

LIMITATIONS IMPOSED BY FAMILY LAW ON A SEPARATED PARENT'S ABILITY TO MAKE SIGNIFICANT LIFE DECISIONS: A COMPARISON OF RELOCATION AND INCOME IMPUTATION

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I. INTRODUCTION

Separated parents have no shortage of things to fight about. At the top of the list is the issue of whether any restrictions should be placed on the “custodial” parent’s freedom to choose a place of residence.

The American Law Institute’s *Principles of the Law of Family Dissolution* contains suggested provisions regarding relocation by the custodial parent.¹ I will discuss the “gender effects” of these rules, and try to determine whether they are consistent with other rules applicable to parents living apart. In keeping with this gender consciousness, and because most² primary custodians are women, I will sometimes use the feminine pronoun for the primary custodian and the masculine for the other parent.

II. DISCUSSION

A. Background

When parents live apart and one parent is the primary caretaker, a fairly basic and commonly confronted question is whether the primary custodian may live wherever she chooses. To the extent the primary custodian is given freedom to relocate, that parent is allowed flexibility to best restructure her life.

One can imagine numerous bona fide reasons a primary custodian may want to relocate. Common rationales include the desire to be closer to parents or other family members, go to school, obtain a better job, accommodate the career of a new partner, or because of a preference for living in another part of the country. Giving the primary custodian substantial freedom of movement en-

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1. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Preliminary Draft No. 7, 1997) [hereinafter ALI PRINCIPLES 1997].

2. A number of studies have found that the mother is the primary custodian in approximately 90% of all cases. See generally IRA MARK ELLMAN, PAUL M. KURTZ & ELIZABETH SCOTT, FAMILY LAW 629 (3d ed. 1998) (citing studies).

ables the primary custodian to best structure her post-separation life³ as she chooses.

Such freedom places significant obstacles in the path of the other parent if that parent desires to have a meaningful role in the child's life.⁴ At a minimum, if a child is moved a significant distance away, this makes contact more expensive for the parent left behind.

A related point, sometimes discussed, is how great a distance the custodial parent must move to give rise to these concerns. For example, a South Dakota court has concluded that a move of 70 miles was minor and not a substantial change in circumstances.⁵ The Louisiana statute pertaining to relocation provides that it applies to a move out of state or a move of over 150 miles within the state.⁶

If the non-primary custodian has not maintained significant contact with the child before a proposed relocation, it seems more clear the custodial parent should be able to relocate. The other parent has not played much of a role in the child's life, so the preferences of the primary caretaker should presumably be entitled to more weight. However, if both parents have been involved in the child's life, it is less clear whether the primary custodian should have a presumptive right to move.

No easy answer exists in this situation. The primary custodian could be given substantial freedom to relocate, which would make it much more difficult for the other parent to remain involved in the child's life. Or the non-primary custodian could be given the right to block any move by the primary custodian, potentially complicating the life of the primary custodian, at the very least. Courts in the U.S. and elsewhere⁷ have struggled to find the best approach.

B. Different Approaches

1. Make Relocation Difficult

One possible approach would be to make it difficult to relocate, particularly if the child seems to be well-adjusted (in terms of school, friends, etc.) in the current domicile. Such an approach could be phrased in different ways; one possible variant would be the old New York view. Under this approach, if the move would deprive the non-primary custodian of "regular and meaningful access" to the child, relocation would presumably not be in the best interest of the child—unless the primary custodian could show exceptional circumstances that justified the move.⁸

3. Assuming the parties at one time lived together.

4. Some argue that, even if the custodial parent relocates, the other parent may maintain a close relationship with the child by having fewer visits of longer duration. See ALI PRINCIPLES 1997, *supra* note 1, § 2.20 cmt. f.

5. *Fossum v. Fossum*, 545 N.W.2d 828, 832-33 (S.D. 1996).

6. LA. REV. STAT. ANN. § 9:355.1 (West 2000).

7. See Patricia Easteal, Juliet Behrens & Lisa Young, *Relocation Decisions in Canberra and Perth: A Blurry Snapshot*, 14 AUST. J. FAM. L. 234 (2000).

