



RELOCATING ANDY

*Remaining With the Nurturer
as Guiding Principle;
Impact of Relocation Statute;
How to Win a Removal Case*

by Robert L. Gottsfield

The guiding principle in the late 20th Century is not to destabilize a child's family unit, if that child is reasonably content and developmentally on course.

For the majority of the 20th Century, courts traditionally gave the custodial parent carte blanche to move with their children to another city, state or country.¹ The rationale was that as long as there was a legitimate loosely defined reason for uprooting the family (i.e. not done solely to thwart visitation), a continuation of the existing custodial arrangement was in the best interest of the children. Beginning in the late '70s and early '80s, coincident with the joint custody movement then beginning to be favored by legislatures and courts, an evolving minority view developed which maintained that a court should require the *custodial* parent to show *sufficient* cause before moving to a new jurisdiction or a substantial distance from the staying parent.² Arizona cases embraced this late 20th Century view.³

Now at the dawn of the 21st Century in an era of "instability and unpredictability of the employment market, the high incidence of remarriage, and the high incidence of second divorces, separate moves by each parent are coming to represent the norm."⁴ Thus it is not surprising that history has repeated itself and we are back to the original presumption that the custodial parent has a right to move with the children.⁵ Interestingly, the latest psychological literature agrees with the view that the children's need for stability and remaining with the parent who actually does the day-to-day care and nurturing is more important than maintaining "frequent and continuing contact with the noncustodial parent" (as found in A.R.S. § 25-408A) on a weekly or biweekly basis.⁶ An amendment to the relocation statute, effective August 6, 1999, adds to the relevant factors in determining the child's best interests "(t)he potential effect of relocation on the child's stability."⁷

Research bearing on the complex issues that relocation

engenders has called into question the view that children are malleable and soon surmount the stressors caused by divorce, claiming instead that such experiences have lasting effects on a child's developing character, self-esteem, and a whole multitude of attitudes and expectations concerning themselves, others and society as a whole.⁸ The anxieties created in children by divorce are said to be reawakened by contemplated relocations and to be reduced by the children remaining with the moving parent, if that parent has provided a stable environment and relationship. The guiding principle in the late 20th Century is not to destabilize a child's family unit, if that child is reasonably content and developmentally on course.⁹

In most sole custody cases it may be obvious for the welfare of the children that they be permitted to relocate with the moving parent, who is usually the primary caregiver responsible for their general well-being. However, what happens in the more difficult cases where two parents are sharing the day-to-day care and raising of a child under a joint legal or joint physical custody arrangement? Amendments to Arizona's relocation statute, A.R.S. § 25-408C-J, effective July 21, 1997, and as further amended in 1999,¹⁰ attempt to answer such questions. The relocation statute is consistent with the trend allowing a move away by all but the joint physical custodial parent who actually shares day-to-day caregiving activities.

Arizona Relocation Statute

The statute provides for and distinguishes the following situations:

a) Where the relocation issue is already provided for in a court order or written agreement of the parties (i.e. decree, property settlement agreement, parenting plan or other order of the court) the court "shall not deviate"¹¹ from it unless the provided plan is no longer in the child's best interest. In such a case, there is a presumption that the moving away issue as provided for by the parties is in the best interest of the child.¹²

b) Where there is no order or written agreement of the parties concerning relocation (or pursuant to a 1999 amendment the order or agreement providing for relocation is dated more than one year from the date of the proposed move) then there are two contingencies provided for:

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- 1) A notice of request to move;
- 2) And, emergency moves.

Notice of Request to Move

When both parents are in Arizona and both are entitled to custody or visitation by order or agreement, at least 60 days advance notice must be provided to the staying parent.¹³ An amendment, effective August 6, 1999, provides that if relocation has been provided for by an order or written agreement and it "is dated within one year of the proposed relocation of the child" no notice of a move need be sent.¹⁴ If a notice is required it must be in writing and sent by certified mail, return receipt requested ("or pursuant to the Arizona rules of civil procedure"), before the moving parent may relocate with the child outside of

the state of Arizona or more than 100 miles from the moving parent's present residence.¹⁵ The staying parent has 30 days after notice is served on him or her to file a petition to prevent relocation. If the staying parent fails to file such a petition within 30 days, that parent may still petition to stop the move if good cause is shown,¹⁶ which apparently means good cause for the delay in filing. Alternatively, if the moving parent does not provide 60 days written notice of a move, he or she may still file a petition to relocate with the court, it apparently being assumed that 60 days will transpire before a court could hear the matter in any event.¹⁷ Where a moving parent relocates without filing a petition to relocate and fails to give 60 days written notice, that parent shall be sanctioned by the court, which could include removing custody from the moving parent if that is in the child's best interest.¹⁸

