Custody and Parenting Time
(Relocation)

9/12/14

In **In Re Marriage of Harpenau**, 17 N.E.3d 342 (Ind. Ct. App. 2014), the Court affirmed the trial court's decision modifying primary physical custody of the parties' two children from Mother to Father due to Mother's proposed relocation from Floyd County, Indiana to Scott County, Indiana. Id. at 349. The Court also affirmed the trial court's order that modified child support. Id. Mother and Father were married in 2005 and had two children born in 2007 and in 2009. The parties' marriage was dissolved on August 29, 2013. The parties entered into a settlement, approved by the Perry Circuit Court (trial court), which provided that: (1) Mother and Father would have joint legal custody; (2) Mother would be the children's primary physical custodian; (3) Father would have parenting time during the school year each week from Friday at 5:00 p.m. until Sunday at noon; (4) during the children's summer break, Mother's parenting time would be the same as Father's was during the school year; (5) since Mother intended to relocate to Floyd County and Father intended to relocate to another residence in Perry County, both consented to these first relocations without filing a notice of intent to relocate; (6) Father would not be required to pay child support to Mother; (7) Mother and Father would each pay one-half of the children's expenses for extracurricular activities, school fees, books, lunches, and clothes, which were intended to be child support.

On October 4, 2013, Mother filed a notice of intent to move to a residence in Scott County, stating that she intended to live in Boyfriend's house with the children, and that Boyfriend's residence was closer to Mother's work than her current residence. In response, Father filed a petition to modify custody, requesting that the custody arrangement be modified to grant him primary physical custody, and also objecting to Mother's relocation with the children. At the hearing on Father's motion, Father testified that he objected to Mother's move to Scott County because he had researched the school districts in and around his home in Perry County, Floyd County, and Scott County and believed that the Scott County schools were inferior to the schools in Perry and Floyd Counties. Father also had concerns about the level of criminal activity in and around Boyfriend's home and schools in Scott County. Other evidence presented at the hearing showed that: (1) numerous family members on both Mother's side and Father's side reside in Perry County, but no family members reside in Scott County; (2) Father's drive time to the children and to their schools would increase if Mother and the children moved to Scott County. The trial court announced that it was granting Father's petition to modify at the conclusion of the hearing. The trial court issued an order later which formalized its decision and stated, inter alia, that: (1) Mother had proven that her proposed relocation to Scott County was made in good faith

and for a legitimate reason; (2) Father had met his burden by showing that the proposed relocation was not in the children's best interests; (3) Mother's proposed relocation was not in the children's best interests because the relocation was a 120 minute drive from Father's present residence, meaning that Father would have to travel 120 minutes one way to exercise his parenting time; (4) there was no evidence shown of the significance and duration of the relationship Mother has with Boyfriend; (5) when Mother moved to Scott County, she would have no legal interest in Boyfriend's house, so that if Mother and Boyfriend broke up, Mother and the children would then have to find another place to live; (6) there are no relatives in Scott County, but significant numbers of relatives live in Perry County. The court granted Mother the same parenting time schedule that Father had been granted in the dissolution decree and, based on the child support worksheet that was attached to the worksheet and Father's testimony that the income figures therein had not changed since that time, ordered Mother to pay $119.00 per week child support. The court eliminated the requirement that each party should pay one-half of the children's expenses. Mother appealed the custody modification and child support order.

The Court found that the trial court's decision that Mother's proposed relocation was not in the children's best interests was supported by the record and was not an abuse of discretion. Id. at 349. Quoting Wilson v. Myers, 997 N.E. 2d 338, 340 (Ind. 2013), the Court said, "[w]e review custody modifications for abuse of discretion with a preference for granting latitude and deference to our trial judges in family law matters." Harpenau at 345-46. The Court, citing Kirk v. Kirk, 770 N.E. 2d 304, 307 (Ind. 2002), observed that it would not substitute its judgment if any evidence or legitimate inferences supported the trial court's judgment. Harpenau at 346. The Court looked to IC 31-17-2.2-5, which states that: (1) the relocating parent has the burden of proving that the proposed relocation is made in good faith and for a legitimate reason; then (2) if the relocating parent meets that burden, the burden then shifts to the non-relocating parent to show that the proposed relocation is not in the child's interest. Id. The Court observed that the trial court was required to consider all the enumerated factors listed in IC 31-17-2.2-1(b), which include: (1) the distant involved; (2) the hardship and expense involved for the non-relocating individual to exercise parenting time; (3) the feasibility of preserving the relationship between the non-relocating individual and the child through suitable parenting time 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 to promote or thwart the non-relocating individual's contact with the child; (5) the reasons provided for seeking relocation and opposing the relocation; (6) other factors affecting the best interest of the child, including the custody factors delineated by IC 31-17-2-8. Id. at 346. The Court, citing Baxendale v. Raich, 878 N.E. 2d 1252, 1257 (Ind. 2008), noted that, when a parent is relocating, the trial court does not need to find a substantial change in one of those "other factors" before modifying custody. Harpenau at 346.

In considering the trial court's determination that relocation was not in the children's best interests, the Court said that the trial court should consider all of the enumerated factors; therefore the parent seeking modification must present evidence on each of these factors. Id. at 347. The Court found there was sufficient evidence of each relevant factor to support the trial court's decision. Id. The Court noted that: (1) Father lived on a 160 acre property in Perry County that was also home to the children's paternal grandparents and paternal great-

grandmother; (2) both Father's and Mother's relatives lived close to Father's home; (3) the oldest child had started kindergarten in Perry County; (4) the house Mother proposed to move to in Scott County was wholly owned by Boyfriend; (5) there was no specific testimony about the length of the relationship between Mother and Boyfriend or the relationship between Boyfriend and the children. Id. at 347-48. The Court observed that it is not enough that the evidence might support some other conclusion; it must positively require the conclusion advocated by the appellant in order for the Court to reverse. Id. at 348, citing Kirk v. Kirk, 770 N.E. 2d 304, 307 (Ind. 2002). The Court noted that the children's stability and permanency were promoted by the change in custody because, in Father's physical custody, the children were able to stay in a familiar place, be close to their extended family, and to continue with their current babysitter and in their current school. Id. at 348-49.

The Court concluded that the trial court acted within its discretion in figuring the modified child support based upon the previous child support worksheet in light of the fact that so little time had passed since the worksheet had originally been prepared. Id. at 349. The Court noted that Father testified the figures had not changed, and Mother did not submit her own worksheet or otherwise challenge the income figures. Id.