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Appendices

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Elkhart Superior Court 2

September 12th, 2016

Initial Order Denying Change of Venue

STATE OF INDIANA)
COUNTY OF ELKHART)
IN THE ELKHART SUPERIOR COURT
CAUSE NO. 20D02-1412-DR-890

D.. P., II)
Petitioner)
)
And)
)
D.A. P.,)
Respondent)

ORDER

Cause coming on for hearing. Husband appears in person and by counsel, Mike Christofeno. Wife appears in person and by counsel, David Joley. Arguments heard. The Court denies Wife's Petition for Change of Venue and Petition for New Custody Evaluator. The Court grants Wife's Motion for an In-Camera Interview. The Court will schedule an interview with the child upon the conclusion of the evidentiary hearing.

The Court grants Husband's Motion for an Updated GAL Report. The Court

defers Husband's Motion for Change of Custody and VSNC and Wife's RTSC to the evidentiary hearing. The Court authorizes the parties to contact each other regarding matters involving H. via text messages. Parties are directed to retain the texts. Notice.

So ordered on this the 12th day of September, 2016.

s/ SR Bowers

Judge/Magistrate
Elkhart Superior Court 2
JH

FILED
September 12, 2016
Elkhart Superior Court 2
JH

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Elkhart Superior Court 2

**March 31st, 2017 Order in Dissolution
Proceeding**

STATE OF INDIANA)
COUNTY OF ELKHART)
IN THE ELKHART SUPERIOR COURT
CAUSE NO. 20D02-1412-DR-890

D.. P., II)
Petitioner)
)
And)
)
D.A. P.,)
Respondent)

FILED March 31, 2017

Elkhart Superior Court 2

SB

FINDINGS, RECOMMENDATIONS AND
ORDER

This cause came on for trial on October 4th, 5th, 6th, and December 6th, 7th, 8th, 9th, 12th, and 13th of 2016. The parties and witnesses were sworn and evidence was presented.

Wife timely moved the Court for special findings in accord with Indiana TR. 52. The

parties submitted their proposed findings, Husband having submitted the same on January 4, 2017, and Wife on January 5, 2017. This Court thereafter took this matter under advisement.

This Court finds and recommends as follows:

This Magistrate previously entered findings on the issue of dissolution of the parties' marriage only, and the parties' marriage was dissolved based upon said findings and recommendations on October 18, 2016. The remaining pending issues were presented to the Court on 'a bifurcated basis. Wife's Motion For Change Of Venue On September 9, 2016, the Wife filed her Motion For Change of Venue. On September 12, 2016, arguments were heard before the Honorable Stephen Bowers and the Motion For Change of Venue was denied.

While Husband is an Elkhart County Deputy Prosecutor, he does not practice in Superior Court No. 2. On October 4, 2016, Wife again sought to raise the issue of change of venue. Arguments were heard on the motion, and this Magistrate found that the Motion had previously been ruled on by

the Elkhart Superior Court No. 2. Wife then presented an offer of proof and based upon said offer argued the possibility of undue influence upon the Court due to Husband's position as a deputy Elkhart County prosecutor. The Wife also presented correspondence from the Elkhart County Prosecutor's Office relative to a Protection Order proceeding also pending in the Elkhart Superior Court No. 2.

The correspondence was from then Elkhart County Prosecutor Curtis Hill and directed to Wife about a violation of the Protection Order under 20D02-15 07-PO-3 83. Counsel for Wife further asked that the Court note that the juvenile court proceedings were transferred to Marshall County on the CHINS petition previously initiated in the Elkhart County juvenile court. This Magistrate having reviewed the correspondence and having considered the offer of proof denied the Motion For Change of Venue asserted by the Wife under I.C. 34—35-1-1(3).

While this Magistrate recognizes that the Husband is a deputy prosecutor, this Court notes that he is an employee of the Elkhart

County Prosecutor's Office. He is not the Elkhart County Prosecutor. The letter and offer do not establish a basis for change of venue under I.C. 34-35-1-1 which states in relevant part,

“Sec. 1. The court or the judge shall change the venue of any civil action upon the application of either party made upon affidavit showing one (1) or more of the following : the opposite party has an undue influence over the citizens of the county, or an odium attaches to the applicant or the applicant's cause of action or defense, on account of local prejudice.”

This Court noting that this argument was previously addressed to the Elkhart Superior Court No. 2 which denied the Motion and this Magistrate finding no basis for a conflict or other reason to disqualify this Magistrate in these proceedings personally denied the motion. While recusal was proper in the juvenile court proceedings referred to by Wife as the presiding judge or judge overseeing the magistrate for juvenile court was the Elkhart Circuit Court judge, then the Honorable Terry Shewmaker, a

judge that Husband practiced in front of, no such connection was

present in these proceedings. This Magistrate confirms its findings on the Wife's Motion to Change Venue.

Custody of H. P.

The primary issue in these proceedings is the custody of the parties' minor child. This Magistrate now finds as follows on said issue:

The Husband and Wife were married on April 27, 2007. There was one child born of their marriage, namely, H. P. (DOB June 19, 2008). The parties lived in different locations in Elkhart County during their marriage including apartments, and the parties also lived in a home located in Wakarusa, Indiana, commencing in July of 2008. The parties eventually moved to a home in Middlebury, Indiana, around the middle of 2012 to what 'was then the marital residence commonly known as 10019 Crabapple Lane, Middlebury, Indiana 46540. The parties chose to move to Middlebury, Indiana, due to its excellent school system.

During different periods of time, the Wife's parents lived with the parties along with the Wife's biological daughter from a previous relationship who was adopted by the Wife's parents as an infant. The living arrangements created stress on the parties' marital relationship. The Husband allowed Wife's parents to live in the marital home as the Husband recognized that Wife wanted to remain close to her biological daughter.

During the parties' marriage, and after H. was born, the parties often became involved in heated arguments which occurred primarily when the Wife's parents were residing with the parties. While living in Wakarusa, Indiana, with the Wife's parents, the Husband and Wife lived in the basement of the home. During the time the parties lived in Wakarusa, and when H. was approximately a year and a half old, Husband kicked the Wife during an argument. Husband also tipped over a television set and broke a door in anger during an argument between the parties when H. was an infant. The parties both participated in the argument in which the TV and door were damaged.

Wife's parents again moved in with the parties in Middlebury, Indiana, around the middle of 2013 and again the parties' relationship became strained. Eventually, the parties had a brief separation in November of 2014 around the Thanksgiving holiday, and after a brief reconciliation, they separated on Christmas of 2014.

The parties have different cultural backgrounds. The Wife is Samoan and was born in Western Samoa. Husband was born and raised in the United States. The parties met in Western Samoa when Husband was employed as a prosecutor in Western Samoa. The Wife is very proud of her Samoan roots, culture, and traditions.

During the time that the parties lived together, they would frequently bathe together as a family which was D.P.e until shortly before the parties' separation. The parties undertook the bathing as a method of simply relaxing. Husband and Wife never had intimate relations while bathing. The parties also allowed their minor child H. to sleep in the marital bed. The parties on occasion had sexual relations in the bedroom quietly and discreetly while their

minor child was asleep. The Husband often slept without wearing bed clothes.

The parties' separation on December of 2014 was the result of an argument that occurred on Christmas when Husband requested that Wife's extended family move out of the residence.

The Wife became enraged during the Christmas 2014 argument and proceeded to scream and approached the Husband in an aggressive manner. The Husband called the neighbors — Diane Wheatley and Steven Wheatley — as a result of the Wife's behavior. The Wheatley's were close friends of both the Husband and the Wife during the time they resided in Middlebury. The

Wheatley's observed the Wife's screaming and yelling at the Husband. During the argument, the Wife disclosed to the Wheatley's that the Husband had been diagnosed as bipolar and proceeded to Show medicine bottles to the Wheatley's reflecting the prescriptions Husband was taking for his bipolar-diagnosed condition. Wife also made statements that Husband was an atheist and that knowledge of his bipolar condition might affect his employment with

the Elkhart County Prosecutor's Office. Wife also kept repeating during the Christmas incident that Husband was "throwing us out" of the home, meaning Wife, her parents, and Wife's biological daughter, despite the fact that Husband had advised that he was not throwing out Wife but merely wanted the extended family to begin moving from his residence.

The Wheatley's were concerned about the status of their friends' marriage and attempted to offer assistance. This Court finds that the testimony of Diane and Steven Wheatley was highly credible. Around the time immediately before the parties' separation, Steven Wheatley testified that he spoke with Wife about the custody issues should the parties divorce and Wife became extremely upset when Mr. Wheatley suggested that Husband likely would continue to be involved as a co-parent in H.'s life.

When the parties separated Christmas of 2014, Wife moved with H. to her sister's home, also in the same Middlebury neighborhood. While H. resided at Wife's sister's home, Wife only allowed contact

between Husband and H. outside the home (in winter weather). Immediately after the separation, H.'s relationship with her Father was close.

Evidence presented at trial established that H. and her Father had a close, happy relationship during the parties' marriage and that they were involved in many normal, healthy activities together. Likewise, H. was very close with her Mother prior to the parties' separation.

Husband filed for dissolution of the parties' marriage on December 31, 2014. When the Husband presented a Summons and Petition to Wife, Wife immediately showed the same to the parties' daughter and made a comment about the same.

After the Husband filed his Petition For Dissolution of Marriage in 2014, the parties entered into an Agreed Provisional Order on February 16, 2015, pursuant to which the parties were granted joint legal custody with Wife being granted primary physical custody. Both parties were represented by legal counsel during the February 16, 2015, hearing. Under the Provisional

Order, Husband was to have parenting time in accord with the Indiana Parenting Time Guidelines with the exception that the Husband was to have Monday and Wednesday of each week from five o'clock pm. until eight o'clock pm. rather than one overnight per week. The Husband exercised his parenting time in accord with the February 16, 2015, Order, and H. related well to the Husband during the parenting time.

