

Children's Law Center of Indiana



Custody and Parenting Time

7/21/16

In **B.L. v. J.S.**, 59 N.E.3d 253 (Ind. Ct. App. 2016), the Court affirmed the trial court's orders which: (1) allowed Mother to relocate; (2) denied Father additional parenting time; and (3) found Father in contempt of a prior parenting time order. *Id.* at 266. Mother and Father were married on June 24, 2007, and their child was born in December, 2007. The trial court entered its decree for dissolution of marriage on July 26, 2012. The court granted the parties joint legal custody of the child, with Mother having primary physical custody. Parenting Time was ordered to be governed by the Indiana Parenting Time Guidelines, except that Mother would have the child every Memorial Day weekend and Father would have the child every Labor Day weekend. In addition, the order provided that Father would have the child on Wednesday and Friday and the parties would exercise additional parenting time, as long as they did not infringe on the other party's parenting time. The parties continued to engage in past-decree litigation. Mother alleged that Father had violated the parenting time order by picking the child from pre-school at times not designated to him, and exercising parenting time while Mother was at work. Other problems alleged by Mother included that Father failed to notify her in advance of his plans for the child after school, failed to keep her apprised of the child's whereabouts, and failed to ensure that the child's homework was finished. On June 26, 2014, after a hearing, the trial court issued an order stating that Mother should add Father to the child's school pick-up list, but this did not give him carte blanche authority to pick up the child. The court also modified Father's parenting time during the school year, granting him mid-week parenting time on Tuesdays and Wednesdays from 4:00 p.m. to 8:30 p.m. and beginning his parenting time with the child on his weekends when school ended on Friday.

During their marriage, the parties had moved to a thirteen acre property in Fortville, Indiana when the child was one and one-half years old. Mother worked in Fishers, Indiana, and the child attended daycare and preschool in Fishers for the first five years of her life. The child was enrolled in the YMCA afterschool program in 2013-2014 when she was in pre-school and in 2014-2015 when she was in first grade. The YMCA program offered physical fitness activities, snacks, social time, homework time, and a broad range of crafts and special activities. Following the divorce, Father purchased land about a mile from the home where Mother and the child resided. Father built a home on the property he had purchased and filed notice of his intent to move. On August 23, 2013, Father filed his verified petition seeking additional parenting time instead of having the child placed in an afterschool program. Three days later, on August 26, 2013, the trial court issued an *ex parte* order permitting Father to exercise additional parenting

time whenever Mother was at work, but on condition that he returned the child to preschool in time for Mother's normal pick up time. On September 10, 2013, Mother filed a motion to vacate the *ex parte* order. On the same day, Mother also filed notice of her intent to relocate to Fishers. Mother stated that she wanted to be closer to work, the child's activities were in Fishers, she did most of her shopping in Fishers, and it was becoming more difficult to maintain the thirteen acre property surrounding her home. Also, Mother claimed that it would be in the child's best interest to live in a neighborhood where other children were present. On October 30, 2013, Father filed his objection to Mother's relocation, arguing that Mother's move was an attempt to erode his relationship with the child, and that relocation was not in the child's best interests. Father requested adjustment of parenting time, and an order preventing relocation. Mother filed a petition for clarification of additional parenting time and other issues regarding Father's parenting time. Mother alleged that: (1) since September 2013, Father had been caring for the child after school almost on a daily basis until Mother returned from work; (2) Father allowed the child to eat unhealthy snacks and remain sedentary while he worked; (3) the child was in the top weight category for her age and did not get much exercise; (4) Father failed to notify Mother numerous times of his plans with the child after school; (5) when Father returned the child on Sundays, her homework was not completed.