8. See Carol Bruch & Janet Bowermaster, *Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 298 (1996).

A somewhat diluted version of this approach was employed by a California court of appeals, in a case subsequently overturned by the California Supreme Court.⁹ The court of appeals held that once the non-primary custodian could show that a move would significantly affect his access rights, the burden would shift to the primary custodian to show the move was reasonably necessary, either because not moving would impose an unreasonable hardship on the custodial parent, or because moving would result in such a discernable benefit that it would be unreasonable to ask that parent to forego the opportunity.¹⁰ Louisiana has adopted a statute that places the burden on the relocating parent to show that the proposed move would be in the best interests of the child.¹¹

2. Balance Numerous Factors

Another alternative would be to accept no presumptive right of either parent to move or block a move. A proposed move would be reviewed by a court on a case-by-case basis after considering a number of factors.¹² A number of courts that have adopted such an approach have emphasized that relocation cases are fact-specific, and no general rule is possible.¹³

3. Establish a Presumptive Right to Relocate

A third possible approach would be the converse of the first approach. The custodial parent would be given the right to move, unless the other parent could show some exceptional circumstance that justified another result.

A number of recent cases have adopted similar approaches. In California, a custodial parent has the right to move, unless the other parent can show it would be detrimental to the child.¹⁴ Under Tennessee law, a custodial parent may move unless the other parent can show the move is motivated by a bad-faith intent to deprive him of contact with the child.¹⁵ The rules in Florida¹⁶ and Minnesota¹⁷ are similar.

Colorado has adopted a somewhat more diluted version of this type of approach. The custodial parent has to establish a "sensible" reason for the move, and then the burden shifts to the other parent to show that the negative impact of the move would outweigh any benefit.¹⁸

9. *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996).

10. *Id.* at 477-78.

11. LA. REV. STAT. ANN. § 9:355.13 (West 2000).

12. This is the current New York view. See *Tropea v. Tropea*, 665 N.E.2d 145, 150 (N.Y. 1996).

13. See *Baures v. Lewis*, 27 Fam. L. Rep. (BNA) 1287 (N.J. 2001); *In re Marriage of Smith*, 665 N.E.2d 1209 (Ill. 1996); *Love v. Love*, 851 P.2d 1283 (Wyo. 1993); *Schwartz v. Schwartz*, 812 P.2d 1268 (Nev. 1991).

14. *Burgess*, *supra* note 9, at 482.

15. *Aaby v. Strange*, 924 S.W.2d 623, 628 (Tenn. 1996).

16. See *Russenberger v. Russenberger*, 669 So.2d 1044, 1046 (Fla. 1996).

17. See *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); see also *Kaiser v. Kaiser*, 2001 WL 315647 (Okla. 2001).

18. See *In re Marriage of Francis*, 919 P.2d 776, 784 (Colo. 1996).

4. The Views of Commentators

No consensus has yet arisen among commentators. Some favor giving the custodial parent substantial freedom to relocate,¹⁹ others advocate much more significant restrictions on moving with the child,²⁰ while a third group favors an approach that would balance many factors when deciding whether a parent may relocate with a child.²¹

C. Different Proposed Model Rules

1. The ALI View

The ALI suggests that as a general rule, the primary custodian should be allowed to relocate with the child, even if it significantly impairs the other parent's ability to maintain regular contact with the child. The primary custodian is permitted to relocate as long as the custodian has a "legitimate purpose," which is defined as a move: i) to be close to family; ii) for health reasons; iii) to pursue employment or an educational opportunity; or iv) to be with a partner who is pursuing a career or an educational opportunity elsewhere;²² this rule is not applicable to joint custody.²³ Thus, the primary custodian is given the right to relocate for almost any good-faith reason, except a mere desire to make a fresh start elsewhere.

2. The American Academy of Matrimonial Lawyers

The American Academy of Matrimonial Lawyers have drafted a proposed model relocation act.²⁴ Their recommendation differs from the ALI view. The drafters could not agree on who should have the burden of proving what was in the best interest of the child. They set forth alternative provisions that the legislature could choose to adopt.²⁵

D. Guidance from Child Support Rules

1. Current Trends

A custodial parent's interest in retaining control over where she lives is certainly not the only instance in family law when a parent's freedom might be

19. See Bruch & Bowermaster, *supra* note 8; Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1, 2-3.

20. See Frank G. Adams, *Child Custody and Parental Relocations: Loving Your Children from a Distance*, 33 DUQ. L. REV. 143, 144 (1994); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1986); Merrill Sobie, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?: A Response*, 15 PACE L. REV. 685, 688-89 (1995);

21. See Steve Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 WASHBURN L.J. 497, 532-36 (1998).

22. ALI PRINCIPLES 1997, *supra* note 1, § 2.20.

23. *Id.* For a different approach to joint custody and relocation, see *Brown v. Brown*, 621 N.W.2d 70 (Neb. 2000).

