

Children's Law Center of Indiana



Custody and Parenting Time (Relocation)

7/15/14

In **Myers v. Myers**, 13 N.E.3d 478 (Ind. Ct. App. 2014), the Court affirmed in part and reversed in part the trial court's order on Mother's request to relocate to Texas with her fourteen-year-old daughter (Daughter). Mother and Father have six children, and this case concerns Daughter, who was born in 2000. Mother and Father divorced in 2006, and, during the dissolution proceedings, Mother informed Father that he was not Daughter's biological father. The dissolution decree stated that Father was not Daughter's biological father, although he was identified as such on her birth certificate and the parties have always held him out to be her father. The trial court found that treating Daughter differently from the other children for parenting time would not be in her best interests, and Mother testified that Father should have Guidelines parenting time with Daughter. The trial court found, in its dissolution decree, that Father should have parenting time with Daughter. The parties did not appeal the parenting time order. Six years passed, during which time Father continued to act as Daughter's parent without objection from Mother. In 2012, Father filed a Motion to Modify Custody, seeking primary custody of the parties' son and Daughter. The trial court appointed a guardian ad litem (GAL) to represent Daughter's best interests. Father's modification petition was granted for the parties' son but not for Daughter, who continued to live primarily with Mother. Mother did not challenge Father's continued right to exercise parenting time with Daughter.

A few months later, Mother filed her notice of intent to relocate to Texas. Father and the GAL filed objections. The trial court held a hearing on the issue of relocation in October 2012. Mother's testimony included: (1) she wished to relocate to Texas for financial reasons because she was having difficulty paying her living expenses and owed a large amount of money in attorney fees; (2) she believed she could live rent-free in Texas with her cousins; (3) she had quit her job and accepted a job at a podiatrist's office in Texas; (4) she would earn the same amount of money in Texas as she had in Indiana; (5) Daughter had no real connection to Texas in that Father's family was located in Indiana, and Daughter had no friends in Texas; (6) Daughter had extracurricular ties to Indiana, including piano lesson and dance classes, and she was involved in her local church. The trial court entered an order formally denying Mother's request to relocate. The order stated that: (1) Mother had not met her burden of establishing that the relocation was made in good faith and was in Daughter's best interests; (2) Mother was not permitted to relocate to Texas with Daughter; (3) if Mother still intended to relocate to Texas, custody of Daughter would be modified and awarded to Father, and Mother would have parenting time pursuant to the Indiana Guidelines. Mother appealed.

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The Court concluded that Father was a nonrelocating parent capable of challenging Mother's relocation request. *Id.* at 483. Mother argued that Daughter was not a child of the marriage and that the court record established that Father is not Daughter's biological parent, but the Court was not so convinced. *Id.* at 482. The Court, citing IC 31-14-7-1(1), noted that Daughter was born in 2000 when Mother and Father were married, Father signed Daughter's birth certificate; therefore Daughter is, by definition, a child of the marriage, and she is presumed to be Father's child. *Id.* The Court also noted the trial court's dissolution order, which neither party appealed even though it stated that Daughter is not Father's biological daughter, yet it granted parenting time according to the Guidelines for Father. *Id.* The Court observed that neither party had appealed the dissolution order. *Id.*

The Court, quoting *Farrow v. Farrow*, 559 N.E.2d 597, 600 (Ind. 1990), said that the presumption that Father is Daughter's father could have been rebutted only "by clear, direct, and convincing evidence." *Myers* at 482. The Court observed that the trial court's dissolution order did not mention the types of evidence traditionally used to rebut the marriage presumption for paternity, namely that the husband: (1) is impotent; (2) was absent so as to have no access to the mother; (3) was absent during the entire time the child must have been conceived; (4) was present with the mother only in circumstances which clearly prove there was no sexual intercourse; (5) was sterile during the time the child must have been conceived; or (6) is excluded as the child's father based upon blood grouping test results. *Minton v. Weaver*, 697 N.E.2d 1259, 1260 (Ind. Ct. App. 1998) *trans. denied*. *Myers* at 482. The Court further observed that the trial court's order did not mention DNA testing, which has emerged as the principal method of determining paternity. *Id.* at 482-83. The Court could not say that the presumption that Daughter is a child of the marriage had been rebutted, absent conclusive, direct, clear, and convincing evidence, and in light of the contradictory dissolution order. *Id.* at 483. The Court explained that its conclusion was bolstered by the parties' and the trial court's post-dissolution conduct; namely, Mother has never challenged Father's right to parent Daughter, Father sought custody of Daughter at one point, and the court ordered that Father would have automatic custody of Daughter if Mother moved to Texas. *Id.*

