

FAMILY LAW



The Right Moves

by David J. Steerman

A generation ago, divorce was infrequent and in many cases unimaginable. Family wars were fought on the home front, not in the courtroom. Today, few of us do not know a relative, friend or a co-worker who has not either been involved in a divorce or been a victim of it.

In 1991 alone, more than one million couples were divorced in the United States. One out of every two marriages begun in the past twenty years ends in divorce. These statistics are further complicated by the current demands of the nineties, especially the newly evolved second wage earner and the hard-pressed econ-

omy that often necessitates dual incomes to start a family.

Given the current economic climate in which work is difficult to find, often it is the opportunity and not the individual that dictates the location of employment. The issue of when, where and why a custodial parent chooses to relocate has become a recurring theme in custody disputes in courtrooms throughout the country.

Whimsical relocation decisions by a custodial parent cannot exist. It is every lawyer's task, whether a family lawyer or a general practitioner, to advise custodial parent clients about their legal rights in moving with their children from one jurisdiction to an-

other and the stakes involved in making such a decision.

The "best interest of the children" standard remains the primary focus of the courts in custody cases today. In 1990 Judge Phyllis Beck, writing for a panel of the Pennsylvania Superior Court in *Gruber v. Gruber*,¹ set forth a three-pronged test to be used with the "best interest" standard in custody cases involving relocation:

1. What are the potential advantages of the proposed move, economic or otherwise, and what is the likelihood the move would substantially improve the quality of life for the custodial parent and the children? Is the move a result of a momentary whim on the part of the custodial parent?

2. What is the integrity of the motives of the custodial parent in seeking the move or of the non-custodial parent in seeking to prevent it? A court must assure itself that the move is not motivated by a desire to frustrate the visitation rights of the non-custodial parent or to impede the development of a healthy, loving relationship between the child and the non-custodial parent.

3. What is the availability of realistic, substitute visitation arrangements that will adequately foster an ongoing relationship between the child and the non-custodial parent?

In *Gruber*, the court was called upon to rule on two petitions regarding a mother's wish to move to Illinois with the couple's three children. The trial court issued an order granting primary custody of the children to the mother with visitation rights to the father, but it forbade the mother to remove the children from Pennsylvania. The court ruled that if the mother left Pennsylvania with the children, the father would receive legal and primary custody of the chil-

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dren during the school year, leaving the mother with partial physical custody during the summer vacation months. The mother challenged the trial court's refusal to modify the custody arrangement to allow her to move to Illinois and retain primary custody of the children.

While espousing the "best interest of the children" standard, the Superior Court articulated that a more specific set of standards should govern the decision of whether a custodial parent² and his or her children should be permitted to relocate at a geographical distance from the non-custodial parent. The court applied the three factors set forth above and allowed the relocation.

The decision was grounded in the fact that the move would substantially enhance the quality of life of the mother and children. The mother had no friends or family in Pennsylvania. Her feelings of alienation coupled with a series of troubling confrontations with her former husband exacerbated her loneliness, anxiety and depression. Moreover, the mother had no feasible living arrangements and was unemployed and pregnant. The mother's doctor opined that the stress of the situation could harm the baby she was carrying. In Illinois, by contrast, the mother's brother offered a home for her and the children, financial support and aid in securing employment. In addition, the mother could easily re-establish her old network of friends in Illinois.

The court found that no illegitimate motives existed and that a new visitation schedule was easily maintainable. Thus, the court found relocation in the best interests of the children.

In 1991, the Superior Court again affirmed a relocation case and allowed the mother to establish residence for herself and her children in Washington. In *Lee v. Fontine*,³ the mother decided to move to Washington because she and her current husband were assured jobs and ownership of their own home there. In Pennsylvania Mrs. Lee and her husband were receiving public assistance and living in a housing project. The trial court allowed the relocation be-

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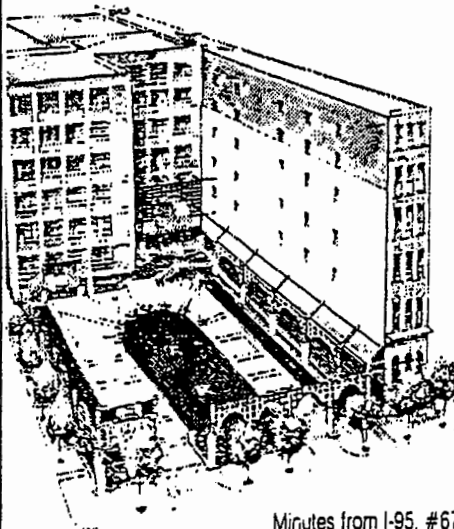
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cause an improved economic environment for the mother and children was in the children's best interest.

As in *Gruber*, the Superior Court in *Lee* found the mother's motives pure in seeking relocation and the visitation arrangements suitable and feasible.⁴ Most important, the improved quality of life for the custodial parent and the children was the crucial factor in the court's decision.

Ten months after the decision in *Lee v. Fontine*, another panel of the Pennsylvania Superior Court in *Plowman v. Plowman*⁵ affirmed the decision of a Pennsylvania trial court granting a mother permission to relocate with her child to Maryland. The *Plowman* court subsequently granted legal and physical custody of the child to the mother, subject to the partial custody of the father.

