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FAMILY LAW FOCUS

Courts Favor "Effective Mediation"

Court views mediation in cases of domestic relations as useful.

Generally content to leave family law matters with the lower courts, the state Supreme Court recently stepped into the murky waters of mediation.

"Indiana judicial policy favors the effective use of mediation," the Court noted in an opinion that allowed it to clarify — and reaffirm — the use of mediation in domestic relations cases.

Paternity for Out-of-wedlock Child

In this case, Dad petitioned for paternity of an out-of-wedlock child, and the trial court established paternity as agreed by the parties.

It stated, in addition, that the parties shall have joint legal custody of the child and assigned "primary legal and physical custody" to Mom.

The court also set forth parenting time arrangements between the parties and ordered Dad to pay support and health care insurance for the child.

Dad Raised Multiple Arguments

On appeal, Dad challenged the trial court's judgment as to custody and parenting time credit.

In addition, he contested the order mandating mediation for the parties before returning to court as "an improper restriction upon litigants' access to courts."

The Court of Appeals affirmed the custody decision and reversed the parenting credit, sending it back to the lower court to be modified.

Court Persuaded by Dad

As for Dad's claims about mediation, the Appellate Court agreed, reversing the lower court.

But the Indiana Supreme Court found otherwise.

According to the high court, it is common for trial courts to require mediation before parties proceed to contested final hearings.

"Such a requirement is not an impediment to a party's access to courts," noted the Supreme Court.

"Appropriate Procedural Step"

"Rather, it (mediation) is an appropriate procedural step consistent with the efficient administration of the party's case."

Neither is mandating mediation contrary to Indiana's Alternative Dispute Resolution Rules (A.D.R.), the Court observed.

Mediators train in family law.

But such must comply with the timing requirements in A.D.R. §2.2 and contemplate the right of any party to file a written objection.

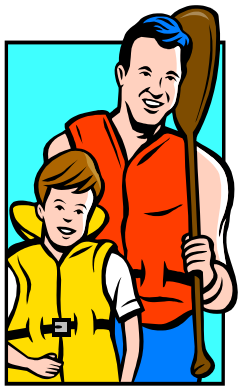
Local Rules Carried No Weight

Even Dad's claim that mandatory mediation is not allowed under local court rules carried little weight.

"We hold that the power of an individual trial court to order mediation in a specific case is not limited by such rules," declared the Court.

See *Fuchs v. Martin,* 845 N.E.2d 1038 (Ind. 2006).♦

SPOTLIGHT ON:



Dad Refused to Let Mother Move 10-year-old Son to Another State

Dad filed petition to fight Mom's taking son to Iowa.

If the facts in this case were to be condensed into two words, it might well be: "NO WAY!"

No way was Dad going to let his ex-wife move their 10-year-old son out of state without a fight.

The two shared legal custody. Mom had physical custody of the child, and Dad had "parenting time upon reasonable notice and at all reasonable times and places."

Boy Stayed with Dad Half Time

By the time Dad learned about Mom's taking the boy to Iowa, the youngster was spending 150 nights each year with him.

Dad was a "daily presence" in the boy's life, regularly caring for him every day after school.

After finding Mom was intending to move, Dad filed a petition to modify custody which was denied.

Dad Appealed Refusal to Modify

He appealed soon after, arguing the court had abused its discretion by denying the modification.

The Court of Appeals agreed.

"In the initial custody determination, both parents are presumed equally entitled to custody," it said.

"[B]ut a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody arrangement should be altered."

According to the Court, the best interests of the child must be served before any custody arrangement will be modified.

Substantial Change in Factors

In addition, there must be "a substantial change in . . . the factors a court consider[ed] under IC §31-17-2-8 when it originally determine[d] custody."

The relocation *per se* is not the key, the Court noted. Rather, "it is the effect of the move upon the child that renders a relocation substantial or inconsequential — i.e., against or in line with the child's best interests."

Case Remanded to Trial Court

"For that reason, we must remand to the trial court for an evaluation of the evidence that fully considers those factors. . . .

"In particular, the trial court appears not to have considered several factors that . . . suggest that relocation to Iowa may not be in (the boy's) best interests."

Reversed and remanded.

See *Green v. Green,* 843 N.E.2d 23 (Ind.App. 2006).♦

Effective July 1! Divorced parents with a child must file a notice of intent for any move. Indiana Code §31-17-2.2.

REALITY CHECKS:

√ The divorce rate, especially in the Army, has risen where the number has nearly doubled from 2001 to 2004.

√ Soldiers must provide child support and/or alimony under court orders or the provisions of written support agreements.

√ Soldiers cannot use their military status or assignment to deny financial support.

√ If there is no court order or support agreement in place, soldiers must follow the minimum support provisions of Army Regulations 608-99, paragraph 2-6 and/or the child custody of paragraph 2-9.

√ Violations of AR 608-99 are punishable under the Uniform Code of Military Justice.

√ Such measures are interim only until the parties can settle or resolve their issues in court.

SOURCE: *The New York Times,* 30 October 2005, and Family Law Section, Indiana State Bar Association e-newsletter.