Although Mother argued that, because Daughter is not a child of the marriage, the trial court should not have entertained issues related to Daughter's custody, the Court found that the doctrine of laches prevented Mother from challenging the trial court's authority. *Id.* Quoting *Vanderbilt v. Vanderbilt*, 679 N.E.2d 909, 910 (Ind. Ct. App. 1997), *trans. denied*, the Court explained that "[l]aches is neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done." *Myers* at 483. The Court said that laches requires: (1) inexcusable delay in asserting a right; (2) implied waiver of the right arising from knowing acquiescence in existing conditions; and (3) circumstances causing prejudice to the adverse party. *Vanderbilt* at 910. *Myers* at 483. The Court noted the following in support of its conclusion that Mother could not now challenge Father's parenthood: (1) Mother had never challenged the trial court's authority to hear custody issues relating to Daughter, despite having numerous chances to do so; (2) Father was identified as Daughter's father on her birth certificate; (3) seven years after Daughter's birth, Mother suddenly revealed that Daughter

was not Father's biological child; (4) when this new information came to light, Father continued to act as Daughter's parent; (5) Father is the only father that Daughter, now a teenager, has ever known; (6) Mother knowingly acquiesced in the status quo for the whole of Daughter's life; and (7) Mother's actions have prejudiced Father. *Id.* at 484.

After review of the evidence the Court could not say that the trial court erred in finding that Mother did not meet her burden of proving good faith and legitimate reasons for relocation. *Id.* at 486. The Court looked to IC 31-17-2-5, which states that: (1) when a parent files a notice of intent to relocate, the nonrelocating parent may object by moving to modify custody or to prevent the child's relocation; (2) if the nonrelocating parent objects, the burden is on the relocating parent to show that the proposed relocation is made in good faith and for a legitimate reason; (3) if the relocating parent meets that burden, then the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the child's best interests. *Id.* at 484. The Court noted that, in considering the proposed relocation, the trial court must weigh the following factors: (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 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 by the relocating parent to either promote or thwart the nonrelocating parent's relationship with the child; (5) the reasons provided by the relocating parent for seeking relocation, and the nonrelocating parent for opposing the relocation of the child; (6) other factors affecting the child's interests, including those listed at IC 31-17-2-8. *Id.* The Court cited the trial court's statement denying Mother's relocation request in which the court noted that: Daughter had no friends in Texas; her father, siblings, school, and piano teacher are in Indiana; Mother had taken a job in Texas that paid the same amount of money that her Indiana job did; Mother had made no showing that she couldn't find other part-time work or a different kind of job in Indiana; Mother had not petitioned the court to lower her child support; Mother had been temporarily staying with other people in Indiana without paying any rent; and Mother's relocation request followed closely on the heels of a recent modification of custody in Father's favor. *Id.* at 481. On appeal, Mother argued that she was paying rent in Indiana, she had many family members in Texas, and Father was financially able to travel to Texas, but the Court found that her arguments were a request to reweight the evidence, which the Court declined to do. *Id.* at 485-86. Mother also argued that the burden of proof is on the nonrelocating parent to establish that the relocation is not in the child's best interests. *Id.* at 486 n.8. The Court clarified that *if* the relocating parent meets the burden to show that the proposed relocation is in good faith and for a legitimate reason, *then* the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the child's best interests (emphasis added). *Id.* The Court held that, because Mother did not meet her burden in this case, Father's burden of proof was never triggered. *Id.*

The Court reversed the portion of the trial court's order that automatically granted Father primary custody of Daughter if Mother relocated to Texas. *Id.* at 486. The Court explained that an automatic future custody modification order violates Indiana's custody modification

statute. Id. The Court, quoting Bojrab v. Bojrab, 810 N.E.2d 1008, 1012 (Ind. 2004), said that, by contrast, language declaring that a present award of custody is conditioned upon the continuation of a child's place of residence is proper as a "determination of a custody under carefully designated conditions." Myers at 486. The Court held that, in this case, the trial court's order operated to automatically modify custody upon the happening of a future event, namely, Mother's relocation to Texas, and this was error. Id.