



Custody and Parenting Time

5/13/2020

In **In re I.P.**, 148 N.E.3d 1098 (Ind. Ct. App. 2020), the Court held that the trial court abused its discretion in awarding custody of the child to Father and reversed and remanded the matter.

Father and Mother never married, and established paternity in Ohio by paternity affidavit in 2012. The paternity affidavit included a notification that Mother was the sole residential parent and legal custodian of the child unless otherwise determined by a court order. Mother and Father never sought any court intervention regarding the child until the State of Indiana filed a child support proceeding in 2019. Mother and Father lived together with the child at Maternal Grandfather's home; they then moved together to California in 2013 and lived in two different residences. In 2017, Mother, Father, and the child returned to Indiana, and Mother and the child moved out in 2018. The child lived with Mother except for a brief period of time where the child lived with Father while Mother recovered from a serious car crash. Father exercised parenting time and provided transportation for the child. Mother applied for benefits for the child, which resulted in the State filing to seek child support from Father. Father then filed a petition seeking custody of the child, alleging that Father was the more stable parent with steady employment, and that Mother was planning to relocate and had exhibited concerning behavior involving an OWI. The parties agreed that an order had never been issued regarding custody, though the parties disagreed about whether the present action was an initial custody determination or was a modification of custody. Mother testified that she had always been the primary custodian and the primary caretaker of the child, even when she and Father were together. Mother's testimony revealed that other than when she had moved around with Father, Mother had a stable residence, that the child had a good relationship with her and her family, and the child was doing well in school. Father's testimony and evidence was scant and mostly conclusory, and without factual support or timelines. Father had never paid formal child support but did buy items for the child. The trial court granted Father's petition for custody. Mother appealed.

Father's petition for custody should have been treated as a petition to modify custody and should have been determined under a modification standard rather than an initial custody standard. Id. at 1104. The Court determined that the initial question to be answered was whether the trial court had entered an initial custody order, or a modification of custody. Id. at 1102. The Court noted this was significant because initial custody determinations may be made in accordance with best interests only, but modifications of custody must be made only when there is a substantial change in circumstances and must also be in the child's best interests. Id. at 1103. IC 31-14-13-1 provides that a biological mother of a child born out of wedlock has sole legal custody of a child, unless a court order or statute provides otherwise. IC 31-14-13-2 provides that a court must make an initial custody determination in a paternity case by looking at all relevant best interests factors, and in doing so, is not to entertain a presumption in favor of either parent. IC 31-14-13-6 provides that a trial court may only modify an order if the petition

establishes that modification is in the child's best interests, and there is a substantial change in one or more of the best interests factors. Mother argued that Father's petition was actually a petition to modify custody, because, pursuant to IC 31-14-13-1 she had sole legal custody of the child. *Id.* at 1103. Ohio's paternity statutes state a similar provision. *Id.* The Ohio paternity affidavit stated in part that a man who is determined to be a child's father has the right to petition a court for parenting time and/or custody, but absent a court order, the mother is the sole "residential parent" and legal custodian of the child. *Id.* at 1103-4. Because of the Ohio paternity affidavit, Mother had sole legal and physical custody of the child for all seven years of the child's life, and Father's petition should have been construed as a petition to modify custody. *Id.* at 1104.

Father failed to present evidence showing that there was a substantial change in at least one of the best interests factors which would support a modification of custody; therefore, Father failed to carry his burden of proof for modifying custody. *Id.* at 1106. IC 31-14-13-2 lays out the best interests factors, which include: (1) the age and sex of the child; (2) the wishes of the parents; (3) the wishes of the child, with more consideration given if the child is at least fourteen years old; (4) the interaction and interrelationship of the child with: (A) the child's parents; (B) the child's siblings; and (C) any other person who may significantly affect the child's best interest; (5) the child's adjustment to home, school, and community; (6) the mental and physical health of all individuals involved; (7) evidence of a pattern of domestic violence; and (8) evidence that the child has been cared for by a defacto custodian. The Court noted that there was little to no evidence in the record regarding these factors, and Father bore the burden of proof. *Id.* at 1105. The Court noted that Father did not pursue custody until the State filed a child support action on Mother's behalf; the Court characterized this as Father not objecting to Mother having custody until she sought child support. *Id.* The Court noted that while Father argued he was the more stable parent, he did not present evidence showing why or how he was the more stable parent. *Id.* Mother, however, presented evidence regarding Father's lack of time with the child and lack of bond with the child. *Id.* Mother presented evidence showing that she had raised the child and been the primary caretaker with little assistance from Father, and that even when the child was with Father, the child spent much of the time with Paternal Grandmother instead of Father. *Id.* Mother also presented evidence of her stable living situation, the child's good grades, and that the child has his room and good relationships with Mother's family. *Id.* at 1105-6. The Court noted that many of Father's allegations—that Mother was moving, that the child lived with someone else, that child did not have his own room—was not supported by evidence that Father produced. *Id.* at 1106. The Court noted that the OWI was Mother's only criminal offense and the child was not present. *Id.* The Court concluded that Father failed to carry his burden of proof. *Id.*

There was no evidence in the record which would allow the Court to conclude that it was in the best interests of the child to modify custody to Father. *Id.* at 1107. Father testified at the hearing that it was in the child's best interests for Father to have custody because the child needed stability and Father could provide that. *Id.* at 1106. Father asserted Mother had never and could not provide stability; however, the evidence Father presented did not support his assertions that Mother moved around frequently and provided no stability. *Id.* at 1106-7. The Court noted the scant evidence showed that Mother provided all care for the child, that Father had never paid support for the child, and that Mother's prior moves occurred when she was living with Father. *Id.* at 1107.