

Young Trial Lawyers

Relocation in custody cases: A history and the present state of the law

by Katharine W. McGregor

In the area of family law, relocation of children has become an increasingly common aspect of custody cases. With the increased mobility of the American public and the changing job market, more and more single parents are seeking the court's permission to move out of state with their child either as a part of divorce proceedings, or afterward. Two of the most frequent reasons parents cite in seeking to relocate, are better economic conditions in another state, and the need to be near their extended family in a different state after divorcing in Virginia. While relocation used to be infrequently granted, courts now appear more willing to permit a party to relocate with their child out of state.

In deciding the issue of relocation, courts are faced with the fact that "[n]o Virginia statute specifically addresses relocation of a custodial parent."¹ However, courts are vested with power to determine relocation matters pursuant to Virginia Code §20-107.2.² "Though sometimes treated as a special topic, with principles unique to it, the relocation issue is best understood under traditional constructs governing custody and visitation."³

"When a trial court has entered a final custody and visitation order,... it cannot be

modified absent (i) a showing of changed circumstances under Code §20-108 and (ii) proof that the child's best interests under Code §20-124.3 will be served by modification. When no such order has been issued, the court must only examine the best interest question."⁴ Regardless of when the issue of relocation arises, the trial court's determination is "a matter of discretion" which will not be reversed "unless plainly wrong or without evidence to support it."⁵ Further, issues involving relocation "involve a balancing of interests. More often than not there are advantages and detriments on both sides of the issue. A trial court's role is to weigh those concerns and conscientiously seek the solution that serves the best interests of the children."⁶ In structuring the relocation issue before a court, "[t]he party requesting permission to remove the child from the state bears the burden of proof."⁷

Case Analysis

Background

Prior to 1979, the issue of relocation was not frequently litigated. However, in 1979 a mother, Mrs. Carpenter, sought permission from the court to relocate her minor children away from Virginia Beach

where they had lived their entire lives, to New York where Mrs. Carpenter would be near her extended family and where she believed she would have better job opportunities.⁸ This case is widely considered to be the first major relocation case, and there the Court denied relocation on the basis that the father had always been very involved in the children's upbringing, the children were doing well in Virginia, and the mother's job opportunities in New York were speculative.⁹

Despite the fact that relocation was denied in *Carpenter*, thereafter *Carpenter* was not considered to be a case which supported a denial of a relocation request; rather, it stood for the proposition that "before a court permits a custodial parent to remove [a child] from the Commonwealth, it must determine that removal is in the [child's] best interest."¹⁰ Therefore, if relocation is found to be in the children's best interest, it would be error to deny a relocation request.¹¹

Relationship between non-custodial parent and child

A common theme throughout relocation cases is whether the non-custodial parent can maintain a relationship with the child after a relocation. Where the non-custo-

dial parent has not maintained a close relationship with the child, courts will likely cite that as a factor supportive of relocation. However, where “the evidence establish[es] that [the non-custodial parent is] ... an active participant in the [child’s life] on a daily basis,” courts are more likely to deny relocation.¹² This issue is framed as follows: “[T]he issue is not whether [a non-custodial parent] is devoted to his [child], but whether instead, the benefit of the relationship can continue upon the [child’s] move [out of state].”¹³ Accordingly, “the added difficulty in maintaining a beneficial relationship between a child and a non-custodial parent should not be the sole basis for restricting a custodial parent’s residence except where the benefits of the relationship cannot be substantially maintained if the child is moved away from the non-custodial parent.”¹⁴

Thus, if the non-custodial parent is an active and frequent participant in the child’s life, that is a factor in favor of denying relocation. In contrast, where the non-custodial parent may be emotionally close to the child but is not involved in the child’s upbringing on a frequent and regular basis, that fact may be used to show that the relationship will not be substantially impaired should the child relocate. Overall, the role that the non-custodial parent’s involvement in the child’s life plays in a relocation matter involves a showing of whether that relationship “would be substantially impaired” in allowing relocation.¹⁵ Courts will not simply look at the non-custodial parent’s involvement post-separation, but rather that parent’s entire history of parenting.¹⁶ Further, courts will consider whether the non-custodial parent’s relationship with the child can be maintained through extended, although less frequent, visitation.¹⁷

Factors supportive of the custodial parent’s interest vis-a-vis factors supportive of the child’s best interest