On March 16, 2015, Wife filed a Motion to Modify Provisional Orders and referenced at Paragraph 9 “. . . allegations of child abuse committed on the part of the Husband both physical and sexual in nature.” Wife also requested restricted visitation, psychological assessments, and an appointment of a guardian ad litem. Elkhart Attorney Paula Michalos was appointed as guardian ad litem on April 20, 2015; and on May 27, 2015, the Guardian Ad Litem Michalos filed her report.

All Guardian Ad Litem reports were admitted by stipulation during the trial of this cause. The Guardian Ad Litem 's report of May 27, 2015, raised concerns about the

allegations of child molesting and stated, if true, she had concerns not only about the molest but that the Wife allowed the same to happen. The Guardian Ad Litem likewise raised concerns about the allegations being made if they were not true. The Guardian Ad Litem finally referenced that a criminal investigation was being made into the allegations, and if it was found that abuse occurred, that neither party would be fit and a CHINS referral should be made. The Guardian Ad Litem then confirmed her recommendation of continuation of the existing Provisional Order on parenting time in accord with Parenting Time Guidelines. (Husband's Exhibit 65)

In March of 2015, while at work, Husband was advised of the allegations of child molest and that an investigation was being had by the Indiana State Police. A CFAC interview of H. was performed in March of 2015 which revealed that H. had smacked or spanked Husband on his bare buttocks at Husband's direction. Husband testified that the slapping was part of a "game" which included smacking his arm and that D.A. thought that the

behavior was funny and that no sexual intent was involved. The CHINS filing also indicated Wife acknowledged witnessing improper touching of H. by Husband.

An Affidavit of Kristin Ford of DCS dated April 27, 2015, references statements made by Michelle Rehbein, H.'s counselor, about H. stating that she was improperly touched. The statement came from H. after H.'s counselor related a story about a girl who had been improperly touched.

On May 26, 2015, Husband was advised to be in Juvenile Court on May 27, 2015, on the matter of a CHINS filing regarding the parties' child, H.. Husband's parenting time was ordered by the Juvenile Court to be supervised shortly thereafter. On July 2, 2015, Husband filed a stipulation that H. P. was a child in need of services. (CHINS) (Wife's Exhibit H)

After-the CHINS adjudication, Husband's parenting time continued on a Supervised basis.

Initially, a request for filing of a Petition For CHINS was made on May 27, 2015, in Elkhart. After entering the CHINS

adjudication Order, the cause was transferred to Marshall County.

Placement was made by the juvenile court of H. initially with the Wife, with Husband being afforded only supervised parenting time. Originally the DCS investigation substantiated the allegations of abuse by Husband and upon Wife for neglect of H.. After testing by Dr. Anthony Berardi in 2014, and culminating with the report rendered by Dr. Berardi on October 28th of 2015 (Exhibits 40, 41, and 42), and after an investigation by the Indiana State Police, a determination was made to unsubstantiate Husband on abuse and substantiate against the Wife based upon Dr. Berardi's findings that the Wife's conduct, whether because of being over vigilant or vindictive, was alienating the child from the Husband. Dr. Berardi determined that for the child to have a relationship with her Father, the removal of the child was necessary and placement was recommended with foster care. After hearing Dr. Berardi's testimony

relative to his report at a hearing held in early November of 2015, H. was removed from the Mother's care and she was placed

in foster care where she remained for more than eight (8) months.

During the time period immediately prior to the parties' separation, both parties maintained a happy relationship with H.. Immediately after the parties' separation, Husband continued to maintain a happy relationship with H.; however, during the time period that Husband's parenting time with H. was supervised and H. was in Wife's custody, H. began to regress in her relationship with the Husband eventually to the point that by October of 2015 H. was not interacting well with her Father. Eventually the regression continued to the point that H. would barely speak with or interact with Husband at all.

Husband's testimony as to the decline in the relationship that he had with his daughter is supported by observations made by the parenting time supervisor as referenced in

Dr. Berardi's reports. A visitation in October of 2015 in which Husband's Mother, Mariann P., exercised parenting time in the Husband's absence was described by Husband's Mother as "the worst day of my life." Mariann P. was

unable to interact with H., who climbed under a table to avoid her. While H. began to talk with her paternal grandmother toward the end of the visitation, she continued to reject her grandmother's attempts to engage.

Prior to Mariann P.'s October visit with H., she had a good relationship with H. and they had in the past engaged in numerous activities. After H. was placed in foster care in November of 2015, her relationship with her Father greatly improved. Husband's testimony which was supported by the supervisors, relative to H.'s regression and on her relationship with her Father, was detailed and credible. Dr. Berardi's reports of testing of Husband, Wife, and H. (Husband's Exhibits 40, 41 and 42), in summary, recommended that H. be placed into neutral placement or foster care due to the concerns that H. was "not in a safe environment" due to "dynamics involving child alienation." Specifically, Dr. Berardi states as recommendations,

"1. This evaluation and those of the parents indicate that there is sufficient reason to believe that the sexual abuse allegations

regarding H. are suspect and may have all been promoted and cultivated within the context of a high conflict, hostile, marital breakdown with the influence of dynamics involving child alienation in the context of a pre-existing family unit with poor child-parent boundaries. H. is not in a safe environment and her ongoing regression is evidence of the impact that such dynamics are having on her. It is strongly recommended that she be removed (sic) from her Mother's home and placed in an appropriate, neutral relative placement or foster home.

2. Supervised visits should be arranged for H. and her Mother and continued with her Father.

3. Individual counseling is important to help H. understand the inappropriateness of the family's lack of clear parent-child boundaries and its implications for her adjustment and ongoing confusing (sic). She also needs to understand how she has been emotionally pulled and confused in the midst of a high conflict separation and how her attachment to her parents has been adversely effected by the forces to which she

has been exposed, particularly those with her Mother in the wake of the marital breakdown last year and the progression of her movement from a loving and possible relationship with her Father to one of outright rejection.

4. Permanency plans will ultimately depend on H.'s treatment progress and that of her parents."

This Court finds Dr. Berardi's testimony in this cause to be highly credible. Wife's expert, Dr. Steven Ross, opined that certain testing of Wife should not have been evaluated due to Wife providing information that rendered an invalid testing, in particular for MMPI-2 and MCMI—III as testing revealed Wife to be "highly defensive". Dr. Ross further testified that some of the testing should have been repeated or not interpreted. Dr. Berardi testified information could be gleaned from the test results including the test results which were scored as "highly defensive." This Court also notes that Dr. Berardi was not contracted by either of the parties but rather by DCS to perform the testing.

The CHINS proceeding in Marshall County was dismissed in June of 2016 when, after further investigation, DCS determined the claim that Mother had alienated the child was determined to be unsubstantiated.

Thereafter, in July of 2016 the parties' parenting time reverted back to the Provisional Order entered in this cause of standard parenting time according to the Indiana Parenting Time Guidelines.

Having observed the Husband and Wife testify in court, as well as their respective family members and friends, this Court finds both parents to be highly intelligent and that both have much to offer as parents to H..

Wife went to college in Kentucky on an academic scholarship where she started school around the age of sixteen. Wife also studied at Notre Dame and while in Samoa obtained numerous certificates for training in terrorism response and weapons of mass destruction. Wife's résumé, (Exhibit 81) is, to say the least, highly impressive. In summary, while slight in size and appearance, this Court believes that Wife is a strong individual with advanced self-

defense instruction. Testimony from Dianna Wheatley established that Wife prided herself in the ability to defend herself against a possible would-be attacker by inserting a pen into the aggressor's jugular vein, apparently something that was learned from her advanced training.

Husband is an Elkhart County deputy prosecutor with several years of experience in his position.

This Magistrate also has several concerns relative to these parents. Husband testified that the parties fought. Husband kicked Wife during an argument in the home in which the minor child, although very young, was present. Husband turned over a television set and damaged a door of the parties' home during an argument. Husband has lost his temper, although the incidents occurred long ago when H. was very young and not likely to remember the same. Husband's temper is a concern of this Magistrate. This Magistrate does not believe Husband has inflicted his temper on the parties' minor child, H..

Husband has also been diagnosed as being on the bipolar disorder spectrum; however,

this Court also notes Husband takes medications for the same and is under the treatment of a physician. This Court has very little concern that Husband's bipolar condition will in any way affect his parenting of H., provided he abides by his physician's care instructions.

This Magistrate is also concerned with the parenting style adopted by both parents prior to their separation. This Magistrate would agree with Dr. Berardi's assessment that both parties exercised poor boundaries with sleeping arrangements, bathing, and Father's allowing the minor child to spank Father's buttocks.

This Court is likewise concerned about various statements made by Wife during the trial that this Court finds undermined her credibility. For example, Wife's testimony that when Husband turned over the parties' 1997 BMW after the parties agreed she would have the car as part of a settlement, Wife claimed the same was vandalized by the removal of the car's emblems or badges.

The Court finds that Wife's statement was untrue as Husband produced photos of the

vehicle immediately prior to his delivery of the same to Wife. Wife also testified that a chain of text messages (Wife's II) was complete when it was later determined through Husband's cross examination of Wife that important text messages were not included that explain why Husband did not want to contact Wife. Wife also falsely testified that Husband had control of the parties' accounts. Husband later provided a check reflecting the parties' account was in both names. (Husband's Exhibit 90) While all of the misstatements were relatively minor, they raise concerns about Wife's credibility.

This Court, likewise, has concerns about Wife's temper. The Court notes the testimonies by the Wheatley's reflect Wife was the apparent aggressor in the argument on Christmas at the time of the parties' breakup and her statements about exposing Husband's bipolar diagnosis and that the same might have an effect on Husband's employment. It appears that Wife's statements made during the argument and her behavior reflect an intent to inflict significant emotional abuse towards Husband.

