

Children's Law Center of Indiana



Custody and Parenting Time

6/08/16

In **Milcherska v. Hoerstman**, 56 N.E.3d 634 (Ind. Ct. App. 2016), the Court affirmed the probate court's denial of Mother's request to relocate from Mishawaka, Indiana to Texas with the parties' eleven-year-old child. *Id.* at 640. The Court also affirmed the trial court's denial of Father's request for the court to order Mother to pay his attorney's fees. *Id.* at 643. Paternity was established, and Mother and Father had shared custody of the child since her birth in 2004. On March 13, 2015, Mother filed a notice of intent to relocate to Texas with the child after accepting a new job there. Father objected to Mother's relocation request, and requested a preliminary injunction, and the appointment of a guardian ad litem. After a hearing on June 9, 2015, the probate court issued a temporary order which: (1) permitted Mother to relocate with the child; (2) ordered the parties to exchange the child bi-weekly; (3) ordered Mother to pay the cost of transportation; (4) appointed Mark James as the guardian ad litem (GAL); and (5) scheduled a final hearing on August 25, 2015. On July 21, 2015, Father filed a motion asking for the court to order Mother to pay his attorney's fees. At the final hearing, the child's therapist and the child's GAL, testified that it was in the best interests of the child to remain in Indiana with Father. After the hearing, the probate court entered an oral judgment in which the court made eight findings to support its decision. The court denied Mother's motion to relocate with the child, and granted Father primary physical custody of the child and Mother parenting time with the child consistent with the Indiana Parenting Time Guidelines when distance is a factor. The court also granted Father sole legal custody of the child. The court denied Father's request for Mother to be ordered to pay his attorney's fees. Mother appealed the probate court's denial of her request to relocate with the child and the court's grant of sole legal custody to Father. Father appealed the probate court's denial of his motion for attorney's fees.

The Court found that the probate court did not err by denying Mother's request for relocation or by modifying the physical custody arrangement for the child. *Id.* at 640. On appeal, Mother alleged that the court gave too much weight to the child's wishes when determining what was in the child's best interests. The Court referenced a similar situation where a mother wanted to relocate in **Sabo v. Sabo**, 858 N.E.2d 1064, 1070 (Ind. Ct. App. 2006), in which the Court held that it was not err for the trial court to use the eleven-year-old child's wishes as the determining factor since both parents were equally well-equipped to care for the child and all other statutory factors weighed equally in favor of both parents. **Milcherska** at 639. The Court also explained that, although IC 31-17-2-8 states that a child's wishes should be given greater consideration if the child is older than fourteen, a court can also "give a child's wishes

more or less consideration based on additional factors, such as the child’s maturity level, intelligence, emotional health, and the reasons for the child’s wishes.” Id. at 639-40. The Court observed that the probate court had conducted an in-camera interview with the child, agreed with the child’s guardian ad litem that the child was intelligent and mature for her age, and therefore gave her wishes greater weight. Id. at 639. The Court further noted that the court’s decision was not based solely on the child’s wishes, but that other factors also favored the decision to place the child with Father, including the child’s strong emotional connection with Father, the child’s anxiety about the move to Texas, her connections in Indiana, and the great distance of the relocation. Id. at 639-40.

The Court held that the probate court’s failure to issue specific findings of fact was not err. Id. at 641. The Court noted that “[i]n making a custody determination, probate courts are not required to issue special findings of fact unless requested by a party.” Id. at 640. The Court also stated it had sufficient information to identify the probate court’s reasoning for its decision. Id. at 641. The Court found the probate court had orally explained which factors it found most important, and noted the probate court credited the testimony of the child’s therapist and GAL. Id. at 641.

The Court found that the probate court did not err by granting Father sole legal custody of the child. Id. at 642. The Court noted that trial courts are given a great amount of discretion with regards to custody decisions. Id. The Court found that the court’s decision was not clearly erroneous because it was supported by evidence showing that the child was emotionally attached to Father and the parents’ ongoing disagreements would make co-parenting difficult. Id.

The Court held that it was not an abuse of the probate court’s discretion to deny Father’s request for attorney’s fees. Id. at 643. The Court found that the probate court properly considered a number of factors in deciding to decline Father’s request that Mother be ordered to pay his attorney’s fees. In affirming the probate court’s decision on this issue, the Court noted the probate court’s factual findings that Mother’s income was no longer as stable as it had been previously and that Father was at least partially responsible for the contentious and protracted litigation. Id.