

Movin' on Up: Issues in Relocation Litigation

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In the aftermath of divorce, some custodial parents propose relocating with their children from the geographic area they shared with their co-parent. Citing needs for a fresh start, remarriage, educational or employment opportunities, family of origin support, and/or escape from their former spouse, these parents contend that the benefits to them and their children outweigh the ramifications to the left behind parent and his or her relationship with the children (Warshak, 2000). A relocation dispute necessarily has a binary outcome; it juxtaposes the custodial parent's right to choose that which he or she determines is in the best interest of the children with the non-custodial parent's right to continue an ongoing parenting relationship with the children. States vary in the presumption of a custodial parent's right to relocate. In Georgia, there is no statute that specifically addresses the issue of parental relocation except for requiring a minimum of 30 days' notice of such intention (O.C.G.A. 19-9-3). In the absence of a clear presumption, courts have had few guidelines upon which to rely.

In an effort to promote consistency across states, The American Academy of Matrimonial Lawyers adopted a model relocation act to guide the courts in making relocation decisions. It consists of eight factors: "(1) the nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the non-relocating parents, siblings, and other significant persons in the child's life; (2) the age, developmental stage, needs of the child, and likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child; (3) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties; (4) the child's preference, taking into consideration the age and maturity of the child; (5) whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating parent; (6) whether the relocation will enhance the general quality of life for both the custodial party seeking relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity; (7) the reasons of each person for seeking or opposing the relocation; and (8) any other factor affecting the best interest of the child" (Warshak, 1999, p. 9).

As evident, these factors call for a subjective analysis of the risks and benefits for an individual child. The court has three options in deciding relocation cases. It may allow the custodial parent to move with the child, thereby impacting the nature and frequency of contact with the non-residential parent; switch custody to the non-moving parent, thereby impacting the extent and amount of contact with the parent who relocates; or the status quo if relocation is denied and the primary residential parent does not move (Austin, 2000). The AAML contends that the latter option should be excluded from consideration as it is prejudicial to the parent who desires to move (American Academy of Matrimonial Lawyers, 1998). Thus, the court is in the position of having to predict the likelihood of a negative outcome for a particular child and balance the impact of the relative loss or attenuation of relationship with either the relocating custodial parent or the non-relocating parent. Given the nature and complexity of relocation cases, courts have turned to psychologists and other mental health experts for guidance.

In the few studies that examined the effects of relocation in children whose parents have divorced, the findings suggest that there is a correlation between moving away from the child's "home" community and adjustment indices such as school performance, such that there appears to be a general risk factor to children relocating (Austin, 2000). However, these studies do not differentiate transient reactions commonly associated

with environmental change with more enduring patterns of maladaptive behavior. In addition, these studies report aggregate statistical data as opposed to predictions for an individual child or family (Austin, 2000). In the absence of empirical studies in relocation cases, psychologists and other mental health professionals have relied on several lines of inquiry to assist them in their opinions regarding relocation. These include the literature on (1) attachment, separation, and developmental stage; (2) the effects of divorce on children; (3) and resiliency (Austin, 2000). Thus, the findings from research in these areas are inferentially applied to relocation outcomes.

The literature on attachment, separation, and developmental stage indicates an interactional effect, with varying putative responses to relocation as a function of a child's age. Relocation of infants and toddlers can have significant negative consequences. Children of this age are capable of forming multiple attachments to multiple caregivers (Pruett, Ebling, & Insabella, 2004) such that frequent overnight visits with both parents are essential for bonding. When frequency of contact between an infant or toddler and a parent is reduced due to geographical distance, there is significant risk of attenuating the bond between the child and the noncustodial parent, if not extinguishing it altogether (Austin, 2000). Some studies also suggest that an infant forms a hierarchy of attachments, with the parent in the primary parenting role being the strongest (Pruett et al, 2004). Theoretically, this mitigates any negative impact associated with very young children relocating with the custodial parent. However, recent research suggests that infants simultaneously form attachments to both parents (Lamb, 2012; Ludolph, 2012). Mother and father figures often provide complementary functions for the child, with the parent in the maternal role providing comfort and security (i.e., secure attachment) and the other parent providing stimulation and play (i.e., secure exploration; Waters & McIntosh, 2011). Grossman and colleagues (2002) indicated that an infant's maternal attachment and a toddler's paternal attachment were positively associated with the child's ability to form attachments at age ten. However, by age sixteen, only father's early encouragement of secure exploration was related to an adolescent's ability to form attachments (Ludolph, 2012). This research suggests that a child's access to both parents is essential for long-term adjustment, arguing against relocation that limits a child's ability to have a meaningful relationship with both attachment figures.