Finally, this Magistrate is concerned about both parties' history of alcohol use. Finally, this Court finds that more likely than not Wife engaged in behavior which undermined H.'s relationship with her Father. This Court also finds Wife failed to comply with Court Orders by failing to file a Notice of Relocation before moving to Lagrange County, Indiana, and failing to deliver the minor child for supervised visits during these proceedings. Additional facts will be provided as necessary.

Indiana Statute I.C. 31-17—2—8 states,

“Sec. 8. The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant

factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if

the child is at least fourteen (14) years of age. -

(4) The interaction and interrelationship of the child with:

(A) the child's parent or parents;

(B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.”

In reviewing these factors, this Magistrate finds as follows:

(1) The age and sex of the child. H. P. is an eight-year-old female.

This Magistrate finds that both parties are highly intelligent individuals who are capable of communicating with each other relative to H.'s needs. This Magistrate is not impressed with the parties' level of cooperation and communication to date. However, this Magistrate also recognizes that to date the parties have been attempting communication during a highly heated and contentious custody proceeding. Despite H.'s age and sex, both parties are capable of being able to parent H. and can communicate to resolve any hurdles.

(2) The wishes of the child's parent or parents. Both parents love H. deeply and wish to have full custody. By the same token, both parents do recognize what the other brings to the table that could benefit H. including Wife's Samoan culture and traditions and Husband's work ethic and willingness to explore and participate in various outdoor activities with H. such as swimming and bike riding.

(3) The wishes of the child with more consideration given to the child's wishes if the child is at least 14 years of age.

H. is eight years old. She has expressed a desire to live with her Mother as testified by her former teacher and foster parents. However, photos and testimony establish H. appears to enjoy the company of both parents and this Court must use caution in accepting H.'s desire to live with her Mother in light of Mother's likely efforts to influence H.. This Court also believes that H. may consider Mother's home a more stable environment as she goes to school in Mother's location in Lagrange, Indiana.

(4) Interaction and interrelationship of the child with (A) child's parents (B) the child's siblings (C) any other person that basically can affect the child's best interests.

H., with the exception of time in which she was in Mother's custody and Father had supervised parenting, interacted very well with her Father. Extensive testimony was presented as to both parties' interaction with H.. With the exception of the boundary issues discussed above and Wife's likely efforts to undermine Husband's relationship

with H., both parents interact well with H.. H. has a half-sibling who is now attending Purdue University but she also has additional extended family on Wife's side that she gets along with. Wife lives with her mother and father in Lagrange, Indiana. This Magistrate believes Wife's parents have the ability to provide and enrich H. with a cultural history.

H. gets along well and is bonded with Wife's family. Husband's family is not as extensive, but he does have a Mother who is highly intelligent and appears to be a very caring individual. Evidence also established that Husband's mother, Ms. Mariann P., is also closely bonded with H.. H.'s reluctance to interact with his mother in October 2015 as referenced above appears to be an aberration. H., in short, appears to have a good relationship with her paternal grandmother.

(5) The Child's adjustment to her home, to her (A) home (B) school and (C) community.

A) Home.

H. appears to have adjusted to her home in Lagrange, but likewise, H. has a home in

Middlebury, Indiana, with her Father. This Court finds while she has friends in Lagrange and enjoys her extended family there, she likewise has friends in Middlebury that she enjoys. H. appears to be well adjusted in both homes. H.'s home with Husband was the family home which she was familiar with prior to the parties' separation.

(B) School.

H. is well adjusted in school in Lagrange. She is the class president and is a good student. She enjoys school in Lagrange. There is no indication that H. was not well-adjusted and doing well while attending school in Middlebury.

(C) Community.

Little evidence was provided as to H.'s adjustment to community which this Magistrate considers to be intertwined with the factors set out above.

(6) The mental and physical health of all individuals involved.

Husband has been diagnosed with bipolar disorder but credibly testified that he works

with a physician and takes prescribed medications. Husband's diagnosis does not appear to affect his employment or his ability to parent in any way. This Court is convinced that Husband's diagnosis does not impair his ability to parent or co-parent H. provided he continues regular treatment with his physician and strictly follows instructions relative to medications and treatment.

Wife was not diagnosed with any mental disorder; however, based upon Dr. Berardi's recommendations and findings, this Magistrate believes that counseling recommended by Dr. Berardi in his report for Wife is appropriate and necessary to allow Wife to act properly to support H. in her relationship with her Father.

(7) Evidence of a pattern of domestic violence by both parents.

Both parties have a history of engaging in arguments with the other. This Magistrate believes that both parties participate on a verbal level in the arguments and both admit to the same. Husband's conduct, as stated, is disconcerting. Husband kicked Wife during an argument when the minor

child was very young. This Court believes Husband thoroughly regrets his behavior, yet this Court is also concerned that Husband places some blame on the Wife for his behavior. Husband also turned over a TV and broke a door during an altercation that both Husband and Wife participated in.

Wife, likewise, engaged Husband in arguments and most recently in an argument on Christmas of 2014 appeared to be taunting and aggressively approaching the Husband during the argument and made statements about Husband's bipolar diagnosis and its possible impact on Husband's career likely with the intent to inflict emotional harm. Both parties' conduct in the arguments is very disconcerting. While this Court believes the number of disputes and the physical nature of the same have been exaggerated by Wife, this Court has concerns about both parties' conduct. However, no evidence was presented that any physical conduct was directed by Husband towards H.. Wife, in an angry exchange which occurred when receiving the dissolution pleadings from Husband, chose to show the same to H.,

advising what the documents were. Wife's decision to involve H. in the dissolution proceedings was, at a minimum, poor judgment on her part. Both parties' conduct during the marriage dissolution proceedings has been disturbing.

(8) There is no evidence that H. has been cared for by a de facto custodian.

H.'s placement in foster care was temporary. As stated, despite the parties' conflict when they were married, and after separation, these are two highly intelligent individuals. These parents are capable of co-parenting H..

Husband testified that "despite everything that has happened, I am still interested in co-parenting with D.A.."

Wife has shown a reluctance to co-parent which could have placed H. in harm's way when she refused to provide Husband information as to H.'s diagnosis and treatment for a breathing condition and information as to H.'s medications. Some of these actions have nearly resulted in harm to H. as H. was taken to the hospital while in Husband's custody for a breathing

problem that Wife apparently knew about. Wife has also been reluctant to share information with Husband about medications that H. was prescribed. Wife on those occasions valued her animosity toward Husband over the best interest of H..

Despite the animosity between these parties, this Magistrate believes that the parties can effectively co-parent if given the opportunity to do so. After consideration of the evidence in this case, this Magistrate believes H.'s long-term best interests would be best served by her having strong, positive relationships with both parents. This Magistrate further believes that outcome is more likely if the parties make a good faith effort to minimize the conflict between them and actively cooperate with one another as co-parents. This Magistrate understands that such cooperation will be difficult, but believes that it is not only possible, but will become easier as the parties put the divorce behind them.

I.C. 31-17-2—15 sets forth the matters this Court must consider in making an award of joint legal custody. The statute states:

“Sec. 15. In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:

(1) the fitness and suitability of each of the persons awarded custody;

(2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare;

(3) the wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age;

(4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;

(5) whether the persons awarded joint custody:

(A) live in close proximity to each other; and

(B) the nature of the physical and emotional

environment in the home of each of the persons awarded joint custody.”

When considering these factors this Court finds as follows:

(1) the fitness and suitability of each of the persons awarded joint custody;

As set forth above, this Court has concerns about both parents. This Court has concerns about Father’s temper. This Court likewise has concerns about Mother’s temper and what appears to be an effort to alienate H. from having a relationship with her Father. Despite the concerns, this Court finds that both parents are suitable to parent H.. H. appears bonded to both parents.

(2) Whether the parents awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare

While this Court has concerns about Wife’s failure to provide medical care and prescription information about H. to Husband, this Magistrate also recognizes the environment in which the communication problems arose. That is,

Wife apparently proceeded with decisions relative to H.'s medical care when orders were in place in a CHINS proceeding out of Elkhart and eventually Marshall County. The tense environment likely hindered communication by Wife to Husband. However, the CHINS proceeding has been dismissed and a close examination of the text messages between the parties reflects that they are able to communicate in matters affecting H..

(3.) The wishes of the child with more consideration given to the child's wishes if the child is at least fourteen (14) years of age;

H. is eight (8) years of age. She has voiced a desire to live with her Mother

However, this Court is cautious to consider H.'s desires as evidence reflects H. may have been influenced by the Mother. H. appears to enjoy time with both parents.

(4) Whether the child has established a close beneficial relationship with both of the persons awarded joint custody.

The evidence presented reflects H. enjoys activities and time spent with both parents. Evidence presented that H. enjoys activities such as swimming and reading with her Father. H. enjoys activities with her Mother as well. Photos presented reflect outdoor activities are enjoyed by H. with her Mother as well. (Exhibit 00)

(5) Whether the persons awarded joint custody

(A) live in close proximity to each other and

(B) plan to continue to do so;

Initially, the parties lived close together after their separation. In fact, the parties lived in the same neighborhood in Middlebury. Mother moved to Lagrange County around the start of the 2016 school year and did so without filing a notice of relocation as required by statute. The distance between the parties will likely cause some difficulty in transporting H. on a weekly basis to school and other activities. Based upon the Guardian Ad Litem's testimony, this Court believes the distance factor can be overcome. The distance between the parties' residences, while inconvenient, is not such that it would

significantly impair the parties' ability to co-parent and act as joint custodians. Presently Wife is living with her parents. This Magistrate heard no evidence on Wife's future location plans other than testimony that she is not a flight risk.

(6.) The nature of the physical and emotional environment in the home of each of the persons awarded custody.

H. enjoys her home in Lagrange County which includes her Mother and extended family. H.'s maternal grandmother appears capable of providing the benefit of additional parenting assistance and H. appears to be bonded to her extended family in her Mother's home. It appears H. has a happy home with Mother.

