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SPRING 2006
VOLUME 4 / ISSUE 4

FAMILY LAW FOCUS

Tell Court of Any Plans for Moving

If you're a divorced person with custody of a child and you want to sell your home and buy a fancy condo on some lake, be forewarned.

Despite the scarcity of family law legislation from the recently adjourned 2006 Indiana General Assembly, the short session did enact new statutory provisions that might affect you.

Effective on July 1, 2006

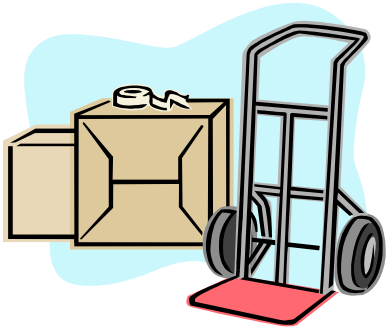
According to these provisions, to go into effect on July 1, 2006, you may have to check with a court if you're thinking about moving.

The statutes provide that a person who has or who is seeking custody of — or parenting time with — a child and who plans to move his or her primary residence, "must file a notice of the intent to move" with the court that:

• issued the custody order or parenting time order, or

• has jurisdiction over custody or parenting time proceedings.

Both parties can offer reasons for and against proposed relocation.



Moving primary residence may trigger scrutiny by court if child is involved.

This "relocating individual" must also "send a copy of the notice to any non-relocating individual."

(For the purposes of these statutes, "relocation" means a change in the primary residence of an individual for a period of at least 60 days.)

Upon the motion of a party, the court must "set the matter for a hearing to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation order, or child support order."

Court Must Consider Factors

In making its determination, the court must take into account the following factors:

• The distance involved in the proposed change of residence.

• The hardship and expense involved for the non-relocating person to exercise parenting time or grandparent visitation.

• The feasibility of preserving the relationship between the non-relocating person and the child, including a consideration of the financial circumstances of the parties.

• Whether there is an established pattern of conduct by the relocating person to either promote or thwart a non-relocating person's contact with the child.

• Reasons given by the parties for and against the relocation.

Motion to Prevent Child's Move

Not later than 60 days after getting the notice from the "relocating individual," a motion seeking a temporary or permanent order to prevent the child's relocation may be filed.

Then, on the request of either party, the court must hold a full evidentiary hearing to grant or deny the relocation motion.

See *SB 0040, to be added to the Indiana Code as IC §31-17-2.2.*♦

SPOTLIGHT ON:

Modifying Dissolution Order Is Possible by Arguing Fraud

Like a bad "shaggy dog story" that goes on and on and on, a recent decision by the Indiana Court of Appeals got its start in 1988.

That was the year Wife filed for a divorce. There were no marital debts, and the sole asset to be divided was their residence.

Entering its decree of dissolution in January of 1991, the court gave the residence to Husband and awarded Wife a judgment against him in the amount of $30,000.

Wife Awarded Judicial Lien

Six months later, she petitioned to enforce her decree, and she was granted a judicial lien against the residence in October.

Meanwhile, Husband had filed a Chapter 7 bankruptcy petition in July of 1991 — unbeknownst to Wife and the trial court.

For the next 14 years, the two squabbled in court and, finally, in February of 2005, a hearing on all pending motions was held.

Decree Modified by Court

Ultimately, the court modified the original divorce decree, awarding the residence to both Husband and Wife as tenants in common.

On appeal Husband argued, among other things, that the trial court abused its discretion when it modified the decree.

According to Indiana Code §31-15-7-9.1, "orders concerning property disposition entered under this chapter may not be revoked or modified, except in case of fraud."

Wife Fails to Allege Fraud

Finding no fraud allegation by Wife, the Court agreed with Husband that the trial court had abused its discretion in modifying the parties' original decree.

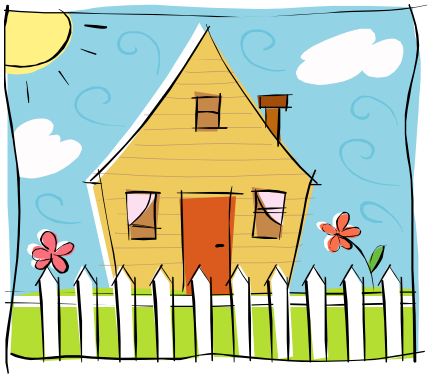
"[W]hile Husband's decision to bankrupt his dissolution obligation to Wife might be morally repugnant to most Hoosiers," the Court observed, "Husband did not commit a fraudulent act that could serve as grounds for modification of the original divorce decree."

Wife Takes Nothing in Divorce

Although the decision put Wife "in the unfortunate position of taking nothing away from the parties' 1991 dissolution," the Court continued, "Indiana statute does not permit modification of the original decree absent fraud."

As such, the decision of the court was reversed and remanded for further proceedings.

For more information, see *Strohmier v. Strohmier*, 839 N.E.2d 234 (Ind.App. 2005).♦



Residence was only marital asset and source of great contention.

REALITY CHECKS:

√ In studies conducted in the late 1990s, between four to six percent of older Americans said they were in a relationship they considered to be physically abusive.