24. See *American Academy of Matrimonial Lawyers Proposed Model Relocation Act: An Act Relating to the Relocation of the Principal Residence of a Child*, 15 J. AM. ACAD. MATRIM. LAW 1 (1998).

25. See *id.* at 20-21.

restricted due to parenting responsibilities. Child support rules may be consulted for guidance relating to restrictions on parental autonomy in another context.

In separated families, like intact families, it is not uncommon for a parent to change careers or to want to take time off from work for various reasons. When parents live apart and the child support obligor decides to change careers, courts are frequently asked to decide whether to adjust the child support order in light of the obligor's new circumstances. This question is difficult only when the obligor does something that reduces his income. If the income is thereby increased, the order will also be increased, provided the increase is continuing and substantial.

Currently, courts typically base child support orders on the parents' incomes.²⁶ Child support guidelines were drafted in such a way to attempt to ensure that separated parents would devote the same percentage of their income to children as would parents in intact households.²⁷ As a result, one might expect courts to reduce the child support if the obligor's income is reduced. However, many courts have not been inclined to do this, at least when such income reductions are "voluntary." A few different approaches have evolved.

No court will reduce the child support amount if it can be determined that the obligor is making the career change primarily to spite the other parent and reduce child support payments.²⁸ A minority of courts would grant a request to reduce support, as long as the court concludes that the movant was acting in good faith and not with the intent to lower the living standards of the custodial household.²⁹ However, the majority rule states that a court should not reduce child support when the obligor has voluntarily lowered his income.

For example, a California case involved a petition by an obligor working as a pharmacist who wanted to attend medical school.³⁰ The obligor wanted to decrease the child support due while he was in school. The court refused this request, even though the court found he was making this career change in good faith.³¹ The trial court stated that "child support. . . constitutes a priority overhead expense which must be taken into account whenever an obligor wishes to pursue a different lifestyle or endeavor."³² The appellate court affirmed, stating

26. HARRY KRAUSE ET AL., *FAMILY LAW, CASES, COMMENTS AND QUESTIONS* (4th ed. 1998).

27. Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 *FAM. L.Q.* 7, 9 (1999).

28. See, e.g., *McKenna v. Steen*, 422 So.2d 615, 617-18 (La. Ct. App. 1982); *Mitchell v. Kelley*, 628 So.2d 807, 809 (Ala. Civ. App. 1993). See generally Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 *CONN. L. REV.* 647 (1997).

29. See, e.g., *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App. 1997). See also *Kelly v. Hougham*, 504 N.W.2d 440, 445-46 (Wis. Ct. App. 1993) (the court noted that the primary custodian's income had substantially increased, that the parties have always understood that the father would go back to school after the mother finished school, and that the aggregate child support received by the children throughout their minority may well be increased due to this education and the increased earning capacity that should result); see also *Williams v. Williams*, 202 Cal. Rptr. 10, 12 (Cal. Ct. App. 1984) (obligor and new spouse moved to pursue a simpler and less expensive lifestyle).

30. *Ilas v. Ilas*, 16 Cal. Rptr. 2d 345 (Cal. Ct. App. 1993).

31. *Id.* at 350.

32. *Id.* at 348.

that the obligor "did not have the right to divest himself of his earning ability at the expense of. . .his two minor children."³³

Similarly, a recent Maine case involved an obligor who quit working for the National Guard (in part because he was afraid he would be involuntarily retired) and returned to school.³⁴ His ultimate goal was to obtain a medical degree. He worked part-time while attending school and moved to reduce his support. Even though the court found that he embarked on his new career goals in good faith, the supreme court refused the motion to reduce the support.³⁵ The court stated that, although he was working as much as his schedule permitted while attending school, "his decision to change his career and pursue a full-time educational program has imposed needless hardships on his children."³⁶ Because the children would not share in his increased earning capacity due to his education (they would be adults when he graduated), this career change was not in the best interests of the children. This was so even though the parents (while an intact family) had an understanding that the father would go to school when the mother's education was completed. Because the father's "education would benefit only himself, and deprive his children," his support should not be reduced due to the career change.³⁷

A number of other courts have held that child support should not be reduced when the obligor quits a job to go to school, unless the schooling will increase the obligor's earning capacity and the children will benefit from that increase. In other words, when the children are young enough, and the obligor will graduate soon enough, it is more likely child support would be reduced while the obligor attends school.³⁸

Obligors also have moved to modify support when they took a new job or started a new business and their income decreased. In many instances, such motions are denied. Examples include instances where an attorney left his job to start his own firm,³⁹ a person quit his job with a lawn care company to start his own lawn care business,⁴⁰ an insurance agent started his own business as an independent agent,⁴¹ an obligor moved to another state with a new spouse and could not find an equally high-paying job,⁴² and a person had the bad luck to

33. *Id.* at 350.

