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Chair's Column

Post-judgment Cohabitation and the Suspension of Alimony—Another Option?

by Brian Schwartz

Countless late evenings and early mornings watching the house for comings and goings. Snapping photos of the couple at dinner, at the children's events and on vacation. Reviewing emails, texts, Facebook pages, voting records and white pages listings. Videotaping attendance together at special events. No, this is not a day in the life of the Kardashians. Rather, this is the post-judgment dating life of a former spouse receiving alimony.

Every matrimonial attorney has had this experience—telling an alimony-paying client that alimony will likely continue even though the recipient is living with a paramour. To that client, it defies logic. "So not only do I have to pay alimony, but I have to support the lover as well? Who wrote these laws?" After an awkward silence, you begin the analysis. It goes something like this:

First, you cite *Gayet v. Gayet*.[1] In that matter, Justice Daniel O'Hern properly posited the balancing act:

> Two policies of the law intersect in the resolution of this issue. First, the Legislature has directed that alimony shall terminate upon remarriage. *N.J.S.A. 2A:34-25*; *see Sharpe v. Sharpe, 109 N.J. Super. 410 (Ch. Div.1970), mod., 57 N.J. 468 (1971).* This signals a policy to end alimony when the supported spouse forms a new bond that eliminates the prior dependency as a matter of law. That policy, however, can conflict with another state policy that guarantees individual privacy, autonomy, and the right to develop personal relationships free from governmental sanctions.[2]

In order to properly balance these seemingly conflicting policies, the Court determined that the mere existence of the post-judgment relationship was the first step in determining what, if any, relief should be granted. Instead, the Court opined that once the relationship was established, an economic needs test would next be applied to determine the extent of the relief. More specifically, Justice O'Hern stated:

> The principles of *Garlinger* call for modification when (1) the third party contributes to the dependent spouse's support, or (2) the third party resides in the dependent spouse's home without contributing anything toward the household expenses. In short, this scheme permits modification for changed circumstances resulting from cohabitation only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief.[3]

In other words, you have just explained to your client that it is not enough to prove that the former spouse is in a relationship with another; your client must also prove that there is some level of economic benefit provided by the paramour to entitle your client to either a reduction or a substantial economic benefit to perhaps result in termination. So all the photographs, tape-recordings, text messages, Facebook status screenshots and the like, not to mention the significant invoice paid to the private investigator who has been following the happy couple, may only satisfy the first prong.

But wait. There is still hope. You next review the marital settlement agreement to determine whether there is a *Konzelman* clause; that is, does your client's agreement provide for a termination of alimony based upon "cohabitation."

A short detour here. Use of the term "cohabitation" and attempts to define it in agreements may work *against* the paying spouse. After all, the word "cohabitation," by definition, requires the recipient spouse and the paramour to live together as a condition precedent to modification or termination of alimony. In fact, many attorneys have a provision in their agreements seeking to define cohabitation before entitlement to relief (for example, in *Konzelman*, the agreement stated that Mr. Konzelman's support and maintenance obligation of $700 per week would terminate should Mrs. Konzelman undertake cohabitation with an unrelated adult male for a period of four continuous months).[4] However, the *Konzelman* Court also discusses cohabitation for purposes of determining whether there is a change in circumstances warranting action:

> Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. *These can include,* but are not limited to, *living together*, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle.[5] (emphasis added)

Similarly, in *Devaney v. L'Esperance*[6] (a palimony case) the Court noted the following in discussing a "marital-type" relationship:

> Indeed, whether the parties cohabited is a relevant factor in the analysis of whether a marital-type relationship exists, and in most successful palimony cases, cohabitation will be present. We recognize, however, that palimony cases present highly personal arrangements and the facts surrounding the relationship will determine whether it is a marital-type relationship that is essential to support a cause of action for palimony. There may be circumstances where a couple may hold themselves out to others as if they were married and yet not cohabit (i.e., couples who are separated due to employment, military, or educational opportunities and who do not cohabit). The trier of fact must consider the realities of the relationship in the quest to achieve substantial justice. *Therefore, in addressing a cause of action for palimony, the trial judge should consider the entirety of the relationship and, if a marital-type relationship is otherwise proven, it should not be rejected solely because cohabitation is not present.*[7] (emphasis added)

By defining cohabitation to require that the parties live together (such as the clause in *Konzelman*), a recipient spouse seeking to avoid modification or termination merely does not live with the paramour. To avoid this loophole, when drafting your marital settlement agreement, the focus should be on whether a marital-type relationship exists, whereas living together is only a factor, not a determinant.

Returning to our hypothetical, disappointed client, unfortunately, it appears the recipient spouse's attorney was familiar with the *Konzelman* decision and, as such, was too smart to allow for a strict termination provision.

Last, you review the Honorable Marie Lihotz's recent decision in *Reese v. Weis*.[8] In *Reese*, the former wife had been in a 10-year relationship with her paramour at the time the application was filed by her former husband.

In fact, the former wife never hid her cohabitation and explained the two intended to remain in a long-term, exclusive, intimate, romantic relationship.[9] As such, the issue before the court was not whether there was cohabitation. Instead, the appellate panel sought to "develop standards defining what constitutes an economic benefit or when such a benefit warrants termination rather than modification of alimony."[10] In doing so, Judge Lihotz reviewed the types of economic benefits one might receive:

> When examining the cohabiting household, a trial judge starts with a review of the parties' financial arrangements, to discern whether the cohabitant actually pays or contributes toward the dependent spouse's necessary expenses, such as housing, food, clothing, transportation, or insurance. If so, the cohabitant provides the dependent spouse with a direct economic benefit.
>
> Further, indirect economic benefits, which benefit the dependent spouse, must be considered, including the cohabitant's payment of his or her own expenses. A clear example occurs when a dependent spouse moves into the home of the cohabitant. Although the cohabitant continues to pay pre-existing, personal housing obligations, the dependent spouse would be relieved of the need to expend funds for housing expenses.
>
> More subtle economic benefits also may result from the parties' intertwined finances. When each party to the relationship has discrete, defined expense obligations, the individual economic responsibilities are set. However, when the parties' financial obligation arrangements are comingled, blurring the demarcation of economic responsibility, subsidization of expenses by one party for the benefit of the other may occur, *Boardman, supra, 314 N.J. Super. at 347, 714 A.2d 981*, and the ability to prove economic independence may diminish or possibly disappear.[11]

Based upon the facts in *Reese*, including the "subtle" economic benefits provided to the former wife and the stability and significant length of the relationship, the Appellate Division affirmed the trial court's decision to terminate alimony.

But, alas, very few cases that walk in your door have an undisputed 10-year relationship with a significantly increased lifestyle that would allow for a termination of alimony based upon the facts. Your client leaves deflated (and likely very angry) and perhaps you can even sympathize.

So, is there a fair way to balance the two interests recited above—the payor's 'right' to not support a former spouse and the paramour who have formed a new bond and are engaged in a marital-type relationship against the recipient's right to individual privacy, autonomy, and the right to develop personal relationships? I suggest that there is—a suspension of alimony.

The protocol would be as follows:

- The payor spouse must first prove a change in circumstances by demonstrating that the recipient spouse is involved in "an intimate, close and enduring relationship, requiring more than a common residence or mere sexual liaison, in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle." This standard is clearly intended to be more than "they have lived together for a couple of months."
- Once this first prong is proven:
  - If there is a *Konzelman* termination provision, alimony is terminated.
  - If there is no such provision, alimony is immediately suspended.
- In order to reinstate alimony, the recipient spouse must demonstrate the relationship that led to the termination no longer exists. If proven, alimony would be reinstated. However, if the alimony is limited duration alimony, the terminal date cannot be extended. Therefore, if the terminal date has passed, alimony cannot be reinstated.
- If alimony is suspended, and not reinstated within a reasonable time, the payor may move to terminate the alimony.

Some may argue the alimony should terminate automatically if, say, one year passes and the alimony is not reinstated. However, I prefer a review of the circumstances at that time before ultimate termination.

Next time you have a cohabitation case, try seeking a suspension of alimony as an alternative prayer for relief. It may be just the type of fair compromise a court of equity would embrace.

Endnotes

1. 92 N.J. 149 (1983).
2. *Gayet* at 151.
3. *Gayet* at 153-4, *citing Garlinger v. Garlinger*, 137 N.J. Super. 56, 64 (App. Div. 1975).
4. *Konzelman v. Konzelman*, 158 N.J. 185, 191 (1999).
5. *Konzelman*, at 202.
6. 195 N.J. 247 (2008).
7. *Devaney*, at 258-9.
8. 430 N.J. Super. 552 (App. Div. 2013).
9. *Reese*, at 559.
10. *Id.* at 573.
11. *Id.* at 576.

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Editor-in-Chief's and Emeritus Editor's Column

Relocation Revisited: Is It Time for a Legislative Response?

by Charles F. Vuotto, Jr. and Mark Biel

Sometimes attorneys must issue a clarion call for substantive change when the underlying predicates of a judicial decision no longer exist, or perhaps never really existed in the first place. Such is where we find ourselves as we critique the law of relocation presently extant in the state of New Jersey.

The co-authors have been privileged to craft a number of articles on the topic of relocation, which have previously appeared in the *New Jersey Family Lawyer*.[1] These articles and others, which have appeared in this publication, discuss in detail *Baures v. Lewis*,[2] which since 2001 has established the legal standard for relocation cases litigated in this state. *Baures* provides that a parent seeking removal of a child outside the state of New Jersey over the objection of the other parent must first demonstrate a *prima facie* case for removal before the court will consider the application.

Initially, the moving party has the burden to produce evidence that: 1) there is a good faith reason for the move; and 2) the move will not be inimical to the children's interests.[3] To make such *prima facie* showing, the moving party must provide facts that, if not rebutted, would sustain a judgment in the proponent's favor.[4] As a practical matter, in most cases the custodial parent will be able to make such *prima facie* showing. As the New Jersey Supreme Court explained, such *prima facie* demonstration by the custodial parent "is not a particularly onerous one."[5]

The Supreme Court indicated the following:

> The initial burden will be met for example, by a custodial parent who shows he is seeking to move closer to a large extended family that can help him raise his child; that the child will have educational, health and leisure opportunities equal to that which is available here and that he has thought out a visitation schedule that will allow the child to maintain his or her relationship with the noncustodial parent.[6]

Once the *prima facie* demonstration is made, the noncustodial parent has the burden of moving forward with evidence demonstrating that the removal is "either not in good faith or inimical to the child's interests."[7] After the noncustodial parent has gone forward, the moving party may rest or produce additional evidence regarding the noncustodial parent's motives, the visitation scheme or any other matter bearing on the application.

While *Baures* also requires a trial court to examine a number of factors relevant to the relocating party's burden of proving good faith, and that the move will not be inimical to the child's interest, these factors do little to change the clear presumption in favor of relocation. Short of very unusual facts such as a special needs child or a child whose talent would uniquely be benefitted by remaining, proofs respecting the various factors will generally be insufficient to overcome the underlying social science predicates detailed in *Baures*.

