

Children's Law Center of Indiana



Custody and Parenting Time (Relocation)

8/7/14

In **Gold v. Weather**, 14 N.E.3d 836 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the dissolution court's order granting Mother's motion to relocate with the child and denying Father's petition to modify custody. *Id.* at 847. The child, a daughter, was born on August 7, 2008, and her paternity was established by affidavit when she was nearly eight months old. Father lived in Indianapolis with his wife and their two children, ages eight years old and two years old. Father worked part-time, and was a fulltime student who expected to receive his degree in occupational therapy by the end of 2014. Mother, a registered nurse, lived in Terre Haute prior to July 2011, where the child's maternal grandmother, fifteen-year-old aunt, and ten-year-old uncle also lived. On September 9, 2009, Father filed a petition to establish custody, parenting time, and child support. On March 1, 2010, Mother filed a petition seeking protection from Father's wife, which the trial court denied. On March 19, 2010, the trial court approved the parties' preliminary agreement, under which Mother retained physical custody, Father received parenting time, and the parties agreed that only Mother and Father would transport the child for parenting time exchanges, which would take place in Greencastle. Father filed two contempt motions against Mother, but the trial court did not find Mother in contempt, instead ordering that all non-emergency communication between the parents must be by email, and that Father was entitled to eight full hours of parenting time with the child. On September 16, 2010, per the parties' agreement, the trial court issued an order: (1) recognizing Father as the child's biological father; (2) awarding physical custody to Mother; (3) awarding Guideline parenting time to Father; and (4) ordering Father to pay \$63.00 per week child support. On Christmas Day of 2010, Father picked up the child for parenting time at 2:00 p.m., but the return exchange did not occur, Mother called the police alleging that Father had kidnapped the child, and Indianapolis Police officers retrieved the child from Father's home and returned her to Mother. Following Christmas Day, Mother denied Father access to the child. Father sent numerous email messages to Mother and drove to the exchange point in Greencastle, but his efforts to see the child were unsuccessful. For the next five months, Mother withheld parenting time. On May 12, 2011 Father filed a verified motion for contempt. On May 23, 2011, Mother sent an email to Father informing him that she intended to relocate with the child to Atlanta, Georgia in July 2011. Less than an hour later, Father replied, informing Mother that her email notice was insufficient notice according to the State guidelines. Having received no response from Mother, Father sent another email on June 8, 2011, stating that he disagreed with the child being taken to another state. On

June 17, Mother filed her official notice with the trial court, declaring her intent to relocate to Stockbridge, Georgia, because of her job relocation and the relocation of the child's maternal grandmother, maternal aunt, and maternal uncle. On June 29, 2013, Father filed a Verified Emergency Motion for Rule to Show Cause and Objections to Notice of Intent to Relocate Residence, arguing that Mother had denied his parenting time, and that the relocation would inhibit his ability to exercise parenting time. Without waiting for the court's permission, Mother relocated, and, within a few months, began living in Dallas, Georgia in a five bedroom house with maternal grandmother, aunt and uncle. After moving, Mother secured a higher paying nursing job than she had in Terre Haute.

After Mother relocated, Father did not have any parenting time or communicate with the child, and, by December of 2011, Father had not had any parenting time for nearly a year. Upon Father's expedited motion for a hearing, the trial court issued an order specifying Father's 2011 holiday parenting time. On December 28, 2011, Father filed a motion to modify the child's legal and physical custody. The trial court had to convene the parties on two additional occasions to designate Father's spring break and summer time parenting time schedules. On August 8, 2012, more than a year after Mother moved to Georgia, the trial court conducted a hearing on Father's objection to the relocation, accepting evidence solely on the issues of whether Mother's relocation was made in good faith and for a legitimate reason. On October 15, 2012, the court issued findings of fact and conclusions thereon and determined that Mother had satisfied her burden to prove that the relocation was proposed in good faith and for a legitimate purpose. On October 19, 2012, Father moved for certification of an interlocutory appeal, which the trial court denied. On July 30, 2013, the trial court conducted a hearing on the remaining relocation issues, including the child's best interests and modification of custody. On October 28, 2013, the court issued its final order, with findings and conclusions. The trial court: (1) determined Father had failed to establish that relocation would be contrary to the child's best interests; (2) denied both Father's objections to the relocation and his motion to modify physical custody; (3) modified the child's legal custody to be shared jointly; (4) as a contempt sanction for Mother's obstruction of Father's parenting time, ordered Mother to pay \$2000 of Father's attorney fees. Father appealed.

