

# Children's Law Center of Indiana



## Custody and Parenting Time

8/15/16

In ***In Re Marriage of Gardenour v. Blondelie***, 60 N.E.3d 1109 (Ind. Ct. App. 2016), the Court affirmed the trial court's orders which: (1) found same sex partners Kristy Gardenour and Denise Blondelie agreed to enter into a California domestic partnership, which was a spousal relationship; (2) found Denise is the child's legal parent; and (3) awarded joint legal custody to Denise and Kristy, physical custody to Kristy, and parenting time to Denise. *Id.* at 1120-21. In 2003, Kristy Gardenour (Kristy) moved from Michigan to California to begin a relationship with Denise Blondelie (Denise). In accordance with California law, the couple entered into a registered domestic partnership (RDP) agreement in 2006. Thereafter, Denise and Kristy moved to Indiana. In 2012, the couple agreed to co-parent a child and Kristy was artificially inseminated. On May 14, 2013, Kristy gave birth to a child. After their relationship ended in October 2014, Denise returned to California. On March 2, 2015, Kristy filed a Petition for Dissolution of Marriage.

On October 8, 2015, the parties entered into a Partial Mediated Agreed Entry settling their property disputes, leaving only the issue of child custody before the trial court. On December 15, 2015, the trial court held a final hearing. During the hearing, Denise requested joint legal custody and parenting time, including regular video contact with the child and parenting time when she visited Indiana. Kristy requested primary physical and legal custody of the child. The trial court issued the Findings of Fact, Conclusions Thereon, and a Decree of Termination of Domestic Partnership, recognized the couple's RDP agreement established a spousal relationship, terminated the RDP, awarded Kristy primary physical custody of the child, awarded Denise joint legal custody and parenting time, and ordered Denise to pay child support:

**Recognizing that the spousal relationship between Kristy and Denise did not go against Indiana public policy, the Court held the trial court did err in concluding that Kristy and Denise agreed to enter a spousal relationship in accordance with California law nor did it err in recognizing their spousal status.** *Id.* at 1118. Kristy contended the evidence did not support the trial court's findings that, by entering into a RDP, Kristy and Denise understood they were agreeing to, and intending to be bound by, California laws governing domestic partnerships and shared the same rights and obligations spouses share. She also argued that, assuming the RDP agreement did establish a relationship identical to marriage, the trial court erred in recognizing such a relationship in Indiana. The Court looked to the California Domestic Partner Act, noting that, effective January 1, 2005, section 297.5 provided that: (1) registered domestic

partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law...*as are granted to and imposed upon spouses*; and (2) the rights and obligations of registered domestic partners with respect to a child of either of them *shall be the same as those of spouses* (emphasis in opinion). *Id.* at 1116. The Court observed that California Family Law Code section 299.3 put individuals who sought to enter into a RDP after January 1, 2005, such as Kristy and Denise, on notice that they would be governed by the default terms set forth in section 297.5 unless they entered into an express agreement to the contrary. *Id.* The Court noted that, while living together in California, Kristy and Denise signed a notarized Declaration of Domestic Partnership in March 2006, and the California Secretary of State issued a Certificate of Registered Domestic Partners “[i]n accordance with Section 297 of the Family Code of the State of California.” *Id.* at 1116-17. Kristy claimed she did not intend to be bound by the default terms set forth in section 297.5 because the Declaration of Domestic Partnership did not include language notifying her of the default terms. In response to Kristy’s claim, the Court said: (1) both the Declaration and Certificate referenced California’s domestic partnership statute; (2) parties to a contract “are presumed to know and to have had in mind all applicable laws extant when an agreement is made”; (3) “[i]t is well settled in Indiana that generally, unless the contract provides otherwise, all applicable law in force at the time the agreement is made impliedly forms a part of the agreement without any statement to that effect...; the parties are presumed to have the law in mind”, quoting *Ethyl Corp. v. Forcum-Lannom Assocs., Inc.*, 433 N.E.2d 1214, 1220 (Ind. Ct. App. 1982). *Gardenour* at 1117. The Court concluded that Kristy and Denise contractually entered into a RDP, thereby incorporating default terms of California law, and agreed to be treated as spouses. *Id.* The Court did not see how the trial court erred in recognizing the couple’s RDP was the equivalent of marriage, noting *Mason v. Mason*, 775 N.E.2d 706,709 (Ind. Ct. App. 2002), *trans.denied*, which stated “[o]n comity grounds, Indiana will accept as legitimate a marriage validly contracted in the place where it is celebrated.” *Gardenour* at 1117.

