

Children's Law Center of Indiana



Custody and Parenting Time

2/27/2019

In **Smith v McPheron**, 120 N.E.3d 226 (Ind. Ct. App. 2019), the Court affirmed the trial court's modification of custody and order on attorney's fees, but reverses the trial court's denial of Mother's request to appeal *in forma pauperis*. The Court held that it would not consider Mother's arguments concerning the trial court's handling of the emergency petition for modification of physical custody; that Mother failed to preserve her argument that the trial court's modification of physical custody was clearly erroneous because of the appellate court's previous decisions; that the Court declined to consider Mother's argument that awarding Father custody was not in the child's best interests; that the trial court abused its discretion in denying Mother's motion to proceed *in forma pauperis*; and other child support and attorney fees orders.

Mother filed for dissolution and custody in March 2016, and was granted primary physical custody of the Child by court order in June 2016. In May 2016, during the pendency of that matter, Mother was investigated by DCS after police were called because Child was unattended on the apartment balcony. Mother admitted that she and her boyfriend smoked marijuana and fell asleep, leaving the child unattended. The trial court was unaware of this incident when making its June 2016 ruling. In March 2017, the child was found wandering in the street several blocks from Mother's home. Mother again admitted to smoking marijuana and falling asleep, leaving the child unattended. Father filed his petition to modify custody shortly afterward. The trial court granted primary physical custody to Father, noting that "in light of the fact that 'Mother has twice had [Child] escape unattended, both times after she and her boyfriend had used substances,' there had been 'a substantial and continuing change in circumstances' to justify modification of physical custody over Child from Mother to Father." *Id.* at 231.

Mother's arguments regarding a lack of substantial change in circumstances were not supported by the evidence in the record, and were not supported by any cogent reasoning. *Id.* at 231-32. In order for a trial court to modify custody, it must find that the modification is in the best interests of the child and that there is a substantial change in one or more of the factors found at IC 31-17-2-8. IC 31-17-2-8(6) specifically provides that a trial court must consider the mental and physical health of all individuals involved in the case. Mother's argument that the trial court erred because it denied Father's request for emergency custody modification, but continued to hear and ultimately grant his petition on a nonemergency basis was not supported by cogent reasoning and declined to consider the argument under Ind. Appellate Rule 46(A)(8)(a). *Id.* at 231. The Court declined to entertain Mother's argument that there was no substantial change in circumstances the time between the trial court's refusal to grant Father's emergency petition, and the granting of Father's nonemergency motion for the same reasons. *Id.*

Mother's argument that the child did not suffer any harm in her care was not supported by the evidence in the record and as such, was contrary to the appellate standard of review. Id.

By failing to cite any authority to support her argument, Mother did not preserve her argument for appellate review; Mother's argument was that the trial court erred in modifying custody, when it based that modification at least in part on Mother's drug use, when some CHINS and TPR cases have held that isolated incidents of drug use are insufficient to support those determinations. Id. at 231-32. Mother had argued that because some CHINS and TPR cases have held that an isolated incident of drug use which does not endanger the child is not sufficient to uphold a CHINS or TPR finding, that the same logic should apply to her custody modification case. Id. at 231. However, the Court noted Mother cited no statute or case law showing that a court errs when it modifies custody based on a parent's repeated drug use which does endanger the child. Id. at 231-32. Because Mother cited no authority, she failed to preserve her argument for appellate review. Id. at 232.

The Court declined to say that the trial court erred in modifying physical custody of the child to Father, and Mother's arguments regarding the child's best interests were merely an invitation to reweigh the evidence. Id. at 232. Mother argued that placing custody with Father was not in the child's best interests, and pointed to evidence which the trial court acknowledged showed that Father was not a perfect parent. Id. However, the Court noted that this was an attempt to have the Court reweigh the evidence, which is impermissible. Id.

Mother's voluntary underemployment, without a simultaneous finding that the voluntary underemployment is without just cause, is not sufficient basis on which to deny a motion to proceed *in forma pauperis*, and as such, the trial court abused its discretion. Id. at 233. In order to proceed *in forma pauperis* on appeal, a person must convince the court of their indigency, a determination which is left to the discretion of the trial court. Id. The trial court here denied Mother's motion to so proceed, reasoning that Mother was voluntarily underemployed, as she had taken a job as an unpaid intern during a career change. Id. The court opined that allowing such reasoning would force a choice between choosing a new career path or pursuing a constitutional right to appeal. Id. The Court noted that in the context of child support, a trial court must find that a parent's voluntary underemployment is without just cause, and held that it would keep to the same standard in these cases. Id. Thus, since there was no simultaneous finding that Mother's voluntary underemployment was without just cause, the trial court abused its discretion, and the matter was remanded on this issue to have the costs of the preparation of the record of the proceedings assessed as a public expense. Id.

The Court also held that the trial court did not abuse its discretion when it declined to hold Father in contempt regarding the child support arrearage, and held that the trial court did not abuse its discretion when it declined to order Father to pay Mother's attorney's fees, especially when the trial court found Mother was partly responsible for the ongoing proceedings. Id. at 232-33.