Likewise, H. has a home in Middlebury with which she is familiar and was the family marital residence. H. has friends in Middlebury and enjoys activities with the Father. As the parties have separated, it appears that the emotional environment in the former marital home has improved.

If the parties fail in their efforts to co-parent, the appointment of a parenting

coordinator to make decisions on behalf of H. may be necessary. Based upon the foregoing, this Magistrate respectfully recommends that the parties be granted joint legal custody and finds that for the reasons set forth herein the same would be in H.'s best interest. This Court also notes that the Guardian Ad Litem in this cause conducted an extensive investigation and recommended joint physical custody, the same to alternate on one-week periods with exchanges on Sundays. This Magistrate concurs in the recommendation of the Guardian Ad Litem. While this Magistrate has concerns as to the disruption that may be caused to H., this Magistrate believes that such an arrangement would be in H.'s best interests. H. has bonded with both parents. H. is an intelligent young lady who this Magistrate is convinced can adapt to changes in her environment, the logistics of the transfer on a weekly basis can be resolved by the parties. The Guardian Ad Litem testified that transportation to school could be resolved. Recognizing that Mother moved away without filing a notice of relocation and also recognizing the disparity in the parties' incomes with Father earning substantially more income than Mother,

this Magistrate recommends the parties equally share the cost of transportation.

Despite Wife's testimony as to her lack of knowledge as to filing a notice of relocation and her argument that at the time proceedings were pending in juvenile court, this Court notes no exception with complying with the Relocation Statute because proceedings are pending in juvenile court. Wife's testimony that she notified DCS of the new address is not sufficient and

does not constitute compliance with the statute. In summary, Wife's arguments relative to relocation are not well taken.

After H. has completed the 2016-2017 school year in Lagrange County, Indiana, this Magistrate recommends that she resume her education in Middlebury. She will be attending her first year at a new junior high or middle school and will be among friends she has had in the past while attending Middlebury Schools. Moreover, this will be a new transition for all of her classmates and she will be in the same situation as her classmates.

Husband credibly testified that he and Wife chose their home in Middlebury based upon the benefits of an excellent school system. But for the parties' dissolution, H. would have attended Middlebury's schools. Husband testified that he believed the Middlebury School System to be superior to that in Lagrange. While H.'s teacher testified as to programs that are available for advanced students, this Court is convinced based upon testimony presented that Middlebury is the superior school system. While there will be adjustments for H., this Magistrate believes H.'s best interests lie in the foregoing findings and recommendations of joint legal and joint custody.

Husband's Motion to Modify Support

Filed 6-1-16

On June 1, 2016, the Husband filed his Motion to Modify Support. In summary, Husband states in his motion that support was ordered at \$203 per week on August 25, 2015, when the parties' child resided with the Wife. On November 4, 2015, the Marshall Circuit Court removed the minor child from the Wife's care and placed the

child in foster care. The child was not returned to Wife's custody until July 11, 2016. The Husband is requesting in his Financial Disclosure a reimbursement of support monies that he paid during the time period that H. was in foster care placement. The trial court has discretion to make a modification of child support relate back to the date the Petition to Modify is filed, or any date thereafter. *Becker v. Biker* 902 NE. 2d 818, 820 (Ind. 2009). An exception to the general rule that support may not relate back past the date of the filing of the Petition to Modify is if there has been a change of custody. *Whited v. Whited* 859 NE. 2d 657 (Ind. 2007). However, the rule of retroactive modification based upon a change in custody per m contemplates a permanent change in custody. The placement of H. in foster care was not for such a period of time that the same could be considered permanent, nor does this Court believe that either of the parties ever intended or believed the same would be permanent. As such, modification could only be made effective to the date of the Husband's filing on June 1, 2016. H. was returned to Wife's physical custody on or about July 11, 2016. In this case, after a

hearing was held on June 27, 2016, the Court ordered on June 29, 2016, that all payments made “from June 3, 2016, and thereafter be assigned to DCS of Elkhart County.” The Court further reserved the issue of payment made after placemen “. . . resulting in the Orders in Marshall Circuit Court in the CHINS proceeding . . .” Again, this Magistrate finds that modification cannot be made before the date .of the filing of Husband’s Petition on June 1, 2016. However, this Magistrate recommends, to the extent that Mother received monies from June 3, 2016, until July 11, 2016, that said funds should be disgorged and returned to the Clerk of the Elkhart Superior Court 2 to be held and redistributed to the Department of Child Services at their direction for support and alleged expenses for H. while she was in foster care placement.

With regard to current support, this Magistrate recommends that Husband pay child support to Wife of \$111 per week effective the first Friday following entry of the Order Approving these findings and recommendations based upon Husband’s income of \$1,747 per week and Wife’s

income of \$650 per week and \$30 credit for health insurance paid by Father for the Minor Child. (See Child Support Work Sheet attached hereto and incorporated herein as Exhibit A.) As parenting time will be equally shared, this Magistrate further recommends that the Wife be ordered to pay the controlled expenses for the minor child. (See Indiana Child Support Guideline 6 and related commentary.) This Magistrate finds that since separation, Mother has likely paid controlled expenses as H. has attended school in the district in which Wife resides. It also appears that while both parents have paid controlled expenses in the past, Wife likely paid more of the same since the parties' separation. After the child moves to Husband's school district, the issue of responsibility for payment of controlled expenses and possible modification of support may be reviewed and subject to further hearing and order. This Magistrate further recommends that in accord with the foregoing attached Worksheet Mother be obligated to pay the first \$889.20 of annual uninsured health care expenses with a balance to be paid 73% by Husband and 27% to be paid by Wife. This Magistrate recommends that said \$889.20 be prorated

to the date of the Order Approving these findings -- the said prorated amount being the appropriate sum for which Wife will be responsible from the date of the Order' herein until December 31, 2017. Thereafter, the parties shall use the calendar year commencing on January 1, 2018, to calculate responsibility for payment of said uninsured expenses. Health care expenses, for purposes of the Six Percent Rule shall include, but not be limited to therapy/counseling, orthoD.P.tia, .optical, and prescription expenses.

Husband's Motion For Reimbursement For Overpayment of Federal and State Taxes

Filed June 1, 2016

The Husband's filing of June 1, 2016, requests reimbursement of what Husband contends was an overpayment of federal and state income taxes for tax year 2015. Husband's calculation reflects a combined federal and state income tax refund received by Husband of only \$97 as Wife refused to address the tax issue after it was brought to the attention of Wife or her counsel at the hearing on April 6, 2015, and therefore, Husband had to file as married,

single individual. (Husband's Exhibits 62 and 63) Wife claimed H. as the dependent for tax year 2015. H. was primarily in Wife's care in 2015 and no provisional order was entered on the issue of claiming H. as a dependent for tax year 2015.

The increased tax liability resulting from the filing of individual tax returns may be considered a dissipation of marital property. *Hartebeck v. Hartebeck* 917 NE. 2d 694 (Ind. App. 2009). However, whether a spouse's failure to file a joint tax return constitutes dissipation under I.C. 31—15-7-5(4) must be determined from a review of the facts and circumstances in each case.

Here, the filing of the tax return by Wife occurred after the parties' separation. The issue of the tax filing was brought to Wife's attention prior to April 15, 2016. The Wife provided no credible excuse or reason for her refusal to file a joint return. This Court finds that Wife's refusal to file a joint return constitutes a dissipation of marital property by the Wife. However, this Court also finds that Husband disposed of assets belonging to the parties which he thereafter claimed as charitable contributions on his 2015

Indiana Tax Return Form 8283. Husband's tax records reflect D.P.ations to Good Will as follows:

(a) 3-10-15 Items with a D.P.or value of \$6,000 and fair market value-of \$2,500

(b) 6-20—1 5 Items with a D.P.or value of \$8,000 and a fair market value of \$3,000

(c)10—20-15 Items with a D.P.or value of \$8,000 and a fair market value of \$3,000

((1) 2-15-15 Items with a D.P.or value of \$6,000 and a fair market value of \$3,500

This Court finds that the exact value of the items, whether or not they were acquired before the parties' marriage, or even a specific description of the D.P.ated items, was not testified to by either party.

Based upon the foregoing, this Court finds that both parties likely disposed of or dissipated assets of approximately similar value, and this Court, therefore, recommends that to the extent either maintains a claim for reimbursement for dissipation or disposal of property that the same be denied.

Allocation of Tax Dependency

The Mother claimed minor child H. as a dependent for federal and state income tax purposes for tax year 2015. This Magistrate having considered the factors set forth in LG. 31-16-6-1.5 recommends the Husband be granted the right to claim H. for federal and state income tax purposes for tax year 2016 and all even-numbered tax years thereafter provided

Husband is 95 percent current on his obligation to pay child support by January 31st of the year following the year in which the right to claim the tax dependency is sought by Husband. Wife shall claim H. as a dependent for tax purposes for tax year 2017 and all odd—numbered tax years thereafter. In making this determination, this Court considered the evidence of the parties' respective income as set forth in the Child Support Obligation Worksheet attached hereto, and financial and other contributions undertaken by each parent as set forth in the mediated Settlement Agreement and noting the parties' joint legal and physical custody of H.. This Court further considers each parent's percentage

of costs of supporting H. as set forth in the Child Support Obligation Worksheet as well as H.'s age and the number of years the dependency will remain available. This Magistrate recommends' that the parties be ordered to take all necessary actions to effectuate release of the dependency in accord with Section 152(3) of the Internal Revenue Code.

Husband's Verified Showing of
Noncompliance Filed September 9, 2016

The Husband's Verified Showing of Noncompliance filed September 9, 2016, also includes a Motion For Change of Custody. For the reasons, and based upon the findings set forth above, this Magistrate has recommended an Order of joint legal and joint physical custody and finds that such an Order, provided the parties can and do effectively co-parent from this point forward, would be in H.'s best interests.

