

Untangling the Knots of Child Custody Relocation Litigation

Your client asks you, “What does it mean to be a primary residential custodian? What effect does it have? After our divorce is final, can my spouse move and take my children away?”

Good questions. Unfortunately, the family law attorney has been unable, in recent years, to give a satisfactory answer, as the law on parental relocation in Kentucky seems to be forever in a state of flux. However, the odds of having concrete answers to those questions by the end of the year have improved on both the legislative and judiciary front, for legislation has been introduced to Kentucky’s House of Representatives that would provide family courts with much-needed guidance to resolve parental relocation disputes; and the Kentucky Supreme Court recently accepted discretionary review of three parental relocation cases: *Pennington v. Marcum*, 2006 WL 2194903 (Ky. App. 2006); *Frances v. Frances*, 2006 WL 3759659 (Ky. App. 2006); and *Rankin v. Coffman*, 2007 WL 1229022 (Ky. App. 2007).

Within four years of separation and divorce, about one fourth of mothers with custody move to a new location.¹ Whether caused by a high divorce rate, remarriages, shifting job market, an increase of joint custody arrangements or simply the mobility of our society, more and more cases are presented to courts regarding relocation of children. It is probable that the number of cases litigated on this issue would decrease if there was clear statutory or case law on the subject, so that the family law attorney can properly advise her client. Relocation disputes pose great dilemmas for family courts. In a case where both parties are acting in good faith, the court must balance the relocating parent’s understandable desire of seeking a better life by moving away with her child against the non-relocating parent’s understandable desire to maintain frequent and continuing contact with his minor child.

Most state legislatures have addressed the issue, but ours has not. In the absence of legislation requiring notice and determining the factors to be considered when a parent desires to relocate a child, courts are struggling. In 2006, in *Robinson v. Robinson*, the Kentucky Court of Appeals noted that the arrival of the 21st century brought “an accelerated evolution” in child custody relocation litigation. The court then went on to lament the absence of legislation addressing the issue: “Unfortunately, despite Kentucky’s recent legislative efforts, Chapter 403 of the Kentucky Revised Statutes fails to specifically address the special problem faced by our courts when custodial parents desire to relocate with their children subsequent to divorce... [U]ntil our legislature aligns with the majority of states [with relocation statutes], we are compelled to address relocation/custody issues by applying the general custodial modification statutes, KRS 403.340 and KRS 403.350.”²

In 1998, in recognition of the issue and dilemmas faced by the courts, the General Assembly passed a bill establishing a task force to study custody and visitation in Kentucky and to submit findings to the Legislative Research Commission. That report was submitted January 6, 2000 and included recommendations regarding the relocation of children as well as a bill draft. Sadly, no legislation regarding child relocation was passed.

In 2008, the relocation issue may finally be addressed by our statutes. House Bill 383 has been introduced this session in the Kentucky Legislature and was referred to the House Judiciary Committee. House Bill 383 would add a new section to KRS Chapter 403 that would provide a framework to family courts for proper adjudication of parental relocation disputes.

A parent who provides the principal residence for a child will be required to provide notice of his or her proposed relocation and a proposed revised parenting time schedule to any other person with custody or visitation rights. Furthermore, if the parent who does not provide the child's principal residence intends to move, he or she will also be required to notify the parent who provides the child's principal residence of his or her intent to relocate as well as a proposed revised parenting time schedule. In both instances, notice must be provided no less than sixty days prior to the planned relocation, unless the parent does not become aware of the need for the move during that time frame, in which case he or she will have ten days from the date the information was received. The non-relocating parent will have thirty days after receiving the notice to object to the move, or the move will be permitted. Failure to provide notice can be considered by the court in its determinations regarding relocation or change of custody or visitation, as well as a basis for ordering the return of the child, an award of attorney's fees to the non-relocating parent, or a finding of contempt against the relocating parent. The court may grant temporary orders allowing or disallowing the relocation. The court is to determine whether the relocation of the child should take place in accordance with the best interests of the child. The court would be prohibited from considering the relocating parent's intention that he or she will not relocate if the relocation is denied. Lastly, the relocating parent will have the burden of proof that the proposed relocation is made in good faith and in the best interests of the child. The court may sanction either party if it finds that the party's proposal or objection was made to harass the other party or delay the proceedings or was unsupported by the law or the evidence.

Should this legislation not pass, though that would truly be to the detriment of the courts, there is still hope for clarification of relocation law in the guise of the above-mentioned Kentucky Supreme Court cases. Our last Kentucky Supreme Court case on the issue, *Fenwick v. Fenwick*, left many Kentucky family law attorneys shaking their heads, as the Court declared that "a custodial parent's decision to relocate with the children is presumptively permissible, and a custodial parent may relocate with the children without prior approval or modification of the joint custody award."³ The Court further declared that "a non-primary residential custodian parent who objects to the relocation can only prevent the relocation by being named the sole or primary residential custodian, and to accomplish this designation would require a modification of the prior custody award."⁴ At the time, this meant that he or she must show that "the child's present environment seriously endangers his physical, mental, moral, or emotional health, *and* the harm likely to be caused by a change of environment is outweighed by its advantages."⁵ The custodial modification statutes have since been amended, but the Court of Appeals stated in *Robinson* that "The Supreme Court's holding in *Fenwick* remains sound law under KRS 403.340(2) where the modification is sought within two (2) years of the original award of permanent custody."⁶

In *Fenwick*, the Court provided that it was following the trend of allowing the residential parent to move away with the child, if the move is made in good faith and a satisfactory revised parenting schedule can be achieved, based on "a prioritizing of the 'new family unit' constituted by the post-divorce relationship between the primary care-taker parent and the child."⁷ Since that time, new evidence has been obtained to suggest that this is not the right approach. A new study suggests that, as compared with divorced families in which neither parent moved, students from families in which one parent moved had weaker relationships with their parents, as a whole, and fared worse overall as adults than their counterparts.⁸ While this should not suggest that relocation is not in a child's best interests

in every case, it will hopefully influence the Kentucky Supreme Court's upcoming relocation decisions so that there is no longer a preference for the primary residential parent to be able to move with the child.

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¹ Sanford L. Braver et al., *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. Family Psychology 206, 206 (2003).

² 211 S.W.3d 63, 67-68 (Ky. App. 2006).

³ 114 S.W.3d 767, 785 (Ky. 2003).

⁴ *Id.* at 786.

⁵ *Id.*

⁶ *Robinson*, 211 S.W.3d at 71.

⁷ *Fenwick*, 114 S.W.3d at 789.

⁸ Braver, *supra* at 214.