

SUPREME COURT OF INDIANA

In re the Marriage of Julie Marie Bojrab v. George David Bojrab

810 N.E.2d 1008 (Ind. 2004) · No. No. 02S03-0308-CV-365 · Decided June 28, 2004

SUMMARY

The Indiana Supreme Court held that a trial court may not order an automatic prospective change of custody upon a future relocation, but may condition a present custody award on the continuation of existing residence circumstances. The court also held that failure to take an interlocutory appeal from a provisional support or maintenance order does not waive the right to challenge the issue on appeal from the final judgment. The court nevertheless upheld the denial of retroactive modification because the trial court did not abuse its discretion.

CASE DETAILS

COURT	Supreme Court of Indiana
WRITING FOR THE COURT	Justice Dickson; Chief Justice Shepard; Justice Sullivan; Justice Boehm; Justice Rucker
JURISDICTION	Indiana
DECIDED	June 28, 2004
DOCKET	No. 02S03-0308-CV-365
DISPOSITION	affirmed
PROCEDURAL POSTURE	Following a dissolution decree, the wife appealed and the husband cross-appealed. The Indiana Court of Appeals affirmed in part and reversed and remanded in part. The Indiana Supreme Court granted transfer and addressed only conditional prospective custody modification and whether failure to take an interlocutory appeal waived a challenge to denial of retroactive modification of provisional support and maintenance.
STANDARD OF REVIEW	The denial of retroactive modification of provisional support and maintenance is reviewed for abuse of discretion. The court considers the facts most favorable to the judgment without reassessing credibility or reweighing the evidence.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Julie Marie Bojrab v. George David Bojrab

TOPICS

relocation

child custody

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spousal support

PRACTICE AREAS

family law

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QUESTIONS PRESENTED

1. Whether a trial court may prospectively order an automatic change of child custody upon a future relocation by the custodial parent.
2. Whether a party waives a challenge to a provisional support or maintenance order by failing to pursue an interlocutory appeal.
3. Whether the trial court abused its discretion by denying the husband's request for retroactive modification of provisional child support and maintenance.

HOLDINGS

1. A trial court may not order an automatic prospective change of custody upon the occurrence of a future relocation because a custody modification must comply with Indiana Code section 31-17-2-21. The court may, however, make a present custody determination conditioned on the continuation of specified present circumstances, such as the children's residence in a particular county.
2. A party does not waive the right to challenge a provisional order for support or maintenance by failing to take an interlocutory appeal; the claimed error may be raised on appeal from the final judgment.
3. The trial court did not abuse its discretion in denying the husband's request for retroactive modification of provisional support and maintenance.

KEY QUOTATIONS

"We agree that a trial court may not prospectively order an automatic change of custody in the event of any significant future relocation by the wife." (810 N.E.2d at 1012)

"There is a significant difference between the two phrases. One purports to automatically change custody upon the happening of a future event; the other declares that the present award of custody is conditioned upon the continuation of the children's place of residence." (810 N.E.2d at 1012)

"A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal from the final judgment." (810 N.E.2d at 1014)

FACTUAL BACKGROUND

Julie and George Bojrab's marriage was dissolved after they had three children. The trial court awarded the wife custody but stated that custody was subject to the children's remaining in Allen County, Indiana, and further stated that custody would be granted to the husband if the wife relocated without agreement or further court order. During the dissolution proceedings, the husband voluntarily left a medical practice, began a new pain-management practice, and sought retroactive reduction of provisional child-support and maintenance obligations

based on decreased income. The trial court found that he could have remained in his prior position, had the capacity to pay, and had not shown grounds for retroactive modification.

PROCEDURAL HISTORY

The marriage was dissolved by decree on March 28, 2002. The Court of Appeals affirmed in part and reversed and remanded in part. The Supreme Court granted transfer, resolved two issues, and summarily affirmed the Court of Appeals on all remaining issues under Indiana Appellate Rule 58(A)(2).

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The Supreme Court affirmed the custody ruling and the denial of retroactive modification. It summarily affirmed the Court of Appeals on the remaining issues, under which the trial court was affirmed in part and reversed and remanded in part. The Court of Appeals had remanded for modification of the relocation restriction to conform to Indiana Code section 31-17-2-23.

CASES CITED

- Bojrab v. Bojrab, 786 N.E.2d 713 (Ind. Ct. App. 2003)
- Hanks v. Arnold, 674 N.E.2d 1005 (Ind. Ct. App. 1996)
- Georgos v. Jackson, 790 N.E.2d 448, 452 (Ind. 2003)
- Elliott v. Elliott, 634 N.E.2d 1345, 1348-49 (Ind. Ct. App. 1994)
- Ullery v. Ullery, 605 N.E.2d 214, 215 (Ind. Ct. App. 1992)
- Crowley v. Crowley, 708 N.E.2d 42, 50 (Ind. Ct. App. 1999)
- Burbach v. Burbach, 651 N.E.2d 1158, 1162 (Ind. Ct. App. 1995)
- Indiana High School Athletic Assoc. v. Raike, 164 Ind. App. 169, 191, 329 N.E.2d 66, 80 (1975)