This Magistrate finds that with regard to Husband's Verified Showing of Noncompliance that H. did go to Husband's residence for parenting time in July of 2016 and that Wife ' neglected to advise that H. had been diagnosed with a breathing

problem. As a result, H. was taken to the hospital when she experienced breathing difficulties. After the episode in which H. was taken to the hospital, Wife provided Husband with information about breathing problems that H. had been experiencing. In addition, during H.'s

placement with Wife and after May of 2015, H. was prescribed medication that was not later disclosed to or discussed with Husband. While Wife did provide documentation relative to the prescriptions and contact information for H.'s physician (Husband's Exhibit 49—55B and Wife's Exhibit 11), the information was only provided after Husband made inquiry into the same. The Wife also interfered with Husband's parenting time on Labor Day of 2016 by demanding H. be brought home on Sunday evening of Labor Day weekend of 2016 and by requesting an unnecessary wellness check on H. to be conducted by the Elkhart County Police Department. This Court finds that Wife's interference with Husband's parenting time Labor Day weekend was due to an error on Wife's part as to her understanding of the Parenting Time Guidelines. This Court declines to

sanction Wife for such violation of parenting time finding that the same was not an intentional violation of a court order. Wife is, however, found in contempt of court for failing to timely provide Husband with documentation as to H.'s prescription medications and breathing condition. This Court finds it appropriate to recommend

a sanction of attorney's fees of \$400 based upon the Elkhart County Local Rules of Court. This Magistrate further orders said fees to be paid within 90 days of the Order approving these findings. This Magistrate also believes that the parties should be admonished to use care in their communications to avoid messages which could result in an escalation of existing conflicts or create new conflicts between the parties.

Division of Health Saving Account

The parties resolved nearly all issues relative to division of property during a successful mediation with the exception of the division of the health savings account. (See Mediated Settlement Agreement Husband's Exhibit 57) Paragraph 8 of the

parties' Mediated Settlement Agreement states:

“The health savings account shall be deferred at this time. The Husband's health savings account as of the date of separation shall be divided evenly between the parties which means each party shall receive approximately \$1,645. In the event that the Wife has used all of her share of the health saving account, she shall owe Husband any amount overused. In the event that the Wife has not used her share of the health saving account, she shall receive the remainder of her one-half of the health savings account.”

Both parties presented evidence that all of the funds in the health savings account (HSA) were spent. Husband testified that Wife overspent her one-half share and that the Husband is entitled to a reimbursement of \$611.84. Husband presented Exhibit 61 which, according to Husband, highlighted expenditures by Wife totaling \$2,256.84 or approximately \$612 in excess of her allotted one-half share of said account. Wife produced Exhibit J J , the identical printout

of the HSA account. Wife disputes certain expenditures attributed to her by Husband on JJ by marking the same with an X. Wife admits certain expenditures as hers on JJ which she identified by writing "D.A.'s" in the margin next to the entry. Wife calculates that she used \$1,598.07 and that she under-spent her share and is entitled to \$146.93 to be reimbursed to her by Husband. Wife credibly testified that she was not aware of certain emergency room expenditures.

Husband did refer to certain emergency room visits with H.. Even if, *arguendo*, this Court were to adopt Wife's \$1,598.07 figure, after subtracting the same from Wife's allotted share, the difference is \$46.93 and not \$146.93. Having reviewed both Exhibits J J and No. 61 along with Husband's testimony on October 6, 2016, and Wife's testimony of December 13, 2016, and noting the dearth of additional documentation and noting Husband's testimony that he did not include in his calculations expenditures noted on No. 61 that he was unsure of, this Magistrate finds that more likely than not there were expenditures that benefited H. as well as the parties and that the account

was likely evenly divided. This Magistrate recommends Husband's claim for reimbursement of \$612 and Wife's claim for reimbursement of \$146.93 be denied.

Attorney's Fees

Both parties have made claims for attorney's fees. Husband testified that he is seeking \$35,660 from Wife for reimbursement of attorney's fees.

Husband's Exhibit 68 reflects fees incurred by the Husband with the Law Office of Michael Christofeno. Husband's Exhibit 68 was later redacted to reflect Husband's claim for fees relating to DCS matters and parenting time which Husband contends were related to Wife's false claim that he molested the parties' daughter.

Wife's proposed findings request attorney's fees of \$8,000. Wife's Exhibit KK reflects fees incurred by the Wife with her former attorney, Marty McCloskey, of \$6,650.

Wife's Exhibit GG reflects fees incurred with her current attorney, David L. Joley, up to December 2, 2016, of \$21,663.

Although Mr. Joley's Affidavit does not reflect an hourly rate, it appears, from a review of his fee detail attached to his

Affidavit, that his hourly rate is \$180 per hour. In short, both parties have incurred significant attorney's fees during the pendency of this cause.

As stated, Husband claims attorney's fees were incurred by him as a result of false

allegations made by Wife as to child molesting. During the trial in this cause Husband admitted to conduct which Dr. Berardi described as "poor boundaries." Husband admits engaging in a game in which he allowed H. to spank him. Husband further engaged in a game in which candy was transferred from his teeth to his daughter's teeth. Husband and Wife also allowed H. to sleep in the same bed as he and his Wife often during times in which Husband was not clothed. Husband bathed with H. and his Wife until just before separation. Husband contends, and this Court believes, that the behavior was not with sexual intent. However, Husband's engaging in these behaviors caused Wife to feel uncomfortable and this Magistrate believes likely raised concerns by Wife. Dr. Berardi states in his Psychosexual Evaluation of H. P. (Exhibit 40) at page 18,

“Based on this assessment, there is sufficient data to raise concerns about the veracity of the sexual abuse allegations and the possibility, if not likelihood, that H. is not a victim of sexual abuse, but that she has been intentionally influenced by a hypervigilant mother or a vindictive mother. The latter may be more parsimonious given the poor boundaries that both parents created for H. that D.A. could later rely on to shape a narrative of child sexual abuse in its absence, responding with anger and vindictiveness in the wake of the separation, while creating an atmosphere of fear for H. —fear that became increasingly manifested despite supervision of the father-daughter context since June and ending in H.’s ultimate rejection of her father and grandfather.” While Dr. Berardi’s report places blame at the feet of the Mother, Husband’s conduct, actions and behaviors described as “poor boundaries” contributed to some extent to the environment which resulted in an investigation into Husband’s conduct. While both parties participated in the behavior described as “poor boundaries,” and while Wife later wrongfully alleged a touching incident that this Court finds lacks

credibility based upon consideration of all of the evidence presented, Husband's actions contributed towards the CHTNS filing. I.C. 31-15-10-1 states

“(a) The Court periodically may order a party to pay a reasonable amount for the

cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediations services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

(b) The Court may order the amount to be paid directly to the attorney, who may enforce judgment in his own name.” (emphasis added)

In this case most of the fees that Husband is requesting that are set forth in Exhibit 68 relate to the CHINS proceeding in juvenile court; however, this Court also notes that the proceedings in juvenile court were to some extent intertwined with the proceedings in this dissolution matter because the same were referred to for custody purposes. In this case, this Court

also notes that Husband's earnings are substantially more than Wife's. . (See Child Support Obligation Worksheet attached hereto) and this Court may consider Husband's superior position to pay attorney's fees based on his higher earnings. Troyer v. Troyer 987 NE. 2d

1130 (Ind. App. 2013) After considering the foregoing factors finding that some of the Husband's conduct contributed to the filing of the CHINS petition and also that Wife contributed conduct by allowing and participating in the general behaviors described as poor boundaries and considering Wife's false allegation and Husband's superior earnings, this Magistrate recommends, with the exception of the \$400.00 of attorney fees to be paid by Wife to Husband as set forth above, both parties' requests for attorney's fees be denied and that each party be ordered to pay their respective attorney's fees.

The Fine Mats

Extensive testimony was provided in this case relative to certain fine mats that were constructed by Wife's family while they resided in Samoa. The Wife testified as to

the extraordinary cultural and family significance of the mats and that they were last seen by Wife under the bed used by the Wife's parents in the Middlebury residence. Wife testified that she could not place a monetary value on the mats but rather requested that due to their importance to

her family that the same be returned. Husband testified that Wife's parents vacated the home in Middlebury in December of 2014. Husband also testified that Wife's parents have lived in several locations during the parties' marriage. The Wife's parents were afforded numerous opportunities to remove belongings left with Husband eventually doing so a year after vacating the residence. In light of the importance to the Wife's parents of the mats, this Magistrate finds that Wife's testimony that the same would have been left behind by her parents upon vacating the Middlebury home to lack credibility. This Magistrate recommends that the Husband be ordered to immediately return the mats to the Wife and her parents if the same are located in the Husband's residence in Middlebury, Indiana.

All of which this Magistrate now finds and recommends this of March, 2017.

s/ Dean O. Burton,

Magistrate Elkhart Superior Court 2

ORDER

This Court, having reviewed the foregoing findings and recommendations of the Magistrate in this cause, now approves the same as an Order of this court. The parties are granted joint legal and joint physical custody of their minor child, H. (DOB 06/19/2008), with physical custody to be exchanged on a weekly basis each Sunday. Husband shall pay child support of \$111 per week commencing the first Friday following the entry of this Order. All other findings of the Magistrate are adopted as an Order of this Court.

It is SO ORDERED this day of 31st March, 2017.

s/ Honorable Stephen R. Bowers

Judge, Elkhart Superior Court 2

A65

Court orders that the Husband's first week of physical custody will begin Sunday, April 9, 2017 at 4:00 p.m.

So Ordered this 31st day of March, 2017.

