

Children's Law Center of Indiana



Custody and Parenting Time

2/5/14

In **H.H. v. A.A.**, 3 N.E. 3d 30 (Ind. Ct. App. 2014), the Court affirmed the trial court's denial of Mother's request to relocate with the child to Hawaii. Mother and Father had separated in 2005 while Mother was pregnant with the child. Mother and Father subsequently divorced. The child was born on January 21, 2006, and Father has been exercising parenting time with the child since she was a baby. Mother married Stepfather in May of 2008. Father married Stepmother in December of 2010. Stepmother has four children from a previous relationship, and she and Father have two children together. Mother filed a Notice of Intent to Relocate to Hawaii on April 18, 2012. Father objected to the relocation, and the trial court, after conducting an evidentiary hearing, denied Mother's request to relocate on July 18, 2012. Stepfather accepted employment in and moved to Hawaii. On April 22, 2013, Mother filed a second Notice of Intent to Relocate. Mother also filed a request for a change of trial judge, which was granted. Father objected to the proposed relocation, and the trial court conducted an evidentiary hearing on Mother's request. At the time of the evidentiary hearing, Father was exercising overnight, holiday, and summer visitation pursuant to the Indiana Parenting Time Guidelines. Father and Stepmother lived in Martinsville. Father was employed by a car dealership in Indianapolis. Stepmother was employed cleaning houses in Greenwood. Mother and the child lived in Columbus, where Mother was employed as a nurse. Stepfather was employed as a government contractor working on the Pacific Missile Range in Hawaii. Mother indicated that, if she were permitted to move with the child to Hawaii, she intended to open a health clinic and work as a certified nurse practitioner. Mother acknowledged that she did not believe this business venture would make a profit for a number of years. On July 12, 2013, the trial court entered an order denying Mother's request to relocate, and providing that custody of the child would be granted to Father if Mother chose to relocate to Hawaii. Mother appealed.

The Court found that the trial court erred in its conclusion that Mother's proposed relocation was not made in good faith and for a legitimate reason. *Id.* at 36. The Court looked to the relocation statutes (IC 31-17-2.2 et seq.) and to **T.L. v. J.L.**, 950 N.E. 2d 779 (Ind. Ct. App. 2011), and noted the following: (1) a relocating parent must file a notice of intent to move with the clerk of the court that issued the custody or parenting time order, or has jurisdiction over the legal proceedings concerning custody of or parenting time with a child, and send a copy of the notice to the nonrelocating parent; (2) the nonrelocating parent may object to relocation by filing a motion to modify the custody order or a motion to prevent relocation of the child; (3) the relocating parent has the burden of proof that the proposed relocation is made in good faith and for a legitimate reason; (4) if the relocating parent meets that burden, the burden

shifts to the nonrelocating parent to show that the proposed relocation is not in the best interest of the child (multiple citations omitted). *Id.* at 34. The Court also quoted IC 31-17-2.2-1, which states that, in determining whether to permit a relocation, the trial court shall consider the following:

- (1) The distance involved in the proposed change of residence.
- (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
- (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating 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.
- (6) Other factors affecting the best interest of the child.

Id. The Court, citing Baxendale v. Raich, 878 N.E. 2d 1252, 1257 (Ind. 2008), observed that the “other factors affecting the best interest of the child” include, by implication, the factors set forth for custody determinations and modifications under IC 31-17-2-8. H.H. at 34. The Court, citing T.L. v. J.L. at 950 N.E.2d 787, said that Indiana case law has not explicitly set forth the meaning of legitimate and good faith reasons in the relocation context. H.H. at 35. The Court quoted its observation in T.L. v. J.L. at 787-88 that “it is common in our society that people move to live near family members, for financial reasons, or to obtain or maintain employment.” H.H. at 35. The Court noted the following evidence from Mother and Stepfather: (1) Mother had desired to move to Hawaii since she and Stepfather had visited there on their honeymoon; (2) Mother testified that the differences in the laws of Indiana and Hawaii would allow her to work in Hawaii in her own clinic as a certified nurse practitioner with more autonomy than she would have in Indiana; (3) Stepfather testified that he was required to work significantly fewer hours in Hawaii to earn the same salary he had earned in Indiana; (4) Stepfather’s employment in Hawaii provided health benefits which had not been affordable when he was self-employed in Columbus. *Id.* at 35-36. The Court, citing In Re Paternity of X.A.S., 928 N.E. 2d 222 (Ind. Ct. App. 2010), concluded that Mother’s stated reason for her request to relocate to Hawaii with the child, i.e. to live and create a family life with Stepfather, was sufficient to prove that her request was made in good faith and for a legitimate purpose. H.H. at 36.

The Court concluded that the trial court did not err in determining that the requested relocation was not in child’s best interests. *Id.* at 39. Mother claimed that the trial court erroneously determined that relocation was not in the child’s best interests because the trial court did not make a specific finding relating to each of the factors available for consideration under IC 31-17-2.2-1 [the relocation statute] and IC 31-17-17-2-8 [the custody factors statute]. The Court disagreed, stating that, while the trial court is to consider all relevant factors, the court is not necessarily required to make specific findings on each factor unless requested to do so by the parties. *Id.* at 36. The Court said that the trial court heard evidence on: (1) the distance involved;

(2) the significant decrease in the regularity with which Father could exercise parenting time; (3) the unlikelihood that the close nature of the relationship between the child and Father would be preserved if relocation were permitted; (4) the interactions of the child with her parents, Stepmother, paternal grandparents, and her step- and half-siblings; (5) the child's adjustment to her home, school, and community; and (6) prior attempts by Mother to thwart Father's exercise of parenting time with the child. Id. at 37. The Court noted that the trial court's findings were: (1) the child is thriving in Indiana; (2) the child is able to visit with Father and her grandmother regularly; (3) the child attends private school and is receiving good grades; (4) whether the child will achieve as well at a private school in Hawaii is unknown; (5) the child's reaction to being separated from Father, grandmother, and her friends is also unknown; (6) the child's separation from Stepfather has had a negative effect on her; (7) it stands to reason that her separation from nearly everything else she knows will likewise have a negative impact on her; (8) for these reasons, the court finds that Mother's proposed relocation to Hawaii is not in the child's best interest. Id. at 36-37.

The Court reviewed the evidence on the relocation and custody issues, and found that it supported the trial court's determination that the proposed relocation was not in the child's best interests. Id. at 37. Among the evidence noted by the Court was: (1) Father would not be able to afford to travel to Hawaii to visit; (2) although Mother was willing to bear the additional transportation costs, there were concerns about her ability to pay for them given the higher cost of living in Hawaii, Stepfather's income, and Mother's earning capability; (3) relocation would substantially decrease the regularity and amount of Father's parenting time; (4) there was uncertainty about maintaining a continuing close relationship between the child and Father if relocation occurred; (5) the child had a close bond with Stepmother, her step- and half-siblings, and paternal grandparents, all of whom lived in Martinsville; (6) neither Mother nor Stepfather had any extended family living in Hawaii; (7) the child had adjusted well, was thriving at her current school and had many friends; (8) the two social workers who had met with the child gave conflicting opinions on whether relocation was in the child's best interest; (9) Mother had previously been found in contempt for a prior refusal to allow Father to exercise parenting time. Id. at 37-39.