

THE RELOCATION RODEO: WRANGLING CUSTODY CASES

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Introduction

- Trial courts cannot prohibit a parent from relocating, but they can prohibit a parent from taking his/her child with them

- *Hale v. Hale*, 1994 Va. App. LEXIS 35

Relocation: Statutory analysis

- § 20-124.3

Best interests of the child analysis

- § 20-108

Statutory authority for the courts to alter custody and visitation orders

- § 20-124.5

Notification of relocation (if a prior custody order has been entered)



Relocation: Statutory analysis

- Relocation: No applicable statute
 - a. Petry v. Petry*, 41 Va.App. 782 (2003)
 - b. Judd v. Judd*, 53 Va.App 578 (2009)

Relocation: Statutory analysis

No applicable statute, BUT might there be relevant Rules or Statutes applicable to a *Pendente Lite* Motion to Enjoin a Relocation?

Rule 3:26(c): Temporary Restraining Orders and Preliminary Injunctions

“Threshold Requirement for Preliminary Injunctions. – A court may issue a preliminary injunction only if it first determines that the movant will more likely than not suffer irreparable harm without the preliminary injunction.”

Relocation: Statutory analysis

Rule 3:26(d): Temporary Restraining Orders and Preliminary Injunctions

“Additional Requirements for Preliminary Injunctions. – If the irreparable-harm threshold has been met, the court must determine whether the following factors support the issuance of a preliminary injunction:

- i. whether the movant has asserted a legally viable claim based on credible facts (not mere allegations) demonstrating that the underlying claim will more likely than not succeed on the merits;
- ii. whether the balance of hardships – that is, the harm to the movant without the preliminary injunction compared with the harm of the nonmovant with the preliminary injunction – favors granting the preliminary injunction; and
- iii. whether the public interest, if any, supports the issuance of a preliminary injunction.

A preliminary injunction may be issued only if it is supported by factors (1) and (ii), and it is not contrary to the public interest in factor (iii).”

Relocation: Statutory analysis

Virginia Code § 8.01-624 (Duration of temporary injunctions to be fixed therein):

“When any court authorized to award injunctions shall grant a temporary injunction, either with or without notice to the adverse party, **such court shall prescribe in the injunction order the time during which such injunction shall be effective** and at the expiration of that time such injunction shall stand dissolved unless, before the expiration thereof, it be enlarged. Such injunction may be enlarged or a further injunction granted by the court in which the cause is pending or by the court to whom the bill is addressed in the event the cause be not matured, after reasonable notice to the adverse party, or to his attorney of record of the time and place of moving for the same.” (Emphasis added).

Relocation: Case Law analysis

- Initial custody determinations
- Custody modifications

Initial Custody Determinations

- § 20-124.3 – Primary consideration
- Parties already reside in different states / locations
 - *Brandon v. Coffey*, 77 Va. App. 628 (2023).
- Parties reside in same location and one parent seeks to relocate
 - *de Haan v. de Haan*, 54 Va. App. 428 (2009)

Custody Modification Determinations

- Broader analysis required
- Required considerations (high level)
 - Has there been a material change in circumstances?
 - Would the relationship with the left-behind parent be substantially impaired?
 - Would the relocation be in the child's overall best interests?

Burden of proof:

- Moving party:
 - Moving party bears the burden of proof in all relocation cases
 - *Cloutier v. Queen*, 35 Va. App. 413 (2001)
 - Material change in circumstances & best interests of the child
 - *Sullivan v. Knick*, 38 Va. App. 773 (2002)
 - Substantial impairment
 - *Goodhand v. Kilddo*, 37 Va. App. 591 (2002)
 - *Judd v. Judd*, 53 Va. App. 578 (2009)

Burden of proof, continued:

- Non-moving party:
 - No burden of proof, *but* prudent for the non-moving party to put on evidence
 - *Scinaldi v. Scinaldi*, 2 Va. App. 571 (1986)
 - *Stockdale v. Stockdale*, 33 Va. App. 179 (2000)
- What happens after the moving party has met his/her burden of proof to establish a *prima facie* case?
 - Focus on the weight of the evidence under § 20-124.3
 - *Stockdale v. Stockdale*, 33 Va. App. 179 (2000)

Court of Appeals: Standard for Review

Same deference given to relocation matters as to initial custody determinations:

The trial judge's decision is a matter of discretion; the court's decision will be upheld unless it is plainly wrong and/or without evidence to support it.

- *Dolan v. Dolan*, 2000 Va. App. LEXIS 758

Required Considerations:

- So long as the trial court considers § 20-124.3 factors, is that sufficient?