Assuredly, the *Baures* paradigm is not applicable when there has not been an initial determination of custody either by litigation or settlement. Most notably, this will occur when the parties are about to separate or have been separated for a short period of time. In such instances a determination must be made pursuant to N.J.S.A. 9:2-4 under a best interest analysis. The second type of case where the *Baures* paradigm is inapplicable is the case in which the parties share essentially equal physical custody, either *de facto* or *de jure*. In those circumstances, the removal application constitutes a motion for change of custody and will be governed initially by a changed circumstances inquiry and ultimately by a best interest analysis.[8]

But the majority of relocation cases that are litigated do not fall within those exceptions. They fall under the

post-judgment structure where a more traditional PPR/PAR arrangement exists. In such cases, the Supreme Court's decision to establish a far less onerous demonstration than 'best interest' and requiring only that the move will "not be inimical to the children's best interest" establishes an unequivocal presumption in favor of a custodial parent's right to relocate. While the case itself does not expressly provide for such a legal presumption, the application of the *Baures* procedures and factors essentially creates such a presumption.

The difficulty in defending a relocation case is predicated upon the conclusion of the Supreme Court that social science research links a positive outcome for children of divorce with the welfare of the primary custodian and the stability and happiness within that newly formed post-divorce household.[9] As the Court has indicated:

> ...Social science research has uniformly confirmed the simple principle that what is good for the custodial parent is good for the child.[10]

Accordingly, this social science presumption will always provide a compelling argument that if the custodial parent is enjoined from moving, that parent will be unhappy, unrewarded, unfulfilled and distraught, and that this, in and of itself, will be inimical to the child's best interest.

Inconsistent Social Science

An analysis of the social science references contained in *Baures* compels the conclusion that not only did the Supreme Court fail to rely upon any empirical data, but in great measure relied upon conclusions offered by divorce research pioneer Judith S. Wallerstein, whose conclusions have come under serious scrutiny.

Practitioners who have followed judicial relocation decisions know that the important decision in *In re Marriage of Burgess*[11] closely tracked the opinions expressed in the *amica curiae* brief filed by Dr. Wallerstein.[12] In that brief, she cited 10 social science articles in her table of authorities, which, as has been pointed out by other researchers, contained seven citations from her own research group.[13] While Wallerstein argued for a presumption in favor of relocation, her brief essentially ignored her earlier research, where she recognized a child's need for continuity of emotional bonds included the need for continuity of relations with *both* parents, noting:

> Our findings regarding the centrality of both parents to the psychological health of children and adolescents alike leads us to hold that, where possible, divorcing parents should be encouraged and helped to shape post-divorce arrangements which permit and foster continuity of the children's relations with both parents.[14]

Well respected researcher Dr. Richard Warshak has questioned:

> Why Wallerstein now interprets the same research results as supporting the view that courts should foster continuity in the child's relationship with the mother but not with the father is unclear, but the scientific literature does not justify it.[15]

Wallerstein's early research contradicts her own *amicus* brief in *Burgess*, since in a non-litigation-based treatise she noted:

> At five years [the] positive contribution of the father's role emerged with clarity. Specifically, good father-child relationships appeared linked to high self-esteem and in the absence of depression in children of both sexes and at all ages. We were interested to find this significant link in both sexes up to and including those in the thirteen-to-twenty-four age group. ...It is noteworthy that the divorce appeared not to diminish the importance of the psychological link between father and child. This connection was especially obvious at the five-year mark in those children who were between nine and twelve, or entering adolescence. Children in this age group took intense pleasure in the visiting and when they were not visited they grieved. It seems possible, in fact, that in this nine-to-twelve-year old group the visiting father might sustain a youngster even in the care of a disorganized mother.[16]

It is not suggested that the conclusions of a social scientist such as Wallerstein cannot be modified over time, based upon new information. The problem with Wallerstein's position expressed in her brief is that it fails to indicate, let alone explain, the disparate conclusions she has reached.

Highlighting this disparity is the statement in her *amica curiae* brief:

> There is no evidence in my own work of many years, including the 10-and 15-year longitudinal study, that frequency of visiting or the amount of time spent with the noncustodial parent over the child's entire growing-up years was significantly related to good outcome in the child or adolescent.[17]

However, in her first publication, Wallerstein herself *provides* such evidence:

> In the youngest children the good father-child relationship was closely related to a regular and frequent visiting schedule and to a visiting pattern that included continuity and pleasure in the visiting. For most children, this meant overnight and weekend stays.[18]
>
> Boys and girls of various ages who had been doing poorly at the initial assessment were able to improve significantly with increased visiting by the father. Similarly, visits by the father, which increased after the first year, diminished loneliness among the older youngsters and adolescents. Those children who had been fortunate enough to enjoy a good father-child relationship on a continuing basis over the years were more likely to be in good psychological health.[19]
>
> A rethinking of visiting issues must include the concept that both parents remain centrally responsible for and involved in the care and psychological development of their children.[20]

These inconsistencies raise serious questions, since the Supreme Court in *Baures* has relied on the Judith S. Wallerstein and Tony Tanke 1996 publication, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*.[21] This publication refers substantially to the *amica curiae* brief, without discussing Wallerstein's prior publications, which reach different conclusions. A review of that 1996 article also contains references to other social science studies, which were briefly cited by the court in *Baures*.

The Supreme Court also cites the research study of Mark F. Furstenberg and Andrew J. Cherlin as indicating that there is no connection between frequency of noncustodial visits and good outcomes for a child.[22] Respectfully, this statement is both misleading and not based upon any original research by Furstenberg and Cherlin. The conclusion Furstenberg and Cherlin reach—that the amount of contact children have with their father seems to make little difference to their well-being—is a statement made without foundation on any statistical data, or even any social science research of their own, Rather, it relies on their 1991 publication, which, in turn, was based upon two surveys of the National Survey of Children taken in 1976 and 1981, respectively.

Moreover, as prominent clinical and research psychologist Dr. Richard A. Warshak has pointed out, the *Burgess* brief fails to add Furstenberg's *caveat*: "The absence of any general association between contact with the noncustodial parent and child outcomes may be due to the fact that relatively few outside parents see their children frequently enough to exert much influence.[23]

Sadly, Wallerstein's brief is reduced to the use of anecdotal data of two case studies supporting a woman's request for relocation, and, in what Dr. Warshak refers to as an "unfortunate oversight" in the *Burgess* brief, it has failed to disclose the limitations of social science research.[24] As he states:

> Psychologist's opinions routed solely in clinical experience can lead to faulty generalizations based on the most troubled population of children whose problems are severe enough to warrant mental health intervention. Empirical research can help psychologists avoid this error.[25]

More Recent Studies

Due in part to more recent studies that have dispelled predicates upon which cases such as *Baures* were based, some states, by case law or statute, have now established a far more balanced approach to the relocation standard. Unfortunately, New Jersey is not one of those states. In truth, there has been very little research directly focusing upon relocation and children's well being. In 2003 the study conducted by Arizona State University Professors Stanford L. Braver and Ira M. Ellman examined retrospectively how college students who live more than 100 miles from the other parent, irrespective of the reasons for the relocation, were faring as compared with college students whose parents were divorced but did not live a substantial distance from one another.[26]

In that study Professor Braver and his colleagues reiterated Dr. Warshak's finding that heretofore not an empirical single study could be found containing direct data on the effects of parental moves on the well being of children of divorce. Distilled to its essence, the Braver study found that there was harm associated with longer-distance living arrangements between parents. While the study recognized the data could not establish with certainty that moves caused children harm, they concluded there is absolutely no empirical basis on which to justify a legal presumption that a move by a custodial parent to benefit the parent's life would necessarily confer equivalent benefits on the child.

More recently, William G. Austin, Ph.D., a highly respected clinical and forensic psychologist in Colorado, has identified and isolated many factors that must be considered by the courts in either permitting or disallowing relocation. Certain factors may be risk factors, in that they increase the risk of a child's harm in moving, or protective factors, in that they would ameliorate the risk of harm in moving or even serve as factors suggesting the move would be good for the child.[27] Among those factors are:

A. The history of involvement by the noncustodial parent, including post-separation involvement. Has the parent spent regular quality time with the child? Is the parent involved with extracurricular activities and/or social activities? Put another way, how integrally involved is that parent in the child's life?

B. What effect would geographical differences have on parenting time and involvement that may affect the child's development? As many researchers have pointed out, there is a great distinction between visitation at least every other weekend, which will be unrealistic if the move is far away, and a parenting plan where visitation can be more frequent, including some weekends. The lack of visitation at least every other weekend, when that has been the norm, has been more likely to fundamentally impact the emotional bond between parent and child. The younger the child, the more likely this will become significant.

Social scientists like Joan Kelly and Michael Lamb have long discussed the importance of regular interaction with young children and their "attachment figures" in order to foster, maintain and strengthen their relationships.[28] Such conclusions were also reached by Dr. Linda Nielsen in an article titled "Shared Residential Custody: Review of the Research (Part II of II)".[29] Dr. Nielsen's findings emphasize the importance of the role of the non-residential parent and shared parenting arrangements. The article makes it clear that the empirical data supports the importance of the non-residential parent and the benefits associated with shared parenting. This article draws the following four major conclusions:

1. Most of the children in shared parenting arrangements fair as well or better than those in a maternal residence, especially in terms of the quality and endurance of the relationship with their fathers.
2. Parents do not have to be exceptionally cooperative, without conflict, wealthy, and well educated, or mutually enthusiastic about sharing the residential parenting, in order for the children to benefit from a shared parenting arrangement.
3. Young adults who have lived in these families say this arrangement was in their best interest.
4. The U.S., like most other industrialized countries, is undergoing a shift in custody laws, public opinion, and parents' decisions—a shift toward more shared residential parenting.

Therefore, if shared parenting is best for children, shouldn't there, at the very least, be no presumption in favor of a custodial parent's relocation away from the noncustodial parent?

C. What is the cognitive and emotional status of the child, as that status tends to predict coping responses and resiliency? A child with special needs may benefit from two parents if for no other reason but to provide respite for the custodial parent. A child suffering from ADHD may well respond poorly to the changes and loss of structure associated with relocation.

D. What is the psychological health of both parents? For example, a high level of parental stress of a primary parent would tend to be a predicator of poor child coping with a transitional life such as relocation. It may also affect the ability (or inability) of the custodial parent to truly promote a relationship with the other parent, which becomes more difficult after relocation (generally speaking).

E. Is there a history of child or spouse maltreatment? When this exists, usually only parallel parenting patterns as opposed to joint decision making is possible or advised. In such instances, relocation may, in fact, be consistent with the need for fewer transition times for exchange of the child, less

communication, and structured parenting time.

F. What is the age of the child? If relocation occurs before the child has the opportunity to form an emotional bond, it is argued by many experts that the harm to the child in terms of lost opportunity for nurturance and support from the other parent is substantial.

G. What is the timing of proposed relocation? How long have the parties been separated, if at all? What has been the reaction of the child upon both of the parents living separate and apart?

