's request, the trial court appointed Dr. Ferraro, a clinical psychologist, to perform a custody evaluation. Following a hearing on August 13, 2010, the trial court issued a preliminary order in which it awarded custody of the child to Mother during the pendency of the dissolution, and ordered Father to pay Mother \$166.00 per week in child support and \$320.00 per month for expenses of the marital residence.

On May 15, 2011, Dr. Ferraro submitted his report to the court, recommending that Father be awarded primary physical and sole legal custody. Mother then retained Dr. Lawlor to perform a second custody evaluation. Dr. Lawlor recommended that the parties share joint legal custody with Mother having primary physical custody. Father hired a third clinical psychologist, Dr. Ross, to critique the opinions of Dr. Ferraro and Dr. Lawlor. Dr. Ross found scoring errors in Dr. Lawlor's psychological examination of Father and testified that Dr. Ferraro's evaluation was more comprehensive.

The trial court conducted the final dissolution hearing on August 28, 29, and 31, 2012 and entered its decree, which contained 129 findings of fact and conclusions of law, on January 28, 2013. The trial court concluded that it was in the child's best interests to award legal and physical custody to Father. Mother received parenting time, was instructed to pay child support, and was ordered to participate in "intensive individual psychodynamically-oriented psychotherapy." Mother filed a motion to correct error, which was denied after a hearing. Mother then appealed.

The Court opined that, notwithstanding the faulty language in the trial court's findings, the findings provided the parties and the reviewing court with a comprehensive theory upon which the case was decided. *Id.* at 558. Mother contended that the trial court's findings were insufficient to support its custody determination. The Court, quoting *Garriott v. Peters*, 878 N.E.2d 431, 438 (Ind. Ct. App. 2007), *trans. denied*, observed that, where a trial court's findings are mere recitations of a witness' testimony, they cannot be considered as "true determinations." *Pitcavage* at 553. The Court treats the trial court's inclusion of these findings as "mere surplusage" rather than harmful error. *Pitcavage* at 553, quoting *Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 33 (Ind. 1981). The Court reviewed the eighteen findings disputed by Mother, and found that she correctly asserted that several of the findings recited the testimony and opinions of the three psychologists. *Id.* at 557. The Court found that the findings were specific, detailed, and clearly indicated the trial court's theory for its custody decision. *Id.* at 558. The Court noted that: (1) the record in this case was voluminous, and the reports of Dr. Ferraro and Dr. Lawlor alone spanned nearly 150 pages; (2) the trial court did not repeat the testimony and opinions of the

experts verbatim, but paraphrased the information gleaned from them that it deemed relevant to its decision; (3) Dr. Ferraro and Dr. Lawlor relied upon different procedures for completing their evaluations, and they reached opposite conclusions; (4) Dr. Ross' testimony explained the standard practices in the psychology field with respect to custody evaluations and revealed that Dr. Lawlor's opinion was derived, at least in part, from a flawed score on Father's psychological test. *Id.* The Court found that, by recounting the three experts' testimony regarding their procedures, testing methods, results, and conclusions in its findings of fact, the trial court clearly conveyed its rationale for discrediting Dr. Lawlor's recommendations and agreeing with Dr. Ferraro's recommendations on the child's best interests. *Id.*

The Court opined that there was sufficient evidence to uphold the trial court's best interests determination exclusive of several inaccuracies in the trial court's findings, and affirmed the trial court's decision to award custody of the child to Father. *Id.* at 561.

