

RELOCATION CASES: DETERMINING THE BEST INTERESTS OF CHILDREN

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In divorce and separation cases the determination of child custody and visitation is often the highest priority and the most difficult issue to resolve. There are few experiences of life that are more emotionally traumatic for individuals and their children than a contested custody case. After custody and visitation issues have been resolved either through litigation or by agreement, the relocation of one of the parents can cause the reopening of all the initial questions and emotions and requires a reexamination of the best interests of children. Relocation is a material change in circumstances and if the parties are unable to readjust the custody and visitation arrangement, the Court is required to examine the statutory factors to determine the best interest of the children. There are no presumptions in favor of either party even though one of the parties may have retained sole custody of the children.

Relocation is common in our modern society. In metropolitan areas where there are heavy concentrations of military or government personnel, relocation may be predictable. It is important that lawyers know the factors that a practitioner may use to analyze a relocation case and to evaluate the best mechanisms to resolve a readjustment of custody and visitation schedules for children. Since all legal determinations about children are grounded in the best interest test, I suggest that these cases be analyzed from the children's perspective. The overriding goal should be to maximize the opportunity for each parent to participate in the children's life and development. When cases are approached from this perspective, the legal labels of sole custody, joint custody, shared custody and visitation rights become secondary. In other words, if a plan

can be developed which maximizes the opportunity for parents to participate in their children's lives within the context of the unique factors in a particular case then the legal definitions will fall into place. It is useful to discuss this perspective with clients at the beginning of the case so that everyone is working from a best interest perspective rather than an effort to protect turf or self interest.

History of Court Consideration of Relocation Cases.

Early decisions by the Virginia Supreme Court reaffirm the general rule in Virginia that a relocation will be permitted if the trial court determines that such a move is in the best interests of the children. In *Carpenter v. Carpenter*, 220 Va. 229, 257 S.E.2d 843 (1979) the mother asked to move the children, ages 7 and 9 from Tidewater to New York City. The children had a close relationship with their father and spent significant time with him. The trial court enjoined the mother from moving to New York with the children and focused on a number of factors related to the children's best interests. In denying a parent's request for permission to relocate to New York, the Supreme Court affirmed the trial court's ruling and focused on the fact that the children were doing well in their Virginia surroundings, they had a good relationship with both parents, the move would reduce the father's visits and the mother's expectation of increased income in New York was speculative.

Six years later, in *Gray v. Gray*, 228 Va. 696, 324 S.E.2d 677 (1985) the Supreme Court clarified its earlier ruling in *Carpenter* by stating that *Carpenter* merely holds that before a court permits a custodial parent to remove a child from the Commonwealth, it must determine that the removal is in the children's best interest. In *Gray* the trial court made a finding that it was in the children's best interest to return to Arizona with the mother, but erroneously held that *Carpenter v. Carpenter* prohibited the move. The Supreme Court affirmed the position that children's best

interests will prevail.

One year after the *Gray* decision the Court of Appeals decided two cases permitting a parent to move from Virginia with the children. In *Scinaldi v. Scinaldi*, 2 Va. App. 571, 374 S.E.2d 149 (1986), the Court of Appeals reversed an injunction preventing the mother from moving from Tidewater to New York with her two children ages 3 and 8. In this case, the parties had previously been residents of New York and the mother wished to return with the children. The father obtained an injunction from the trial court and claimed that his relationship with the children would be impaired. In the opinion, the Court of Appeals reversed the injunction and said that the trial court could not assume that a move would necessarily end the benefit or relationship with the non-custodial parent. In addition, the father in this case did not show that his relationship could not be accomplished through longer visits. Further, he had a relationship with another woman and had already been enjoined from having overnight visits with the children when his girlfriend was present. This additional factor allowed an argument about his sensitivity to the children's well-being.

In *Simmons v. Simmons*, Va. App. 358, 339 S.E.2d 198 (1986), the Court of Appeals affirmed a trial court ruling which allowed a mother to go to Florida with her children. The Court noted the children's stable home life with the mother and that the father's relationship could be maintained because "he was given liberal visitation rights of up to eight weeks per year." The Court stated that Mr. Simmons could not adequately care for the children because he worked long hours and that the mother could spend more time with the children in Florida because family members would provide her housing and eliminate babysitting costs. In *Simmons* the father asked the Court of Appeals to adopt the New Jersey Rule that custodial parents wishing to leave must seek permission and establish: (1) a real advantage to the parent in the move and (2) that the

move is not adverse to the best interests of the children. The Court of Appeals rejected the invitation and restated the Virginia Rule as established in *Carpenter* that a move will be allowed if the trial court determines it is in the best interests of the children.

