

B. Legal Consequences of Relocation of Child

i. Georgia Law

When preparing a Settlement Agreement, the practitioner needs to be aware and cognizant of the likelihood that one of the spouses will relocate after the entry of the Final Judgment, especially when representing the non-custodial spouse. As our society becomes increasingly transitory, our courts and legislatures are addressing the issue of relocation with more frequency. However, the issue remains without clear definition in Georgia.

When faced with a custodial issue, both the initial award of custody and the modification of a custodial award are governed by O.C.G.A. §§19-9-1 and 19-9-3. In the initial award of custody, there is no prima facie right to custody in either the mother or father. See O.C.G.A. §19-9-3(a). However, after an award of custody has been made, the custodial parent maintains a prima facie right to custody. Ormandy v. Odom, 217 Ga. App. 780 (1995). After an award of custody has been made and a party brings a petition to modify the custodial award based on the relocation of the child, an important consideration is whether the custodial parent was originally awarded sole custody or whether sole or joint custody was originally awarded and whether the relocation is in the best interest of the child.

Generally, when dealing with the issue of relocation, the relocation of the custodial parent, in and of itself, is not a sufficient change to authorize a change of custody. Rather, a relocation of the custodial parent will be one of several factors for the trial court to consider. In re R.R., 222 Ga. App. 301 (1996). In the In re R.R. case, the father was awarded sole custody at trial, which had been consented to by the mother since she was in a recovery program for alcoholics. The father later accepted employment in Louisville, Kentucky and the mother sought to change custody because she was a recovered alcoholic and the father's sudden unannounced relocation rendered her liberal visitation meaningless. In addressing the issue of relocation, the Court of Appeals held that the primary consideration is the welfare of the child, and whether the evidence shows a new and material change that affects the welfare of the child. In reviewing this matter, the Court of Appeals held that generally, "it is a change for the worse in the conditions of the child's present home environment rather than any purported change for the better

in the environment of the non-custodial parent that the law contemplates under this theory." More important, the Court held that relocation standing alone cannot support a finding of change of condition and a resulting change of custody. Rather, it is the adverse emotional impact caused a child that is a factor for consideration. See In re R.R.

Therefore, when drafting a Settlement Agreement, the practitioner would be wise to consider incorporating a self-executing change of custody provision. The Court of Appeals reviewed such a provision in the case of Carr v. Carr, 207 Ga. App. 611 (1993). See attached. In the Carr case, the parties had been awarded "shared custody," with a self-executing change of custody provision, which was interpreted by the Court of Appeals to provide joint custody. After the divorce, the mother sought to set aside the self-executing provision, which set forth that in the event either parent moves to another city (outside the metropolitan Atlanta area) or another State, then the primary residence of the child shall be with the non-moving parent. The Court of Appeals held that the self-executing provision of the Court's Order was not void, because custody was with both parents and the self-executing provision simply changed the primary custodial parent, which did not prohibit the mother from moving. Id. at 612.

Unfortunately, the Supreme Court considered reviewing the Carr case, but later declined. However, Justice Hunstein urged the Court to accept the petition for certiorari to review the self-executing provision. When preparing a self-executing provision, the practitioner would be wise to review the dissenting opinion of Justice Hunstein, wherein she holds that the self-executing provision should be declared void because it prevents additional judicial scrutiny and the consideration of factors that may bear on the best interest of the child. Carr v. Carr, 263 Ga. 451, 452, (1993).

ii The American Academy of Matrimonial Lawyers:

The American Academy of Matrimonial Lawyers has compiled a proposed model Relocation Act, which addresses the issues of the relocation of the principal residence of a child. This Act has not been adopted by the Georgia legislature, nor do we know what our legislature's inclination will be regarding this issue. However, the Act gives some guidance of those issues contemplated by other states when addressing this issue and can provide the practitioner with important consideration when preparing a

relocation clause.

An important provision of the Act is found in §201, which would require that notice be given to every person entitled to visitation with the child, prior to the relocation taking place. The importance of the notice requirement is to provide the non-custodial parent with the opportunity to object to the relocation, which would provide the courts with the opportunity to review the matter and determine whether relocation is in the best interest of the child.