The trial court heard evidence on Mother's notice of intent to move, Father's objection to Mother's requested relocation, and Mother's petitions for clarification of parenting time and orders requiring Father to take the child to activities during his parenting time, ensure that the child's homework is completed, and keep Mother apprised of the child's whereabouts. On January 15, 2015, the trial court issued findings of fact and conclusions thereon, ordering, among other items, that: (1) Mother may relocate to Fishers; (2) Father shall have parenting time every other weekend from Friday after the end of the school day until Sunday at 6:30 p.m., every Tuesday and Wednesday from 4:00 p.m. until 8:30 p.m., and holidays pursuant to the Guidelines; (3) Father shall take the child to her extracurricular activities which occur during his parenting time; (4) each party shall make sure the child's homework is done. Father timely filed his notice of appeal on February 16, 2015.

Mother also filed a contempt petition against Father on December 22, 2014, asserting that Father had failed to comply with the June 26, 2014, order prohibiting him from picking up the child at times not designated on his parenting time schedule. On February 10, 2015, the trial court conducted a hearing and found Father in contempt at the close of the evidence. Father filed his notice of appeal of the contempt order on May 18, 2015. On May 29, 2015, Father filed a motion to consolidate his appeals of the orders allowing Mother to relocate, denying him additional parenting time, and the contempt finding.

The Court found there was sufficient evidence to support the trial court's finding that Mother's relocation from Fortville, Indiana to Fishers, Indiana was in good faith and for a legitimate purpose. *Id.* at 262. Father asserted that Mother failed to satisfy her burden of proof that her proposed relocation was in good faith and for a legitimate purpose. The Court looked to the relocation statute, IC 31-17-2.2-5, which states that: (1) the relocating parent must prove "that the proposed relocation is made in good faith and for a legitimate reason"; (2) if the court

finds a good faith, legitimate purpose for the relocation, the burden then shifts to the non-relocating parent to demonstrate “that the proposed relocation is not in the best interest of the child.” Id. at 259.

Citing T.L. v. J.L., 950 N.E.2d 779, 787-88 (Ind. Ct. App. 2011), the Court observed that: (1) because there is no explicit criteria for determining whether a relocation is in good faith and for a legitimate reason, the Court has generally required that the moving parent demonstrate an objective basis for relocating; and (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. B.L. v. J.S. at 259. Quoting T.L., 950 N.E.2d at 788, the Court said, “[w]e infer that these and similar reasons...are what the legislature intended in requiring that relocation be for ‘legitimate’ and ‘good faith’ reasons.” B.L. v. J.S. at 259. The Court noted Mother’s testimony on her reasons for relocating: (1) she realized over time that the house was very big and there were 13 acres of property to maintain; (2) everything they were doing was back in the Fishers area, including shopping, work, and doctor and dentist appointments; (3) she wished to live in a neighborhood where she and the child could ride bikes, walk, and have interaction with other people; (4) her relocation was not intended to thwart Father’s efforts to spend more time with the child; (5) her proposed move was only twenty minutes driving time from Father’s residence and would not interfere with any of his parenting time or make it unreasonably difficult for him to pick up the child after school, attend church, or participate in the child’s other activities. Id. at 260. The Court noted the trial court’s conclusions that the distance involved in Mother’s proposed change of residence was minimal; Father would be able to exercise the same parenting time; the feasibility of preserving the relationship of the child with Father was excellent; both parties had the financial resources such that the expense of the increase in driving time was not a consideration; there was no established pattern of conduct by Mother to thwart Father’s contact with the child; Father has had ample additional parenting time in the past, in addition to his regular parenting time. Id. at 260-61. The Court also noted the trial court’s conclusions that Mother met her burden of proof that the proposed relocation was made in good faith and for a legitimate reason and Father had failed to meet his burden of proof that the proposed relocation was not in the child’s best interest. Id. at 261. Father argued that Mother did not go shopping frequently, she went to the doctor and dentist for herself and the child only two times per year, Mother’s work commute would be lengthened due to busy traffic if she relocated, and Mother leases out eight of the thirteen acres for farming and cares for only two acres. The Court found that Father’s argument amounted to nothing more than his disagreement with the trial court’s conclusions, and was an attempt to convince the Court to impermissibly substitute its judgment for the judgment of the trial court. Id. The Court found the record supported the trial court’s finding that Mother legitimately desired to live in Fishers. Id. at 262. Citing In Re Paternity of X.A.S., 928 N.E.2d 222, 224 (Ind. Ct. App. 2010), *trans. denied*, the Court said it was the prerogative of the trial court to award more weight to the evidence favoring Mother, and it was not the role of the Court of Appeals to reweigh evidence or assess witness credibility. B.L. v. J.S. at 262.