NO!

Required Considerations:

Has there been a Material Change in Circumstances?

- If no: Analysis stops, relocation denied
- If yes: Analysis continues

Has a material change in circumstances occurred since entry of the prior controlling order?

- *Keel v. Keel*, 225 Va. 606 (1984)
- *Sullivan v. Knick*, 38 Va. App. 773 (2002)
- *Gulley v. Brinkley*, 2022 Va. App. LEXIS 39

Why must the court consider whether a material change in circumstances has occurred?

- *Res Judicata*
- *Sullivan v. Knick*, 38 Va. App. 773 (2002)
- *Gulley v. Brinkley*, 2022 Va. App. LEXIS 39

Standard for determining whether a material change in circumstances has occurred

- No precise test – fact based
 - *Gulley v. Brinkley*, 2022 Va. App. LEXIS 39
- Should courts consider the positive effects of a relocation?
 - *Gulley v. Brinkley*, 2022 Va. App. LEXIS 39, *14

A parent's relocation may constitute a material change in circumstances

- *Sullivan v. Knick*, 38 Va. App. 773 (2002) (includes best interest analysis)
- Does distance matter?
- If so, what distance would trigger a finding of a material change in circumstances?

Required Considerations: Best Interests of the Child

- “Best interests of the children” is the primary consideration
 - *Simmons v. Simmons*, 1 Va. App. 358 (1986)

Best Interests of the Child, continued

- Benefits accruing to a parent versus a child
 - *Judd v. Judd*, 53 Va. App. 578 (2009)
 - *Cloutier v. Queen*, 35 Va. App. 413 (2009)
 - *Wheeler v. Wheeler*, 42 Va. App. 282 (2004)
- Unity of interests analysis with respect to parent and child?
 - *Cloutier v. Queen*, 35 Va. App. 413 (2001)
 - *Sullivan v. Jones*, 42 Va. App. 794 (2004)

Best Interests of the Child, continued

- Relevancy of the current status quo / current circumstances
 - *Sullivan v. Knick*, 38 Va. App. 773 (2002) (“Sullivan I”), **but see,** *Sullivan v. Jones*, 42 Va. App. 794 (2004) (“Sullivan II”)
 - *Cloutier v. Queen*, 35 Va. App. 413 (2009)

Best Interests of the Child, continued

- Frequently referenced § 20-124.3 factors (factors 3, 5 and 6)
 - *Bedell v. Muller*, 2016 Va. App. LEXIS 294
- Overall stability
 - *Wheeler v. Wheeler*, 42 Va. App. 282 (2004)
 - *Parish v. Spaulding*, 26 Va. App. 566 (1988)
 - *Scinaldi v. Scinaldi*, 2 Va. App. 571 (1986)
 - *Simmons v. Simmons*, 1 Va. App. 358 (1985)

Best Interests of the Child, continued

- Maintaining stability: Is Virginia the only option?
 - *Wheeler v. Wheeler*, 42 Va. App. 282 (2004)
- Connection to new location
 - *Petry v. Petry*, 41 Va. App. 782 (2003)
- Presence of a stable and loving environment
 - *Simmons v. Simmons*, 1 Va. App. 358 (1985)
- Consideration of role of the primary caretaker
 - *Stockdale v. Stockdale*, 33 Va. App. 179 (2000)
- Propensity of the relocating parent to encourage the child's relationship with the non-custodial parent
 - *Bostick v. Bostick-Bennett*, 23 Va. App. 527 (1996)

Best Interests of the Child, continued

- Consideration of the parent's reasons for the relocation
 - *Carpenter v. Carpenter*, 220 Va. 299, 302-303 (1970)
 - Fanciful, speculative and questionable reasons for a relocation are likely not be to approved
 - *Bedell v. Muller*, 2016 Va.App. LEXIS 294
 - Improper purpose?
 - *Hale v. Hale*, 1994 Va.App. LEXIS 35
 - Balance reasons for relocation versus impact on visitation

Best Interests of the Child, continued

- Benefits of New Location
 - *Stockdale v. Stockdale*, 33 Va. App. 179 (2000)
 - Consideration of schools, environment and parent's ability to financially provide for the children
 - *Dolan v. Dolan*, 2000 Va. App. LEXIS 758
 - Consideration of educational opportunities, cultural opportunities and economic advantages

Best Interests of the Child, continued

- Consideration of access to extended family members
 - *Judd v. Judd*, 53 Va. App. 578 (2009)
 - *Petry v. Petry*, 41 Va. App. 782 (2003)
- BUT: Maintaining status quo with both parents may be more important than the presence of extended family members.
 - *Dolan v. Dolan*, 2000 Va. App. LEXIS 758