The effects of divorce on children are well-known (Emery, 1998; Heatherington, Bridges, & Insabella, 1998; Wallerstein and Kelly, 1980). In comparison to their peers from intact families, as a group, children of divorce have more emotional, behavioral, and academic problems. However, longitudinal studies suggest that most children cope well with the dissolution of their parents' marriage, although short-term adjustment problems are common. Highly predictive of post-adjustment to divorce is a child's pre-separation functioning (Kelly, 1998). In addition, variables such as gender, time with each parent, and parental conflict mediate the relationship between divorce and children's adjustment. Research suggests that low parental conflict, cooperative co-parenting, and the availability of a healthy father who spends time with his children are predictors of prosocial behavior and positive adaptation following divorce (Warshak, 2000b). In general, boys have more adjustment problems than girls and the frequency and quality of contact between boys and their fathers is related to post-divorce outcomes. For those who have had adjustment problems, when their mothers remarry, boys demonstrate improved functioning. This suggests the importance of a father figure in boys' lives. In the custody of their mothers, girls show no significant differences on indices of adjustment than girls from intact families (Austin, 2000). Much has been written about the negative impact the loss of a mother has on girls, but little is known about girls' adjustment when the focus variable is father custodianship. For both boys and girls of all ages, a good father-child relationship appears to have a positive influence on mood and self-esteem. Children who had infrequent contact with their fathers consistently reported wanting more time with them (Kelly, 2014). However, central to post-divorce adjustment is not the amount of time a child spends with his or her father but the extent to which he maintains his parental role by providing structure, discipline, and guidance.

Most of the research on the effects of divorce on children was conducted on custodial mothers and noncustodial fathers (Warshak, 1999). Extrapolating these findings to the issue of relocation stresses the importance of the noncustodial parent's role in children's adjustment. Simply put, children need both parents.

Consistently with the attachment literature, the quality of a child's relationship with the noncustodial parent is strongly associated with positive outcomes. Moves that involve long distances are particularly problematic for children and the left behind parent to maintain a meaningful relationship. Proponents of relocation argue that technologies such as Skype and Facetime encourage continuity of the relationship between a parent and child. Without question, they help; but very young children do not have the attention span or conversational skills for anything but a brief encounter. If the child and parent are in different time zones, scheduling calls that do not interfere with school hours, extra-curricular activities, bedtime routines, and a parent's work schedule adds a significant level of complexity to these interactions. In addition, Skype and Facetime do not substitute for comforting or playful physical contact (i.e., hugging, sitting on a parent's lap, tousling hair, piggy back rides, etc.), thus attenuating the secure attachment and/or secure exploration bond. Proponents of relocation also contend that schedules can be altered to give the non-relocating parent significant time with his or her children (Warshak, 1999). For example, breaks in the school calendar, summers, alternating primary residences annually, or switching custody at pre-defined grade levels that coincide with transitions to middle or high school. In theory, these options may be viable but there is no research on the effects of varying custody/parenting time schedules and children's adjustment. Furthermore, young children need frequent contact with both parents to develop secure, healthy attachments and older children are likely to resist and resent having to leave friends, summer activities, or change schools for time with his or her nonresidential parent (Warshak, 1999). Another complicating factor is that most parents need to work and cannot be away from their paid employment for extended periods of time. It defeats the purpose of extended parenting time for maintaining the parent-child relationship if the child is in the care of a nanny, sitter, or step-parent for a large part of the working day. Under these circumstances, the left behind parent is likely to be viewed by his or her child as selfish and uncaring, thus greatly increasing the probability of a strained parent-child relationship. Psychological distance now becomes superimposed on physical distance. To compensate, the left behind parent may abdicate his or her role in disciplining or setting limits with the child owing to how little quality time they may have together, thus creating the polarity of the nonresidential parent being associated with vacations and fun and the custodial parent being associated with homework and chores (Warshak, 1999).

