

Children's Law Center of Indiana



Custody and Parenting Time

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In **Wilson v. Myers**, 997 N.E.2d 338 (Ind. 2013), the Indiana Supreme Court vacated the trial court's order modifying custody of the parties' two children to Mother. Father and Mother were divorced in 2006 and physical custody of the children was awarded to Father. In February, 2011, Mother moved to modify physical custody of one of the children so the child would be allowed to reside with her. Mother later amended her motion to request physical custody of both children. The matter was referred to Domestic Relations Counseling Bureau, which recommended that the parties and children participate in family counseling. At the hearing on custody modification, Father, Mother, their attorneys, and the family counselors were present. At the beginning of the hearing, the trial judge announced her intent to grant Mother's motion to modify custody. Father requested an evidentiary hearing on custody and an additional in-camera interview of the children. Witnesses were not sworn and evidence was not received during the hearing. No courtroom formalities were observed. The trial court denied Father's requests for an evidentiary hearing and an in-camera, and granted Mother's motion to modify custody. The trial court ordered the custody modification to be effective the next weekend, with Father receiving the parenting time that had been previously awarded to Mother.

The Court found that this summary resolution, without an evidentiary hearing and without the consent of the parties and their counsel, was an abuse of the trial court's discretion. The Court remanded for a proper evidentiary hearing and inquiry into in-camera interviews. *Id.* at 340-42. The Court observed that IC 31-17-2-21(a) prohibits a court from modifying 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 the court may consider under section 8, and, if applicable, section 8.5. *Id.* at 339-40. The Court noted that there is no presumption favoring either parent, and the party seeking the modification bears the burden of demonstrating that the existing arrangement is no longer in the best interest of the child and that there has been a substantial change in one or more of the enumerated statutory factors. *Id.* at 340.

The Court, quoting *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009), stated that "[w]e review custody modifications for abuse of discretion with a 'preference for granting latitude and deference to our trial judges in family law matters.'" *Wilson* at 340. The Court found such an abuse of discretion in the way this modification was carried out and ordered. *Id.* The Court noted the following: (1) no mention was made of whether this modification was in the children's best interests, nor was there any mention of a substantial change in any of the factors enumerated in

IC 31-17-2-8; (2) the trial court made reference to looking at “the whole picture” in making its decision, but provided no insight into what was contained in that picture before simply announcing that it planned to grant Mother’s motion to modify custody; (3) the trial court had previously contacted the family counselors directly with the agreement of Father and Mother, but none of what was learned in these conversations was reflected in the record; and (4) nothing in the transcript of the hearing related to any of the factors enumerated in IC 31-17-2-8, so the Court could not safely assume that they were considered. Id. at 341. The Court was not persuaded by Mother’s arguments that Father had effectively waived his right to protest this process by signing the release authorizing the court to contact the counselors directly, not insisting that the witnesses be sworn, and not filing a motion requesting specific findings of fact and law. Id. The Court was mindful that, even if Father and Mother waived their right to confrontation and formal cross-examination of witnesses, and consented to an “unorthodox and summary procedure”, the interests of “two critical individuals” in this case, namely the children, were not separately represented at the hearing. Id. The Court noted that neither the children nor their court appointed guardian ad litem were present at the hearing. Id. at 341 n.5.

The Court said that summary proceedings, when properly agreed to, can be beneficial in deciding matters of custody and parenting time to minimize the negative impact on the children, but summary proceedings may be less appropriate where the parties are vigorously contesting every facet of the process and appear incapable of approaching these decisions in a civil or cooperative manner. Id. at 342. The Court encouraged trial courts in such cases to use the formal procedures embodied in the Indiana Trial Rules to maintain a level of control and decorum that keeps the litigation process from turning into a “mud-slinging argument” and preserves the rights of all involved. Id. The Court was aware that the children had already been removed from the school and the community where they were living with Father and are now living with Mother in Michigan; therefore, the Court ordered the status quo to continue to minimize further disruption to the children, until further order of the Court.