H. What are the available financial resources? If the removal is a great distance, in a lower-middle class family the cost of transportation may make parenting time for the parent left behind all but impossible. Additional consideration needs to be given to the noncustodial parent's work schedule, and even that parent's ability to take off substantial time from work to accommodate parenting time, both in terms of permissibility and economic impact. How helpful is it, for example, if the relocating parent cedes many weeks of summer parenting time to the parent remaining in New Jersey, when that parent is a factory worker who is unable to get blocks of time off and would not be able to afford to take time off even if it was available.

I. What is the child's present school experience? Could the child arguably benefit from the wholesale change in his or her school experience? Conversely, is the child an excellent student; well entrenched in AP courses; successful in varsity sports or other extracurricular activities?

These factors are not all-inclusive, but are illustrative of the type of considerations a court needs to keep in mind. To some degree it can be argued that these factors are tantamount to a 'best interest analysis' for children, but at the end of the day isn't that really what it's all about?

California Changes Its Calculus

While New Jersey law has remained static under *Baures*, which in great measure tracked the California decision *In the Marriage of Burgess*, the law has changed substantially in the last several years in California. It began with *In Re Marriage of LaMusga*.[30] In that case, the California Supreme Court created a two-part test for relocation: The noncustodial parent must first show detriment associated with the move of the child. Then, if that showing is accomplished, the court must determine whether a change of custody is in the best interest of the child. The California Supreme Court in *LaMusga* also directed a trial court to consider a variety of factors in its analysis of whether or not to grant or deny relocation. Those factors include:

1. The children's interest in stability and continuity in the custodial arrangement;
2. The distance of the move;
3. The age of the children;
4. The children's relationship with both parties;
5. The relationship between the parents, including but not limited to, their ability to cooperate effectively and their willingness to put the interest of the children above their individual interest;
6. The wishes of the children if they are mature enough for such inquiry to be appropriate;
7. The reasons for the proposed move; and
8. The extent to which the parents are currently sharing custody.[31]

Since *LaMusga*, California Courts of Appeal have continued to hear numerous cases and have refined relocation law even further. The courts have explicitly stated that when a parent proposes to move with the children to another location, the trial court must make a determination of what parenting plan is in the children's best interest, with the explicit assumption that the move is going to take place (but not necessarily with the child moving). Put another way, the trial court must determine whether or not the child should move with the moving parent or remain with the non-moving parent, and then determine what parenting plan is in the child's best interest as it relates to access between the child and each parent.

Continued Research

While published research in the United States has focused on a retrospective analysis, ongoing research in other countries has more recently focused on actually understanding the families as they are in the midst of relocation.[32] One of the most significant findings was that, whether courts granted or denied the move, one parent was emotionally devastated. However, at the same time, regardless of such devastation, when both parents were able to remain child-focused and supported the relationship between the child and the other parent, relocation was either not harmful or, in some instances, was a positive experience for the child.[33]

This research has also shown that when relocation was granted certain burdens fell upon the children, the largest being the burden of travel, whether by car, rail

or plane. The other primary burden was associated with lesser contact with the other parent, as many distant parents had difficulty managing contact, and that most children found electronic access such as Skype, email and phone to be less than satisfactory.

If there was one conclusion that can be culled from the most recent research available, it is that the polarized views that children are always harmed by the moves or, conversely, that moving with the primary parent is almost always good for the children as expressed in *Baures*, are not based on conclusive research and are not helpful in making relocation decisions in a given case.[34] The recent study conducted by London University Law Professor Marilyn Freeman and University of Otaga, New Zealand Professor Nicola Taylor identified that many children are at risk when relocation occurs, but whether or not a particular relocation is harmful for an individual child depends on both risk and protective factors that may be present in that case. Like Professor Austin, they identify that relocation needs to be thought of within a risk context, and within each case a multiplicity of factors either ameliorate or elevate risk and resiliency, depending on the child. That risk includes the lack of contact with the noncustodial parent as highlighted in the article by Wake Forest University Adolescent and Educational psychologist Dr. Linda Nielsen's article, which outlines numerous studies concluding that the role of the non-residential parent is critical and that shared parenting arrangements are generally best for children.[35]

What is to be distilled from all of the research available is that there is no justifiable basis for diluting the burden necessary to permit interstate relocation to occur. Once the underlying social science predicates upon which *Baures* is based are invalidated, we are left with a troubling set of legal standards in New Jersey. In fact, the burden placed upon the potential relocating parent who may want to move with the children across the country is actually *less* than the burden placed upon the parent seeking custody when the parties live in the same municipality and school district.[36]

In great measure responding to this new body of research, a number of states have enacted statutes that are truly child centered, in that they focus solely on the best interests of the child. Among those states is Pennsylvania. Its relocation history exemplifies a national trend.

The Pennsylvania Experience

From 1990 through Jan. 25, 2011, child custody relocation was analyzed under *Gruber v. Gruber*.[37] The custodial parent seeking to relocate with the minor child(ren) was required to meet the three prongs of the *Gruber* test, summarized as follows:

1. The proposed move is likely to significantly improve the quality of the life for the relocating parent.
2. The proposed move is not motivated by the desire to impede a meaningful parent-child relationship with the non-relocating parent.
3. There exists a substitute custody arrangement that insures a continuing relationship between the child and the no-relocating parent.

In Nov. 2010, the Pennsylvania Legislature passed a statute that eviscerated *Gruber*. This legislation, which is codified at 23 Pa.C.S. §5337, went into effect on Jan. 26, 2011. Pursuant to subsection (h) of the statute, the trial court must consider 10 factors in determining whether to grant a proposed relocation. 23 Pa.C.S. §5337(h) provides, in full, as follows:

> In determining whether to grant a proposed relocation, the court shall consider the following factors, giving weighted consideration to those factors which affect the safety of the child:
> (1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the non-relocating party, siblings and other significant persons in the child's life.
> (2) The age, development state, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.
> (3) The feasibility of preserving the relationship between the non-relocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.
> (4) The child's preference, taking into consideration the age and maturity of the child.
> (5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.
> (6) Whether the relocation will enhance the general quality of life for the party seeking

the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including but not limited to, financial or emotional benefit or educational opportunity.

(8) The reasons and motivation of each party seeking or opposing the relocation.

(9) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.

(10) Any other factor affecting the best interest of the child.

Prior to the passage of this statute, there was significant legislative discussion regarding whether or not it was appropriate to include a presumption for or against relocation. Ultimately, it was decided that there would not be a presumption for or against relocation, rather subsection (i) of the statute sets forth the following burdens of proof:

(1) The party proposing the relocation has the burden of establishing that the relocation will serve the *best interest* of the child as shown under the factors set forth in subsection (h).

(2) Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation.

In a recent case, the Pennsylvania Superior Court found that pursuant to the statute there are no presumptions in relocation matters.[38]

Let's Return To Best Interests

Ours is an increasing mobile society. Accordingly, relocation litigation is not likely to diminish, and, in fact, is more likely to increase. As Braver points out, people appear especially likely to move after their marriage fails.[39] Recent studies show that within four years of separation and divorce about one-fourth of mothers with custody move to a new location.[40] Today, about 40 percent of U.S. households change addresses every five years. About 33 percent of Americans reside in a state other than the one they were born in. Almost half of U.S. college graduates move out of their birth states by age 30.[41]

The Braver study suggests that from the perspective of the child's interest, there may be a real value in "discouraging moves" by custodial parents, at least in cases in which the child enjoys a good relationship with the other parent and the move is not prompted by the need to otherwise remove the child from a detrimental environment.[42] The authors believe that this conclusion is supported by the conclusions contained within Dr. Nielsen's article, and the surveys cited therein. However, the authors do not suggest that the evidence is so overwhelmingly conclusive that a presumption against relocation is appropriate.

To be sure, in the past one of the co-authors has raised the question of whether there should be a legal presumption that parents relinquish their autonomy to relocate upon the birth of a child to the extent necessary to facilitate the best interest of the child, except in extraordinary circumstances where failure to move would cause harm to the child.[43] While a few states, such as Colorado and Minnesota, continue to maintain a presumption against relocation, the authors believe such an approach, which is based upon the converse predicate from that of *Baures*, creates unnecessary legal and moral debate, which would cloud the issue as much as *Baures* does by its now unsubstantiated conclusions.

The authors do suggest, however, that the best empirical data available compels the conclusion that a purely best interest analysis should be utilized in judicially determining removal cases, giving primary importance to the needs of the child and only ancillary importance to the prospective plans of the custodial parent. New Jersey, already enjoys the benefit of an open-minded activist court, willing to craft decisions and modify decisions based upon, *inter-alia*, substantiated social and psychological information. The New Jersey Supreme Court has particularly not hesitated to decide controversial cases involving parent-child rights and relationships[44] rather than leaving such determination to the Legislature.

Assuredly, the Legislature could readily modify N.J.S.A. 9:2-2 and provide that the 'cause' provision of that statute is to be determined solely by the best interest of the child. Alternatively, the Legislature could enact a statute defining the best interest considerations in detail, akin to what has been done in Pennsylvania, Arizona and other jurisdictions.[45]

The authors believe ideally the delegation of such power by the court to the Legislature, which must deal

with competing political interests, would not best serve divorced and otherwise separate families in this state. Therefore, the authors propose the New Jersey Supreme Court, when the appropriate case is placed before it, should revisit *Baures* and establish a best interest paradigm consistent with the most current and reliable empirical data. However, it is important to be mindful of the fact that *Baures* has now been the law of this state for more than 12 years, without judicial modification. Those attorneys who believe children are not best served by the existing standard should not necessarily sit back and wait for the Supreme Court to reconsider the *Baures* catechism when the 'right case' comes along. That could be years, if ever. Given the passage of time, it would appear the best hope for change to a best interest standard now may well lie with the Legislature. ■

Endnotes

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16. Wallerstein and Kelly, *Surviving the Breakup, supra* note 11 at 219.
17. Burgess *amica curiae* brief *supra*, note 12 at 17.
18. *Surviving the Breakup*, *supra*, note 14 at 219.
19. *Ibid*.
20. *Id*. at 134.
21. Judith 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 (1996).
22. Frank F. Furstenberg and Andrew J. Cherlin, *Divided Families: What Happens To Children When Parents Part*, 72 (1991), cited in *Baures*, *supra* at 107.
23. Warshak, *supra* at 109. Indeed, Warshak's article was, in many respects, the harbinger of recent empirical data. While beyond the scope of this article, lawyers and researchers are encouraged to review other clinical studies detailed in Warshak's presentation, which demonstrates a link between frequency of children's contact with divorced fathers and children's overall adjustment, which studies were excluded from Wallerstein's work. Cf. Warshak *supra* at 89-95.
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Executive Editor's Column

Is There a Factorial Folly Brewing in *Baures v. Lewis*?

by Ronald G. Lieberman

All family law practitioners are well versed in the 12 factors set forth in *Baures v. Lewis* governing the removal of a child from New Jersey.[1] One of those factors—factor four—appears to lack any metrics or guidelines for analysis. It states "[w]hether the child will receive educational, health and leisure opportunities at least equal to what is available here." How can a practitioner representing the parent seeking to relocate with a child demonstrate to a court that the child's "educational, health and leisure opportunities" are "at least equal" in the proposed new state as compared to what the child is now experiencing in New Jersey? Conversely, how can the practitioner representing the parent opposing the relocation defeat a *prima facie* case on that factor? Which metrics or guidelines exist to measure educational, health and leisure opportunities in two different states?