In addition to the aforementioned issues, international relocation poses specific challenges. Oftentimes, non-residential parents who are self-employed, work remotely, or have the ability to transfer offices within large corporations move domestically with a custodial parent and their child; rarely, is this case in an international relocation (Warshak, 2013). Thus, rather than parenting time with the child, parent-child contact becomes visitation. Cultural and language differences between the United States and a foreign country may be disadvantageous to the visiting left behind parent, not to mention the expense of travel, lodging, and other costs associated with spending time with one's child or children. Children may return to their home community on breaks from school which may or not be feasible depending upon the child's age and his or her ability to fly as an unaccompanied minor. Travel time, the complications of increased airport security, customs, flight delays, and jet lag tax most adults' coping resources, let alone a child's (Warshak, 2013). Of particular concern in international relocation is the history of the relocating parent in promoting or hindering the relationship between the nonresidential parent and their child. If the relationship has been fraught with problems, the parent who moved to a foreign country can deny the other parent access to the child with little consequence and the non-residential parent having little recourse. Thus, if the country to which the child has moved does not routinely enforce original custody orders, a relocating parent can use the legal system in the destination country to obtain whatever hoped for outcome that was not granted by the court having original jurisdiction. Courts should weigh the laws, customs, and political climate of a destination country to determine if it will protect a child's best interests, promote the non-custodial parent's right to access his or her child, and respect the original parenting plan (Warshak, 2013).

Countries vary considerably in the degree to which they will enforce custody orders from the United States. The Hague Abduction Convention (1980) delineated provisions for returning a child who has been wrongfully removed from his or her habitual residence in an effort to preserve custody decisions from the country of origin (Warshak, 2013). In essence, the Hague Convention was designed to prevent a parent from having any legal or

practical advantage in gaining custody by taking a child to a foreign country. The non-custodial parent must petition for the child's return within a year of the child being removed from his or her home country, otherwise the custodial parent may claim that the child should not be returned because he or she is now settled in the destination country; in other words, is a habitual resident. In 1996, the Hague Convention was expanded to include provisions for resolving disputes over custody and access. Countries differ greatly with respect to how easily one parent essentially can be eliminated from a child's life, especially if the custodial parent has citizenship and the other parent does not. However, according to Warshak (2013), the Hague Convention lacks any enforcement power even for countries who have signed it. In addition, foreign courts may modify a custody order under the habitual residence provision if the custodial parent and the child have lived in the destination country continuously for six months.

Some children cope better with change than others. Those who do not have any special needs, are fairly independent and resourceful, have an easy-going temperament, have well developed social and emotional regulation skills will likely adapt well to any major environmental change such as relocation. These are resilient children. However, for children who do not possess these characteristics, relocation is a major stressor that can tax the child's coping mechanisms, resulting in unintended consequences to the parent-child relationship as well as other emotional and behavioral problems in the child (Austin, 2000).

Austin (2000) has developed a hierarchical model to assist custody evaluators and the courts in making relocation decisions for a particular child. Consistently with a family systems perspective, it is a set of factors specific to the child, such as age, special needs, and adaptability; factors related to both the residential and nonresidential parents, such as extent of parental involvement with the child, parents' psychological stability, level of conflict, and history of cooperative co-parenting; and contextual factors such as geographic distance, recency of divorce, and the availability of outside resources, such as extended family and community support (Austin, 2000). Research strongly suggests that how a child coped with the separation and/or divorce is predictive of how he or she will cope with relocation (Austin, 2000; Warshak, 1999).

By virtue of having experienced the major life event of loss of the family unit, children facing relocation are a vulnerable population. According to Austin (2000), an analysis of each of these variables can predict potential negative outcomes in the areas of emotional well-being, social adjustment, and academic success. This model, however, has not been empirically investigated.

In summary, relocation decisions require a risk/benefit analysis for any given child. There is no "one size fits all" approach to weighing all the factors that courts and evaluators need to consider in permitting one parent to move a child away from his or her other parent. Childfocused variables such as age, gender, coping resources, and resiliency; parent-focused variables such as reason for desiring to relocate and history of the co-parenting relationship; and contextual variables such as recency of divorce/separation, geographical distance, domestic or international relocation, community support, and educational/financial benefits all need to be considered when courts are faced with the dilemma of a custodial parent's right to move in the best interests of the child with the non-custodial parent's right to continue an ongoing parenting relationship with his or her children.

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