The Court opined that the trial court did not abuse its discretion by not awarding Father additional parenting time as he requested. Id. at 264. Father argued that the trial court abused

its discretion by ordering that the child should attend the afterschool program at the YMCA rather than allowing Father additional parenting time. Father claimed that the trial court's conclusion was "unsupported by any law in Indiana, and impermissibly places the child in the care of a third party, notwithstanding the fitness and availability of a natural parent." Citing Shelton v. Shelton, 835 N.E.2d 513, 517-18 (Ind. Ct. App. 2005), *summarily aff'd*, 840 N.E.2d 835 (Ind. 2016), the Court observed that the Guidelines' imposition of a preference for parental childcare is founded upon the premise that it is usually in the child's best interest to have frequent, meaningful, and continued contact with each parent, but the trial court may, within its discretion, determine that a deviation is necessary or appropriate. B.L. v. J.S. at 262. The Court noted findings from the trial court on the YMCA afterschool program: (1) the YMCA After School Enrichment Program has one (1) hour scheduled for the children to do their homework; there is staff available to assist with homework; the program has weekly learning projects, and charitable projects focusing on giving to others; (2) the children participate in crafts, cooking, outdoor activities, play time, and physical activities; (3) during the 2013-2014 After School Enrichment Program, the child played mostly with the boys, with Legos or followed the adults around, and her attendance was limited because of the time she spent with Father; (4) in the 2013-2014 school year, the child developed social skills, played with girls and boys, played different games, and the YMCA After School Enrichment Program has been beneficial to her; (5) in the 2013-2014 school year, Father failed to ensure that the child's homework was completed; (6) the child missed one homework assignment this school year, which occurred while the child was with Father and Mother was in Hawaii; (7) Father has had additional parenting time almost every day after school during the 2013-2014 school year, when Mother preferred that the child attend the YMCA After School Enrichment Program. Id. at 263. The Court noted the trial court's conclusions that, although the child is well bonded with Father, she would benefit from the YMCA After School Program, and "[a] big part of parenting is to ensure that a child is exposed to a wide variety of opportunities and activities". Id. at 264. The Court found the trial court clearly considered the possibility of allowing Father to exercise additional parenting time, but decided it was in the child's best interest to attend the After School Program instead of spending every available moment with Father. Id.

The Court concluded that the trial court did not abuse its discretion by finding Father in contempt. Id. at 265. Quoting Ind. High Sch. Athletic Ass'n v. Martin, 765 N.E.2d 1238, 1241 (Ind. 2002), the Court noted that, "[a] party may not be held in contempt for failing to comply with an ambiguous or indefinite order." B.L. v. J.S. at 264. The entire premise of Father's argument was that the trial court never issued an order limiting his ability to pick up the child at times other than his designated parenting time. The Court found the Father's premise was incorrect. Id. at 264. The Court noted that the June 26, 2014 order included the caution that, because Father was added to the school pickup list, this did not give him "carte blanche authority" to pick up the child from school except for his Tuesday and Wednesday parenting time from 4:00 p.m. to 8:30 p.m. and Fridays of his weekend parenting time when school was out. Id. at 265. The Court noted Mother's claim that Father picked up the child at 2:00 p.m. on at least four occasions in November and December 2014. Id. The Court found it "beyond dispute" that the trial court issued its order before the incidents in question and that the order was intended to prevent the type of conduct that resulted in the trial court's contempt finding. Id.