Most important is that *all custodial parents* residing in Arizona, even those with sole custody, must give the 60-day notice of a move (except where the order or agreement providing for relocation is dated within one year of the proposed relocation). If it is contested they must be prepared to justify the move at a subsequent hearing.¹⁹ A staying parent who does not object to a relocation may always petition the court at any time to enhance visitation rights if the moving parent will not agree to a modification of visitation. Parents should realize that by agreeing to joint physical custody they may have a tougher time moving with the children. They may always agree in writing that the relocation statute does not apply and that the custodial parent may move with the children at any time without court approval or, conversely, they may agree that no move will be permitted at any time.²⁰ The reloca-

tion statute specifically provides that a “court shall not deviate from a provision of any parenting plan or other written agreement by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child’s best interests.”²¹ It further provides for “a rebuttable presumption that a provision from any parenting plan or other written agreement is in the child’s best interests.”²² Thus while the parties may undoubtedly initially agree that the 60-day notice of move requirement of the statute will not apply, if the best interests of the child militates against any agreed-to provision concerning relocation, including notice, the same will undoubtedly fail.

Child’s Best Interest Still Standard

In resolving whether to allow a parent to relocate under the Arizona relocation statute, the court is to ap-

ply the best interest of the child standard.²³ The burden of proof is, however, on the parent who is seeking to relocate.²⁴ If a court permits relocation then it has a duty to “make appropriate arrangements to ensure the continuation of a meaningful relationship between the child and both parents.”²⁵ In determining the child’s best interests, the new statute sets forth factors²⁶, many of which are found in previous Arizona cases²⁷ which are in addition to the normal considerations made by a court with respect to custody in a dissolution matter (as found in A.R.S. § 25-403). These factors will be considered in the discussion of how to win a relocation case.

Emergency Moves

The emergency move permitted by the statute “(p)ending the determination by the court of a petition or application to prevent relocation” is dependent on a finding that a parent had

to move in less than 60 days after written notice has been given as “required by circumstances of health or safety or employment of that parent or that parent’s spouse.”²⁸ Note, however, that the emergency move provision is only available to a *sole custodian* or a *joint custodian with primary physical custody*.²⁹ A joint custodian with substantially equal physical custody may only make an emergency temporary move with written permission of the staying parent, failing which, the child must stay in Arizona until after the hearing.³⁰

How to Win a Relocation Case

Moving parent: Acknowledge in your pleading that you as the moving parent have the burden of proof to show the move is in the child’s best interest, and then show, if you can, (1) that you are the sole custodial parent or that you have joint legal custody and are the primary physical cus-

todian; (2) the reason for the intended move and its advantages which will enhance "the general quality of life" for you or the child (or preferably the both of you)³¹ (i.e. your or present spouse's job opportunity; better schools and/or neighborhood environment; emotional and/or financial support of family at place of move, etc.); (3) how you as the moving parent intend to help mitigate the losses to the child of the staying parent's access change³² (i.e. phone calls placed twice a week by moving parent and the sharing (or paying all) of such cost; bearing cost of some travel; longer visitations with staying parent during holidays (or all holidays to be spent with staying parent) and during summer vacation period); (4) that sufficient time has been provided for the staying parent and the child to deal with the move³³; (5) the attempts you have made to renegotiate in advance child support, travel expense, telephone and other expenses caused by the move to the staying parent, as well as a more advantageous visiting arrangement³⁴; (6) how you are the parent who actually does the day-to-day care and nurturing and that the continuation of such a stable environment is a paramount interest as evidenced by the recent literature and the 1999 amendment acknowledging same by the addition of the factor of the effect of a relocation on the child's stability³⁵; (7) that given the foregoing showing there can be no doubt the relocation is made in good faith and not to thwart the relationship between the child and the staying parent³⁶; (8) how you have always complied with visitation orders in the past and will certainly do so in the future, and how you recognize a continuing and meaningful relationship between the staying parent and the child is absolutely essential³⁷; (9) how your proposed visitation schedule permits a realistic opportunity for visitation with both parents and the child³⁸; (10) how the move will not detrimentally affect the "emotional, physical or developmental needs of the child"³⁹; (11) how there is abso-

lutely no financial advantage to you as the moving parent by relocating with respect to either child support obligations or travel or vacation expenses⁴⁰; and, (12) that you have a previously agreed-to relocation provision which is presumed to be in the child's best interest and which the court is (respectfully) mandated and urged to follow, as continuing enforcement thereof is in the child's best interest in this case.⁴¹