The only guidance a practitioner received from the *Baures* Court on factor four was a statement *in dicta* that "if the focus of the challenge to removal is the inadequacy of the out-of-state health or educational facilities, that factor will take on greater significance."[2] Given the paucity of direction from the *Baures* Court on factor four, an analysis of it is now warranted to determine if it is objectively measurable or merely subjective.

A Comparison of School Districts is "Inherently Subjective"

A practitioner need not look very far to determine there are no metrics available to him or her to establish a comparison between educational opportunities in different school districts. In *Levine v. Levine*,[3] a dispute arose between the parents regarding where a child should attend school in New Jersey. The trial court weighed the two competing school districts by reviewing the school report cards and results of early warning tests.[4] In affirming in part and reversing in part, the Appellate Division held that it "question[ed] the wisdom of a Family Part judge engaging in a comparative evaluation of public school districts based upon such data in the midst of an ongoing endeavor to equalize educational opportunities in this State."[5] Moreover, the trial court did not have before it any testimony interpreting the tests and applying to the child's best interest.[6]

The following holding in *Levine* appears to strongly militate against any attempt to measure one school district against the other:

> In the context of the best interests of a child, any evaluation of a school district is inherently subjective. Just as a student cannot be summed up by IQ, verbal skills or mathematical aptitude, a school is more than its teacher-student ratio or State ranking. The age of its buildings, the number of computers or books in its library and the size of its gymnasium are not determinative of the best interest of an individual child during his or her school years. Equally, if not more important, are peer relationships, the continuity of friends and an emotional attachment to school and community that will hopefully stimulate intelligence and growth to expand opportunity.[7]

The *Baures* Court neither addressed nor overruled the above finding in *Levine*. One school district in New Jersey could not be evaluated against another school district in New Jersey in a way that was nothing other than inherently subjective.

Evidentiary Issues Abound When a Comparison is Inherently Subjective

There are no guidelines or generally accepted standards for a proposed witness to use when compar-

ing one school district to another or reviewing educational opportunities in different states. Consequently, it becomes questionable who, if anyone, is competent to testify about such comparisons. If a proposed expert attempts to do so, a practitioner should object on grounds that such testimony is a net opinion, and thus fails under N.J.R.E. 702. Such a claim would then likely trigger what is commonly called a Rule 104 hearing, named for N.J.R.E. 104, to address the preliminary question of admissibility of any expert testimony on the issue of comparison of school districts or educational opportunities across state lines. Here, a recitation to *Levine* would be helpful, and potentially outcome determinative.

An expert must have the "knowledge, skill, experience, training, or education" necessary to permit testimony in the form of an opinion that "will assist the trier of fact to understand the evidence or to determine a fact in issue."[8] Experts can rely on information that otherwise would be hearsay, and present it in court if others in their field reasonably and customarily do so.[9] In order to determine whether a proposed expert meets the evidentiary thresholds, courts apply the *Frye* standard, requiring expert testimony to be based upon a scientific principle "sufficiently established to have gained general acceptance in the particular field in which it belongs."[10]

Are there any fields or academic disciplines in existence to compare school districts or educational opportunities across state lines? What information would a proposed expert actually be reviewing in this instance? Those questions do not have clear answers.

What if the parties themselves tried to supply the trial judge with testimony about comparing school districts or educational opportunities? Lay opinions must be "rationally based on the perception of the witness and assist in understanding the witness' testimony or in determining a fact in issue."[11] 'Perception' means gaining knowledge through sense of touch, smell, sight, taste, or hearing.[12] It is unclear how lay opinion testimony from a party on comparing one school district or educational opportunity in New Jersey to those in another state would fit within the narrow definition of testimony based on the perception of a witness. Moreover, how would such testimony assist the trial judge in determining if the educational opportunities in another state are 'at least' equal to what is offered in New Jersey?

If such an opinion on comparing one school district to another in New Jersey is 'inherently subjective,' how can a court decide if an expert is competent to make interstate comparisons? Which discipline of the proposed expert must find the evidence generally acceptable, or what percentage of the community of that proposed expert must find the evidence generally acceptable, and what exactly must be generally accepted?

A practitioner should keep those questions in mind when a proposed expert or lay person seeks to compare one school district or educational opportunities in New Jersey to those in another state under factor four. ■

Endnotes

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The Criteria for International Relocation and Application of the Hague Convention to International Abduction Cases

by Robert H. Siegel

On Jan. 30, 2009, the public was introduced to a heart-wrenching story that instantly generated exhaustive tabloid fodder. A *Dateline NBC* segment titled, "Fighting for Sean," hosted by Meredith Vieira, told the incredible unfolding story of the international abduction of then four-year-old Sean Goldman, who was taken to Brazil by his mother. The segment spotlighted Vieira's interview of Sean's father, David Goldman, a resident of Tinton Falls, who was in the midst of a protracted legal battle to regain custody of Sean. The Goldman story provided the public with a rare glimpse into the arcane realm of international relocation/abduction law, which continues to be the source of great aggravation for family law attorneys.

The Goldman saga began on June 16, 2004, when Sean's mother, Bruna Bianchi Goldman, took Sean with her on a flight from Newark to Brazil, purportedly for a brief visit to see her family. Four years after leaving their Monmouth County home for Brazil, in Aug. 2008, Bruna died during childbirth, leaving Sean in the custody of her parents and second husband, a well-connected Brazilian attorney named Joao Paulo Lins e Silva.

Sean's visit to Brazil, which was supposed to last for 20 days, culminated with a decision by Justice Gilmar Mendes of the Federal Supreme Court of Brazil on Dec. 22, 2009, awarding full custody of Sean to David Goldman. By that juncture, the international litigation had spanned from July 2004 to late Dec. 2009, and had included decisions by courts ranging from the family part in Monmouth County to the state Family Court of Rio de Janeiro.

Despite the intense media circus surrounding the case, the litigation served to highlight the procedural analysis that New Jersey courts have developed in deciding international relocation cases. Unlike domestic relocation matters, which are adjudicated at plenary hearings prior to relocation, many international relocation cases are initiated after one party has already absconded to a foreign nation with a child or children.

Procedural Framework

In adjudicating international relocation cases, New Jersey courts undertake the following analysis: First, the courts must have both personal jurisdiction and subject matter jurisdiction to move forward with deciding each individual case on the merits. Second, courts must determine whether there is a "good-faith motive" for the removal, and determine that the move is not "inimical to the child's best interests" by analyzing the move under the factors set forth in *Baures v. Lewis*.[1] The standard of proof for the *Baures* 12-factor test is by a preponderance of the evidence. As part of the 12-factor *Baures* test, courts must determine the applicability of the Hague Convention to determine the child's "habitual residence." The Hague Convention is primarily applicable where one parent has already removed the child to a foreign nation without the consent of the other parent or a court order permitting him or her to do so. Lastly, New Jersey custody statutes are applied, specifically N.J.S.A. 9:2-2 and N.J.S.A. 9:2-4(c), to determine which parent should retain or regain custody of the child(ren).

Application of the *Baures* Factors to International Relocation

In the seminal case of *MacKinnon v. MacKinnon*, a unanimous Supreme Court of New Jersey held that the legal standard for relocation established in case law by the 12-factor *Baures* test should also be utilized to adjudicate applications for international removal.[2] The Court held that both the interstate and international removal contexts involve the "same interests," and thus the *Baures* test "appropriately balances the concerns implicated in either situation."[3]

The *Baures* factors are: 1) the reasons given for the move; 2) the reasons given for the opposition; 3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; 4) whether the child

will receive educational, health and leisure opportunities at least equal to what is available here; 5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; 6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; 7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; 8) the effect of the move on extended family relationships here and in the new location; 9) if the child is of age, his or her preference; 10) whether the child is entering his or her senior year in high school, at which point he or she should generally not be moved until graduation without his or her consent; 11) whether the noncustodial parent has the ability to relocate; and 12) any other factor bearing on the child's interest.[4]

In *MacKinnon*, the defendant, Mrs. MacKinnon, requested to relocate with the parties' four-year-old daughter, Justine, to Okinawa, Japan, her home country. After the trial court and Appellate Division granted Mrs. MacKinnon permission to relocate with the child to Japan, the Supreme Court of New Jersey ruled on the issue. In seeking reversal of the lower court rulings, the plaintiff, Mr. MacKinnon, argued that *Baures* provides a good starting point for international removal disputes, but the "implications of an international removal are so distinguishable" from interstate removal that "stricter criteria" should be required to address these allegedly distinctive areas. The Supreme Court disagreed, holding that both interstate and international removal applications involve the "same interests," particularly the ultimate issue of whether the child's interests will suffer from the move.[5] The Court held that because the *Baures* factors can accommodate distinctions between interstate and international removal contexts, the *Baures* standard also provides "flexibility" to courts in determining the appropriateness of foreign removal. The Court also held that due to the inherent complexity of international removal cases, New Jersey courts called on to decide them should apply *Baures* "expansively" to adapt to international circumstances.[6]

In *MacKinnon*, the Court relied heavily upon the report of a court-appointed family psychologist, who testified that if Mrs. MacKinnon were not permitted to return to Japan, her depression would "negatively impact" Justine.[7] The expert also stated that Justine, who was bilingual and had a dual citizenship, was capable of handling the adjustment of relocating to Japan. Therefore, the Court had ample support to affirm the ruling of the lower courts that Justine's best interests would be served by a move to Japan.

New Jersey courts have not analyzed each of the 12 *Baures* factors in the international relocation cases that have come before the courts, instead deciding each case based on its unique facts and circumstances and applying the factors that relate to those circumstances. However, the trend has been that an overall analysis of the *Baures* factors hinges on whether a proposed move is in the child's best interests. In making this determination, the standard of proof applied by the courts is by a preponderance of the evidence.

Case Law Background and Origins

On Feb. 17, 2011, Judge Michael A. Guadagno, of the Monmouth County Family Part, in an unpublished decision, decided a complaint filed by Sean Goldman's maternal grandparents seeking visitation with Sean. In the unpublished opinion, which denied the grandparents' request for visitation, the trial court relied heavily on the analytical framework first established by the Appellate Division as part of its decision in *Innes v. Carrascosa*.[8] Notwithstanding the "contemptuous actions" previously taken by Sean's maternal grandparents, as well as his mother's second husband, Judge Guadagno's opinion focused on the relevant legal analysis set forth in *Innes v. Carrascosa*.[9]

In *Innes*, the parties were married on March 20, 1999, and during their marriage resided in West New York, New Jersey. The parties had a daughter, Victoria, who was born in Secaucus on April 17, 2000, and held dual citizenship in both the United States and Spain. Victoria attended a parochial school in Fort Lee during the parties' marriage.