Best Interests of the Child, continued

- Balancing of interests
 - *Simmons v. Simmons*, 1 Va. App. 358 (1986)
 - *Hale v. Hale*, 1994 Va. App. LEXIS 35
- Catch-all considerations
 - *Dolan v. Dolan*, 2000 Va. App. LEXIS 758
 - Virginia Code § 20-124.3(10)

Required Considerations: Consideration of the Relationship with the Non-Custodial Parent (Substantial Impairment Analysis)

- Inconvenience of new location vis-a-vi substantial impairment analysis:
 - *Scinaldi v. Scinaldi*, 2 Va. App. 571, 575 (1986)
- Impact of geographic distance involved / overall balance of interests
 - *Scinaldi v. Scinaldi*, 2 Va. App. 571, 575 (1986)
 - *Wheeler v. Wheeler*, 42 Va. App. 282 (2004)
 - *Cloutier v. Queen*, 35 Va. App. 413 (2001)
 - *Sullivan v. Knick*, 38 Va. App. 773 (2002) (“Sullivan I”) - - BUT SEE
 - *Sullivan v. Jones*, 42 Va. App. 794 (2004) (“Sullivan II”)

Substantial Impairment Analysis, Continued

- Analysis is fact-based
 - *Wheeler v. Wheeler*, 42 Va. App. 282 (2004)
 - *Example of fact-based considerations in Cloutier v. Queen*, 35 Va. App. 413 (2001)
 - The current time sharing schedule was working well;
 - The non-custodial parent was actively involved with the children and their activities;
 - The non-custodial parent assisted the children with homework;
 - The non-custodial parent met the children's needs generally;
 - The children were doing well academically; and
 - The children were doing well socially.
- Failure to consider substantial impairment constitutes reversible error.
 - *Takacs v. Takacs*, 2016 Va. App. LEXIS 83 (2016)

Separate from consideration of § 20-124.3 factors, must the trial court consider potential “harm”?

- No
- *Garner v. Ruckman*, 2011 Va. App. LEXIS 369
 - The relevant standard is the best interests standard; there is no actual harm standard
- *Goodhand v. Kildoo*, 37 Va. App. 591 (2002)
 - No presumption of harm in relocation cases

May a court consider a generalized, prospective relocation?

- No
- *Wilson v. Wilson*, 12 Va. App. 1251 (1991)
 - The Court may not make advisory opinions

Relocations without consent nor judicial approval

- No relevant statute requiring consent for relocation
- No relevant statute requiring judicial approval for relocation
- Retroactive approval permitted
 - *Parish v. Spaulding*, 26 Va. App. 566 (1998)
- Consideration of post-relocation changes are appropriate
 - *Surles v. Mayer*, 48 Va. App. 146 (2006)
- Rationale: The child should not be punished for the acts of his/her custodial parent. *See generally*:
 - *Parish v. Spaulding*, 26 Va. App. 566 (1998)
 - *Sullivan v. Jones*, 42 Va. App. 794 (2004) (“Sullivan II”)
 - *Surles v. Mayer*, 48 Va. App. 146 (2006)
 - *Prentice v. Cook*, 2022 Va. App. LEXIS 231

What if a parent violates a court order and relocates regardless?

- No automatic reversal
- *Parish v. Spaulding*, 257 Va. 357, 363 (1999)

Conclusions and Issue Spotting:

- The standard for an initial custody determination involving a relocation is simply the best interests of the child analysis under § 20-124.3
- There is a heightened standard applicable for custody modification proceedings
- The burden of proof is on the moving party
- Initial consideration: Has a material change in circumstances occurred since entry of the controlling order?
- Overall, is the relocation in the child's best interests?

Conclusions and Issue Spotting:

- Why is a parent seeking to relocate?
- Various cases have focused on the following:
 - Are there benefits specific to the children of the proposed move?
 - Does the proposed relocation involve an economic hardship or necessity (e.g., a job offer)?
 - Is the relocation necessitated by a new marriage?
 - Is a parent seeking to relocate for health and medical reasons?

Conclusions and Issue Spotting:

- Will the relocation negatively impact the relationship between the child and the non-custodial parent?
 - Difficulties associated the increased distance alone are not sufficient to deny a relocation – Must consider why the increased distance will deprive children of the benefits of their relationship with the other parent
 - Need to balance the interests; this is a fact-based determination
- Does the non-custodial parent have a good faith basis for opposing the move?

Questions? Observations?

- Your experiences?
- Nuances not addressed?