Kristy contended the trial court erred in recognizing the RDP as a spousal relationship because the recognition of a same-sex marriage is contrary to Indiana public policy. The Court opined that Kristy’s argument was outdated, citing *Baskin v. Bogan*, 766 F.3d 648, 657 (7<sup>th</sup> Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (finding that IC 31-1-1-1 is unconstitutional as discriminating against homosexuals) and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.”) *Gardenour* at 1118. The Court reasoned that: (1) California law makes clear a RDP is identical to marriage; (2) if the Court did not recognize California RDPs as the equivalent of marriage, it would seem to allow individuals to escape the obligations California imposes upon domestic partners with respect to children; (3) applied here, a decision not recognizing their spousal status would allow Denise, a non-biological parent, to simply cross state lines in order to avoid parental obligations such as child support; (4) not recognizing their status would ultimately harm the child because a child’s welfare is promoted by ensuring he has two parents to provide financial support. *Id.*

**The Court concluded that Kristy and Denise, as spouses, knowingly and voluntarily consented to artificial insemination and Denise is the child’s legal parent. *Id.* at 1120.** Kristy

contended that an agreement between domestic partners to co-parent a child was not enforceable. Denise argued that she and Kristy knowingly and voluntarily agreed to co-parent a child by artificial insemination. The Court looked to Levin v. Levin, 645 N.E.2d 601 (Ind. 1994) and Engelking v. Engelking, 982 N.E.2d 326 (Ind. Ct. App. 2013), cases where married couples consented to artificial insemination, in which the Court concluded that the non-biological fathers were the legal parents of the children and were required to pay child support when the couples divorced. Gardenour at 1119. Kristy maintained that the Levin and Engleking opinions did not apply because she and Denise were not married when the child was born. The Court said this was not a relevant distinction. Id. The Court found the evidence established: (1) Kristy and Denise agreed to co-parent a child conceived by artificial insemination with Kristy being the birth parent; (2) after seeking donors through sperm banks, Kristy, Denise, and a male friend agreed that the male friend would serve as a donor; (3) the friend provided donations at the couple's home, and Denise was also present; (4) during Kristy's pregnancy, Denise attended Kristy's prenatal appointments and parenting classes, and Kristy planned for the child to carry Denise's last name; (5) following the child's birth, Kristy attempted to give him Denise's last name, but the hospital would not allow it; (6) Denise and Kristy considered the child to be Denise's son, and both Denise and her father included the child as a beneficiary on their life insurance policies; (7) Denise attended the child's doctor appointments and cared for the child by feeding him, changing him and playing with him; and (8) after the couple ended their relationship and Denise moved to California, Denise remained in contact with the child by video chat. Id. at 1119-1120.

**The Court concluded the trial court did not err in awarding Denise joint legal custody nor did it err in ordering Denise to pay child support.** Id. at 1120 n.5. Kristy argued the trial court erred in awarding Denise joint legal custody of the child and ordering Denise to pay child support because Denise is not the child's natural parent, but the Court found that Denise is the child's legal parent. Id. Kristy did not argue that the custody award was not in the child's best interests, so the Court found that her argument was waived. Id.

**Given the lack of evidence indicating parenting time with Denise would endanger the child, coupled with the limited parenting time awarded to her, the Court concluded the trial court did not err in awarding Denise parenting time.** Id. at 1120. The Court noted the trial court ordered Denise to receive the following parenting time: video chat communications twice a week; three visits per week for one hour each, when Denise travels to Indiana; and parenting time as the parties deem fit when Denise travels to Indiana for holidays and the child's birthday. Id. The Court quoted Perkinson v. Perkinson, 989 N.E.2d 758, 764 (Ind. 2013), which states that "not only does a noncustodial parent have a presumed right of parenting time, but the child has the correlative right to receive parenting time from the noncustodial parent because it is presumed to be in the child's best interests." Gardenour at 1120. The Court also quoted IC 31-17-4-1(a), which states, "[a] parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." Id. The Court said that, because Kristy did not assert Denise's parenting time might endanger the child's physical or mental health, she had waived this argument. Id.