In early 2004, the parties separated, and shortly thereafter the defendant, Maria Jose Carrascosa, took the child to Spain and filed for an annulment of the marriage with the Ecclesiastic Tribunal of the Archdiocese of Valencia, Spain. Plaintiff Peter Innes filed an opposition to the annulment, and subsequently filed a complaint for divorce in the family part in Bergen County on Dec. 10, 2004.

On Oct. 8, 2004, the defendant forwarded an agreement to the plaintiff regarding various parenting time issues. The agreement, which was signed by both parties, also stated that "neither Carrascosa nor Mr. Innes may

travel outside of the United States with Victoria Solenne [daughter] without the written permission of the other party."[10]

On or about Jan. 12, 2005, the defendant took Victoria to Spain without the written consent or knowledge of Mr. Innes. On Jan. 19, 2005, Mr. Innes applied to the superior court for joint custody of Victoria, and enforcement of his visitation rights pursuant to the Oct. 8, 2004, agreement.

As part of her attempt to gain custody of Victoria, Ms. Carrascosa filed a Hague Convention application with the Family Court of Valencia. The Spanish court then ordered five-year-old Victoria to be examined by a psychologist to determine her best interests. The psychologist concluded it was in Victoria's best interests to maintain a relationship with both parents in order to avoid any risk to the child's "psycho-emotional" development.[11]

The New Jersey trial court and Appellate Division would ultimately repeat the findings of the psychologist in ordering the return of the child to her home state of New Jersey.

Ascertaining Personal and Subject Matter Jurisdiction in International Relocation

Personal Jurisdiction

In order for the New Jersey Superior Court to proceed with addressing an international custody dispute such as the complex issues presented in *Innes*, personal jurisdiction must be established over the party seeking to relocate outside the United States with the child. The most basic analysis of personal jurisdiction focuses on the residence of the parties at the time of filing the complaint for divorce. The parties in *Innes* each filed separate complaints in different countries, thereby complicating the residency element.

Where an issue exists regarding determining personal jurisdiction, the Appellate Division has stated that courts should be "guided by the fairness of the choice of forum from the defendant's viewpoint. That is, the court must look to a defendant's connection to the forum and whether it is fair—in the constitutional sense—for the defendant to be haled into the forum to litigate the dispute."[12] More specifically, in the matrimonial context, the test is whether there exists a "sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum."[13] This test involves a consideration of whether a defendant has had the "requisite minimum contacts" with New Jersey.[14]

The exercise of personal jurisdiction must also comport with notions of "fair play and substantial justice."[15]

Subject Matter Jurisdiction

Once personal jurisdiction has been sufficiently established over the defendant, the court must determine whether it has subject matter jurisdiction to adjudicate the custody dispute. The relevant *bona fide* resident standard is set forth in N.J.S.A. 2A:34-8, which states that the "Superior Court shall have jurisdiction of all causes of divorce, dissolution of a civil union, bed and board divorce, legal separation from a partner in a civil union couple or nullity when either party is a bona fide resident of this State."

The *bona fide* resident standard is synonymous with being a "domiciliary" of New Jersey, whereby the plaintiff or defendant must be domiciled within New Jersey for the courts to adjudicate the matter in controversy.[16] An individual's choice of domicile is established by "physical presence" coupled with the "concomitant unqualified intention to remain permanently and indefinitely."[17] In the context of international custody disputes, the term "habitual residence" has also become synonymous with *bona fide* resident, and must be addressed in order to assess whether subject matter jurisdiction exists in a particular case.

Once the defendant mother in *Innes* was determined to be a domiciliary of New Jersey by the superior court, New Jersey had the authority to make custody determinations in the case. The superior court also determined there was a sufficient connection between the defendant mother and New Jersey to hale her into court in the state. Therefore, both personal and subject matter jurisdiction were present to permit the case to proceed in New Jersey.

Modifying a Custody Agreement to Prevent International Removal

In 2003, the New Jersey Appellate Division faced a matter of first impression when a party to a previously agreed upon property settlement agreement (PSA) attempted to modify the custody terms of the agreement to prevent an ex-spouse from exercising parenting time in Lebanon, which is not a signatory to the Hague Convention. The parties' PSA had permitted the plaintiff ex-husband, a plastic surgeon, to exercise one month of parenting time each summer with the parties' daughter in his home country of Lebanon.

In *Abouzahr v. Matera-Abouzahr*, the Court held that it would *not* adopt a "bright-line rule prohibiting out-of-country visitation by a parent whose country has not adopted the Hague Convention or executed an extradition treaty with the United States."[18] The Court held that such a rule would unnecessarily penalize a "law-abiding parent," and could conflict with a child's best interests by depriving the child of an opportunity to share his or her family heritage with a parent.

The Court noted that while the parties' agreement referenced the Hague Convention, "that international agreement gives no remedy to assuage" the fear of the defendant ex-wife.[19] The Court pointed to the jurisdictional requisite of the Hague Convention, which states that all nations involved must be signatories to the convention. Lebanon, like every other Middle East nation aside from Israel, is not a signatory to the Hague Convention.

In addition, as explained during the plenary hearing in *Abouzahr*, under Muslim law the father automatically has custody of a daughter over the age of nine, notwithstanding how he gained custody in the first place. Family matters in Lebanon are under the jurisdiction of the religious courts of Lebanon, which is a Sunni Muslim Court.[20]

Despite these concerns, New Jersey courts in international relocation cases continue to focus on the child's best interests. In *Abouzahr*, the courts added a new wrinkle, setting forth the principle that depriving the child of an opportunity to enjoy his or her family heritage is tantamount to negatively impacting the child's best interests.

The *Abouzahr* case demonstrates that while the Hague Convention, detailed further below, can be a helpful tool for resolving international custody disputes, it is often at the mercy of whichever country a child has been removed to. In addition, the best interest standard continues to apply, notwithstanding the impact, or lack thereof, of the Hague Convention.

Application of the Hague Convention and the Definition of Habitual Residence

On Oct. 25, 1980, the Hague Convention on the Civil Aspects of International Child Abduction was established at the Hague in the Netherlands. As previously stated, the Hague Convention is normally applicable where one parent in an international removal case travels with a child overseas without a court order or the consent of the other parent.

The Hague Convention was implemented as a federal statute in the United States in 1988 as the International Child Abduction Remedies Act (ICARA).[21] Congress subsequently enacted the International Parental Kidnapping Crime Act (IPKCA), which made it a federal offense punishable by up to three years imprisonment for a parent to wrongfully remove a child from the United States.[22] The convention now has approximately 70 signatory nations.

A Hague Convention proceeding is a civil action brought in the country to which a child (under the age of 16) has been "wrongfully removed" or "retained."[23] Each country that is a signatory to the Hague Convention designates a central authority, a specific government office that carries out specialized convention duties. The Department of State is the U.S. central authority for the convention.[24]

The convention applies only between contracting states, and only when the 'wrongful' abduction occurs after the convention is in force between those states. The convention mandates the prompt disposition of each and every Hague-related case.[25] The convention stipulates that if the judicial or administrative authority has not reached a decision within six weeks from the date of the commencement of the proceedings, the petitioner or the central authority of the requested state has the right to seek an explanation of the reasons for the delay.[26]

The key articles of the Hague Convention as they relate to wrongful international abductions are Articles 3(a) and (b) and Article 12. Article 3 of the convention describes a removal or retention to be wrongful where:

> (a) It is in breach of rights of custody attributed to a person, an institution, or any other body under the law of the state in which the child was habitually resident immediately before the removal or retention *and* (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Neither the Hague Convention nor ICARA define "habitual residence," and therefore the courts have been left to interpret that open-ended phrase.

While the Hague Convention has been implemented as a federal statute, Hague cases can be adjudicated in

both state and federal courts. The U.S. Court of Appeals for the Third Circuit has had the opportunity to define "habitual residence," and their interpretation has been relied upon by the New Jersey Appellate Division in cases such as *Innes*.

In *Feder v. Evans-Feder*, the Third Circuit defined habitual residence as the "place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective."[27] Courts have also recognized it to be "practically impossible" for a very young child to acclimatize independent of the immediate home environment of the parents.[28]

Article 12 of the convention states, in pertinent part: "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." Article 12 is wholly dependent on whether the two-pronged elements of Article 3 have been breached.

In *Innes*, the Spanish Court of First Instance erred in rejecting Mr. Innes' Hague petition, using an improper legal analysis to arrive at their conclusion. Rather than examining the habitual residence of the child, the Spanish Court of First Instance instead focused on the party with custody of the child at the time the child was removed to Spain. The New Jersey Superior Court in *Innes* ultimately determined that it had jurisdiction over the parties, and venue was proper in Bergen County, which was the residence of the parties at the time of filing of the divorce complaint.

As to the issue of application of the Hague Convention, the superior court found that the Spanish Court had improperly used the Hague Convention to make a custody determination, rather than simply ascertaining the child's habitual residence.

In *Friedrich v. Friedrich*, the U.S. Court of Appeals for the Sixth Circuit, in an opinion delivered by Circuit Judge Danny Boggs, held that the intent of the Hague Convention is to "restore pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court," not to make custody determinations or judge behavior regarding whether it rises to the level of "chutzpah."[29]

The *Friedrich* case involved an attempted relocation from Germany to Ohio, where the mother of the two-year-old child attempted to take the parties' son back to the U.S., where her family resided. The plaintiff father filed an action in the U.S. District Court for the Southern District of Ohio seeking to compel the child's return to Germany.[30]

The mother attempted to defend her removal of the child, which was initially found to be wrongful by a German court, by relying on the narrow defense provided for in Article 13(b) of the Hague Convention.[31] This defense to wrongful removal, which must be proven by clear and convincing evidence, states that there is a "grave risk" that the return of the child would expose him or her to physical or psychological harm. The mother's removal was ultimately determined to be wrongful, and she was ordered to return the child to the father in Germany.

The issue of compliance with the Hague Convention and the effectiveness of its provisions will continue to create controversy as countries with whom the United States has strained relations (specifically China, Russia, and every Middle East country aside from Israel) refuse to join the convention. It was most recently as a result of the Goldman case the Hague Convention received significant criticism based largely on the perceived ineffectiveness of the convention in streamlining the legal process for international child abductions. In a *Washington Times* article dated June 19, 2009, titled, "Will Brazil do the right thing?" U.S. Congressman Chris Smith of New Jersey singled out Brazil for its "patterns of noncompliance" with the Hague Convention.[32]

Application of New Jersey Custody Statute

As explained above, the Hague Convention does not "seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children" to their home countries. The convention is a "starting point when faced with the issue of whether a child has been illegally removed from his or her home country, or is being illegally retained in another country."[33]

Once it is determined that a particular country is a child's habitual residence and the child should be returned there, a custody determination is left to "the law of the state to which the child is returned."[34] Any subsequent decision on enforcement or modification of the relevant

custody dispute or decree is left to the appropriate judicial or administrative agency of the child's home state.