One emerging trend in recent cases is that the courts will draw a distinction between a move that's in the parent's best interests and one that is in the child's best interests. In *Boisseau v. Scott*, 2407-95-2, 1996 Va. App., Lexis 659 (unpublished) the mother attempted to move from Richmond to Williamsburg and lost custody to the father who showed that he was actively involved with his 10-year-old son and had arranged for the child to attend a local school and extracurricular activities. The mother's reasons for the move were weak and of no benefit to the child. In the unpublished opinion of *Pavel v. Pavel*, No. 1343-96-4, 1997 Va. App., Lexis 69, a mother was prevented from relocating to Buffalo, NY, so that she and the children could be closer to the mother's family. The children were young and the father successfully argued that his relationship with the children would be impaired and he further presented expert testimony that his relationship would be disturbed by losing the benefit of frequent and consistent time with the children. In another unpublished opinion, *DeCapri v. DeCapri*, No. 0446-95-2, 1996 Va. App., Lexis 36, the parties had joint custody. The mother petitioned for sole custody and attempted to move with the child to Cleveland, Ohio. The Court of Appeals affirmed the trial court's ruling that the father played an active role in the child's life and stressed the joint nature of their existing custody agreement.

In the case of *Bennett v. Bostick-Bennett*, 23 Va. App. 527, 478 S.E.2d 319 (1996), the appellate court set the standard that applies when a parent who is enjoined from moving wishes to have the injunction reconsidered. In this case the Court outlined a two-part test, (1) there has to be a material change of circumstances since the relocation was first prohibited and (2) the

relocation must be in the best interests of the child.

In the case of *Hughes v. Gentry*, 18 Va. App. 318, 443 S.E.2d (1994), both parents had remarried and the mother had custody of the party's child and had two children by a new marriage. She planned to move out of the state and the father objected. Expert testimony at trial indicated that the child was more contented and better able to relate to both parents when in the custody of the father. The Court of Appeals affirmed the trial court's determination that the best interests of the child will outweigh concerns about separation from half-siblings.

In the case of *Boyles v. Boyles*, No. 2050-95-1, 1996 Va. App., Lexis 318 (Unpublished), the parties had a written custody agreement which included a provision that the custodial mother would "live within a reasonable commuting distance." In this case the mother was allowed to relocate to Charlottesville from Virginia Beach because the move served the best interests of the children and the court noted that the father's behavior after the agreement had already resulted in restrictions on his visitation.

The trend in the last two years has been for the Court of Appeals to deny relocation and that it is harder to relocate under existing case law, even though cases are very fact specific. The analysis of every case should be grounded in the best interests of the children.

Factors in Analyzing a Relocation Case.

One of the threshold questions in examining a child's ability to adjust to the relocation of a parent, is the degree to which the child has formed a secure emotional attachment to each parent. This factor may well be a function of the child's age and developmental stage. Very young children under the age of two are usually not able to tolerate long separations from the primary nurturer. For young children the question of overnight visitation is important and should be introduced as the child is able to tolerate longer separations from the primary nurturing parent.

This is a function of the child's normal developmental stage. Frequent and regular contact with the non-primary custodian is essential in developing a young child's attachment to the non-custodial parent. If a child is deprived of the opportunity for such frequent and predictable contact, the child's ability to form a secure attachment to the non-custodial parent may be impaired. As the child matures, if the parental attachments have formed, it is easier for the child to maintain a relationship through periods of longer separation.

It is essential to look at the relationship of the child with each parent. In a relocation case, the non-custodial parent often fears that he or she will lose the existing relationship with the child or that the relationship will be severely damaged. Each of the parents must be able to clearly and objectively identify the benefits that a child gets from the other parent. If a parent participates with his or her child on many different levels, for example educator, nurturer, advisor and confidant, this relationship will be difficult to maintain during long-term separations. We must also look at where the parent is active with the child. Is the mother the soccer coach? Is the father the one who helps the child with his or her homework and follows up on teacher assignments? Since these activities flow naturally from the parent's and children's interests when they are close, how can such activities be maintained or duplicated after a move?

Perhaps the single most reliable predictor of how children will develop emotionally after the divorce and separation of parents is the quality of the communication and cooperation between the parents regarding the children. If visitation transitions have been difficult, if there has been a history of animosity or tension in the presence of the children, there is no reason to believe that such a pattern will not be continued after a relocation. Relocation in these cases often provides just one more thing for people to fight about. Since relocation is such a significant change of circumstance and we know that improved parental communication is so essential to the

benefit and social development of children, it might be useful to require mandatory participation for the parents in counseling to improve their communication before any serious consideration of relocating children.

When examining the best interests of the child, the court is required to examine the reasonable and mature preferences of children. Older children always have a point of view and opinion about a potential relocation. Young and older adolescents will almost invariably oppose a relocation. They are concerned about losing the relationships they have with friends at school and activities in the community. However, if a child is succeeding at school and is able to interact well with peers and has a good and stable relationship with parents, experience shows that these children typically adjust well after a relocation. Younger school age children may be ambivalent about a relocation and find that a request for their opinion translates into being asked to state a preference between two feuding parents. Since the reasonable preference of the child is a material factor to be evaluated either for agreement or in litigation, practitioners should be careful about how such a preference is determined. Perhaps it is best to seek the assistance of an expert to give information to both parties regarding the maturity, reasonableness and objectivity of a child's preference regarding a relocation. This may be a better alternative than asking a child to testify as a witness in a contested relocation case.