The parties had originally agreed to an order giving mother primary physical custody and father partial physical custody. The mother then filed a petition for modification so that she could move to Maryland with her son to accept employment as a medical assistant. The father im-

mediately petitioned the court to prevent the move. The trial court denied the modification of custody as well as the father's petition and allowed the mother to move to Maryland. The judge who heard both petitions ordered an expedited custody hearing if the parties could not agree on a visitation schedule. Father subsequently filed a petition to modify custody, and the parties entered into an interim order of custody that allowed both parties to maintain joint legal custody of their son and permitted the mother to have primary physical custody in Maryland. Mrs. Plowman and her son thereafter moved to Maryland.

Between the time the parties entered into the interim custody order and the date for a full custody hearing, the father filed three petitions alleging that the mother had failed to adhere to the interim custody order by denying him access to their son. Thereafter, a full hearing was held, and the trial court issued an order granting the mother physical and legal custody of the son with partial custody to the father.

On appeal, Mr. Plowman argued that the trial court erred in permitting the mother to move out of the jurisdiction with the minor child without a full evidentiary hearing on the child's best interests at the time. The Superior Court agreed and held that due process requires a full evidentiary hearing to be held either before the child is moved from the jurisdiction or within a reasonable time thereafter. The basis of this opinion was grounded in the substantial rights of both parties to maintain a continuing and meaningful relationship with their minor child as well as the court's responsibility to ensure the fairness of both the procedure and the result in a custody action.

The *Plowman* court concluded that to guarantee due process, the custody hearing and determination of the *Gruber* factors must be held before the child is permitted to move from the jurisdiction or, under exigent circumstances, within a reasonable time thereafter. Such hearings are now deemed "Plowman Hearings." The *Plowman* Hearing, however, will not be required if the parties are able to arrive at a joint decision about a relocation.

The Superior Court once again explored relocation in *Lambert v. Lambert*.⁶ *Lambert* involved a long and tortuous procedural history that included numerous petitions. The Superior Court applied the *Gruber* factors in determining the best interest of the children and found that the trial court correctly acknowledged that the ultimate objective in resolving the matters remains the best interests of the children because they are aligned with the custodial parent's quality of life.

In reaching its conclusion to remand the matter to the lower court, the Superior Court also noted that the mother's relocation of the children away from their surroundings and school was, without question, violation of a prior custody order a sufficient basis for finding contempt. However, the finding of contempt could not be the basis for an award of custody.

Finally, the most recent custody relocation decision of the Superior



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Court of Pennsylvania is *Kaneski v. Kaneski*.⁷ In *Kaneski* a mother wanted to move with the parties' two children to New York state because her new husband had accepted employment there. The lower court held a three-day hearing and elicited testimony from both parties and the children.

After reviewing the facts in light of all three *Gruber* factors, the Superior Court specifically stated that the non-custodial parent must show that resistance to the move stems from the concern for the children and his or her relationship with them. The Superior Court's decision in *Kaneski* gives weight to the second prong of the *Gruber* inquiry and recognizes that the focus is not the custodial parent's initial motivation to relocate, but the motivation at the time of the lower court hearing.

The three-pronged test set forth by Judge Beck in *Gruber* and subsequently adopted by the Superior Court in *Plowman, Lee, Lambert and Kaneski* specifically defines the elements required to be established at a custody hearing involving relocation to determine the best interests of the children. This test may prove crucial in advising clients on relocation. Employing the *Gruber* test before the court does is essential in preparing such cases.

In proving that the inquiries set forth in *Gruber* have been satisfied, expert testimony may be necessary. A psychologist's opinion about which parent is best suited to promote the best interests of the children could prove useful, as well as having a

Notes

1. 400 Pa. Super. 174, 583 A.2d 437 (1990).
2. The court specifically noted that it was not addressing the shared physical custody situation in which each parent has an equal amount of time with the child, although the standard set forth on relocation should apply where appropriate.
3. 409 Pa. Super. 552, 594 A.2d 724 (1991).
4. The court referred to 23 Pa.C.S. Section 5301 *et seq.*, and specifically cited Sections 5301 and 5308. Section 5301 annunciates that the general policy of the commonwealth is to ensure continuing contact between both parties and the child after dissolution when in the best interest of the child. Section 5308 ensures that a review of a custody arrangement will be undertaken when a move is contemplated by any party.
5. 409 Pa. Super. 143, 597 A.2d 701 (1991).
6. 409 Pa. Super. 542, 598 A.2d 561 (1991).
7. ___ Pa. Super. ___, 604 A.2d 1075 (1992).

mental health professional demonstrate how relocation may affect the children. A vocational expert may be used to analyze the availability of opportunities for employment in the jurisdictions at issue, or an economist could testify on the standards and costs of living. Some attorneys have hired experts to testify about the advantages and disadvantages of the schools in different jurisdictions.

Clearly, packing up one's belongings and children in a decision to relocate is not simple. Aside from the emotional and social impact on the

family, the repercussions of such a move are serious and could result in a rapid change in custody. While family law attorneys cannot be expected to soothe the pains, fears and tension of relocation, they can discuss the legal ramifications involved and advise their clients accordingly so that at the very least, the client's legal journey will be less difficult than the relocation.

(David J. Steerman is an associate with the firm of Dolchin, Slotkin & Todd, P.C.)

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