34. *Harvey v. Robinson*, 665 A.2d 215 (Me. 1995).

35. *Id.* at 217-19.

36. *Id.* at 217.

37. *Id.* at 218.

38. For example, the court did reduce the support in *In re Marriage of Ehlert*, 868 P.2d 1168 (Colo. Ct. App. 1994), where the period of training was short and the probable increase in income was substantial. Otherwise, a reduction is unlikely. *See, e.g., Johnson v. Johnson*, 597 So.2d 699 (Ala. Civ. App. 1992); *Little v. Little*, 975 P.2d 108 (Ariz. 1999); *In re Marriage of Mizer*, 683 P.2d 382 (Colo. Ct. App. 1984); *Overbey v. Overbey*, 698 So. 2d 811 (Fla. 1997); *In re Marriage of Clyatt*, 882 P.2d 503 (Mont. 1994); *Sabatka v. Sabatka*, 511 N.W.2d 107 (Neb. 1994); *Wolcott v. Wolcott*, 735 P.2d 326 (N.M. Ct. App. 1997); *Baker v. Grathwohl*, 646 N.E.2d 253 (Ohio Ct. App. 1994); *Commonwealth, Dep't of Social Servs. ex rel. Ewing v. Ewing*, 470 S.E.2d 608 (Va. Ct. App. 1996).

39. *Russo v. Russo*, No. FA 81 26286 S, 1995 WL 94634 (Conn. Super. Ct. Mar.2, 1995).

40. *Woloch v. Foster*, 649 N.E.2d 918 (Ohio Ct. App. 1994).

41. *Askew v. Askew*, 458 S.E.2d 217 (N.C. Ct. App. 1995).

42. *Logan v. Bush*, 621 N.W.2d 314 (N.D. 2000); *see also In re Marriage of Van Doren*, 474 N.W.2d 583 (Iowa Ct. App. 1991).

quit his job and become a stockbroker just before the 1987 crash.⁴³ Courts have been concerned about the voluntariness of the decision that led to the change in the obligor's financial circumstances. This rule has been applied even if the obligor's job posed significant health risks,⁴⁴ or required him to live on a ship for most of the year, thereby making it difficult to have a normal life.⁴⁵ These decisions have been justified based on this rationale:

Of course, a father is not prohibited from voluntarily changing employment. But . . . when the father . . . chose to pursue other employment, albeit a bona fide and reasonable business undertaking, the risk of his success at his new job was on the father, and not upon the children.⁴⁶

This rationale would only apply to speculative new ventures or jobs when it would be unclear whether the new job would result in an increase in income. In other instances, the obligor may take a new job knowing his income would be lower, but may want to do it for quality of life concerns. For instance, the prior job might have posed health risks, required work at undesirable times or might have been too stressful. Alternatively, the obligor may wish to change careers due to social justice concerns such as wanting to leave the business world to teach or to become a minister. Courts that are unwilling to reduce child support orders when an obligor voluntarily reduces his income would not reduce the child support order if an obligor changed jobs knowing the income would be lower—even if the obligor has a “good purpose.”

Courts have also refused to reduce child support when the obligor lowers his income due to the pursuit of some religious activity, such as being a missionary⁴⁷ or a church volunteer.⁴⁸ Similarly, courts have imputed income to a lawyer obligor whose income was very low because he represented poor people,⁴⁹ and to an obligor who devoted himself to helping farmers avoid losing their farms due to financial hardship.⁵⁰ Obligor who have pursued low-wage career paths due to quality of life concerns have also had income imputed to them, if they were trained in another career with a higher income.⁵¹

2. A Comment

For many custodial parents, it is very important to have the right to relocate with their minor child. For non-primary custodians, it is similarly important to have the right to change careers, even if the change will reduce their income for a period or permanently. The trends in the law regarding relocation and income imputation are inconsistent. The prevailing view regarding relocation (and the ALI view) reflects a philosophy that the primary custodian should

43. *Antonelli v. Antonelli*, 409 S.E.2d 117 (Va. 1991).

