

Children's Law Center of Indiana



Custody and Parenting Time

3/31/2014

In **Jarrell v. Jarrell**, 5 N.E.3d 1186 (Ind. Ct. App. 2014), the Court affirmed the trial court and held that by waiting two years before filing a motion to modify custody, Father had acquiesced in Mother's relocation, that the Modification Statute applied instead of the Relocation Statute, and that the trial court did not abuse its discretion in modifying custody.

Mother and Father were married from 2003 until 2010, and had one child in common. Father was a stay at home parent for the first two years of the child's life. A January 2011 order adopted the agreement between Father and Mother, which provided for them to share joint legal and physical custody of the child. Mother and Father alternated custody of the child on a weekly basis. In May 2011, Mother moved to Illinois to live with her fiancée, but Mother and Father continued for two years to maintain their shared custody agreement. In March 2013, Father petitioned to modify custody because the child was going to begin kindergarten in August 2013, making the weekly custody arrangement impossible. Father asserted that Mother's relocation without notice was a substantial and continuing change in circumstances warranting modification. An evidentiary hearing was held in July 2013, and the trial court issued its order in August 2013, granting Mother sole physical custody, Mother and Father joint legal custody, and Father parenting time.

The Court held that by waiting two years to file a motion for modification of custody, Father acquiesced to Mother's relocation out of state; because of this, the Modification Statute, and not the Relocation Statute, applied to Father's motion to modify custody. *Id.* at 1193. On appeal, Father argued that because he filed his motion to modify custody as a consequence of Mother's relocation, the Relocation Statute should apply, and that his duty to file a motion objecting to Mother's relocation was never triggered because Mother first failed to comply with the notice requirement. *Id.* 1190, 1192. The Relocation Statute, found at IC 31-17-2.2-1, provides for a trial court to consider factors such as (1) the distance involved in the proposed relocation; (2) the hardship and expense involved for the nonrelocating parent to exercise parenting time; (3) the feasibility of preserving the relationship between the nonrelocating parent and the child through suitable parenting time, which includes consideration of financial circumstances; (4) whether there is a pattern of conduct by the relocating parent which includes actions by that parent to promote or thwart the relationship between the other parent and the child; (5) the reasons given by the relocating parent for moving, and the reasons given by the nonrelocating parent for preventing the relocation; and (6) other factors affecting

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the best interests of the child. Id. at 1190-91 (citing IC 31-17-2.2-1). These factors differ from the Modification Statute, found at IC 31-17-2-8, which provides that a trial court must consider the following factors: (1) the age and sex of the child; (2) the child's parents' wishes; (3) the child's wishes, with more weight given to those wishes if the child is at least fourteen years old; (4) the interactions and relationship between the child and the child's parents, siblings, and any other person who may significantly affect the child's best interests; (5) the child's adjustment to the child's home, school, and community; (6) the mental and physical health of all individuals involved; (7) evidence of a pattern of domestic or family violence by either parent; and (8) evidence that the child has been cared for by a de facto custodian. Id. at 1191 (citing IC 31-17-2-8). The Court noted that the Relocation Statute provides that once noticed is received, a parent only has sixty days to file a motion to prevent relocation or it is deemed approved. Id. at 1192. The Court opined that this did not mean that the parent had to receive the notice before the parent could object; in other words, the Court did not find that the non-relocating parent was prevented from objecting by the relocating parent's failure to file the proper notice of relocation. Id. at 1192. IC 31-17-2.2-6(a)(2)(A) provides that a trial court may grant a temporary restraining order to mandate a child's return when a parent relocates without first providing proper notice if the non-relocating parent has timely filed his or her motion to prevent relocation. Id. Since Father failed to avail himself of this option, Father acquiesced to Mother's relocation. Id. at 1193. Since Father had been deemed to have acquiesced, the Court determined that Father's motion to modify custody should be analyzed under the Modification Statute. Id.

The Court held that there was sufficient evidence to show a substantial change in circumstances to warrant a modification of custody. Id. at 1193. Father argued on appeal that the trial court abused its discretion in modifying custody because Mother failed to show a substantial change in circumstances which warranted modification of custody. Id. The Court first noted that IC 31-17-2-21 provides that in order for a custody modification to take place, there must have been a substantial change in at least one of the best interests factors, and the modification must be in the child's best interests. Id. In addressing the substantial change in circumstances portion of the inquiry, the Court noted the following findings of the trial court which supported its judgment: (1) the child's age and impending need to enroll in school made the current custody arrangement infeasible; (2) the child forged new relationships with Mother's fiancée and other children in Mother's neighborhood; (3) that the child had been enrolled in and thrived at a preschool; and (4) that the commencement of school on a full-time basis would inevitably change the amount of time the child spent with each parent. Id. The Court did opine that while Mother argued that the trial court found that she had relocated 180 miles away and that this itself a substantial change, "[a]n out of state relocation is not, *per se*, a substantial change that merits modifying custody." Id.

The Court held that there was sufficient evidence to support the trial court's findings that modification of custody was in the child's best interests. Id. at 1195. The Modification Statute, in addition to requiring a substantial change in circumstances, also provides that a trial court must find that a modification of custody is in a child's best interest; in making this determination, the trial court must consider the best interests factors. Id. at 1194 (citing IC 31-17-2-21). The trial court conducted an in camera interview with the child heard evidence from the

parties, and made the following findings regarding the best interests factors: (1) Mother's home was appropriate and in an appropriate neighborhood; (2) Father provided no evidence regarding the home environment he could provide; (3) the child has friends at both residences; (4) the child's extended family resides closer to Father; (5) the child went to preschool during his time with Mother, but not with Father, and he thrived in preschool; (6) Father did not engage the child in any learning activities, but Mother did; and (7) Mother had plans for the child's next steps in education, whereas Father had none. Id. The Court determined that these findings were sufficient to support the trial court's decision. Id. at 1195. Father argued that the trial court did not properly consider the child's relationship with extended family and how a modification would affect those relationships and the child's relationship with Father; the Court noted that the trial court did make findings on those issues, but decided to give more weight to the other factors, which was within its discretion. Id.