



Custody and Parenting Time **10/22/2019**

In **S.M. v. A.A.**, 136 N.E.3d 227 (Ind. Ct. App. 2019), the Court reversed the trial court's order terminating Mother's parenting time, and held that the evidence presented failed to establish the statutory prerequisites for terminating or restricting parenting time.

O.A. ("Child") was born in 2011. Mother and Father divorced in 2012, and Child was primarily residing with Mother at this time. In 2017, Mother and Father agreed to joint physical custody of Child. Due to Child's frequent absence from kindergarten classes, Father sought modification and, in 2018, was awarded primary physical and sole legal custody of Child. Mother was awarded parenting time pursuant to the Indiana Parenting Time Guidelines ("IPTG"). Father denied Mother midweek parenting time and did not allow Child any telephonic communication with Mother. On September 28, 2018, Mother went to Child's school to pick up Child and she and Father were involved in a verbal altercation. She was advised by the police to leave without Child and pick Child up later in compliance with Father's wishes. Mother complied and her parenting time commenced on September 28, 2018 at 6 p.m.; Mother was scheduled to return Child on September 30, 2018 at 6 p.m. After picking up Child, Mother went to maternal grandparents house and expressed that she was taking Child with her to a women's shelter. Mother left with Child, but did not go to a women's shelter because there was no shelter in Carroll County. When Child was not at school on October 1, 2018, the trial court issued an ex parte order allowing law enforcement officers to locate and return Child to Father. Law enforcement officers located Mother and Child in a motel in Lafayette, Indiana. Upon return of Child to Father, Father sought to modify or terminate Mother's parenting time and Mother sought enforcement of parenting time and make-up time. At a hearing on December 28, 2018, Father admitted to denying Mother's parenting time and blocking her telephone number. Mother testified that she was afraid of Father and that she posed no threat to Child. The trial court orally modified Mother's parenting time to "as parties may agree, period, until further hearing." At the next hearing on January 25, 2019, Father testified that he had not attempted to reach an agreement with Mother, had not responded to Mother, or responded to any contact from Mother's attorney. Mother's therapist testified that Father declined to participate in family therapy, Mother was not a flight risk, and Mother did not pose a threat to Child. Mother testified that she had no contact with Child since the December hearing. The parties appeared again on March 28, 2019, where Father again admitted to completely denying Mother's parenting time. He testified that Mother's last visit with the Child was six months earlier and no agreements had been reached. On March 29, 2019, the trial court issued an order granting Father's motion to modify citing that Mother posed a flight risk. Mother appealed.

The trial court erred when it terminated Mother's parenting time based of its finding that Mother was a flight risk; that finding was not supported by the evidence. Id. at 231. A child has a right to both parenting time and support from a parent; Indiana law presumes that full

parenting time with a parent is best for a child. Id. at 230. A party who seeks restriction of parenting time bears the burden of presenting evidence justifying that restriction by a preponderance of the evidence. Id.; citing Perkinson v. Perkinson, 989 N.E. 2d 758, 764 (Ind. 2013). IC 31-17-4-2 provides that a court may modify a custody order when its in the best interests of the child, however, a court shall not restrict parenting time unless the court finds it might endanger the child physically or emotionally. Although the statute uses the word “might,” the Court has previously interpreted it to mean that parenting time shall not be restricted unless it “would” endanger the child emotionally or physically. Id., citing Stewart v. Stewart, 521 N.E.2d 956, 960 n. 3 (Ind. Ct. App. 1988). Mother argued that the findings of the trial court that she is a flight risk and poses a threat to Child are not supported by evidence, as she was not physically or financially able to abscond with Child; Father did not contradict these assertions. Id. at 231.. The Court noted that the record only showed one occasion of Mother violating the parenting time order, and testimony of a psychologist revealed no concerns about Mother being a flight risk or properly caring for Child. Id. The Court held that Mother’s actions simply do not rise to the level necessary to suspend parenting time, and as such, Mother had established that the decision to restrict her parenting time was contrary to law due its lacking factual basis. Id. The Court determined that Mother was also entitled to make up parenting time. Id.