A66

March 31st, 2017 Order Dismissing
Protective Order

STATE OF INDIANA)
COUNTY OF ELKHART)
IN THE ELKHART SUPERIOR COURT
CAUSE NO. 20D02-1507-PO-383

D. P.)
Petitioner)
)
And)
)
D. P.)
Respondent)

FILED
March 31, 2017
Elkhart Superior Court 2

**FINDINGS, RECOMMENDATIONS,
AND ORDER ON PETITION FOR
ORDER OF PROTECTION FILED
JULY 2, 2015, AND PETITIONER'S
RULE TO SHOW CAUSE FILED
SEPTEMBER 9, 2016**

This cause came on for hearing on
October 4th, 5th, 6th, and December 6th,
7th, 8th, 9th, 12th, and 13th, 2016, in
conjunction with evidence heard on the
Petition For Dissolution pending under I

20D02—1412-DR—890. During said proceedings this Magistrate also heard evidence on the Petition For Order of Protection filed in this cause on July 1, 2015, and the Petition For Rule to Show Cause filed in this proceeding on September 9, 2016. The Petitioner appeared in person and by her counsel, Mr. David L. Joley. Respondent appeared in person and by his counsel, Michael Christofeno. On December 6, 2016, Respondent's counsel withdrew his Appearance with Respondent's consent, and Respondent appeared thereafter as a self-represented litigant. At the conclusion of the presentation of evidence and after the parties had submitted their proposed findings of fact, this matter was taken under advisement. This Magistrate now finds and recommends as follows:

The Petitioner's Petition For Order of Protection filed July 1, 2016, is primarily based upon two separate instances which Petitioner states happened in Elkhart County on June 11, 2015, and December 25, 2014. The evidence produced establishes that the parties

were involved in a verbal argument on December 25, 2014, which resulted in the parties' final separation as husband and wife. Credible testimony presented by the parties' neighbors, Diane and Steven Wheatley, who were called to the parties' home by the Respondent during the argument, established that the Respondent had announced his intentions to file a petition to dissolve the parties' marriage and had requested that the Petitioner's family vacate the marital residence. The Petitioner became enraged and was the aggressor in the confrontation. The Petitioner yelled at the Respondent, disclosed medications that the Respondent was taking for a bipolar condition, and repeatedly screamed that the Respondent was kicking her out of the marital residence which comments the Wheatley's testified were not true. The Petitioner testified that the Respondent showed her graphic evidentiary pictures (Respondent is a Deputy Prosecutor) and that "the same thing could happen to her." While this Magistrate believes that such photos were likely shown to the Petitioner, the Respondent stated that

the same was D.P.e while preparing for trials or hearings. The Petitioner also testified that Respondent had obtained a life insurance policy on the Petitioner which this Magistrate finds to not be a basis for an Order of Protection.

In order to obtain an Order of Protection under I.C. 34-26-5, a Petitioner must establish that he or she has been a victim of domestic or family violence; stalking; or a sex offense. Domestic or family violence means, except an act of self defense, the occurrence of at least one of the following by a family or a household member:

- (1-) Attempting to cause, threatening to cause, or causing physical harm to another family or household member.
- (2) Placing a family or household member in fear of physical harm.
- (3) Causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress.

For purposes of LC. 34-26-5, domestic or family violence also includes stalking (as defined by IC. 35-45-10-1) or a sex offense under I.C. 35-42-4 whether or not the stalking or a [sex offense is committed by a family or household member. Stalking is defined as “a knowing or Intentional course of conduct Involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened. The term “course of conduct” means two or more incidents. Myslim v. Myslim 953 NE. 2d 1072 (Ind. App 2011) As used in the stalking law, “harassment” means: “conduct directed toward a victim that includes but is not limited to repeated or impermissible contact that would cause a reasonable person to suffer emotional distress that actually causes the victim to suffer emotional distress. As used in the stalking law, “impermissible contact” includes (but is not limited to): “knowingly or intentionally following

or pursuing the victim.” (LC. 35 -45-10-2 and LC. 35-45-10-3)

This Court finds that Wife has failed to prove the existence of domestic or family violence as set forth in her petition by a preponderance of evidence. While the parties testified to an incident of domestic violence which Husband admitted to kicking the Wife, which incident appears to have occurred in 2009, the same was not referred to in a Petition For Order of Protection and appears to have been an isolated incident. The parties around the same period of time also engaged in behavior in which the Respondent tipped over a television set and damaged a door; however, it appears that both parties participated in said dispute. The Petitioner presented evidence that the Respondent had driven his car to the Petitioner’s residence after the parties had separated. Respondent testified that he simply went to the Petitioner’s residence to determine the reason for Petitioner’s failure to bring the parties’ child to court-ordered parenting time. In any event, the Petitioner did not

establish a “course of conduct” necessary to prove stalking, i.e., two or more incidents. Finally, having observed the parties and having reviewed text messages between them, including messages which appear to have been exchanged under heated conditions and concerning their child’s physical welfare, this Court cannot find that the Respondent presents a credible threat to the Petitioner or her family or that an Order of Protection is necessary to bring about cessation of violence. For these reasons, this Magistrate must respectfully recommend that the Order of Protection be dismissed.

Petitioner’s Rule to Show Cause Filed September 9, 2016

The Petitioner’s Verified Rule to Show Cause filed September 9, 2016, alleges, in summary, that the Respondent attempted to contact the Petitioner by e-mail on February 19th and March 2nd, 2016. In support, a communication from linkedz’n (Wife’s Exhibit C) was sent to the_Wife by e-mail. The communication simply states, “Invitation D.P. P.,

Deputy Prosecuting Attorney at Elkhart County”, and the line below that “D.P. wants to connect with you.” A second communication states, upper right,”D.A. Alailima” below that states, “Hi, D.A.. I’d like to join your linkedin network. D.P. P., Deputy Prosecuting Attorney at Elkhart County,Elkhart, Indiana Area.” Below the message are two boxes marked “View Profile” and a box_with the word “Accept” and below that a box “Change Frequency/Unsubscribe/Help”. The_Respondent, D.P. P., testified that he had joined and/or had a subscription obtained on his behalf, as part of his work at the Elkhart County Prosecutor’s Office. Respondent denied that he ever tried to contact the Petitioner through use of a linkedin subscription. This Court finds that the contents of Exhibit C give an impression of junk e-mail. Moreover, the evidence presented in this case reflects that the parties were both represented by counsel at the time the messages were allegedly sent, and it appears that any necessary communication could have been accomplished during this period of time through the parties’ respective

attorneys. In summary, this Court is not convinced that the Respondent attempted contact the Petitioner through the linked in site, but that the same occurred as a result of the Respondent's subscription to the linkedin site. Finally, this Court notes that any communication relative to the children could have been accomplished by a text message, the medium adopted by the parties later in their dissolution proceedings, and that communication by text message would have left the parties with a written record of their communications to avoid any violation of the Order of Protection. This Court finds that the Petitioner's Verified Showing of Non-Compliance was not proven by a preponderance of evidence.

All of which this Magistrate now finds and recommends this 27th of March, 2017.

s/ Dean O. Burton Magistrate
Dean O. Burton Elkhart Superior Court
II

This Court having reviewed the above and foregoing findings of the Magistrate now approves the same as an Order of this Court. The Petition for Order of Protection filed in this cause on July 1, 2015, is dismissed. Honorable Stephen R. Bowers

s/ S E Bowers

Judge, Elkhart Superior Court II

So Ordered : **March 31, 2017**

Elkhart County Courts Seal Indiana

A77

Indiana Court of Appeals February 28th,
2018 Order Denying Appeal

IN THE
COURT OF APPEALS OF INDIANA
D.A.,
Appellant-Petitioner/Respondent,
v.
D.P.,¹
Appellee-Respondent/Petitioner.1

February 12, 2018

Court of Appeals Case No. 20A03-1705-PO-
966

Appeal from the Elkhart Superior Court

The Honorable Stephen R. Bowers, Judge
The Honorable Dean O. Burton, Magistrate
Trial Court Cause Nos.
20D02-1412-DR- 890
20D02-1507-PO-383

1

In this consolidated appeal, D.A. was the petitioner in the protective order action and the respondent in the earlier-filed dissolution action, and D.P. was the converse.

Kirsch, Judge.

This consolidated appeal stems from two trial court orders, one that dissolved the marriage of D.A. (“Mother”) and D.P. (“Father”) and another that dismissed Mother’s request for an order of protection. Mother raises several issues, which we consolidate and restate as: whether the trial court erred when it denied Mother’s verified petition for change of venue from the county.

[2] We affirm. ²

Facts and Procedural History

³Mother and Father married in April 2007, and they had one child (“Child”) together,

² In July 2017, this court issued an order granting D.A.’s request to consolidate related appeals, Appellate Case Number 20A04-1705-DR-971 with Appellate Case Number 20A03-1705-PO-966, and directing that all further filings be made under PO-966.

³ After an initial CHINS adjudication, the CHINS cause was transferred because the Elkhart Circuit Court, where Father practiced as a deputy prosecutor, has jurisdiction over juvenile matters; the matter was transferred to the Marshall Circuit Court. *Tr. Vol. II* at 9; *Tr. Vol. III* at 25.

born in 2008. On December 31, 2014, Father filed a Petition for Dissolution of Marriage in Elkhart Superior Court #2 (“Elkhart Superior #2”) under cause number 20D02-1412-DR-890 (“Cause 890”). *Appellant’s App. Vol. II* at 3. The Honorable Stephen R. Bowers (“Judge Bowers”) was and is the presiding judge in Elkhart Superior #2, which is located in Elkhart, Indiana. At the time of the dissolution filing, Father was employed as a Deputy Prosecuting Attorney for Elkhart County and was at all relevant times assigned to cases out of Elkhart Circuit Court, located in Goshen, Indiana.

