

Children's Law Center of Indiana



Custody and Parenting Time (Relocation)

6/26/14

In **Nelson v. Nelson**, 10 N.E.3d 1283 (Ind. Ct. App. 2014), the Court affirmed the trial court's denial of Mother's motion to relocate to South Carolina with the child. Mother and Father married on February 28, 2005, established a home in Indiana, and their child was born on July 29, 2005. Mother and Father separated in January 2007, and Father filed a petition to dissolve the marriage. On August 9, 2007, the trial court entered a Decree of Dissolution and adopted the parties' settlement agreement. The Decree granted Father and Mother joint legal custody of the child, with Mother having primary physical custody. Father was awarded parenting time on alternate weekends, from Friday at 6:00 pm through Sunday at 6:00 pm and one overnight during the week. Mother's employment selling medical equipment with Home Health Depot, Inc., terminated on October 11, 2010. Her employment contract contained a non-compete clause; therefore, she could not work in a comparable field in Indiana for a period of at least one year. On November 12, 2010, Mother filed a notice of intent to move to South Carolina, citing her inability to obtain employment in her field in Indiana. On February 7, 2011, Father filed an objection to the proposed relocation. On April 19, 2011, Mother filed an amended notice of intent to move, because she had received an offer from Tuomey Healthcare Systems (Tuomey), located in South Carolina, to work as a physical therapist, on the condition that she passed the National Physical Therapist Assistant Exam. Mother also stated that she intended to move to South Carolina on May 27, 2011. On May 10, 2011, Father filed a verified response and objection to Mother's amended notice of intent to move, a motion to modify custody and address parenting time, and a motion for a hearing. Mother relocated with the child to South Carolina without the trial court's approval. Mother failed the National Physical Therapist Assistant Exam, and lost the employment opportunity with Tuomey. Mother then accepted a medical sales job with Ronco Specialized Systems, Inc., in Columbus, South Carolina.

On July 29, 2011, the trial court held an emergency hearing to determine temporary custody of the child pending a full evidentiary hearing. On August 9, 2011, the trial court issued an order granting Father temporary custody of the child and ordered Mother to return the child to Indianapolis. Mother complied and returned the child. On March 5, 2013, and June 25, 2013, the trial court held an evidentiary hearing on Mother's motion to relocate, Father's objection, and Father's motion to modify custody. On August 3, 2013, the trial court issued its Order concluding that: (1) Mother had not met the burden of proof with regard to her relocation request, and the court found that her relocation was not in good faith; (2) Father had met the burden of proof required of him regarding his objection to Mother's relocation; (3) relocation

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was not in the best interests of the child; (4) both parties would share joint legal custody of the child; (5) Father was granted sole physical custody; (7) Mother was granted parenting time. Mother appealed.

The Court concluded that the trial court erred in its determination that Mother's proposed relocation was not made in good faith and for a legitimate reason. *Id.* at 1288. The Court found that, notwithstanding the fact that Mother moved to South Carolina prior to the trial court's approval, her reasons for relocation were legitimate and were in good faith. *Id.* at 287. Citing *T.L. v. J.L.*, 950 N.E.2d 779, 787-88 (Ind. Ct. App. 2011), the Court said that, in general, the Court has found that employment opportunities, financial considerations, and proximity to family are legitimate reasons to justify a relocation. *Nelson* at 1286. The Court noted the following evidence in support of its conclusion: (10) Mother graduated from the University of Indianapolis in 2000 with a Bachelors and Associates of Science degree; (2) after graduation, Mother worked as a physical therapy assistant; (3) Mother intended to work in that field, but never passed the licensure exam in Indiana; (4) when Mother lost her job selling medical equipment, she could not seek employment in a similar field due to the non-compete clause in her contract; (5) Mother had no family in Indiana, could not obtain employment, and had a large, extended family in South Carolina; (6) Mother filed for bankruptcy after she lost her job in Indiana in 2010 and had moved in with her boyfriend; (7) the maternal grandmother had suffered repeated strokes, and Mother needed to take off work from her job in Indiana to respond to the maternal grandmother's medical emergencies; (8) since the maternal grandfather could not secure a job in Indiana, but found a job in South Carolina, the maternal grandparents were also relocating to South Carolina; (9) Mother considered that the move would provide financial security, revive family ties, keep her family under one roof, and provide a team that could take care of the maternal grandmother. *Id.* at 1286-87.

