

Children's Law Center of Indiana



Custody and Parenting Time

(Change of Judge)

4/18/2018

In **S.R.W. by Bessette v. Turflinger**, 100 N.E.3d 285 (Ind. Ct. App. 2018), the Court affirmed the trial court's denial of Mother's motion for change of judge pursuant to Indiana Trial Rule 76(C)(3) in the context of a parenting time dispute. Mother and Father shared joint legal and physical custody, with Father exercising parenting time according to distance guidelines of the Indiana Parenting Time Guidelines. Mother lived with the child in Indiana, and Father lived in Minnesota. The parties had many disputes over parenting time and custody. In 2014, Mother was found to be in contempt, resulting in a suspended sentence of sixty days in the Allen County Confinement Facility. The sentence was suspended as long as Mother continued to strictly abide by the trial court's orders. In 2015, Father filed for contempt again, and the trial court found Mother in contempt twice more. In 2016, the trial court held a hearing on sanctions for the contempt, and ordered Mother to serve thirty of her previously suspended sixty-day sentence, and imposed new suspended sentences. Mother was taken into custody, and she appealed. The Court of Appeals, in an unpublished opinion, affirmed in part, vacated in part, and remanded. After remand, Father filed a motion for an injunction to prevent Mother from changing the child's school, and a new contempt motion, among other things. There was also a pending motion to reinstate Mother's jail sentence. Mother filed for a change of judge pursuant to Indiana Trial Rule 76(C)(3). The trial court denied Mother's motion for change of judge.

On appeal, Mother argued that she was entitled to the change of judge under Indiana Trial Rule 76(C)(3), since the Court of Appeals remanded the case in such a way that required further hearing, and that evidence was required to reconsider the issues in the case. Mother characterized the Court's unpublished order as requiring the trial court to modify its orders of suspended sentences, reconsider future incarceration of Mother, and reconsider the contempt finding. Lastly, Mother argued that the trial court had to hear new evidence and reconsider the issues when it handled the pending motions, including Father's pending motion to reinstate the jail sentence.

Trial Rule 76(C)(3) allows a change of judge only where a new trial is ordered or the trial court is required to reconsider all or some of the issues heard during the earlier trial; since neither of these conditions existed, the trial court properly denied Mother's motion for a change of judge. *Id.* at 290. The Court examined its prior unpublished opinion in this case. In the original appeal, the Court concluded that the sanction of incarceration imposed by the trial court was punitive, and was imposed without proper procedural safeguards; this led to the Court vacating the trial court's incarceration order. *Id.* at 287, 290. The Court had also noted that "the authority to fashion a suspended sentence falls squarely within the trial court's inherent coercive and remedial civil contempt power", and consequently, it had affirmed the suspended sanctions, and reminded that trial court that an order of incarceration must be reasonably necessary to

obtain compliance. Id. at 290. Lastly, the Court had instructed the trial court to revise its order and condition the suspended sentence on willful noncompliance rather than strict adherence. Id. Mother argued that these prior rulings in the unpublished opinion from the Court required new hearings and new evidence, and thus, she was entitled to a chance of judge pursuant to Indiana Trial Rule 76(C)(3). Id.

The Rule provides:

In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for change of judge (or change of venue) shall be filed not later than ten [10] days after the issues are first closed on the merits. Except:

...

(3) if the trial court or a court on appeal orders a new trial, or if a court on appeal otherwise remands a case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial, the parties thereto shall have ten [10] days from the date the order of the trial court is entered or the order of the court on appeal is certified[.]

The Court opined that nothing in its original unpublished opinion required the trial court to conduct a new trial, and it was also not necessary for the trial court to have further hearings or consider additional evidence. Id. at 290-91. The trial court only needed to revise its order in order to comply with the earlier decision. Id. New motions being filed during or after the appeal were not relevant to the question of whether Mother was entitled to a change of judge under Trial Rule 76(C)(3), which “allows a change of judge only where a new trial is ordered or the trial court is required to reconsider all or some of the issues heard during the earlier trial.” Consideration of new motions does not mandate a change of judge under this rule, and consequently, the trial court properly denied Mother’s motion for change of judge. Id. at 291.