In determining a relocation case, courts necessarily receive evidence concerning why the custodial parent wants to move (i.e., what is in the custodial parent’s best interest) in addition to evidence concerning the child’s best interest. While Virginia courts do not apply a “unity of interest test” wherein the best interests of the custodial parent is equated with the best interests of the child,¹⁸ often what is in the custodial parent’s best interest will also be in the child’s best interest.¹⁹ However, courts are not permitted to lose sight of the fact that the primary issue is what is in the *child’s* best interests. Accordingly, courts “may consider a benefit to the parent from relocation only if the move independently benefits the child” as well.²⁰

A common situation where factors supportive of the custodial parent’s interests overlap with what is in the child’s interest is the family’s economic situation. This is because if the custodial parent faces significant economic hurdles in Virginia, but the

parent’s economic situation would improve upon a move to a different state, the improved economic situation would benefit both the parent and the child. For example, courts have allowed relocation where a custodial parent “was about to lose her home and her job in Virginia” and where “she could live near family members in an apartment owned by her mother” in another state.²¹ Generally, courts are more willing to grant relocation where there is a greater level of financial security in another state and/or where the custodial parent has extended family in another state.²² This is because the status quo would often be difficult to maintain absent relocation “because of the deteriorating economic situation of the family.”²³ The court must focus not on the preferences of the custodial parent, but rather on demonstrable benefits to the child.²⁴

Improved economic circumstances and the existence of extended family in another state often serve to show that it would be in the child’s best interest to relocate. However, the court is not permitted to lose sight of other factors as well. Accordingly, “[w]hile advantages accruing to a custodial parent from relocation oftentimes inure to the benefit of a child and merit consideration by the court, such advantages must be weighed against any deleterious effects, including an adverse impact upon the relationship between the child and non-custodial parent.”²⁵

Courts do not limit inquiry to the non-custodial parent’s involvement with the child, economic factors and the presence of extended family members, but rather examine all factors which may be relevant to the child’s best interest. For example, the Virginia Court of Appeals has taken into consideration whether Virginia was an “adopted state of residence” and whether either or both parties intended to remain in Virginia indefinitely.²⁶ Other factors include “the [child’s] development in school” and “in the environment in which they reside”²⁷ whether the non-custodial parent’s relationship with the child can be maintained through extended visitation as opposed to regular visitation,²⁸ financial security and stability for the child,²⁹ whether the custodial parent is seeking to relocate out of spite towards the non-custodial parent,³⁰ the potential for emotional stability for the child,³¹ how the present custodial arrangement is working,³² the wishes of the child,³³ and the child’s environment in the second state.³⁴ In short, the court will consider all factors relevant to a determination of the child’s best interest, which must also necessarily include consideration of all factors set forth in Virginia Code §20-124.3.³⁵

Consideration of retroactive requests to relocate child out of state

With respect to the issue of relocation, Virginia courts have analyzed whether a parent may create changed circumstances and then use those new circumstances in support of a relocation request. The

short answer is “yes.”³⁶ In some circumstances, custodial parents have relocated despite an injunction enjoining a relocation, and despite such acts, courts have still considered their retroactive requests to relocate.³⁷ In this situation, courts have found that “the custodial parent’s voluntary relocation of the [child] does not bar that parent from thereafter seeking modification of the trial court’s order of custody; nor does the custodial parent’s action bar a motion seeking approval of the relocation retroactively.”³⁸ This is because “[i]f the court could not retroactively approve a move or order a change in custody after an unapproved relocation has taken place, having before it evidence that the relocation of the [child] or the modification of custody would be in the best interests of the [child], the court would be required to act contrary to the best interests of the [child].”³⁹ As in all relocation cases, “in a court’s decision as to the propriety of relocating [a child] or the modification of custody, ‘the welfare of the [child] is of primary and paramount importance.’”⁴⁰

In some cases where parents have relocated children absent court approval, the non-custodial parent has argued that the only way to have a fair relocation trial is to order “the [child’s] residence be re-established in the Commonwealth of Virginia.”⁴¹ However, even where a custodial parent relocates a child in violation of a court order, courts will not arbitrarily order that the child’s residence be reestablished in Virginia pending a full relocation trial.⁴² The rationale is that once a parent has already relocated a child outside of Virginia, to then “require the [child] to return to Virginia irrespective of their best interests would ... violate the requirement that courts act only in furtherance of those interests.”⁴³ Accordingly, the court is permitted to consider changed circumstances arising by reason of the previous relocation.⁴⁴ Here again the rationale is that “the best interests of the child is [the court’s] primary concern,” and therefore “positive changes in a child’s life cannot be disregarded simply to ‘punish’” a party who seeks retroactive permission to relocate.⁴⁵

Analysis of *Sullivan I* and *Sullivan II*

Since *Carpenter*⁴⁶ was decided in 1979, the Virginia Court of Appeals has rarely reversed a trial court’s decision to allow relocation. However, in 2002, the Virginia Court of Appeals overturned a trial court’s decision to allow a mother and her child to relocate to South Carolina (*Sullivan I*).⁴⁷ This was widely believed to signal a change in the Court’s view toward relocation, such that it would thereafter be more difficult for parents to relocate their children out of state. However, as *Sullivan II*⁴⁸ made clear, *Sullivan I* did not mark a shift in relocation law, rather it was limited to the particular facts of that case wherein relocation, at that time, was contrary to the child’s best interest.

