

Children's Law Center of Indiana



Custody and Parenting Time Relocation

3/11/2019

In **In re Paternity of W.R.H.**, 120 N.E.3d 1039 (Ind. Ct. App. 2019), the Court held that because Father did not put Mother on notice that he was seeking a change in legal custody, the modification with regards to legal custody was improper.

Mother and Father are the parents of the child, and Mother had primary physical custody with Father exercising significant parenting time and paying child support. They shared joint legal custody, and Mother lived in Indianapolis while Father lived in Westfield. When the child was three years old, Mother filed a notice of intent to relocate in order to pursue higher education as well as work at a new job. Mother wished to relocate to New Haven, Indiana, and she acknowledged this would result in a change in parenting time schedule for Father. Father objected to relocation, and asked that the trial court award him physical custody if Mother should decide to relocate. Mother enrolled the child in school in New Haven without consulting Father, and Father objected to this as a violation of their joint custody arrangement. Father also alleged that Mother wanted to relocate because of her boyfriend, not for a job or school. The trial court issued an order, which was based in part on its belief that Mother would relocate regardless of what the trial court decided. The trial court denied Mother's request to relocate with the child; awarded primary physical custody to Father; awarded sole legal custody to Father; modified child support; and found Mother in contempt for violating the joint custody arrangement. Mother appealed part of the trial court's order, arguing that the parties did not ask the trial court to modify legal custody and the trial court erred in doing so. The trial court set aside the contempt finding, but left its ruling regarding joint legal custody in place, concluding that a "change of custody was requested and plead by both parties." Id. at 1041.

IC 31-17-2.2-1 does not automatically place legal custody at issue any time there is a hearing on a proposed relocation, and the issue of legal custody was not tried by the consent of the parties; therefore, the trial court erred by entering an order modifying legal custody. Id. at 1043. Indiana case law prohibits a trial court from making a sua sponte change in custody, as a party or parties have not been properly put on notice that issue will be addressed. Id. at 1041, citing Bailey v. Bailey, 7 N.E.3d 340, 344 (Ind. Ct. App. 2014). Father argued that legal custody was automatically at issue pursuant to the relocation statutes, and Mother should have been on notice. Id. at 1041. IC 31-17-2.2-1(b) provides that "Upon the motion of a party, the court shall the matter for a hearing to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation order, or child support order." Father argued this means that both physical and legal custody are at issue any time a parent requests a hearing

regarding the other parent's notice of intent to relocate. Id. at 1042. The Court opined that this was an inaccurate misreading of the statute, noting that prior case law already determined that the motion to which the statute refers is a motion to modify an existing custody (or other) order. Id., citing Baxendale v. Raich, 878 NE.2d 1252, 1256 n.5 (Ind. 2008). If a parent files a motion to modify physical custody, then the trial court must address the motion so requesting a modification of physical custody; if a motion is filed regarding legal custody, then the court would address that issue. W.R.H. at 1042. The requests of the parties frame the issues to be considered at the hearing. Id. The Court acknowledged that legal and physical custody matters often overlap, but while physical distance affects physical custody, it may not affect legal custody at all, as distances may not prevent parents from effectively communicating about decision relating to the child's health, education, religious training, and other important matters. Id. If Father had explicitly put legal custody at issue with his motion, it is very possible Mother would have presented evidence relevant to address that specific issue. Id. Instead, Father's motion asked the trial court to modify child support, deny Mother's proposed relocation with the child, and award Father physical custody if Mother decided to move. Id. at 1043. Father put Mother on notice regarding the possibility of a modification in physical custody; if he wanted a change in legal custody, he should have so indicated. Id. The term legal custody was only used at the hearing in the context of Father's request to find Mother in contempt for violating their legal custody agreement. Id. Any evidence presented at trial which may have been relevant for legal custody was in fact presented for and relevant to physical custody, so Father could not claim that Mother consented to the trial of the legal custody issue. Id.

Judge Crone dissenting, opining that IC 31-17-2.2-1(b) put parties on notice that all matters of custody (legal and physical), parenting time, and child support were at issue in a relocation case. Id. at 1043-44. Judge Crone noted that the statute does not require a party to frame any issues, but rather provides that a court can modify the specified types of orders. Id. at 1043. A relocation upsets the balance struck in all existing court orders, and parties must expect that any court order can change with a relocation. Id. at 1044. Judge Crone also opined that since the trial court found that modifying legal custody was in the child's best interests, and Mother did not challenge that part of the ruling on appeal, the trial court's ruling should stand. Id.