In the *Innes* case, after the court fully addressed the Hague Convention, the family part immediately turned to New Jersey's custody statutes, specifically N.J.S.A. 9:2-2 and N.J.S.A. 9:2-4, in order to make a custody determination based upon the "best interests of the child" standard.[35] Pursuant to N.J.S.A. 9:2-2, "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction... while under that age of consent without the consent of both parents, unless the court, upon cause shown, shall otherwise order."

N.J.S.A. 9:2-4(c) states:

> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

New Jersey courts have clearly expressed the principle that wrongful removal of a child outside the United States is against the child's best interests. The New Jersey Legislature has also declared that it is "in the public policy of this State to assure minor children of frequent and continuing contact" with both parents after the parents have separated or dissolved their marriage."[36]

In awarding Mr. Innes sole legal and residential custody of the minor child, the trial court considered the N.J.S.A. 9:2-4(c) factors. The Appellate Division affirmed the trial court's custody determination, due, in part, to the defendant mother's refusal to cooperate with the child's father, as well as numerous court orders directing her to return the child to the United States.

Conclusion

With the 12-prong *Baures* test now firmly ensconced in international removal cases, New Jersey courts can be guided by the principles set forth in the cases detailed above as they seek to establish a clear set of international relocation criteria. Cases such as *Innes* and *Abouzahr* demonstrate that above all else, courts will continue to look to what custody arrangement is in the child's best interests in determining whether to permit international relocation.

With respect to the Hague Convention, a proper analysis of its impact should be placed in the context of its limited applicability. The Hague Convention should be viewed as a guidepost for international custody disputes, not a cure-all statute.

Despite the fact that a majority of the world's most influential countries, with some notable exceptions, have joined as signatories to the Hague Convention, the fact remains that international custody disputes are inherently difficult to litigate. ■

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Endnotes

1. *Baures v. Lewis*, 167 N.J. 91 (2001).
2. *See MacKinnon v. MacKinnon*, 191 N.J. 240 (1997).
3. *See Id.*
4. *Baures v. Lewis*, 167 N.J. 91 (2001).
5. *See MacKinnon*, 191 N.J. at 251.
6. *See Id.* at 252.
7. *See Id.* at 253.
8. *Innes v. Carrascosa*, 391 N.J. Super. 453 (App. Div. 2007).
9. *See, generally, Id.*
10. *Id.* at 463.
11. *Id.* at 467.
12. *Tatham v. Tatham*, 429 N.J. Super. 502 (App. Div. 2013) *citing Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).
13. *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 91 (1978).
14. *Shah v. Shah*, 184 N.J. 125, 138 (2005).
15. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).
16. *See Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 572 (App. Div. 1958).
17. *Id.* at 573.
18. *Abouzahr v. Matera-Abouzahr,* 361 N.J. Super. 135, 156 (App. Div. 2003).
19. *Id.* at 153.
20. *See Id.* at 146.
21. *See* 42 U.S.C. §11601-11611.
22. 18 U.S.C. §1204 (1993).
23. *See* Hague Convention at Article 4.
24. *See* Hague Convention at Article 6 and §11606 of ICARA.
25. *See* Hague Convention at Article 16.
26. *See* Hague Convention at Article 11.
27. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995).
28. *Holder v. Holder*, 392 F.3d at 1020.
29. *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996).
30. *See Friedrich* at 1060.
31. *See* 42 U.S.C. §11603(e)(2)(A).
32. *Washington Times* (June 19, 2009).
33. *Roszkowska v. Roszkowska*, 274 N.J. Super. 620, 631 (Ch. Div. 1993).
34. *See Id.* at 631.
35. *See Innes*, 391 N.J. Super. at 476.
36. N.J.S.A. 9:2-4.

Guaranteed Employment and Relocation: Is It Time to Reexamine New Jersey's *Baures* Standard?

by Cheryl E. Connors

In the recent decision of *Benjamin v. Benjamin*,[1] the court held that it is not a mandatory prerequisite for a parent to have a guaranteed job to prevail in a relocation application. Rather, the court must evaluate whether there is a "likelihood that the custodial parent can provide the child with a financially stable household in the new state, including employment as necessary."[2] The court reached this decision based on application of the standard established in *Baures v. Lewis*.[3]

In *Baures*, the New Jersey Supreme Court clarified the standard and burden of proof applicable to an application by a custodial parent to relocate outside of the state of New Jersey. Beginning with an analysis of N.J.S.A. 9:2-2, which precludes removal of a child "without the consent of both parents, unless the court, upon cause shown, shall otherwise order," the Court discussed the progression of case law in evaluating the "cause" provision of the statute.[4] The Court first examined *Cooper v. Cooper*,[5] in which the Court established a requirement that a parent show a "real advantage" to the relocation, and noted the *Cooper* Court's reasoning that "[t]he custodial parent who bears the burden and responsibility for the child is entitled, to the greatest possible extent, to the same freedom to seek a better life for herself or himself and the children as enjoyed by the noncustodial parent."[6] The Court next considered *Holder v. Polanski*,[7] in which the Court held that the real advantage test was too great a burden on the custodial parent and that "any sincere, good-faith reason will suffice."[8]

To clarify confusion regarding the standards discussed in *Cooper* and *Holder*, the *Baures* Court delineated a standard that the moving party bears the burden[9] of proof and "should produce evidence to establish *prima facie* that (1) there is a good faith reason for the move and (2) that the move will not be inimical to the child's interests."[10] In making that determination, the Court establishes 12 factors for consideration:

1. the reasons given for the move;
2. the reasons given for the opposition;
3. the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move;
4. whether the child will receive educational, health and leisure opportunities at least equal to what is available here;
5. any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location;
6. whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child;
7. the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed;
8. the effect of the move on extended family relationships here and in the new location;
9. if the child is of age, his or her preference;
10. whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent;
11. whether the noncustodial parent has the ability to relocate;
12. any other factor bearing on the child's interest.[11]

The Court further noted that "[v]isitation is not an independent prong of the standard, but an important element of proof on the ultimate issue of whether the child's interest will suffer from the move."[12]

In establishing this standard, the Court relied on various findings by social scientists that "uniformly confirmed that simple principle that, in general, what is good for the custodial parent is good for the child,"[13] and that "so long as the child has regular communica-

tion and contact with the noncustodial parent that is extensive enough to sustain their relationship the child's interests are served."[14] The Court relied on the studies that concluded that no connection exists "between the duration and frequency of visits and the quality of the relationship of the child and the noncustodial parent."[15]

The principles of *Baures v. Lewis* were reaffirmed by the New Jersey Supreme Court in *Mackinnon v. Mackinnon*[16] in the context of an application to relocate to a foreign country. The Court categorized the *Baures* factors into three groups. The Court explained that the first and third factors concern whether the custodial parent has a good faith reason to move.[17] The second, sixth, seventh and 11th factors relate to the noncustodial parent's visitation and continuing relationship with the child.[18] The fourth, fifth, eighth, ninth, and 10th factors address whether there is any potential harm to the child in relocating.[19] Lastly, the Court noted that the 12th catchall factor allows for a flexible standard, and further explained that "not all factors will be relevant and of equal weight in each case."[20]

In light of the standard established by the Supreme Court, the trial court in *Benjamin* addresses the issue of guaranteed employment for the custodial parent in the new state. In *Benjamin*, the parties shared joint legal custody of their 11-year-old daughter.[21] The father had parenting time every other weekend and a mid-week dinner visitation but did not regularly exercise his time. The mother filed an application seeking to relocate from New Jersey to North Carolina. The court's decision focused on one of the father's primary stated reasons for opposing the relocation, namely that the mother had no guaranteed employment in North Carolina and had secure long-time employment in New Jersey.[22]

Relying on *Baures v. Lewis*, the court noted that no mandatory requirement exists for a custodial parent to have a specific job or promise of guaranteed employment in the new state.[23] Although employment is not a specific factor, the issue of a custodial parent's employment is relevant to the fourth factor under *Baures*, which directs the court to consider "whether the child will receive educational, health and leisure opportunities at least equal to what is available here,"[24] as well as the 12th catchall factor. The court aptly explained hypothetical scenarios under which a mandatory job requirement would not make sense: "if a moving parent (a) has significant financial support from other family members such as parents or a new spouse, or (b) has traditionally been a homemaker with young children and no remarkable work history, or (c) is disabled and out of the labor force, or (d) is independently wealthy."[25]

The court further noted the impracticality of requiring a custodial parent to have a guaranteed job in light of the time gap between filing a motion for relocation and a decision being rendered after the conclusion of a hearing.[26] In light of the economic downturn, the court reasoned that it would be an unrealistic hurdle to expect an employer to hold a position for a new employee who cannot commit to a start date while still residing in New Jersey, and further cannot commit to accept the job due to an ongoing custody litigation.[27] The custodial parent in *Benjamin* presented evidence that she had been offered a job in North Carolina but was unable to accept it because of the ongoing litigation.

The court held "[t]he most practical and relevant inquiry is not whether the moving parent has a guaranteed job, but rather whether she has a reasonable plan for providing the child in her care with an economically stable home in the new state."[28] In that vein, a court must examine "employability" and "work history" as relevant considerations in a party's overall financial stability.[29] In addition to considering employability, a court must examine whether other financial considerations make the move financially reasonable, such as family members who are available to provide daycare, affordability of housing, a less competitive job market or a reasonably calculated risk to undertake a potentially lucrative opportunity.[30] Although a guaranteed job is not necessary, the court averred that a custodial parent should not be permitted to leave a stable economic environment in New Jersey to relocate to an unstable economic environment, because such a move may be financially inimical to a child's interests.[31]

The court granted the custodial parent's application to relocate with the child, concluding her application was reasonable and the move was not financially inimical to the child's interests despite her lack of employment.[32] The court found that it was likely the custodial parent would obtain employment in light of her work history, her previous offer of employment and her marketable skills. It further noted the custodial parent had a goal to buy a home in North Carolina, which she could not afford to do in New Jersey, and that her husband was likely to find employment in North Carolina, as he worked as a department head at a national chain store. As such, the court found the move was not inimical to the child's interests.

While the *Benjamin* decision is in line with the standard established by the New Jersey Supreme Court in *Baures*, the question is whether the pendulum has swung too far. Is it more important for the custodial parent to be able to relocate so she can own a home one day or more important for a child to have regular, weekly contact with the father? The *Benjamin* decision makes a practical point that the time lapse between a parent making an application and a court being able to make a decision in large part prevents a parent from being able to secure guaranteed employment, unless there is some connection between the potential employer and parent or the parent possesses some highly specialized skill.

While this may be a practical reality, should the unavoidable shortcomings of the judicial system be a basis to make it easier for a parent to move a child away from the other parent? In the *Benjamin* matter, the court makes note that the father was not regularly exercising his parenting time, and as such, the court may have considered that the lack of weekly visitation resulting from a move would not have an adverse impact on the child in that case. Likely, granting the application for relocation was the appropriate result in that case, but the decision has far more sweeping implications.