√ If these percents have stayed steady with population growth, three to five million folks over 50 are now in abusive relationships.

√ As the population of seniors increases, so too will the victims.

√ Ashamed by ongoing abuse, older victims tend to be secretive.

√ Abuse is likely to be triggered by retirement, changing family roles, sexual changes or disability.

√ A **National Domestic Violence Hotline** offers crisis intervention and refers victims — or friends or family of victims — to adult protective services organizations in communities nationwide.

√ For help, call **1-800-799-7233,** day or night, seven days a week.

SOURCE: *AARP*, January & February, 2006.

Grandma Battles Dad for Custody

Ice cream for dinner and knitted slippers may say "grandma" to some of us, but the woman in this case took it one step further.

She went head to head with Father in court to obtain legal custody of her grandson "C.A."

Only a year old when his parents divorced, the boy lived with Mother — and a series of her boyfriends — until he was about eight.

Weekend Stay Was Permanent

Then, in June of 2002, Mother left him with Grandmother for the weekend . . . and C.A. ended up staying with her permanently.

Not only did that year bring a new home for the boy, but it also marked the start of a jurisdictional fight in court between his parents.

Finally, in March of 2003, Grandmother filed a motion to intervene as well as a petition in which she sought custody of her little grandson.

Grandmother joined custody fight to rescue her grandson.

Overcoming Presumption

The trial court granted both motions, and Father appealed. He argued that she did not present "clear and convincing evidence" to overcome his presumption as to custody.

The Court of Appeals disagreed and affirmed the granting of custody to Grandmother.

In its analysis, the Court relied on an Indiana Supreme Court case that set forth "the standard to be applied in custody disputes between a natural parent and a third party."

Best Interests of Child

While there is a strong presumption a child's best interests are ordinarily served by placement with the natural parent, this assumption may be overcome, the Court noted.

But before placing a child with someone other than the natural parent, "a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement."

Furthermore, the court must be convinced that such a placement "represents a substantial and significant advantage to the child."

Grandma Had Burden of Proof

In the matter herein, the Grandmother — who had the burden of proof — was able to show that her home was the best place for the boy.

In addition to evidence as to

This Grandmother provided soup and safety to her grandson.

Father's inability or reluctance to have a steady relationship with C.A., Grandmother demonstrated she was engaged in addressing the child's mental health problems.

(The boy had been hospitalized twice for suicide attempts. He was also being treated for attention deficit hyperactivity disorder [ADHD], oppositional defiant disorder [ODD] and depression.)

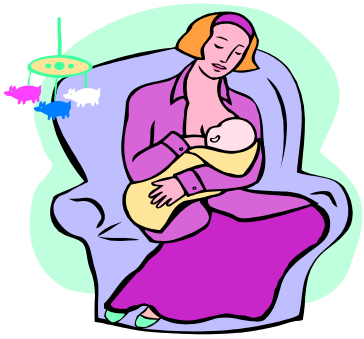
Boy Needed Stable Environment

The child's therapist testified that "it was important for C.A. to have a stable environment and that Grandmother had been a stable influence but that Father did not have stability with C.A."

The psychologist hired by Father even testified Grandmother "had 'possibly . . . saved his life'" and that an abrupt change in custody would cause "more chaos" for (C.A.) and "would precipitate more damages."

See *Allen v. Proksch*, 832 N.E.2d 1080 (Ind.App. 2005).♦

Court Looks at Same-Sex Parents



Birth Mom terminated visitation and rejected support payments.

In a case watched by those interested in same-sex parenting, the state Supreme Court walked a fine line — with one justice filing a concurring opinion and another, a dissent.

The facts involve a lesbian couple's decision "to bear and raise a child." One was artificially inseminated, and a baby was born in 1999.

The two ended their relationship in early 2002. And, for a time, Mom accepted financial support from her ex-Partner and allowed her regular visits with the baby.

Then, in July of 2003, Mom began rejecting the support payments and terminated any visitation.

Partner Sought to be Legal Parent

In October of that year, the ex-Partner filed a lawsuit, seeking to be recognized as the baby's "legal parent with the rights and obligations of a biological parent."

The trial court agreed with Mom that her former Partner had failed "to state a claim upon which relief may be granted" and thereby granted her motion to dismiss.

The ex-Partner appealed, and the Court of Appeals reversed. (See *In Re A.B.*, 818 N.E.2d 126 (Ind.App. 2004) in the Winter 2005 issue of **FAMILY LAW FOCUS**.)

Case Goes to Supreme Court

Mom appealed that ruling, and the Supreme Court agreed to take the case, thus vacating the opinion of the Court of Appeals.

In reviewing a motion to dismiss, a court will look to see if there are any allegations under which the plaintiff could be granted relief.

Only unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts is such a dismissal proper.

Prior Decision Allows Placement

Because this kind of dismissal is "rarely appropriate" and a prior case allows placement "with a person other than the natural parent," the Court reversed and remanded to the trial court to determine the rights of the ex-Partner.

"Given the procedural posture of this case and the guidance provided by (the earlier decision), we find it unnecessary to comment further on the facts of this particular case . . ," the Court noted.

"We (also) do not deem ourselves to have decided the various legal issues raised by the dissent."

See *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).♦

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