



Custody and Parenting Time

9/20/2019

In **T.R. v. E.R.**, 134 N.E.3d 409 (Ind. Ct. App. 2019), the Court held that (1) the trial court did not err in ordering agency supervised parenting time for Father; (2) there was sufficient evidence to support the orders regarding a domestic violence course and a psychological evaluation; and (3) while the trial court did not err in finding Father to be willfully underemployed and in including the cost of preschool in calculations, the trial court did err in calculating Mother's income.

Mother and Father were married in April 2015 and two children were born of the marriage. In July 2016, the Department of Child Services filed a petition alleging the children to be CHINS. While the CHINS case as still pending, Mother filed for dissolution on January 16, 2017. The dissolution court refused to enter any order to pertaining to custody until the resolution of the CHINS case. In July 27, the juvenile court ordered on custody and parenting time. Specifically, that Mother shall have sole legal and physical custody of the children, Father shall have supervised parenting time at a facility at his expense, and that Father complete a domestic violence course. Thereafter, the CHINS case was closed. In December 2018, the trial court entered a decree of dissolution of marriage. It found that (1) Father had failed to complete the domestic violence course; (2) Father had not had any parenting time with the children; and (3) Father failed to pay any child support. Based on these findings, the trial court held that (1) supervised parenting time for Father was necessary; (2) Father shall have two hours supervised parenting time per week; (3) Mother shall remain sole legal and physical custodian of the children; and (4) Father shall pay \$232.00 per week in child support. Father appealed.

The trial court did not err when it ordered Father to have supervised parenting time at his own expense. Id. at 415. Father argued that his mother or brother should be allowed to serve as parenting time supervisor out of his home. Id. While a parent's parenting time with their child is sacred, the best interests of the children must be considered first and foremost. Id., citing Hatmaker v. Hatmaker, 998 N.E.2d 758, 761 (Ind. Ct. App. 2013). Even where the expense of parenting time is of concern to the non-custodial parent, ultimately, the best interests of the children will trump all other concerns. Hatmaker at 762. Here, both the juvenile court and the trial court found it necessary for Father to have supervised parenting time. T.R. at 415. The Court did not find it prudent to second guess the trial court's ability to properly make that determination based off the testimony it heard. Id. Furthermore, the trial court found that Father held four different full-time jobs within the last several years, two of which paid over \$40,000 per year. Id. Even when Father had a regular salary, he failed to exercise his right to parenting time. Id. Finally, although Father argues that his mother or brother should be allowed to serve as supervisor, both live roughly three hours from Father's residence. Id. Because of this barrier, they would only be able to supervise on short periods of time giving him significantly less parenting time than he would get with an agency. Id.

The Court noted that whether or not the trial court had the authority to order domestic violence course was beside the point; the juvenile court issued the order and it had the authority to do so. Id. at 415. IC 31-34-20-3 provides that a juvenile court may order a parent to participate in a “mental health program.” Id. at 415. A domestic violence course falls under the category of a mental health program. Id. at 426. Father argued that upon closure of the CHINS case, the order for him to complete the course was no longer valid. Id. However, IC 31-30-1-13(c) provides that, in the context of CHINS cases, an order establishing or modifying custody or parenting time survives the closure of the case until a court having concurrent jurisdiction “assumes or reassumes primary jurisdiction of the case to address all other issues.” Consequently, the order mandating domestic violence course survived the closure of the CHINS case and was still a valid order. Id. at 416. The trial court did, however, fail to identify how Father should complete the program and whom he should report to when he does. Id. The Court remanded the matter with orders to the trial court to clarify the order. Id.

The trial court did not err when it ordered Father to obtain a psychological evaluation, even though Father’s parenting time was not explicitly contingent upon his completion of such an evaluation. Id. at 417 There is no statutory authority giving the trial court discretion to order a parent to complete a psychological evaluation. Id. at 416, citing Pitcavage v. Pitcavage, 11 N.E.3d 547, 561 (Ind. Ct. App. 2014). However, IC 31-17-4-1(a) does provide that a trial court has authority to provide for reasonable conditions upon a parent’s parenting time where it will ensure the child’s wellbeing. Id. at 417, citing Pitcavage at 561 (holding that even with no statutory authority to do so, a trial court may order a parent’s participation in psychotherapy as a condition of exercising parenting time). The trial court did not explicitly condition Father’s parenting time upon this psychological evaluation, although the Court inferred this to be the trial court’s intent. Id. This issue is remanded for clarification on whether Father’s parenting time is conditioned on completion of the psychological evaluation, and how Father shall complete this and whom he is to report to when it is complete. Id.

Regarding child support, the trial court: (1) did not err in finding Father to be willfully underemployed and imputing income accordingly; (2) did not err by including the cost of preschool in the child support calculation; but (3) did err in calculating Mother’s weekly income. Id. at 418, 419. Indiana Child Support Guideline 3(A)(3) states that if a parent is found to be willingly underemployed, then child support shall be calculated by potential income. Id. at 417. In this case, Father held four jobs in the span of three years, two of which had an annual income over \$40,000. Id. at 418. He was fired from two of the jobs and quit from the other two. Id. The Court holds that this evidence supports the trial court’s finding that the father is willfully underemployed. Id. Indiana Child Support Guideline 3(E) allows for the inclusion of the cost of childcare where it is incurred due to employment or job search. Id. at 418. Mother works during the hours in which the children are in preschool and Father is only entitled to supervised parenting time, therefore, neither is available to care for the children. Id. at 418-19. Thus, the inclusion of childcare costs was reasonable. Id. at 419. Finally, the trial court erred in finding that Mother has a weekly income of \$420 where her actual weekly income is \$532. Id. at 419. The Court remands this issue with instructions to clarify the discrepancy or correct it in the child support order. Id.