The Court found that the evidence supported the trial court's conclusion that relocation was not in the child's best interests. *Id.* at 1289. Mother argued that the trial court failed to make a finding on all of the factors required to be considered under IC 31-17-2.2-1 (the relocation statute) and IC 31-17-2-8 (the best interests statute). The Court said that the trial court was not required to make a finding on all factors enumerated in IC 31-17-2.2-1(b), stating that so long as there is evidence on the record to support each of the factors, the Court will affirm the trial court's finding. *Id.* at 1288. The Court noted that, in making its determination, the trial court should have considered: (1) the distance involved in the proposed relocation; (2) the expense involved for the nonrelocating parent to exercise visitation; (3) the feasibility of preserving the relationship between the nonrelocating parent and the child through visitation; (4) whether there is an established pattern by the relocating parent to thwart the nonrelocating parent's contact with the child; (5) the reasons provided by the relocating parent for the relocation; and (6) other factors affecting the best interests of the child. *Id.* Citing *Baxendale v. Raich*, 878 N.E.2d 1252, 1256 (Ind. 2008), the Court also noted that IC 31-17-2.2-1 incorporates all of the best interests factors considered in making an initial custody determination. *Nelson* at 1288.

The Court found that the trial court considered that: (1) the one-way ten hour drive would diminish the father-son bond; (2) the move to South Carolina would require the child to leave

Father, stepmother, and paternal grandparents, with whom the child has a close relationship; (3) the child would be required to leave established friends and to leave a routine to which he was accustomed; (4) the child desired to reside with Father; (5) the custody evaluators' recommendation to modify custody in favor of Father; (6) Mother's relocation without the trial court's approval; and (7) Mother's indifference towards Father. Id. at 1288-89. The Court found that the trial court thoughtfully considered the hardship and travel expenses involved in that Father started a subcontractor business in mid-2011 and his income was contingent on job offers; Mother testified that she was willing to forgo child support so that Father could afford to drive or fly back and forth to South Carolina at least six times a year; and Mother testified that she would pay half the ticket cost to enable Father to fly to South Carolina for the holidays. Id. The Court said that, based on the fact that Mother was willing to bear the transportation expenses, Mother acknowledged that Father was not in a position to afford the transportation expenses; thus Father would have incurred hardship in exercising parenting time. Id. at 1289.

The Court, in considering the feasibility of preserving the relationship between Father and the child and Mother's thwarting behavior, found the following evidence supported the trial court's denial of Mother's relocation: (1) Mother relocated to South Carolina prior to obtaining the trial court's approval; (2) the ten hour drive one way would "significantly diminish the father-son bond"; and (3) the child custody and visitation evaluation report stated that Mother "presented herself with a sense of entitlement" and felt that she "should be able to do what she wants to do without reproach." Id. The Court noted that, during the evaluation, Mother "related several times that she couldn't believe [Father] was fighting her moving to South Carolina" as he "never did anything with [the child] and [that] she was the main parent in [the child's] life." Id. The Court further noted that the evaluation report's explanation that Mother's statements were "denigrating" and its concern whether Father would be able to sustain a relationship with the child if Mother received primary custody. Id. The Court found that the feasibility of preserving the relationship between Father and the child was highly doubtful. Id. Although Mother pointed to the agreement she and Father had reached for the child to remain with Father from May 31, 2011 to July 12, 2011 as proof that she had no intention to thwart Father's relationship with the child, the Court held that her argument was nothing more than an invitation to reweigh the evidence, which the Court will not do. Id.