When analyzing a relocation case, it is important to look at the amount of notice that was given about the move and how the parties communicated about the potential move. Did one of the parties wait until the last minute and withhold information about the move? If so, why? To what degree do the parties' property settlement agreement require them to openly communicate about issues related to the children? Isn't relocation a major issue that impacts on children? The answers to these questions often reveal the degree to which the parties communicate about any

significant issues regarding their children. The extent that one of the parties withheld information or delayed notification about the move may indicate that person's propensity to promote communication after a move.

Has one of the parties remarried and is a stepparent now relocating? What are the degrees of integration for children in new families? Often this process develops over several years and may pose a threat to the non-custodial parent. Has the non-custodial parent remarried? If the children were to change physical custody would they then be faced with reintegration to another blended family? In examining these issues, it is often useful to take a close look at how the adults are communicating. If there is acceptance and open communication, such transitions are easier and the parties will have much more flexibility in developing a new routine to accommodate a relocation.

Additional factors to consider in relocation include the distance of the move and the reasons for a move. Does the move provide good and different opportunities for the relocating parent as well as the child? Will there be opportunities for continuing or enhanced relationships with extended family? Will there be equivalent or better educational opportunities for the children? These are all factors which must be examined in detail.

Determine a Plan that Provides for the Other Parent's Involvement.

A key element for the representation of clients who are moving is to develop a plan that provides for the other parent's involvement with the children. Depending on the distance of the move and other factors that are specific to each case, the moving parent should propose a plan which attempts to preserve the same amount of time during the year that the other parent can spend with the children. This may be more easily accomplished for older children who are able to fly on airlines as unaccompanied minors and whose school schedules permit extended vacations

where there can be visitation with the other parent. For preschool children, such extended separations are not realistic and thought must be given to the visiting parent's ability to spend some quality time in the location where the child resides.

To implement such planning, there must be serious consideration to economic accommodations to make the visitation plans work. Agreements to pool and use frequent flyer credits to affect visitation; deviations in child support payments to assist visiting parents to afford travel costs and a willingness to share transportation responsibilities are all factors that should be carefully reviewed when proposing a relocation. The extent to which the moving party has facilitated communication about the move and planned for the contingencies that allow maximum contact for the other parent may not only ease the process of potential negotiation but will make the case stronger if there is a court determination.

Have a Contingency Plan if the Move is Disallowed.

In all child custody cases the parties must give serious consideration to the need for litigation. A fundamental question in relocation cases is why the move is in the best interest of the child. If a child has a secure and productive emotional attachment to each parent, will any positive results of a move outweigh the negative impact of a child's relationship with the other parent? A moving party must always think about a contingency plan in the event that a move of the children is disallowed by the court. Also, the parent who is not moving must give thought to contingencies if the children are allowed to relocate. This might include the moving parent delaying a move or an agreement to a trial period after a move and then a re-evaluation. The non-moving party must consider the ability to relocate to an area closer to the children. These are not easy decisions and the particular opportunities are going to be specific to each case.

With older children there is a common belief that teenagers will get themselves where they

need to be. This means that the behavioral manifestation of their preferences will shape future events even if their parents or court does not. Older children who do not relocate initially with a moving parent may later seek a change to the residence of the parent who has moved.

If a parent's relocation is unavoidable, it may be useful to rearrange the physical custody schedule after the move and allow an evaluation period with the guidance of a mental health professional to give feedback to both parents about the best interest of the children regarding their relocation. The danger in this approach is that neither parent will participate in good faith in the evaluation process and use the time to posture for litigation. An agreement to preclude mental health professional testimony before a court may be a way around this dilemma.

Drafting Agreements that Contemplate Relocation.

Practitioners are well advised to draft custody and property settlement agreements which contemplate the possibility of relocation and define the requirements for the negotiation of a revised custody or visitation schedule. These provisions should include extended notice of any intent to relocate. Parties should be required to consult regarding the development of a plan to maintain each parent's involvement with the children. Specific language can be included that requires the parties to work together, or with a third party mediator or mental health professional. Neither one of the parents should be allowed a veto of a legitimate need by the other party to relocate. Such provisions in an agreement will also be helpful to a court in examining the degree to which each of the parties complied with their agreements.

In conclusion, relocation cases often provide some of the most difficult issues for parents, attorneys and judges. These cases demand energy, creativity, and a constant sense of objectivity about what is in the children's best interests rather than battling over "legal rights" to custody, joint custody, or physical custody. These cases and most child custody cases are better analyzed

from the perspective of attempting to maximize each parent's ability to participate in the lives of their children. In almost every case this can be accomplished.