Unmarried Couples Able to Adopt

Regardless of whether your politics lean to the left, to the right or somewhere in between, this case is a hard one to ignore.

For the moment — until and when the Supreme Court writes on this issue — its holding is the law.

The Court has, as the *Indianapolis Star* explained, "cleared the way for unmarried couples in Indiana — including gays and lesbians — to jointly adopt children."

Toddler Is Thriving with Parents

At the heart of this case is a toddler who is thriving with her Parents — women in their mid-30s who have lived in a committed relationship for well over a decade.

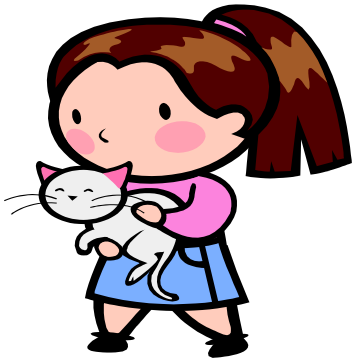
The father of the 18-month-old is unknown, never registering with Indiana's putative father registry. The biological mother decided to put the baby girl up for adoption.

As such, the infant became a ward of the Office of Family and Children (OFC), and she was placed with "licensed foster parents" when she was two days old.

Two Women Adopted Baby

The baby lived continuously in the home of her foster parents until being adopted by them in 2005.

That's when things got difficult. Because the infant was put up for adoption, one county was involved with a Child in Need of Services (CHINS) proceeding, and another was doing the adoption.



Toddler is thriving after adoption by two unmarried women.

Cross appeals were filed by the OFC and the Parents.

"Although this appeal presents a number of issues," the Court noted, "the primary question we must resolve is one of statutory interpretation."

Interpreting State Adoption Act

Does the "Indiana Adoption Act (IC §31-19 *et seq*.) permit an unmarried couple — any unmarried couple, regardless of gender or sexual orientation — to file a joint petition for adoption?"

The Court made short work of OFC's argument that an adoption could not be granted in Probate Court — as long as a CHINS case was pending in Juvenile Court.

Probate Court Had Jurisdiction

Not only were the parties, subject matter and remedies of the actions in the two counties different — hence "comity" did not apply — but "[p]robate courts have exclusive jurisdiction over all adoption proceedings.

"That there is a simultaneous CHINS . . . proceeding does not in any way divest the probate court of its exclusive jurisdiction."

Unmarried Couples Not Barred

To OFC's contention that unmarried couples are barred from adopting by the Indiana Adoption Act, the Court found otherwise.

Relying on rules of statutory construction that aid in reading laws as their drafters intended, the Court analyzed the Adoption Act.

"It is apparent to us that in enacting this statute, the legislature was requiring married persons to petition jointly for the above–described reasons," the Court said.

Requisite for Married Couple

"But it does not follow that in placing this requirement upon a married couple, the legislature was . . . denying an unmarried couple the right to petition jointly.

"Indeed, contrary to OFC's arguments, there is nothing in the Adoption Act that suggests that to have been the legislature's intent."

Accordingly, the Court declared, "we conclude that under the Indiana Adoption Act, an unmarried couple may file a joint petition to adopt a minor child."

See *In Re Infant Girl W.*, 845 N.E.2d 229 (Ind.App. 2006).♦

"Horrific Abuse" Barred Any Visits

In a case that's off the charts in terms of sorrow and disgust, the Court of Appeals made the only decision it could . . . one that was in the best interests of the children.

Mom and Dad wed in 1993 and had a son in 1997. Dad adopted Mom's children from a prior relationship: a girl (born in 1987) and a boy (born in 1990) during 2001.

By then, he had been sexually molesting the girl since she was five.

Repeated incidents of "horrific abuse" took place during her childhood, and they escalated over time.

Girl Told Neighbor of Abuse

At 13, she told a neighbor about the abuse — but denied it later to a case worker after being warned by Dad about his having a loaded gun.

Mom discovered the abuse when her daughter was 15. She called the police and left, taking the children. Dad has not seen them since.

Dad was arrested, charged with several counts of child molestation and incarcerated.

While in jail, he suffered a severe stroke and is now permanently disabled. As a result, the State dismissed the charges against him.

Dad Forbidden Any Visitation

Mom also divorced him, obtaining sole custody of the children. He was forbidden any visitation.

On appeal, Dad claims he was wrongfully denied parenting time.

But the Appellate Court said no.

Noting there is little law "where a father alleged to have molested one child seeks to have parenting time with the other children," the Court said it must ensure "the action taken corresponds to the danger presented.

Level of Danger Must Be Studied

"Accordingly, the level of danger must be examined and appropriate precautions taken. Only in this way can both the parent's visitation rights and the child's health and welfare be fairly and fully protected."

Girl suffered "horrific abuse" at hands of adoptive Dad since the age of five.

Evidence showed neither boy wanted any contact with their dad.

Kids Spared "Volatile Situation"

In addition, because of his "brutal abuse" of their sister, threat with a loaded gun, lack of remorse and refusal to attend counseling, the Court held the "other children would be placed in a volatile situation if visitation were allowed."

As such, the decision of the trial court was affirmed.

See *Duncan v. Duncan,* 843 N.E.2d 966 (Ind.App. 2006).♦

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