In *Sullivan I*, the mother sought to relocate to South Carolina with her new husband; the primary purpose of the relocation was so that the mother’s new husband could pursue employment opportunities in South Carolina and so that he could be closer to his child from a previous marriage.⁴⁹ Additionally, the mother testified that she would be a full time stay at home mother in South Carolina.⁵⁰ Despite that the mother did not seek to relocate on the basis of better economic opportunities for her in another state, and despite that she testified that she was willing to preserve the status quo and remain in Virginia should the court deny her request to relocate,⁵¹ the trial court granted the relocation request.

On appeal, the Virginia Court of Appeals reversed the trial court, focusing on the fact that the proposed relocation “reflected the preferences of mother and [step-father], not necessitous or other compelling circumstances.”⁵² The Court of Appeals also found that “the evidence clearly establishes that the move would disrupt the positive involvement and influence of father in [the child’s] life, a result at odds with [the child’s] best interest.”⁵³ Here, the father was “an exceptionally committed and attentive non-custodial parent,” and he had “established and maintained an ‘attachment’ or ‘bond’ with [the child], which has demonstrably benefited the child.”⁵⁴ In this case, the Virginia Court of Appeals clarified that for a court to grant a relocation request, there must be identifiable benefits to the child of a relocation and that a non-custodial parent’s positive influence in the child’s life must not be placed at risk by relocation. The inescapable inference is that the burden of proof on the custodial parent includes showing benefits to the child accruing from a relocation, and a showing that the non-custodial parent-child relationship will not be harmed due to the resulting greater geographical distance.

After the Court of Appeals ruled in *Sullivan I*, the “mother again petitioned the trial court for permission to stay in South Carolina” and “[f]ather cross-petitioned the court for primary physical custody of the child....[T]he trial court entered an order granting mother’s petition.”⁵⁵ Unlike *Sullivan I*, this time the Court of Appeals affirmed the trial court’s decision.⁵⁶ While on the surface this seems to conflict with the Court’s previous ruling, upon closer analysis, the ruling in *Sullivan II* is exactly in line with the ruling in *Sullivan I*: The emphasis was on the child’s best interest. At the time the mother petitioned for permission to remain in South Carolina, the child had already resided in South Carolina for 11 months, and the mother and child’s life were already firmly established in South Carolina.⁵⁷ Based on these facts, “the trial court determined that mother proved a change in circumstances and, taking into consideration the factors set forth in Code §20-124.3, that it was in [the child’s] best interest that she be permitted to remain in South

Carolina with her mother.”⁵⁸

Unlike in *Sullivan I* where the Court of Appeals determined “that wife failed to carry her burden of showing that relocation was in [the child’s] best interests,”⁵⁹ in *Sullivan II* the Court of Appeals did not find any error in the trial court’s determination that by reason of the changed circumstances, it was presently in the child’s best interest to remain in South Carolina.⁶⁰ The facts presented to the trial court were very different between *Sullivan I* and *Sullivan II*. While in the first instance it would have been in the child’s best interests to remain in Virginia, by the time *Sullivan II* was litigated the child’s situation had changed, and the court was required to determine the matter based on the child’s present situation.⁶¹ Had the facts remained unchanged from *Sullivan I*, the mother’s petition would have been denied; however, courts are required to look at the present situation even where the moving party is seeking retroactive permission to relocate.⁶² In both *Sullivan I* and in *Sullivan II*, the Virginia Court of Appeals focused on the child’s best interests, and in *Sullivan II*, the Court explained the differing results as follows: “Because the best interests of the child is our paramount concern...positive changes in a child’s life cannot be disregarded simply to ‘punish’ [a party who has already relocated].”⁶³

Conclusion: Advice for the custodial parent and for the non-custodial parent

There are no guarantees that a custodial parent will ever be given permission by a Virginia court to relocate out of state. However, the chances increase where the non-custodial parent is only minimally involved in the child’s upbringing and does not maintain frequent and on-going contact with the child in Virginia. Further, if the custodial parent faces economic difficulties in Virginia and can demonstrate to the court that there are better economic opportunities in a different state (such as a lower cost of living, a better job market, specific job opportunities offered to the custodial parent in the other state, etc), the chances of relocation increase. As part of this analysis, the presence of extended family members in the other state who will assist with caring for the child and who may provide an economic “safety blanket” increase the likelihood that relocation will be granted.