Mother argued that the court ignored the uncontroverted evidence that she had been the primary caretaker of the child, especially since Father's move in March 2010, that the court relied too heavily on Dr. Ferraro's opinions and failed to consider her superlative care of the child, and that Dr. Lawlor believed that Mother should have received custody. In response to Mother's argument, the Court reiterated its long-settled tenet that it is the trial court's duty to weigh all of the evidence and determine the proper custody arrangement, and the Court will not find an abuse of discretion where the evidence is merely conflicting. *Id.* at 559, citing *Periquet-Febres v. Febres*, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995), *trans. denied*. Among the evidence noted by the Court in support of the trial court's conclusion that it would be in the best interests of the child for the Father to have sole legal custody was: (1) both parents have spent a significant amount of time as the child's primary caregiver and the child has a close bond with both parents; (2) the child has a wonderful relationship with half-siblings, who live in Mother's home; (3) the half-siblings have developed a bias against Father due to Mother's disparaging comments to them, and this could negatively influence the child's relationship with her half-siblings and Father; (4) Father is currently living with Aunt and Uncle in Waterloo, Illinois, and is welcome to remain there until he is able to purchase his own home, and the child has her own bedroom at the home of Aunt and Uncle; (5) the child has a great relationship with Father's extended family members, who live in Waterloo; (6) the child does well in her daycare programs both in Fishers and in Waterloo, and both parents are supportive of the child's participation in activities, including gymnastics; (7) there was evidence of Mother's physical altercations with Sister; and (8) Mother does not maintain appropriate boundaries or follow-through with disciplining the children. *Id.* at 559-560. The Court found that the trial court acted within its discretion in placing a significant amount of weight on Mother's emotional instability and dysfunctional relationship with Sister in determining that Father would provide a more stable environment for the child. *Id.* at 560. The Court noted the trial court's findings that Mother had deceived Father about the child's health on multiple occasions, had been evasive about answering Father's questions about the child's activities and the involvement of Mother's boyfriend in the child's life, and had been uncooperative in arranging phone calls and parenting time. *Id.* The Court disagreed with Mother's contention that none of these factors could be found to have negatively affected the child. *Id.* Noting that it is in the child's best interests to have a meaningful relationship with both of her parents, the Court observed that this is achieved through the trial court's custody determination because Father is more likely to keep Mother involved and informed than if the

roles were reversed. *Id.* The Court agreed with Mother that the trial court misstated some of the evidence in its findings, but found no prejudicial error. *Id.* at 561.

The Court could not say that it was an abuse of discretion for the trial court to order Mother to attend psychotherapy because the order was a condition of Mother’s parenting time and was an endeavor to protect the child’s emotional well-being. *Id.* at 563. Mother claimed that the trial court had abused its discretion by ordering that she obtain psychotherapy absent evidence that she suffers from a psychological disorder or otherwise poses a risk to the child’s safety. Although Mother did not reference any authority in support of her assertion, which would generally result in a finding by the Court that this issue had been waived, the Court addressed Mother’s claim because its search of relevant case law showed that Indiana’s appellate courts had not yet addressed the authority of a trial court to impose psychotherapy in a dissolution and custody order. *Id.* at 561. The Court first noted that there is no specific statutory authority for the trial court to mandate psychotherapy as part of a dissolution decree or initial custody proceeding. *Id.* The Court looked to IC 31-17-4-1(a), which provides that a noncustodial parent is entitled to exercise reasonable parenting time with his or her child “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*” (emphasis in opinion). *Id.* Citing *Lasater v. Lasater*, 809 N.E.2d 380, 401-02 (Ind. Ct. App. 2004), the Court noted that it had previously held that trial courts have discretion to set reasonable restrictions and conditions upon parent’s parenting time in furtherance of the child’s welfare. *Pitcavage* at 561-62. The Court said that: (1) although the decree does not expressly condition Mother’s parenting time upon her participation in psychotherapy, the trial court specifically adopted Dr. Ferraro’s recommendations regarding counseling; (2) in his custody evaluation, Dr. Ferraro recommended that Mother receive psychotherapy and, *subject to this intervention*, she should receive the parenting time set forth in the Guidelines; (3) based on the trial court’s explicit adoption of Dr. Ferraro’s recommendations, the Court found that the trial court’s decision to award parenting time pursuant to the Guidelines was based upon its expectation that Mother would comply with the mandate to undergo psychotherapy (emphasis in opinion). *Id.* at 562. The Court found that the record was replete with evidence that Mother presented a significant risk of impairing the child’s emotional development. *Id.* The Court noted the following evidence: (1) the parents’ marriage counselor and the family counselor for Sister and Mother raised concerns about Mother’s permissive parenting style, her unwillingness to face problems, and her inability to handle conflict; (2) the marriage counselor surmised that Mother might suffer from a psychological disorder and benefit from medication; (3) the family counselor discussed that Mother’s dysfunctional relationship with Sister may have exacerbated Sister’s severe emotional and behavioral problems, and said that, without addressing her deficiencies and committing to improvement, Mother is likely to parent the child in the same manner; (4) Dr. Ferraro made ample findings regarding the impact of Mother’s prior sexual abuse, rapes, and domestic violence on her parenting; (5) although Mother testified that, with the support of her church and friends, she has moved on from these incidents and does not need therapy, Dr. Ferraro explained that Mother’s unresolved traumatic experiences have manifested themselves in her parenting decisions; (6) Dr. Ferraro opined that Mother’s false sexual abuse allegation against Father “suggests the potential that her perception has been altered or impacted by her own experiences in a way that could result in her concerns stemming from her own past”; (7) Mother has been