The Court found that there was sufficient evidence to support the trial court's finding that Mother relocated to be close to her immediate and extended family, which is a legitimate purpose. *Id.* at 843. The Court looked to T.L. v. J.L., 950 N.E.2d 779, 787-88 (Ind. Ct. App. 2011), and noted the following principles on the criteria for determining whether a relocation is in good faith and for a legitimate reason: (1) the Court has generally required that the moving parent demonstrate an objective basis, that is, "more than a mere pretext" for relocating; (2) it is commonly understood in today's society that individuals move in order to live closer to family members, for financial reasons, and for employment opportunities; and (3) the Court "infer[s] that these and similar reasons...are what the legislature intended in requiring that relocation be for "legitimate" and "good faith" reasons." Gold at 842. Father contended that Mother's inadequate notice and efforts to inhibit his relationship with the child evince her spurious motives for relocating. The Court agreed with Father that the evidence clearly demonstrated that Mother moved without waiting for court approval and without providing the requisite ninety-day notice, and that she prevented Father from exercising parenting time from December of 2010 through December of 2011. The Court opined that, while the trial court may consider

noncompliance with the notice provision and obstruction of parenting time as indicative of a parent's insidious intent, these facts, of themselves are not dispositive of the issue of a good faith, legitimate reason for relocating. Id. The Court explained that IC 31-17-2.2-6(a) provides a distinct remedy for a parent's failure to provide the proper notice; specifically, the court may grant a temporary restraining order to prohibit relocation or order the child to be returned to the non-relocating parent. Id. The Court noted that in this case, Father did not request, and the trial court did not independently order, that Mother be compelled to return the child to Indiana pending the final hearing. Id. The Court also noted that the trial court sanctioned Mother by ordering her to pay \$2000 of Father's attorney fees. The Court found that the record supported the finding that Mother legitimately desired to be near her family. Id. at 843. The Court specifically noted the following evidence: (1) Mother was raising the child in Terre Haute while Father lived in Indianapolis; (2) as a single parent, Mother relied on the emotional, and occasionally the financial support of her family, primarily from the child's maternal grandmother; (3) Mother testified that the child is very "attached" to the maternal grandmother and has a sibling-like relationship with the maternal aunt and uncle, all of whom have been very involved in the child's life; (4) when the child gets sick or has a school function or extracurricular activity that interferes with Mother's work schedule, the maternal grandmother cares for the child or attends the event; (5) Mother further testified that, shortly after the maternal grandmother decided to relocate to Georgia for personal reasons and employment, Mother also decided to move because they "wanted to be together" ; (6) Mother has extended family in the Indianapolis and Atlanta areas, but stated that she would have been left with no other family in Terre Haute after the maternal grandmother, aunt, and uncle moved away. Id.

Because the trial court's findings indicated that it considered evidence on each statutory relocation factor, the Court could not say that the trial court's denial of Father's motion to modify the child's physical custody was clearly erroneous. Id. at 846. The Court reviewed the relocation statute (IC 31-17-2.2-1(b)), and noted the factors which the trial court must consider in deciding whether to modify custody in a relocation case. Id. at 844. The factors are: (1) the distance involved in the proposed change of residence; (2) the hardship and expense involved for the nonrelocating individual to exercise parenting time; (3) the feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time... arrangements, including the financial circumstances of the parties; (4) whether there is an established pattern of conduct by the relocating individual, including actions by the individual to either promote or thwart a nonrelocating individual's contact with the child; (5) the reasons provided by the: (A) relocating individual for seeking relocation; and (B) nonrelocating parent for opposing the relocation of the child; and (6) other factors affecting the best interests of the child. Id. The Court noted that the trial court had specifically considered the following factors in its order: (1) the distance between Indiana and Georgia is approximately 600 miles and an eight hour drive each way; (2) although the parties meet in Tennessee, Father must stop for gas twice, which the court acknowledged "creates a hardship on Father due to the cost"; (3) Father earns \$200 per week from part-time employment and is dependent on his wife's income to support their family, while Mother earns an annual salary of \$65,000; (4) online technology could be used for Father to engage in communication with the child; (5) Mother had withheld parenting time in the past based on Father's delinquent child support payments as well as her "exaggerated" claims about Father's kidnapping and child abuse; (6) Mother did not apprise

Father of the child's enrollment in the child's extracurricular activities and refused to provide Father with the child's school schedule, the name of the school, or the child's doctor appointments, and even concealed the child's surgery from Father. Id. at 844-45. The Court also noted the trial court's best interests findings, including that: (1) Mother has been the child's primary caregiver and the child has a close bond with the maternal grandmother, aunt, and uncle, who all reside in the home, and with whom the child was bonded before the relocation; (2) the child had completed preschool in Georgia and was registered to begin kindergarten in Mother's neighborhood; (3) Mother and the child attend church together; (4) the child has participated in ballet, tap dance, karate, tennis, and a beauty pageant since moving to Georgia. Id. at 846. The Court opined that it was well within the trial court's discretion to place more weight on the evidence that favored Mother as the physical custodian based on the child's best interests rather than the evidence favoring Father based on Mother's efforts to thwart his relationship with the child. Id.