It is important for the party seeking to relocate to demonstrate to the court that there are identifiable benefits to the child of the proposed move, and while there may be more benefits to the parent than to the child, many factors that benefit the parent will also benefit the child. If possible, the custodial parent should provide finite evidence of what the child’s life will be like post-relocation (child care plans, evidence as to where the child will live and the overall home and community environment, whether extended family members will be available

to help care for the child, etc.) in addition to providing the court with a method of maintaining the non-custodial parent’s relationship with the child (extended visitation throughout the year, phone calls, e-mails, sharing news of the child’s academics and extracurricular activities, etc.). In short, a custodial parent who seeks to relocate their children must convince the court that the child’s life will be better in the second state, and that the child’s relationship with the non-custodial parent will be substantially maintained.

Although the burden of proof is on the custodial parent seeking relocation, the non-custodial parent would be well served to prepare as if the burden of proof were on him/her. Relocation is granted with increasing frequency, and this trend can be expected to continue. Therefore, a party who opposes relocation should make every effort to demonstrate to the court that they are actively involved with their child’s life, and that their involvement and influence would be irreparably harmed should their child move to a different state. In addition, where possible, the non-custodial parent should provide evidence that the economic conditions in the proposed relocation state are not significantly superior to those in Virginia. In attempting to convince the court of this, the non-custodial parent may be well served by creating a demonstrative chart outlining the cost of living in both states, the job markets for the custodial parent’s profession in both states, and the average salaries of the custodial parent’s profession in both states. If the non-custodial parent can convince the judge that the economic outlook is not significantly better in another state, that may help to convince a judge to deny the relocation request.

In addition, if the custodial parent does not have a specific plan in place upon moving to another state, the non-custodial parent should highlight this to the judge, although the lack of specific plans is not necessarily fatal to a relocation request.⁶⁴ Finally, the non-custodial parent should also provide evidence to the judge that the child is developing well under that status quo, including how the child is performing educationally, whether the child has a close knit group of friends, and whether the child is involved with local extended family members and local extracurricular activities, etc. In short, the non-custodial parent should strive to convince the court that the child will enjoy a better life growing up in Virginia as opposed to a different state. If the non-custodial parent is asking the court to transfer custody to his/her care, that parent should provide a comprehensive plan as to how he/she will care for the child after custody is transferred.

Finally, both parties should be aware that there are no guarantees; case law demonstrates that the issue of relocation is fact-specific, and it is the particular facts surrounding a child’s life that will determine whether a parent’s request to relocate their child will be granted or denied. In the end,

it may well be the care and diligence with which the relocation case is presented to the court that will determine the outcome. While the court will consider the present status quo, the court will also consider the relevant history of parenting of the child, in addition to changes facing the child upon relocation. Since the trial court's determination is a matter of discretion, each party should ensure that evidence supporting his/her position is put forth in a thorough and compelling manner.