On the opposite end of the spectrum from the *Benjamin* decision, many out-of-state courts, applying a more stringent standard than New Jersey, have denied an application to relocate despite evidence that an employment opportunity would result in increased earnings and would be beneficial to children because of the impact on the relationship with the noncustodial parent.[33] Likewise, some out-of-state courts have actually transferred custody to the noncustodial parent where a custodial parent moved due to an out-of-state employment opportunity.[34] One state, which applies a best interests standard, includes a specific factor relating to employment, namely "the extent to which the relocating parent's income or employment will be enhanced" by the relocation.[35] The author believes, at the very least, New Jersey should consider adding such a specific factor to the *Baures* standard.

It is the author's opinion that the *Benjamin* decision demonstrates the progression of New Jersey case law, which has now reached a point where a parent is permitted to relocate with a child on the sheer speculative hope that life in another state will be less expensive, they will be able to find employment, and some day they will be able to own a home. The *Benjamin* court is correct that this is an adequate and good faith reason to move under the current standard.

The courts established this standard based, in large part, on social science in 2001, which taught that a happy parent means a happy child. The *Benjamin* decision brings to light that it may be time to re-examine the 12-year-old social science the Supreme Court relied upon in reaching its decision in *Baures*. The same countervailing interests that existed when *Baures* was decided remain at odds today in a relocation application, specifically the custodial parent's right to establish a new life post-divorce and the noncustodial parent's relationship with the child post-divorce.[36] Perhaps more recent social science studies have examined the theory that technological advances make it easier to sustain a parent-child relationship over long distances. Can technology replace a hug hello or goodbye, the smiling face of a parent cheering on their child at a soccer game, or the talks between parent and child that happen every day in the car rides between two homes and school sufficiently to sustain the noncustodial parent's relationship with the child? It is the author's opinion that the good faith basis should require something more than a speculative hope that life will be better; it should require an actual and tangible good faith reason for the move to better the life of the family in the new state.

In this author's opinion, the impact of a relocation on a child is profound, and when a parent has chosen, for better or for worse, to marry and have children with someone in New Jersey, they made that decision voluntarily and knowingly. The decision to raise children in New Jersey should not be lightly discarded because they wish to establish a new life. In light of the impact on a child's relationship with the noncustodial parent, any move out of state by the custodial parent should be a carefully weighed decision, and at a minimum, include a well-thought-out plan for employment, housing, schooling, etc., which will be superior to life in New Jersey where the child resides near both parents. ■

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Endnote

1. 430 N.J. Super. 301 (Ch. Div. 2012).
2. *Id.* at 303.
3. 167 N.J. 91 (2001).
4. *Id.* at 109 (*quoting* N.J.S.A. 9:2-2).
5. 99 N.J. 42 (1984).
6. *Baures*, 167 N.J. at 110-11 (*quoting Cooper*, 99 N.J. at 55-58).
7. 111 N.J. 344 (1988).
8. *Baures*, 167 N.J. at 112-13 (*quoting Holder*, 111 N.J. at 352-53).
9. *Id.* at 118-19. The Court notes that it is "not a particularly onerous one," and once it is established, "the burden of going forwards devolves upon the noncustodial parent."
10. *Id.* at 118.
11. *Id.* at 116-117.
12. *Id.* at 122.
13. *Id.* at 106.
14. *Id.* at 107.
15. *Id.*
16. 191 N.J. 240 (2007).
17. *Id.* at 251.
18. *Id.*
19. *Id.*
20. *Id.* at 250 (*quoting Baures*, 167 N.J. at 117).
21. *Benjamin*, 430 N.J. Super. at 303.
22. *Id.* at 304.
23. *Id.* at 305.
24. *Id.* at 304.
25. *Id.* at 305.
26. *Id.*
27. *Id.* at 305-306.
28. *Id.* at 307.
29. *Id.* at 308.
30. *Id.*
31. *Id.* at 308.
32. *Id.* at 310-311.
33. *See, e.g.*, *Foehy v. Knickerbocker*, 130 S.W.3d 730 (Mos. Ct. App. E.D. 2004) (denying application for relocation despite evidence of new job with an increased salary because the custodial parent did not present evidence of where she would live, where the child would attend school or how her increased salary would benefit the child); *Hardin v. Hardin*, 618 S.Ed. 2d 169 (Ga. Ct. App. 2005) (denying custodial mother's application to move out of state due to the fact that mother could only find suitable employment outside the state and would have an increase in income which was beneficial to children because relocation deprived children of contact with father); *but see Woodside v. Woodside*, 949 N.E.2d 447 (Mass. App. Ct. 2011) (applying the "real advantage" test and granting relocation application despite custodial parent's speculative job prospects because custodial parent would be close to family members and her quality of life would be improved). *See also In re Martin & Martin*, 8 A.3d 60, 62 (N.H. 2010) (finding that relocation would not result in an improvement to custodial parent's financial status because she currently had full time employment in New Hampshire and showed no comparable job prospects in Rhode Island).
34. *See, e.g.*, *Ex parte Monroe*, 727 So. 2d 104 (Ala. 1999) (transferring custody from mother to father because mother accepted an employment opportunity in Michigan and child would be detrimentally affected by ceasing contact with his father and extended family); *In re Marriage of Downing*, 432 N.W.2d 692 (Iowa Ct. App. 1988) (holding that the child's special needs required continuity in a secure and stable environment requiring that custody be transferred to the father despite mother's request to move for advancement in her nursing position); *Lavelle v. Freeman*, 181 A.D.2d 976 (N.Y. App. Div. 3d Dep't 1992) (approving change of custody to noncustodial father despite custodial mother's husband's transfer from New York to Missouri to accept a promotion because transfer was for economic betterment rather than economic necessity); *Burr v. Emmett*, 249 A.D.2d 614 (N.Y. App. Div. 1998) (transferring custody despite custodial mother's well intentioned plans to move from New York to California to pursue a career as a lyricist because her plans were speculative and did not justify relocation).
35. *See Wild v. Wild*, 737 N.W.2d 882, 903 (Neb. Ct. App. 2007).
36. *Baures*, 167 N.J. at 110.

Modification of Grandparent Visitation

by Derek M. Freed

When a parent seeks to modify an order governing the custody of his or her child, he or she "must show changed circumstances that would impact on the child's welfare and that the agreement is no longer in the child's best interests."[1] However, the standard for modifying grandparent visitation is less clear. This article addresses the standards used by various courts and proposes a standard that New Jersey courts should consider when a parent applies to modify grandparent visitation in general and in a requested relocation.

Grandparent Visitation, Generally

New Jersey has long recognized the importance of grandparent relationships to children.[2] The Legislature codified this relationship by enacting N.J.S.A. 9:2–7.1, which permits a grandparent to apply for court-ordered visitation. The statute requires the grandparent to "prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child."[3] The statute also directs the court to consider a series of factors in evaluating the grandparent's application for visitation.[4]

Many viewed the standard set forth in N.J.S.A. 9:2-7.1 as encroaching on "the fundamental right of parents to make decisions regarding the care, custody and nurturing of their children."[5] The New Jersey Supreme Court agreed and, in its seminal decision of *Moriarty v. Bradt*,[6] held: "The best interest standard, which is the tiebreaker between fit parents, is inapplicable when a fit parent is in a struggle for custody with a third party."[7] Rather, the *Moriarty* Court determined, a grandparent seeking visitation must establish "by a preponderance of the evidence that visitation is necessary to avoid harm to the child."[8] The Court explained that "avoiding harm to the child is polestar and the constitutional imperative that is necessary to overcome the presumption in favor of the parent's decision and to justify intrusion into family life."[9]

Modification of Grandparent Visitation in the Event of the Relocation of a Parent

Assume that a grandparent obtains formalized visitation with their grandchild, either by way of a consent order or through a contested proceeding in the family part. After the visitation order has been in place for one year, the parent obtains an offer of employment that requires relocation outside the state of New Jersey. The parent files a motion with the trial court to relocate with the child, which would effectively terminate or greatly reduce the amount of grandparent visitation, and the grandparent files a cross-motion to enforce the prior visitation order. What standard should the trial court apply in evaluating the parent's application?

No New Jersey case discusses the legal standard that applies to the analysis of an application to modify a grandparent visitation order. Courts in other states have addressed the subject, although not necessarily in the context of a request to relocate. The standards they have adopted generally fall into two categories: 1) a standard that defers to the parent unless the grandparent can meet a heightened burden (*e.g.*, showing harm, unfitness, or exceptional circumstances), and 2) the traditional 'best interests' standard.

A Standard Deferring to the Parent

Maryland courts apply a standard that generally defers to parents when evaluating requests to modify grandparent visitation unless the grandparent can prove 'harm.' In *Barrett v. Ayres*, the Maryland Court of Special Appeals addressed the modification of a fully adjudicated grandparent visitation order.[10] In *Barrett*, the paternal grandparents had filed for and obtained grandparent visitation with their grandchild, Aliza, in 2006.[11] Approximately one year later, Aliza's mother sought to terminate the grandparent visitation "based on the further deterioration of the relationship between her and the [defendants]."[12] A hearing was held with a special master who determined that visitation should be terminated.[13] A circuit court then vacated that determination after a second hearing "based on a finding of no material

change in circumstances."[14] The mother appealed,[15] and the Court of Special Appeals vacated the circuit court's determination.[16]

The *Barrett* court began by recognizing that "fit parents and third parties do not stand on equal constitutional footings and that visitation orders, like custody determinations, are never permanent."[17] In the court's view, the only way Maryland's grandparent visitation statute could be constitutional is if the "parental presumption" is enforced, with the requirement that the grandparent seeking visitation make "a threshold showing of parental unfitness or exceptional circumstances indicating that the denial of visitation 'would have a significant deleterious effect upon the children who are the subject of the petition.' "[18]

The *Barrett* court then determined that this threshold showing "necessarily applies to both first instance adjudications under the [grandparent visitation statute] and to subsequent judicial modification of existing [grandparent visitation statute] orders."[19] Thus, a parent's fundamental rights are deemed to be "paramount," and grandparents may overcome a parent's motion to modify grandparent visitation only if they can show "parental unfitness or exceptional circumstances. Absent such a showing, the court must assume that the modification is in the child's best interest."[20]

Under *Barrett*, the "desire of a fit parent to modify visitation with a third party, in the absence of exceptional circumstances, presents a material change in circumstances."[21] Unless a grandparent proves "parental unfitness" or "exceptional circumstances," a Maryland court must "presume" that a parent's decision to modify or terminate grandparent visitation is in the child's best interest, and grant the parent's motion.[22]

A Standard Focusing on the Best Interests of the Child

In contrast to the Maryland approach, other jurisdictions have found that the best interests standard is appropriate when a parent seeks to modify an existing order providing for grandparent visitation.