44. *Grimes v. Grimes*, 596 A.2d 240, 243 (Pa. Super Ct. 1991).

45. *Pullis v. Linzey*, 753 So. 2d 480, 482 (Miss. Ct. App. 1999).

46. *Antonelli*, 409 S.E.2d at 119-20.

47. *Bassette v. Bartolucci*, 652 N.E.2d 623, 625-26 (Mass. App. Ct. 1995).

48. *In re Marriage of McKeever*, 583 P.2d 30, 30-31 (Or. Ct. App. 1978).

49. *Robinson v. Tyson*, 461 S.E.2d 397, 399 (S.C. Ct. App. 1995).

50. *Perry v. Perry*, 382 N.W.2d 628, 630 (N.D. 1986).

51. *Rock v. Cabral*, 616 N.E.2d 218, 222 (Ohio 1993).

have substantial freedom. The lack of significant barriers to moving suggests a wish not to impede the parent's autonomy due to the fact of parenthood.

In contrast, child support rules seem to be moving in the other direction. A rule consistent with the prevailing relocation approach would give the obligor significant freedom to structure his life and career as he in good faith would choose. This rule would allow an obligor the right to have his child support obligation reduced if he made a good-faith career change that reduced his income. However, most courts ignore voluntary reductions in income by an obligor, with the justification that parenthood substantially limits one's choices.

There is significant tension between these two inconsistent views. Both views generally help women and harm men. It would seem more fair to decide whether parenthood should significantly limit the choices of separated parents and promulgate consistent rules once this decision is made.

3. The ALI View Regarding Income Imputation

The ALI approach toward income imputation differs significantly from the trend in the law summarized above. Income is not to be imputed to a child support obligor for pursuing education or training "as long as the pursuit is not unreasonable in light of the circumstances."⁵² Somewhat surprisingly, no guidance is provided as to how a court should determine whether the pursuit is unreasonable; presumably the hardship that the custodial household would experience if income is not imputed would be important. Still, this seems more tolerant of an obligor's career autonomy than current case law.

Similarly, income is not to be imputed to an obligor if he changes careers unless the child's standard of living would be "unreasonably reduced."⁵³ The ALI Reporter's comments gives two examples of how this would work. In example one, an obligor who is a partner working in a law firm making \$12,000 per month is offered a job as a judge making \$8,000 per month. Income is not to be imputed here, because the custodial household will still have a "comfortable" standard of living, even with child support calculated based on the \$8,000 income.⁵⁴ Another example discusses what should occur if an obligor lawyer earning \$8,000 monthly quits to work for legal services at a salary of \$3,000, and the custodial mother is not in the work force. The comments state that support should not be reduced here, because the change in the child's circumstances would be too great.⁵⁵ Like the previous example (involving an obligor returning to school), the ALI approach gives the obligor more freedom to change careers than does current law, but by no means total freedom.

The ALI comments do not provide any guidance regarding reductions in income for more "normal" people. Consider what should occur if a truck driver earning \$4000 monthly wants to take a job earning less money so he can be home more? It is unclear what factors would be important in determining whether a child's circumstances would be "unreasonably reduced."

52. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.12(5)(a) (Tentative Draft No. 3 Part II, 1998).

53. *Id.* § 3.12(5)(b).

54. *Id.*

55. *Id.*

III. CONCLUSION

Relocation and income imputation are two issues of great importance to separated parents. One approach toward these issues would restrict parental autonomy to do things that negatively affect the other parent. Under this view, relocation with a minor child would be difficult to accomplish and child support would not be reduced upon a voluntary reduction of income by the obligor. Alternatively, parents could be given substantial autonomy. Such a model would permit relocation in most circumstances and support would be reduced if the obligor (in good faith) decided upon a career change that reduced his income.

Surprisingly, an increasing number of courts take neither view. The current trend is toward more liberal relocation rules, while at the same time, obligors are not given the freedom to change careers and have the career change reflected in the amount of child support due. At least from a parent's rights perspective, these rules are inconsistent. Both favor the custodial parent but take opposite approaches to parental autonomy.

The ALI approach is less inconsistent than the current trend in case law mentioned in the preceding paragraph. Custodial parents are given great freedom to relocate, while a change in careers for the obligor is to be reflected in the child support order only if it would be reasonable to do so. This gives the obligor more freedom to change careers than do many courts today. In sum, although the ALI view imposes more restrictions upon an obligor's decision to change careers than it does upon the custodial parent's desire to move, the approach is more internally consistent than current law.