During the early pendency of the dissolution proceedings, the parties filed agreed provisional orders concerning custody and visitation. Mother later sought and obtained modification of the provisional orders, alleging that Father had committed child abuse, physical and sexual in nature, on Child, and mother asked for restricted visitation, psychological assessments, and appointment of a guardian ad litem. The trial court appointed a guardian ad litem and ordered the parties to mediation. In May 2015, the Indiana Department of Child Services (“DCS”) filed a petition in Elkhart

Circuit Court alleging that Child was a Child in Need of Services (“CHINS”), related to allegations of sexual abuse by Father against Child and allegations against Mother of neglect for failing to protect Child from the abuse. The CHINS action was removed from Elkhart Circuit Court and transferred to Marshall County on June 3, 2015 in cause number 50C01-1506-JC-24.3 *Id.* at 21. Initially, DCS substantiated the allegations; however, after a psychosexual assessment by court-appointed Dr. Anthony Berandi (“Dr. Berandi”), who opined that he did not believe that Child was sexually abused by Father and that Mother’s conduct was alienating Father, and after an administrative appeal filed by Father, DCS “unsubstantiated” the sexual abuse allegations against Father as well as the associated neglect allegations against Mother. *Appellant’s Br.* at 25, 26. In early November 2015, Child was removed from Mother’s care and placed in foster care for eight months. In July 2016, DCS filed a Motion to Terminate Jurisdiction in the Marshall Circuit Court due to reunification. *Appellant’s App. Vol. II* at 25.

Meanwhile, on July 1, 2015, Mother filed for and received an Ex Parte Order for Protection in Elkhart Superior #2 under cause number 20D02-1507-PO-383 (“Cause 383”), enjoining Father from threatening to commit or committing acts of domestic violence or a sex offense against Mother. *Id.* at 15, 74-75.

On September 9, 2016, Mother filed in the dissolution action a Verified Petition for Change of Venue (“Verified Petition”) in Elkhart Superior #2 under Cause 890. *Id.* at 78. Her petition alleged that, due to Father’s status as a Deputy Prosecuting Attorney for Elkhart County, Father had an undue influence in the county due to Father’s relationships and employer that required a change of venue to another county. In support, Mother’s Verified Petition stated, among other things, that on March 2, 2016, she had reported violations of the Cause 383 Protective Order to the Sheriff’s Office in LaGrange County, where Mother lived, and that the reported information was not sent to the LaGrange County Prosecutor and, instead, was forwarded to Elkhart County Prosecutor, Curtis T. Hill, Jr. (“Hill”); Mother received a

letter from Hill in June 2016 stating that the matter should be addressed in either the pending dissolution proceeding or the pending protective order proceeding, both in Elkhart Superior #2. *Id.* at 78-79, 85.

A few days later, at a September 12 preliminary hearing, Judge Bowers heard arguments on Mother's Verified Petition. Judge Bowers noted that Indiana Code section 34-35-1-1, governing change of venue from the county, requires a change if Father "has an undue influence over the citizens of the county," and, here, the dissolution matter was a bench trial, "so it's not like you can't get a good jury, you D.P.'t get a jury anyway[,] " making the citizens of the county element inapplicable. *Tr. Vol. II* at 7. Counsel for Mother urged that Father's employment with the prosecutor's office and the letter from Hill to Mother illustrated Father's influence in the county. Judge Bowers advised:

"I know that [Father] works for the prosecuting attorney's office. I've had some passing contact with him, but he doesn't practice in my court. He's not someone I have to deal with on a daily

basis and so I D.P.'t feel that my judgment is in any way compromised by the fact that he works for the prosecuting attorney.

Id. As for Hill, Judge Bowers assured, "I can tell you for sure Mr. Hill carries no particular[] weight with me." *Id.* at 8. Judge Bowers concluded that the concerns raised by Mother did not have anything to do with his ability to rule on or handle the dissolution matter and finding that Mother's Verified Petition was not sufficiently supported, the court denied it. *Id.* at 9.

In October 2016, Judge Bowers assigned the upcoming evidentiary hearings on the dissolution matter to Magistrate Dean O. Burton ("Magistrate Burton"), who is "an appointed Magistrate with the Elkhart Courts." *Appellant's App. Vol. II* at 8; *Appellant's Br.* at 22. No party voiced concern about or objection to the assignment. The parties proceeded with a bench trial before Magistrate Burton on October 4 through October 6, 2016.

On October 4, 2016, before trial began, Mother's counsel again raised the issue of

Mother's request for a change of venue. *Tr. Vol. III* at 22-29. After confirming that the request had already been heard and decided by Judge Bowers, Magistrate Burton advised Mother that he was not in a position to change that ruling, and any motion to correct error would need to be filed with Judge Bowers in Elkhart Superior #2. Counsel for Mother acknowledged that the Verified Petition had already been heard and decided, and he explained that he wanted to present argument only as an offer of proof, to show Father's standing in the community and his influence over the investigation of any violation of the protective order resulted in Mother's inability to receive the same treatment in court as would Father. *Id.* at 24, 26.

The trial commenced, and the dissolution and child custody matters were bifurcated. Magistrate Burton entered findings on the issue of dissolution on October 18, 2016. A judicial election was held in Elkhart County in November 2016, and Father's trial counsel, Michael Christofeno ("Christofeno") won the seat for judge of Elkhart Circuit

Court, with his term to begin in January 2017.

Trial resumed December 6 through December 13, 2016, on the remaining issues. After Father completed his testimony on December 6, 2016, Christofeno filed in court a Motion to Withdraw his appearance, which the trial court granted, and Father proceeded with the remainder of the trial as a pro se litigant. *Tr. Vol. VI* at 47-49. During Mother's testimony, she testified to having been contacted by Father via text message, which she believed violated the existing protective order, and, therefore, she contacted the LaGrange County Sheriff's Office about the alleged violation. Mother's counsel requested and received permission at trial to present Mother's testimony as an offer of proof with regard to her Verified Petition for Change of Venue, and Mother testified to (1) receiving in the mail the letter from Hill and (2) being contacted by the LaGrange County Prosecutor's Office and meeting with a prosecutor and an investigator. *Tr. Vol. XI* at 106-10. The offer of proof was to support Mother's contention that, because of Father's status in the community, she

believed she would be unable to get a fair trial in Elkhart County. *Id.* at 112.

Trial lasted through December 13, 2016, and, at the court's request, both parties submitted proposed findings of fact and conclusions of law. On March 29, 2017, Magistrate Burton entered Findings, Recommendations, and Order ("Order"), which among other things ordered as follows: awarded both parties joint legal custody and physical custody of Child, which was consistent with the guardian ad litem's recommendation; ordered that the parties were to share expenses in line with the Child Support Worksheets entered into evidence; ordered that the parties would alternate in claiming the Child as a dependent for tax purposes; denied Father's Motion for Reimbursement for Overpayment of Federal and State Taxes; denied Father's Verified Showing of Non-Compliance against Mother; and denied both parties' request for the opposing parties to pay attorney's fees. *Appellant's App. Vol. II* at 96-127. Magistrate

Burton's Order included a specific section regarding "Wife's Motion for Change of

Venue,” observing that (1) Judge Bowers originally ruled on and denied the motion, (2) Mother presented an offer of proof, and (3) the evidence offered did not establish under Indiana Code section 34-35-1-1 that a change of venue was warranted. *Id.* at 96-98. Judge Bowers approved the Order on March 31, 2017.

As to Mother’s request for a protective order, Magistrate Burton issued a separate Findings, Recommendations, and Order and determined that (1) Mother failed to prove the existence of domestic or family violence as set forth in her original petition, (2) Father did not present a credible threat to Mother or her family, and (3) an order of protection was not necessary to bring about cessation of violence; therefore, Magistrate Burton recommended that the Protective Order Petition be dismissed. *Id.* at 133-34. Judge Bowers approved the recommendation and dismissed Mother’s petition for order of protection on March 31, 2017. *Id.* at 135. Mother now appeals.

Discussion and Decision

Mother asserts that the trial court erred when it denied her Verified Petition that

sought a change of venue from Elkhart County. In her Verified Petition, Mother argued that she was entitled to a change of venue pursuant to Indiana Code section 34-35-1-1, which states, in relevant part:

The court or the judge shall change the venue of any civil action upon the application of either party, made upon affidavit showing one (1) or more of the following causes:

(3) The opposite party has an undue influence over the citizens of the county, or an odium attaches to the applicant or to the applicant's cause of action or defense, on account of local prejudice.

Ind. Code § 34-35-1-1(3); *Appellant's App. Vol. II* at 77-80. The decision to grant or deny a change of venue from the county will be reviewed for abuse of discretion. *Eads v. State*, 677 N.E.2d 524, 525 (Ind. 1997).

Mother's appeal primarily asserts a due process argument, namely that the trial court violated her state and federal due

process rights to a fair trial and to a fair and impartial judge when it denied her motion for a change of venue. A trial before an impartial judge is an essential element of due process. *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010). Bias and prejudice violate a party's due process right to a fair trial only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding. *Id.* at 1288.

Here, Mother argues that the situation as a whole leads to the conclusion that her due process rights were violated, and she points to several factors in support of her position. First, she urges that, although she reported a violation of the protective order in LaGrange County, her complaint was not forwarded to the LaGrange County Prosecutor and was, instead, somehow routed to Hill, Father's boss, who then sent a letter to Mother and told her to pursue the matter in Elkhart County, either in the pending dissolution action or the pending protective order action. Second, Mother points to the circumstances

surrounding the DCS CHINS case, where allegations of sexual abuse by Father to Child were, first, substantiated, and then unsubstantiated “based upon a dubious theory,” and after the Child was placed in foster care for a period of months, the case was dismissed. *Reply Br.* at 9.