In *Rennels v. Rennels*, the Supreme Court of Nevada found that "the parental presumption applies at the time of the court's initial determination of a nonparent's visitation rights. However, when...a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling."[23] Thus, when a party seeks to modify a visitation order, whether that order was issued after a contested hearing or by consent, the moving party must demonstrate a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement.[24]

The *Rennels* court focused on the fact that once an order providing for grandparent visitation is entered, it "has a preclusive effect on later litigation" that "serves to prevent parties from re-litigating the same issues."[25] The court acknowledged that Nevada's "non-parent visitation statute...provides...deference to the parent" creating a "rebuttable presumption that the [non-parent's] right to visitation...is not in the best interests of the child."[26] However, once the non-parent visitation has been ordered, "the child's need for stability becomes a paramount concern."[27]

The *Rennels* court identified two reasons why a court should not apply the parental presumption after a court has approved non-parental visitation: It "gives deference to a court's order," and it "promotes the important policy goal of stability for the child."[28] The court explained that if a parent is permitted to "unilaterally modify or terminate visitation with nonparents, with whom a child has had an ongoing relationship, and which exists because the court has adjudicated and approved a visitation schedule, the order would serve no legal or policy purpose."[29] Thus, in Nevada, a court should grant a parent's application to modify a non-parent's visitation only "when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification"[30]—there is no "parental preference."[31]

Several other jurisdictions take the same approach as Nevada. In Tennessee, "a natural parent cannot invoke the doctrine of superior parental rights to modify a valid order of custody, even when that order resulted from the parent's voluntary consent to give custody to the non-parent."[32] Instead, the Tennessee parent must show a material change of circumstances has occurred that makes a change in custody in the child's best interests.[33] In Delaware, a parent's request to modify an existing grandparent visitation order should be reviewed by considering the best interest of the child without requiring the grandparent to prove the child would be dependent, neglected or abused in the care of the parents in order to continue visitation.[34]

In *Ingram v. Knippers*, the Oklahoma Supreme Court was presented with a situation where a mother unilaterally terminated a grandfather's court-ordered visitation.[35] The mother did not present evidence that there had been a change of circumstances or that termination of visitation was in the child's best interest; rather, she argued that a court "may not order grandparent visitation absent a showing that the custodial parent is unfit or that the child will suffer harm if the visitation is not allowed."[36] The trial and intermediate appellate courts agreed and placed the burden on the grandfather to show parental unfitness or potential harm to the child.[37] The Oklahoma Supreme Court reversed and held that the changed circumstances/best interests standard applied.[38] The court explained that the change of circumstance requirement is akin to the doctrine of *res judicata*, according a "'degree of finality to factual and legal determinations made in [child] custody matters, which if absent would lead to constant relitigation of matters already determined.'"[39]

The Oklahoma Supreme Court determined the mother was seeking to litigate issues that could have been litigated in the initial proceeding, and that "[w]hile a fit parent contesting grandparent visitation is entitled to a presumption that the parent will act in the best interest of the child, a court will not modify a valid visitation order without the moving party first showing a substantial change of circumstances."[40] Thus, the mother would need to show the "child's best interest will be served by terminating the visitation."[41]

A Potential Standard for New Jersey

There is a tension between the two approaches used by other states to evaluate an application to modify a grandparent visitation order. The Maryland approach preserves the parental presumption during both pre- and post-order litigation. Although this approach recognizes the 'paramount' rights of a parent, it may lead to continued litigation and a lack of finality for grandparents who have been awarded visitation. More troubling, application of the Maryland approach in New Jersey could operate to elevate parental preference above a child's best interests. That is because a New Jersey court, in ordering grandparent visitation in a contested proceeding, has already determined that the grandparent should have visitation with the grandchild to avoid harm to the child. A parental presumption based solely on the parent's desire to alter or terminate grandparent visitation would elevate the parent's desire above the court's previous finding regarding harm. In the context of a consent order that a court approved as being in the child's best interest, a parental presumption based solely on the parent's desire could lead to modification at the mere whim of the parent, without giving due regard the court's previous finding regarding the child's best interest.

In contrast, the Oklahoma and Nevada courts focus on a child's best interests when deciding whether to modify an existing grandparent visitation order. The standard used by these states stresses the finality of judgments, as well as the importance of creating and preserving a stable environment for children. However, in focusing on the child's best interests, the approach taken by these states risks encroaching on the fundamental right of a parent to determine what is in the child's best interests. This could be viewed as contrary to the way the law is trending in New Jersey, especially in light of the state Supreme Court's decision in *Fawzy v. Fawzy* and its analysis of "the intersection between parents' fundamental liberty interest in the care, custody, and control of their children, and the state's interest in the protection of those children."[42]

The author believes there is a potential hybrid approach that respects the rights of a parent to make determinations regarding their child and also ensures the best interests of a child are protected. Under this proposed approach, in cases in which there has been an adjudication in favor of grandparent visitation (by consent or by the court), and when an out-of-state relocation is *not* an issue, the burden for modifying the adjudication could differ depending on the party seeking the modification. If grandparents seek to expand visitation, they should not be able to do so without overcoming the presumption in favor of the parent. This would essentially require them to meet the same burden they initially had to meet as set forth in *Moriarty v. Bradt*.[43] If a parent seeks to reduce or terminate the visitation, the best interests standard should apply. This standard is akin to the second step of the *Moriarty* analysis that occurs when "harm is proved and the presumption in favor of a fit parent's decision making is overcome...[and] the court must decide the issue of an appropriate visitation schedule based on the child's best interests."[44]

This hybrid approach would reduce the likelihood that a parent can reduce or even terminate grandparent visitation based solely on parental preference, and despite the best interests of their child. The hybrid standard would also lessen the chance that a grandparent would

improperly encroach on the fundamental right of a parent to raise his or her child as that parent sees fit. This type of balance should be sought in the family part.

In the context of a parent seeking to relocate outside of New Jersey, this analysis becomes more complex. The relocation inquiry must acknowledge *Baures v. Lewis*, which holds that the parent seeking to relocate must "produce evidence to establish *prima facie* that (1) there is a good faith reason for the move and (2) that the move will not be inimical to the child's interests."[45] In *Baures*, the New Jersey Supreme Court observed that in a relocation case, "the parents' interests take on importance," and the "happiness and fulfillment" of the custodial parent "enure to the child's benefit in the new family unit."[46] Simultaneously, however, a court must recognize the "importance of the child's relationship with the noncustodial parent and require a visitation schedule sufficient to support and nurture that relationship."[47] Thus, the visitation schedule must be one that "will not cause detriment to the child."[48]

If *Baures* elevates the interests of the custodial parent above the interests of the noncustodial parent and a contest between a parent and a grandparent is not between two equal parties, the initial inquiry in a parent-grandparent relocation dispute should be limited to examining the reason for the proposed relocation, that is, the first prong of the *Baures* test. If the parent proves the proposed relocation is made in good faith and not a pretext, a presumption should be adopted in favor of the parent seeking to relocate. A grandparent should then be able to overcome that presumption by demonstrating the proposed move would be harmful to the child. If the grandparent is unable to satisfy that burden, the relocation should then be permitted.

The standard proposed in this article respects a parent's fundamental right to care for their child while also acknowledging that such a right is "not absolute."[49] This standard also recognizes a court's obligation "to intervene where it is necessary to prevent harm to a child."[50] It tempers the Maryland approach by ensuring the relocation is being made in good faith. By refraining from a strict best interests test, the proposed standard also avoids providing a grandparent an easier legal burden to overcome than a noncustodial parent challenging relocation, thereby remaining faithful to the principles underlying *Baures*.

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Endnotes

1. *Hand v. Hand*, 391 N.J. Super. 102, 105 (App. Div. 2007).
2. See *Mimkon v. Ford*, 66 N.J. 426, 437 (1975), in which the Supreme Court stated: "It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren."
3. N.J.S.A. 9:2-7.1.
4. N.J.S.A. 9:2-7.1(b) states: "In making a determination on an application filed pursuant to this section, the court shall consider the following factors: (1) The relationship between the child and the applicant; (2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant; (3) The time which has elapsed since the child last had contact with the applicant; (4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing; (5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child; (6) The good faith of the applicant in filing the application; (7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and (8) Any other factor relevant to the best interests of the child."
5. *Tortorice v. Vanartsdalen*, 422 N.J. Super. 242, 248 (App. Div. 2011), *certif. denied*, 209 N.J. 233 (2012).
6. *Moriarty v. Bradt*, 177 N.J. 84 (2003), *cert. denied*, 540 *U.S.* 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004).
7. *Moriarty*, 177 N.J. at 116.
8. *Id.* at 117.

9. *Moriarty*, 177 N.J. at 113.
10. *Barrett v. Ayres*, 972 A.2d 905 (Md. Ct. Spec. App.), *cert. denied*, 979 A.2d 707 (Md. 2009).
11. *Barrett v. Ayres*, 972 A.2d at 907.
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Barrett v. Ayres*, 972 A.2d at 914 (*citing Taylor v. Taylor*, 229 A.2d 131 (1967)).
18. *Barrett v. Ayres*, 972 A.2d at 914 (*quoting Taylor*, 229 A.2d at 141 (1967)). *See also Koshko v. Haining*, 921 A.2d 171 (2007).
19. *Ibid.*
20. *Barrett v. Ayres*, 972 A.2d at 915.
21. *Ibid.*
22. *Ibid.*
23. *Rennels v. Rennels*, 257 P.3d 396, 397 (Nev. 2011).
24. *Rennels*, 257 P.3d at 400.
25. *Rennels*, 257 P.3d at 400.
26. *Rennels*, 257 P.3d at 400-01 (*quoting NRS* 125C.050(4)).
27. *Rennels*, 257 P.3d at 401 (*citing Hudson v. Jones*, 138 P.3d 429, 432 (2006)).
28. *Ibid.* (Internal citations omitted).
29. *Ibid.* (Internal citations omitted).
30. *Rennels*, 257 P.3d at 402 (*quoting Ellis v. Carucci*, 161 P.3d 850 (2008)).
31. *Rennels*, 257 P.3d at 402.
32. *Blair v. Badenhope*, 77 S.W.3d 137, 151 (Tenn. 2002).
33. *Blair v. Badenhope*, 77 S.W.3d 137, 151 (Tenn. 2002).
34. *McClean v. Doty*, 4 A.3d 423 (Del. Fam. Ct. 2010).
35. *Ingram v. Knippers*, 72 P.3d 17, 19 (Okla. 2003).
36. *Ibid.*
37. *Ibid.*
38. *Ingram v. Knippers*, 72 P.3d at 23.
39. *Ingram v. Knippers*, 72 P.3d at 22 (*quoting Boatsman v. Boatsman*, 697 P.2d 516, 519 (Okla. 1984)).
40. *Ingram v. Knippers*, 72 P.3d at 22.
41. *Ibid.* The *Ingram* Court clarified that its holding did *not* address a scenario where a grandparent was attempting to expand visitation beyond what was agreed to by a parent or otherwise adjudicated. *Id.* at 20.
42. *Fawzy v. Fawzy*, 199 N.J. 456, 472-73 (2009).
43. *Moriarty v. Bradt*, 177 N.J. 84 (2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004).
44. *Moriarty v. Bradt*, 177 N.J. at 115.
45. *Baures v. Lewis*, *167 N.J.* 91, 118 (2001).
46. *Ibid.*
47. *Baures*, 167 N.J. at 115-16.
48. *Ibid.*
49. *V.C. v. M.J.B.*, 163 N.J. 200, 218 (2000).
50. *Fawzy v. Fawzy*, 199 N.J. at 474-75.