

Children's Law Center of Indiana



Custody/Parenting Time

8/22/18

In **Powers v. Blunck**, 109 N.E.3d 1053 (Ind. Ct. App. 2018), the Court held that the trial court erred in denying Mother's continuance, finding Mother in default, and granting Father sole legal and physical custody based on the default finding. The Court determined that Mother provided good cause for requesting a continuance, and that default as the basis for a custody order is generally disfavored in custody disputes.

Mother and Father had one child together. Father was arrested and incarcerated for drug-related offenses, and Mother and Father agreed that Mother would have full custody of the child. Mother moved to Florida with the child. When Father was released from jail, Mother sent the child to live with him in Indiana. The child wrote a school essay which revealed that while she lived in Florida with Mother, Mother's husband abused her, and consequently, she had started cutting herself and had suicidal thoughts. Shortly thereafter, DCS received a report that Father was using methamphetamines, and Father admitted the allegation was true. The child was removed from Father's home and placed with Paternal Aunt. The next day, Mother took custody of the child and took her to Florida. Mother still had full custody of the child according to the last agreed entry from when Father was incarcerated. Father then immediately filed an emergency petition in the circuit court to modify custody and to have the child returned to Indiana, alleging the information that the child had provide din her school essay. The trial court ordered Mother to appear for a hearing set within three weeks of Father filing his motion. Three days before the hearing, Mother filed a pro se motion to continue the hearing, alleging she could not attend the hearing because her family was on a tight budget, she could not take time off from work, and that she could not travel due to medical reasons. She attached a doctor's note indicating she could not attend the hearing. The trial court denied Mother's motion, held the custody hearing, found Mother to be in default, took testimony from Father, and granted Father sole legal and primary physical custody. The child was returned to Indiana, and Mother appealed.

Since Mother showed good cause for her request for a continuance, the trial court abused its discretion in denying Mother's motion for continuance. *Id.* at 1056. Indiana Trial Rule 53.5 provides in part that a motion to continue "shall be allowed upon a showing of good cause established by affidavit or other evidence." A trial court's decision regarding a continuance is reviewed under an abuse of discretion standard; an abuse of discretion can be shown if the person seeking the continuance can show there was good cause for granting the motion. *Id.* at 1055 (internal citations omitted). Good cause is a fact-sensitive inquiry which requires the Court to review the circumstances surrounding the motion and the reasons given to the trial court for seeking the motion for continuance. *Id.* In finding that there was good cause for granting the continuance, the Court noted: (1) Mother lived in Florida; (2) Mother was served with the motion and notice of the hearing less than five days before the hearing was set to take place; (3) she immediately requested a continuance; (4) her stated reasons were valid; (5) she included a note

from her doctor to supplement her claims of medical hardship; and (6) Mother had just traveled between Florida and Indiana to retrieve the child because Father was using methamphetamines. Id. Thus, the trial court abused its discretion in denying Mother’s motion for a continuance. Id. at 1056.

Default judgments are not favored in custody matters in Indiana, and trial courts should be wary of issuing a custody order based on a default judgment. Id. at 1056. Indiana does not favor default judgments in custody proceedings “because of the grave importance of the matters decided therein.” Id., citing Young v. Elkhart Cty. Office of Family & Children, 704 N.E.2d 1065, 1068 (Ind. Ct. App. 1999). “[W]e do not see how the best interests of the children could be ascertained without a hearing that affords both parents the opportunity to present evidence and cross-examine witnesses...” Walker v. Kelley, 819 N.E.2d 832, 837 (Ind. Ct. App. 2004).” Powers at 1056. The Court opined that trial courts should proceed with extreme caution when finding a parent to be in default in the context of a child custody matter; a trial court will be able to issue a more informed order if it hears from both parents on matters of custody, parenting time, health, education, and welfare of the children involved. Id.