

**March 21, 2003**

**PUBLIC ADMONITION**

**OF**

**THE HONORABLE J. STEVEN COX  
JUDGE OF THE FRANKLIN CIRCUIT COURT**

The Indiana Commission on Judicial Qualifications, having determined that formal disciplinary charges are warranted, issues instead this Public Admonition of the Honorable J. Steven Cox, Franklin Circuit Court. This Admonition is pursuant to Supreme Court Admission and Discipline Rule 25 VIII E (7), and is issued with the consent of Judge Cox, who cooperated fully with the Commission in this matter.

The Commission admonishes Judge Cox for entertaining and granting an *ex parte* petition for change of custody without prior notice to the custodial parent or her counsel. The Commission concludes that Judge Cox violated Canon 3B(8) of the Code of Judicial Conduct and that he failed to abide by Trial Rule 65(B). (See, *In Re Anonymous*, 729 N.E.2d 566 (Ind. 2000); Commission Advisory Opinion #1-01).

K.H. and B.K. were divorced in Franklin County, Indiana in 1996. The Court awarded custody of the parties' two children to the mother, K.H. In 1997, K.H. and B.K. entered into a joint custodial arrangement, wherein they agreed that they would share joint custody of their son, who would reside in Franklin County, apparently with the father's parents. The agreement included the following language: "The parties agree that this is a temporary arrangement and will continue so long as the [mother] feels it is in the best interest of their son...to have this arrangement."

Although the exact details are not necessarily pertinent to the Commission's conclusions, it appears that between 1997 and July, 2002, the parties' son lived for a significant period of time with his paternal grandparents in Indiana, and lived for some time, including during the first half of 2002, with his mother in Ohio. The Indiana dissolution decree had been registered in Ohio, and, on June 28, 2002, the mother filed a proceeding in Ohio to modify the father's child support obligations. Throughout this time, the 1997 agreement that the custodial and living arrangement was subject to the mother's discretion continued in effect.

In 2002, conflicts allegedly arose among the mother and the father and paternal grandparents concerning the child's best interests. On July 1, 2002, the father filed in the Franklin Circuit Court a Verified Petition to Modify, in which he alleged a material change in circumstances and alleged it was in the son's best interests to reside with the paternal grandparents, "[Mother's] determination of what she feels is in the best interest of such child notwithstanding." The motion included no certificate of service.

On July 8, 2002, the father, now by counsel, filed a Petition for Emergency Custody of Child, in which he asked the court to issue an Order granting temporary custody to the grandparents. He asserted that a "conflict has arisen as to whether the child should reside with a parent, or the paternal grandparents with whom he has resided; an emergency exists, and the undersigned requests the Court to grant the paternal grandparents...temporary custody of the child...pending a hearing." This petition included a certificate of service to the mother's Ohio attorney, showing the Petition was mailed that day. Included with the petition was an affidavit from the grandfather alleging that the child had lived with the paternal grandparents "excepting periods of time in early 2002 when he resided with his mother," that the child was ill and "there exists a conflict between the child's parents as to where the child should live, that the child "has refused to go to the residence of his mother, and that he believed it to be in the best interest of the child to reside with the grandparents and, because the child required treatment at an Ohio hospital, he "believes conflict at the hospital will result unless an Order is in place as to the custody of the child pending a...hearing."

Two days later, on July 10, 2002, before the mother's Ohio attorney received service from the Indiana attorney of the July 8 emergency petition, Judge Cox issued an Order stating that "an emergency exists" and gave custody of the child to the paternal grandparents pending a hearing (on July 18, 2002). Prior to issuing the Order, Judge Cox first contacted the Office of Family and Children in an effort to determine whether a CHINS proceeding was appropriate in lieu of the emergency custody proceeding.

Before granting an *ex parte* custody Order, Trial Rule 65(B) requires the petitioner to state under oath the specific facts establishing the irreparable harm which would occur if an Order is not issued *before* the opposing party has the opportunity to be heard, as well as to certify what efforts at notice were made, or why notice should not occur at all. Petitioner's motion included neither, only a certification that the Motion was mailed that day to Ohio counsel. The issue is not only whether extraordinary circumstances are present, but whether prior notice would result in harm. In this case, the Petitioner's own attorney was aware of the identity of the mother's Ohio counsel, as well as the mother's whereabouts, but apparently made no effort to give prior notice. Although the attorney's petition included the name and address of Ohio counsel, Judge Cox made no effort to contact him, or the mother, prior to granting the request. Many facts about the child's best interests and the length of time the child had spent with the mother in 2002 were in dispute; had Judge Cox entertained the

mother's arguments on a temporary custody change, he may have gleaned additional, or contradictory, information than that set out in the *ex parte* pleadings. Judge Cox believed he was preserving the status quo. However, he was apprised of the nature of the alleged status quo by only one side.

Trial Rule 65(B) also requires the judge to define in his order the nature of the emergency and to state why it is irreparable and why the order was granted without notice. Judge Cox deviated from Trial Rule 65(B) in this regard as well. The Commission recognizes that Judge Cox was presented with a compelling plea from the father and grandparents, given the serious illness facing the parties' son and their other allegations. This fact, however, is an equally compelling reason to have allowed the mother a chance to be heard before a modification.

The Commission once again refers the Indiana bench and bar to *In Re Anonymous*, 729 N.E.2d 566 (Ind. 2000), to *In Re Kern*, 774 N.E.2d 878 (Ind. 2002), to Commission Advisory Opinion #1-01, and to Trial Rule 65(B). Judge Cox is now admonished for deviating from the principles outlined therein.

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Questions about this Admonition may be directed to Meg Babcock, Counsel for the Commission, at (317) 232-4706.