Staying parent: Show, if you can, (1) you have joint physical custody with the moving parent and you are both day-to-day caregivers so that the moving parent should be allowed to leave but the child should stay with you;⁴² (2) the relocation is not undertaken honestly, carefully or in good faith;⁴³ (3) the move is frivolous and really the result of anger, desire for revenge, or the like;⁴⁴ (4) the move is calculated to prevent or substantially diminish the child's contact with you as the staying parent;⁴⁵ (5) you have sole custody or joint legal custody; (6) you have such significant periods of physical custody that you, as the staying parent, should be treated as having in effect joint physical custody and for reasons of stability the move should be disallowed;⁴⁶ (7) the moving parent has not presented reasonably detailed plans showing the reason for the move, the new access arrangement and how the move will affect you as the staying parent financially⁴⁷ (e.g. the enormous cost of travel and what the moving parent is prepared to do about it); (8) the effect on the child of the move will be to produce abnormal consequences emotionally, physically and/or developmentally;⁴⁸ and (9) the specific reasons the move will have a deleterious effect on the child's stability.⁴⁹

Staying parent fall-back position: Argue alternatively that if the relocation is permitted the court is requested to do the following⁵⁰: (1) grant the staying parent longer periods of visitation to mollify the loss of the frequent personal contact caused by the move; (2) require the moving parent to pay all or a substantial portion of

the travel expense for the child (and you in the case of a child of tender years where you also must travel) and cost of phone calls; (3) if the staying parent is paying child support, then request a deviation from the child support guidelines to provide an annualized travel credit to reduce the cost of monthly child support; (4) grant the staying parent all holidays and the entire summer in a proper case.

Conclusion

Today most states favor giving primary custody of children to the parent who has been the main caregiver, regardless of gender or financial circumstance. This reasoning should also prevail in a relocation case. Dissolution creates a new family unit and the child's welfare must be judged based on that new perspective. 🏠

Hon. Robert L. Gottsfield is a Maricopa County Superior Court judge.

ENDNOTES:

1. *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983); *Groh v. Groh*, 327 N.W.2d 655 (Wis. 1983); *In re Marriage of Lower*, 269 N.W.2d 822 (Iowa 1978). See also discussion at Gottsfield, *New Vectors in the Battle Over Children*, 2 *Complete Lawyer* 20-24, ABA General Practice Section, Fall 1985; Gottsfield, *Relocation: Rights of the Moving/Staying Parent Under Arizona Law*, Seminar Materials, 2/21/97 MCBA. The custodial parent usually determines the child's upbringing, education, health, care and religious training under A.R.S. § 25-410A.
2. The foundation cases are *Weiss v. Weiss*, 418 N.E.2d 377 (N.Y. 1981) and *D'Onofrio v. D'Onofrio*, 365 A.2d 27, aff'd 365 A.2d 716 (App. Div. N.J. 1976). See also *Stout v. Stout*, 560 N.W.2d 903 (N.D. 1997); *Lamb v. Wenning*, 600 N.E.2d 96 (Ind. 1992) (joint legal custody case); *Matter of Eckert*, 518 N.E.2d 1041 (Ill. 1988).
3. *Pollock v. Pollock*, 181 Ariz. 275, 889 P.2d 633 (App. 1995); *Bloss v. Bloss*, 147 Ariz. 524, 711 P.2d 663 (App. 1985). In relocation cases there are the following competing interests: The *custodial parent* has an interest in seeking career opportunities, advancement in new locations, and an enhanced lifestyle which may require unrestricted travel, and a desire to provide for the children previously entrusted to him or her regardless of where the home is located; the *noncustodial parent* wants continued accessibility which may be diminished by the move; the *children* need stability and usually want a continuous, meaningful relationship with both parents which usually means regular visitation; and the *court* historically has been interested in retaining jurisdiction over the parties and their children to accomplish what is in the best interest of the children while preserving the rights of the parents, although this interest has been considerably diminished by the UCCJA. See n. 13 *infra*.
4. Judith S. Wallerstein and Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 *Family Law Quarterly* 305, at 310 (Summer 1996).
5. *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996); *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996); *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996); *Mize v. Mize*, 621 So.2d 417 (Fla. 1993); *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993); *Long v. Long*, 381 N.W.2d 350 (Wis. 1986); *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998) (noting trend that a growing number of states now presume that the custodial parent's good faith decision to relocate is in the best interests of the child). The trend is reflected in

various newspaper and magazine articles such as M.A. Jacobs, *Courts Let Custodial Parents Move*, W.S.J., 2/10/98 at B1 and B6.