unable to assist Sister, who was raped in Mexico at the age of thirteen and was sexually molested by Mother's brother, in that Mother did not seek therapy for Sister until more than eighteen months after Sister's suicide attempt; (8) Mother discontinued Sister's therapy just two months after Sister revealed the molestation by Mother's brother because Mother had given up on any improvement in Sister's unmanageable behavior; (9) Mother's "[l]ow self-esteem, combined with unresolved feelings of anger or resentment," has resulted in her children's exposure to a chaotic, emotionally turbulent, and even violent home environment. *Id.* The Court recognized that parents have an interest in rearing their children without undue interference from the courts, but observed that, in any child-related matter, whether it be custody, visitation, or termination of parental rights, the best interests of the child must be the primary consideration. *Id.* The Court opined that court-ordered psychotherapy may not be appropriate in every case, but in this case, where the evidence supports the mandate, the Court found that the child's emotional development outweighed Mother's opposition to psychotherapy. *Id.* at 562-63.

The Court could not say that the trial court abused its discretion in ordering Mother to pay half of Dr. Ferraro's fees incurred by Father in obtaining the *court-ordered* custody evaluation and requiring each party to bear the costs of hiring his or her additional expert (emphasis in opinion). *Id.* at 567. In its decree, the trial court determined that the fees of Dr. Ferraro, the court-appointed custody evaluator, should be divided equally between Mother and Father and found that Father "paid Dr. Ferraro approximately \$17,000.00." Offsetting Mother's share of the evaluation costs by \$412.50, which represents Father's obligation to pay for half of the personal property appraisal, the trial court ordered Mother to reimburse Father in the amount of \$8,087.50. Mother acknowledged her obligation to pay for half of the fees associated with Dr. Ferraro's report, which total about \$12,000, but argued that she should not be responsible for paying the remaining \$5000, which reflected the cost of Dr. Ferraro's appearance and testimony in court because she did not call him as a witness. The Court looked to IC 31-17-7-1(a), which provides that the trial court "may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding [in a child custody action]." *Id.* The Court explained that, while this includes fees for attorneys and mediation services, the trial court has broad discretion to award other types of fees associated with maintaining or defending the action, citing *In Re Marriage of Boren*, 475 N.E.2d 690, 696 (Ind. 1985). *Pitcavage* at 567. The Court said that: (1) the cost of Dr. Ferraro's custody evaluation is clearly a cost of maintaining or defending this custody action; (2) maintaining or defending an action necessarily includes the right to cross-examine an expert witness in order to prove or discredit the reliability and accuracy of his report; and (3) both Father and Mother accepted the opportunity to question Dr. Ferraro. *Id.*

The Court disagreed with Mother's assertion that, based upon her obligation to pay for half of Dr. Ferraro's fees, Father should likewise have been ordered to pay for half of the \$3000 expense she incurred for Dr. Lawlor's second custody evaluation. *Id.* The Court said that the trial court appointed Dr. Ferraro and exercised its discretion to divide his cost between the parties, but Mother *chose* to employ Dr. Lawlor's services, and Father *chose* to retain Dr. Ross (emphasis added). *Id.* The Court said that in obtaining these evaluations, Father and Mother were certainly maintaining or defending their respective positions in this custody battle, but it was up to the trial court's discretion to award either party with the costs of these secondary evaluations. *Id.*