Endnotes

1. *Petry v. Petry*, 41 Va.App. 782, 789 (2003).
2. *Bostick v. Bostick-Bennet*, 23 Va.App. 527, 533 (1996) (Code §20-107.2 grants the "court power to make decrees 'concerning the custody or visitation and support of the minor children of the parties.'").
3. *Petry*, *supra*, at 789.
4. *Id.* at 789-90.
5. *Id.* at 790, quoting *Sullivan v. Knick*, 38 Va.App. 773, 783 (2002).
6. *Simmons v. Simmons*, 1 Va.App. 358, 364 (1986) (emphasis in original). See also, *Scinaldi v. Scinaldi*, 2 Va.App. 571, 593 (1986); *Wilson v. Wilson*, 12 Va.App. 1251, 1254 (1991); *Hughes v. Gentry*, 18 Va.App. 318, 321 (1994); *Bostick*, 23 Va.App. at 533; *Parish v. Spaulding*, 26 Va.App. 566, 572 (1998); *Cloutier v. Queen*, 35 Va.App. 413, 430 (2001); *Goodhand v. Kildoo*, 37 Va.App. 591, 599-600 (2002); *Sullivan*, *supra*, at 781; *Petry*, *supra*, at 789-90; *Wheeler v. Wheeler*, 42 Va.App. 282, 290-91 (2004); *Sullivan v. Jones*, 42 Va.App. 794, 810 (2004).
7. *Cloutier v. Queen*, 35 Va.App. 413, 427 (2001), citing, *Bostick v. Bostick-Bennet*, 23 Va.App. 527, 535 (1996). See also, *Sullivan*, 42 Va.App. at 806 ("Analogous to custody and visitation disputes, a party seeking relocation must show that a change in circumstances has occurred since the last custody award and that relocation would be in the best interests of the child....The party requesting relocation bears the burden of proof on both issues.").
8. *Carpenter v. Carpenter*, 220 Va. 299 (1979).
9. *Id.* at 301-02.
10. *Gray v. Gray*, 228 Va. 697, 698 (1985).
11. *Id.* at 698-99.
12. See, e.g., *Cloutier*, 35 Va.App. at 428-29; *Sullivan*, *supra*.
13. *Scinaldi*, *supra*.
14. *Id.*
15. *Cloutier*, *supra*, at 429-30.
16. *Petry*, *supra*.
17. See generally, *Scinaldi*, *supra*.
18. *Cloutier*, *supra*.
19. *Sullivan*, *supra*, at 784. See also, *Parish*, *supra*; *Petry*, *supra*.
20. *Goodhand*, *supra*, quoting, *Cloutier*, *supra*.
21. *Scinaldi*, *supra*.
22. See, *Simmons*, *supra*; *Parish*, *supra*; *Stockdale*, *supra*; *Petry*, *supra*; *Wheeler*, *supra*, at 286-87.
23. *Wheeler*, *supra*, at 290-91.
24. *Id.* at 290.
25. *Sullivan*, *supra*, at 784.
26. *Scinaldi*, *supra*, at 574-576.
27. *Id.* at 576.
28. *Id.*
29. *Simmons*, *supra*, at 360-62.
30. *Id.* at 361.
31. *Parish*, *supra*, at 574.
32. *Cloutier*, *supra*, at 228.
33. *Goodhand*, *supra*, at 600-01.
34. See generally, *Petry*, *supra*, at 786.
35. *Cloutier*, *supra*, at 425.
36. *Parish*, *supra*, at 571-72.
37. See *Id.*
38. *Id.*, at 572.
39. *Id.*
40. *Id.*, quoting, *Simmons*, *supra*, at 361.
41. See generally, *Parish*, *supra*. ("The father next argues that the trial court erred in failing 'to enforce' the juvenile court injunction prohibiting the mother from removing the children from Virginia without court approval. He asserts that 'enforcement' of the order requires that 'the children's residence be re-established in the Commonwealth of Virginia until the terms of the injunction are met.'").
42. See, *Parish*, *supra* (in such an instance, the appropriate remedy for the non-custodial parent is to seek court sanctions against the custodial parent).
43. *Id.*
44. *Sullivan*, *supra*.
45. *Id.* at 810.
46. *Carpenter*, *supra*.
47. *Sullivan v. Sullivan* ("Sullivan I"), 38 Va.App. 773 (2002).
48. *Sullivan v. Jones* ("Sullivan II"), 42 Va.App. 794 (2004).
49. *Sullivan v. Sullivan*, 38 Va.App. at 784.
50. *Id.* at 777.
51. *Id.* at 784.
52. *Id.*
53. *Id.* at 784-85.
54. *Id.* at 783.
55. *Sullivan v. Jones*, *supra*, at 799.
56. *Id.*
57. *Id.* at 803-04.
58. *Id.* at 807.
59. *Id.* at 804.
60. *Id.* at 807.
61. *Cloutier*, *supra*, at 425.
62. *Parish*, *supra*, at 572.
63. *Sullivan v. Jones*, *supra*, at 810.
64. While all aspects of relocation need not be set, there must be some level of certainty in the proposed relocation. See, *Wilson*, *supra*, at 1255 ("A court may determine a particular custodial location to be a factor in awarding custody, if that location affects the child's best interests. Thus, a change of location may be a material change in circumstances, if the evidence at the time so indicates. However, a predetermined automatic reversal of primary custody, based on an undetermined move in the future, is clearly an abuse of discretion.").

Katharine W. McGregor, an associate with Maddox, Cole & Miller in Vienna, has worked in family law since she was in high school when she worked for Betty A. Thompson and Marcia Maddox in Arlington. Prior to law school, she was a paralegal at Covington & Burling where she worked on insurance recovery cases and the successful appeal of a Florida death penalty conviction. Throughout law school she was a law clerk at Maddox, Cole & Miller, assisting with all aspects of family law cases. Ms. McGregor received her B.A. in psychology at the University of Virginia and her J.D. (with Honors) from The George Washington University.