Third, Mother relies heavily on the fact that Father’s trial counsel, Christofeno, later became the judge of Elkhart Circuit Court and, in that position, necessarily would be approving or not approving future findings and recommendations of Magistrate Burton, who was a magistrate for all the Elkhart County courts. Mother’s theory is as follows: (1) Father’s prior attorney, Christofeno, was elected the judge of Elkhart Circuit Court in November 2016, effective January 2017; (2) Magistrate Burton, as a magistrate of all of the Elkhart County courts, would be issuing findings in cases (not this one, but others) that Judge Christofeno ultimately would be approving or not approving; and (3) therefore, Magistrate Burton “would soon be working ... as the surrogate and

subordinate of” Judge Christofeno, and some impropriety existed by having Magistrate Burton preside in the dissolution and protective order proceedings, where Christofeno had advocated for Father. *Appellant’s Br.* at 23. Mother concedes that Magistrate Burton was at all times conscientious, thorough, and fair, but argues that, because Father’s trial counsel later became Elkhart Circuit Court judge, and Magistrate Burton would therefore necessarily “be working under” Christofeno, she was denied a fair trial. *Appellant’s Br.* at 32. She argues that these several circumstances, taken together, illustrate that her due process rights were violated to the extent that the case should have been transferred out of Elkhart County. We disagree.

As an initial matter, we recognize Father’s suggestion that, prior to her appeal, Mother did not raise any opposition or argument with respect to Magistrate Burton presiding over her trial, and her argument is therefore waived. *Appellee’s Br.* at 10. In response, Mother urges that her Verified Petition

was based not only on Indiana Code section 34-35-1-1, it “was also based on the Indiana and United States’ Due Processes Clauses[,]” and, thus, the issue of a denial of due process, including that Magistrate Burton “ended up working as a magistrate for [Christofeno]” was “solidly before the Court at trial” and was not waived. *Reply Br.* at 4, 7. Assuming without deciding that Mother did not waive her argument with respect to Magistrate Burton, we find no due process violation occurred.

The timeline reflects that Christofeno won the judicial seat in November 2016. The latter portion of the bifurcated dissolution trial took place in December 6 through 13, 2016, and after Christofeno completed his examination of Father, he withdrew as counsel on December 6, 2017. Mother had an opportunity, after the election and before trial, to voice any concerns about Christofeno becoming the judge of Elkhart Circuit Court and any alleged potential conflict with Magistrate Burton stemming from Christofeno’s newly-elected position; she did not do so.

The last day of trial was December 13, 2016, and, over two weeks later, Christofeno was sworn in as judge of Elkhart Circuit Court on January 1, 2017. The record before us reveals that Mother voiced no objection to Magistrate Burton presiding over her trial, and she has not alleged, nor do we find, that Magistrate Burton acted in a manner that was biased or that Mother was prejudiced. Mother has failed to show that she was denied a fair trial because Magistrate Burton presided over her trial.

Likewise, we reject Mother's claims that she was denied due process and a fair trial for reasons associated with (1) DCS's reversal of its position concerning CHINS allegations, and (2) the letter from Hill that, Mother claims, shows that Father's boss "intercepted" her complaints alleging violation of the protective order. *Reply Br.* at 5. As to the CHINS matter, DCS initially substantiated allegations, but after receiving a report from court-appointed Dr. Berardi, which opined that Child had not been sexually abused and that

Mother's conduct was alienating Child from Father, DCS unsubstantiated the claim. Dr. Berardi testified at trial and was cross-examined by Mother's counsel on his findings and opinions. As to Hill's letter, Mother presented this evidence as an exhibit to her Verified Petition, and she made two subsequent offers of proof about it, testifying that she had contacted LaGrange Sheriff's Office to report that Father had violated an existing protective order, namely Cause 383 issued by Elkhart Superior #2, and that Hill wrote to her about it. Both Judge Bowers and Magistrate Burton found that the letter from Hill, telling Mother to pursue her complaints in the pending protection order action in Elkhart Superior #2 or in the pending dissolution action, did not evidence undue influence or otherwise require a change of venue. We agree and find that Mother has not proven that she was prejudiced or denied a fair trial.

Father urges that Mother's appeal asserts only due process arguments and appears to have abandoned her trial court claim that she was statutorily

entitled to a change of venue under Indiana Code chapter 34-35-1 by virtue of Father's role as a deputy prosecuting attorney in Elkhart County and his status and influence in the judicial system associated with that position. *Appellee's Br.* at 13 n.2. Mother responds that she has not abandonD.P.ed that claim and maintains that she was entitled under the statute to a change in venue. We agree with Father that, primarily, Mother's appellate arguments focus on the position that she was denied a fair trial and due process, but because she does refer to and include argument regarding Indiana Code section 34-35-1-1, *Appellant's Br.* at 30-31, we will address whether the trial court should have granted a change of venue pursuant to that statute.

Under Indiana Code section 34-35-1-1(3), and as is relevant here, the court shall change the venue of any civil action upon the application of either party if "[t]he opposite party has an undue influence over the citizens of the county, or an odium attaches to the applicant or to the applicant's cause of action or defense, on

account of local prejudice.” Here, the trial court held a hearing on the matter on September 12, 2016, at which Mother’s counsel argued to Judge Bowers that, due to Father’s employment with the Elkhart County Prosecutor’s Office, Father possessed influence in the county and in the judicial processes, as reflected by the letter she received from Hill, and consequently, Mother would be prevented from receiving a fair trial, and a change in venue was necessary. Mother was permitted on two subsequent occasions, October and December 2016, to present argument and testimony as an offer of proof regarding the matter.

Based on the record before us, we find that Mother has presented no facts to show that Father’s job as a deputy prosecutor for Elkhart County resulted in an undue influence of Judge Bowers or Magistrate Burton. Father was an employee of the Elkhart County Prosecutor’s Office, but did not practice in Elkhart Superior #2 and did not work for Judge Bowers or Magistrate Burton.

Mother does not point to any act or ruling at trial that was prejudicial to her. She has failed to meet her burden of proof to show that the trial court abused its discretion when it determined that she had not established the grounds under Indiana Code section 34-35-1-1 for a change of venue from the county. Accordingly, we find that the trial court did err when it denied her Verified Petition for Change of Venue from the county.

Affirmed.

Bailey, J., and Pyle, J., concur.

A99

**Indiana Supreme Court Order Denying
Transfer**

Dated May 17th, 2018

A100

In the Indiana Supreme Court

Court of Appeals Case No.

20A03—1705-PO-OO966

Trial Court Case No.

20D02-1507-Po-383

20D02-1412—DR—890

D. A.,

Appellant(s),

V

D. P., Appellee(s)

Filed

May 17, 2018, 1:08 pm Clerk Indiana
Supreme Court, Court of Appeals and
Tax Court

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the

submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, On
5/17/2018

s/ Loretta H. Rush

Loretta H. Rush

Chief Justice of Indiana

All Justices concur.

A102

**Petitioner's Verified Petition for
Change of Venue filed September 9th,
2016**

D. P., II
Petitioner

And

D.A. P.,
Respondent

**Filed: 9/9/2016 12:01:52 PM
Elkhart Superior Court 2
Elkhart County, Indiana**

VERIFIED PETITION FOR CHANGE OF VENUE

COMES NOW, Respondent D.A. P., after having first been duly sworn upon oath, moves the Court according to I.C. 34-35-1 and the Due Process Clause of both the Indiana and United States' Constitutions to transfer this cause to another county, based upon the following facts:

1. There is currently a final hearing scheduled in this matter on October 4th and 7th, 2016.
- 2.
3. IC. 34-35-1 states in relevant part:
 - a. “The Court or the Judge shall change the venue of any civil action upon the application of either party, made upon affidavit showing: (3) The opposite party has an undue influence over the citizens of the county, or an odium attaches to the applicant or the applicants cause of action or defense, on account of local prejudice.”
4. Respondent states there is good cause showing to transfer jurisdiction of this matter to another county pursuant to I.C. 34-35-1, based upon the Petitioners status in Elkhart County.
5. The Petitioner is a Deputy Prosecuting Attorney in Elkhart County, IN, and has been a Deputy Prosecuting Attorney in Elkhart County for over ten (10) years.

6. Petitioner has made statements in the past that he would be able to sway Court's decisions in this County.
7. A civil protective order was granted in this matter on July 15', 2015 under cause number 20D02-1507-PO-383.
8. Respondent/Mother made reports of violations of the protective order to the Lagrange County Sheriff's Department on March 2nd, 2016, based messages sent to her in Lagrange County by the Petitioner on February 19th and March 2nd, 2016, which are attached and marked as Exhibit "A".
9. For reasons unknown to the Affiant, this information was not sent by the Lagrange County Sheriffs Department to the Lagrange Prosecutor where Affiant lives, received the correspondence, and made the report but instead was forwarded to the Elkhart Prosecutor, Mr. Curtis Hill, whom is the Petitioner's employer. Elected Prosecutor Curtis Hill's correspondence is attached and marked as Exhibit "B".

10. Affiant was subsequently contacted by the Lagrange County Prosecutor's office and a meeting was requested. They informed Affiant that the Lagrange Prosecutor's Office was not made aware of the reports and were very concerned by this.
11. The Elected Prosecutor Mr. Curtis Hill, Jr. is a potential witness in these dissolution proceedings, as he participated in an evaluation that the Respondent believes the Petitioner has asked the Guardian Ad Litem, Ms. Pauline Michalos, to review and use in regards to her recommendation.
12. A Child In Need of Services matter involving the Parties was previously transferred to Marshall County, Indiana.

All of these facts, lead to the conclusion that there is an undue amount of influence that the Petitioner holds in this County due to his relationships, employer, and the above facts.

WHEREFORE, Respondent requests that the Court transfer this case, and all

papers and files pertaining to it and certified copies of all orders of the Court pertaining to the dissolution of marriage and protective order proceedings herein to another County agreeable by all parties.

I AFFIRM, UNDER THE PENALTIES FOR PERJURY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT, TO THE BEST OF MY KNOWLEDGE AND BELIEF.

s/ D.A. P.