6. N.4 *supra* at 311-314. See also Dr. Wallerstein's seminal work with Joan Kelly, *Surviving The Breakup: How Children and Parents Cope With Divorce*, Basic Books, Inc., New York (1980).
7. N.10 *infra*.
8. Wallerstein and Tanke, *supra* n.4 at 307-311.
9. *Id.* at 315-321.
10. The relocation statute was originally enacted as A.R.S. § 25-337(C-F) in 1996 as part of an omnibus bill (Laws 1996, Chapter 145) of the Domestic Relations Reform Study Subcommittee of the Legislature. The Domestic Relations Unit of the Administrative Office of the Courts (AOC) staffs this subcommittee. Further revisions were enacted in 1997 as Laws 1997, Chapter 176 (Senate Bill 1293) and in 1999 as Laws 1999, Chapter 85 (Senate Bill 1185). As discussed in the text the 1999 Amendment became effective August 6, 1999, and modified subsections (F) (60-day notice need only be given where order or agreement providing for relocation is over one year old) and (I) (adds potential effect of relocation on child's stability as factor to be considered by court), respectively.
11. A.R.S. § 25-408(I).
12. *Id.*
13. A.R.S. § 25-408(C). If a parent without a court order or agreement leaves the state such as prior to a dissolution being filed, the Uniform Child Custody Jurisdiction Act (UCCJA) comes into play and will protect the remaining Arizona parent. See A.R.S. § 25-431 et seq. and especially § 25-433.
14. A.R.S. § 25-408(F). The Act originally provided that the 60-day notice did not have to be given if provision for relocation was previously made by court order or written agreement of the parties at any time. See also n.10 *supra*.
15. A.R.S. § 25-408(C).
16. *Id.* at (E).
17. *Id.*
18. *Id.* at (D).
19. *Id.* at (C) and new 1999 amendment to (F). This is consistent with the constitutionally protected fundamental liberty interest each parent has in the care, custody and management of their children. *Graville v. Dodge*, 287 Ariz. Adv. Rep. 68 (CA1, 1/28/99).
20. A.R.S. § 25-408(I).
21. *Id.*
22. *Id.*
23. A.R.S. § 25-408(H).
24. *Id.*
25. *Id.*
26. *Id.* at (J).
27. N.3 *supra*.
28. *Id.* at G(1) and (2).
29. *Id.* at G(1).
30. *Id.* at G(2).
31. *Id.* at J(3).
32. *Id.* at J(2), (4), (5) and (7).
33. *Id.* at J(6).
34. *Id.* at J(2), (4), (5) and (7).
35. *Id.* at J(8) added by 1999 amendment. See n.10 *supra*.
36. *Id.* at J(2) and (7).
37. *Id.* at J(2) and (4).
38. *Id.* at J(2) and (5).
39. *Id.* at J(6).
40. *Id.* at J(7).
41. *Id.* at I.
42. See notes 5-10 *supra* and discussion in text.
43. A.R.S. § 25-408(J)(2) and (7).
44. *Id.*
45. *Id.* at (J)(2) and (5).
46. N.42 *supra*.
47. A.R.S. § 25-408(J)(2), (5) and (7).
48. *Id.* at (J)(6).
49. *Id.* at (J)(8) added by 1999 amendment.
50. An excellent article showing specific tasks the father can do to help his custody/relocation position is J.M. Leving and C.M. Kenik, *Trial*, Jan. 1999 at 42-48. See also Note: *The Court's Role Facilitating an Effective Relationship Between the Noncustodial Parent and Child When the Custodial Parent Relocates With Child*, 37 *Brandeis L. J.* 259-272 (1999) (examining the creative solutions courts employ to protect the noncustodial staying parent when the child is allowed to move with the custodial parent).