In the event the custodial parent fails to provide the required notice, the Act requires the court to consider that failure as a factor in making its determination regarding the relocation and in determining whether a modification should take place. However, this is only one of the factors to consider, the other factors include:

- (a) The child's relationship with the persons involved;
- (b) The age and developmental stage of the child, and the likely impact of the relocation;
- (c) The feasibility of preserving the relationship with the non-relocating person(s);
- (d) The child's preference (considering the child's age and maturity);
- (e) Whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;
- (f) Whether the relocation will enhance the general quality of life for the child and the custodial party;
- (g) The reasons of each person for seeking or opposing the relocation; and
- (i) Any other factor affecting the best interest of the child.

As previously mentioned, the Georgia legislature has not addressed this issue. However, a review of the American Academy proposed model Relocation Act and other self-effectuating clauses can give the practitioner a guidance in preparing a Settlement Agreement. Furthermore, a review and comparison of the Act and current Georgia law reveals that the best interest of the child should remain a primary concern for the practitioner.

iii. Foreign Jurisdiction

Additional guidance for the practitioner can be found in reviewing decisions of other jurisdictions. Consistent with the theories espoused in the American Academy proposed Relocation Act, the Tennessee Courts have held that custodial parents cannot be prevented from moving, provided that reasonable visitation is established for the non-custodial parent. When addressing the relocation issue, the Tennessee Courts have held that the burden of proof falls on the parent who files a petition for relief. In the event the non-custodial parent is seeking relief, that parent must show by a preponderance of evidence that removal is adverse to the best interest of the child in order to prevent a move. In the event the custodial parent brings a petition, that parent has the burden of proving that removal is in the best interest of the child, which can be shifted by a prima facie showing of a sincere, good faith reason for the move and that the move is consistent with the child's best interest. Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993). In the Taylor case, the Tennessee Supreme Court reviewed its own law and that of other jurisdictions, in a well written and reasoned overview. As a result, the Court ultimately looked to the best interest of the child to determine whether relocation should be allowed.

In the case of deBeaumont v. Goodrich, 644 A.2d 843 (Vt. 1994), the Court was faced with a situation relatively similar to that in the Carr case. In both cases, the parents shared parental responsibilities in a joint custodial arrangement. In deBeaumont, the mother sought to remove the children from Vermont, and in fact changed her residence prior to a court determination. Furthermore, the original Divorce Decree provided a provision stating that a parent's move of more than 50 miles from the home state shall constitute a change of circumstance so that the family court may reconsider existing parental responsibilities and visitation. In reviewing the issue of relocation, the Court looked to the best interest of the children and what affect the move would have, prior to upholding the modification by the trial court. In this case, the self-effectuating language was important, as was the parent's co-parenting relationship and the non-custodial parent's strong role in the lives of the children. However, the deBeaumont opinion points out the significance of a relocation clause, since the Court held that relocation is not a significant factor in and of itself which would warrant a change of custody.

In a situation wherein a Final Judgment incorporates a prohibition against relocation, the parent seeking to relocate should have the responsibility to show that a

change of circumstances has occurred in order to justify the relocation. When reviewing a case involving a prohibition against relocation, the practitioner should be aware that if the move is for a well intended reason and is in the best interest of the custodial parent and the child, the move should be approved. However, in making the ultimate decision, a number of factors were reviewed by the Florida Court in the case of Mize v. Mize, 621 So.2nd 4017 (Fla. 1993). Those factors are substantially similar to those set forth in the American Academy proposed Relocation Act. In the Mize case, the Court determined that the best interest

of the child is clearly the prime consideration; however, the following factors must be considered:

1. Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children;
2. Whether the motive for seeking the move is for the express purpose of defeating visitation;
3. Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements;
4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the non-custodial parent;
5. Whether the cost of transportation is financially affordable by one or both of the parents; and
6. Whether the move is in the best interest of the child.

In sum, the issue of relocation has yet to be addressed by our legislature. However, the practitioner should be cognizant of the issue when preparing a Settlement Agreement, especially when representing the non-custodial parent. Given the increasing frequency of relocation of divorced spouses, the inclusion of a relocation clause would be well served. Such a clause should always consider the best interest of the child and should not operate as a blanket prohibition to move. Rather, by considering the best interest of the child, relocation should impact the custodial and visitation issues.