

REMOVAL OF CHILDREN FROM THE STATE- MAY I AND HOW SOON ?

Should the Court Permit Out-of-State Removal of Children Prior to a Full Hearing?

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A custodial parent's removal of the children from the state is more traumatic and injurious than a custody dispute. Custody disputes result in a division of daily and weekly time between the parents. Removal disputes dramatically alter the time, distance, and character of the parent-child relationship. One can never replace an alternating weekend and midweek evening with an extra few weeks during the summer and some extra time on holidays. Gone are the everyday-shared experiences such as soccer games, dance recitals, and school projects. The list is endless. Web cams and emails cannot bridge the distance gap. Removal cases are therefore given a high priority and most often require a plenary hearing.

STATUTORY AUTHORITY

Statutory authority for removal cases is found in N.J.S.A. 9:2-2 which provides:

“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 5 years within its limits, they shall not be removed out of its jurisdiction without their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order. The court, upon application of any person on behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the purposes of this section.”

The criminal justice system provides criminal sanctions for unlawfully removing the child from the state. N.J.S.A. 2C:13-4 imposes substantial fines and incarceration for violations of the removal statute. Interference with custody is a crime of the third degree, but the presumption of non-imprisonment set forth in sub-section (e) of N.J.S.A. 2C:44-1 for a first offense of a crime of a third degree, shall not apply. However, if the child is taken, detained, enticed, or concealed outside of the United States, interference with custody is a crime of the second degree. A crime of the third degree may lead to imprisonment for 3 to 5 years and a fine of \$7,500, or both. A crime of the second degree carries a specific term of incarceration from between 5 to 10 years and a fine up to \$1,000,000, or both. See N.J.S.A. 2C:43-3, and N.J.S.A. 2C:43-6.

NEW JERSEY CASE LAW

An analysis of N.J.S.A. 9:2-2, New Jersey's removal statute starts with the case of Cooper v. Cooper, 99 N.J. 42 (1984). As stated by the Supreme Court, the purpose of this statute, "*is to preserve the rights of the non-custodial parent and the child to maintain and develop their familial relationship.*" The Court surmised that the problem in removal cases is balancing those rights with the rights of the custodial parent to seek a better life for him or herself, in this or another state. The calculus for solving this problem is giving proper consideration to the custodial parent's interest in freedom of movement, as qualified by his or her custodial obligation, the state's interest in protecting the best interest of the child, and the competing interest of the non-custodial parent in preserving a relationship with the child.

Prima Facie Requirement

The custodial parent is entitled to a hearing, only after having met the threshold requirement. The Court in Bauers v. Lewis, 167 N.J. 91 (2001) held that the party seeking to move should initially produce evidence to establish a prima facie case that, (1) there is a good faith reason for the move, and (2) that the move will not be inimical to the child's best interest. The Bauer's Court gave examples of how a custodial parent could show a good faith reason for the move:

"The custodial parent showing that the move is requested to be closer to a large extended family that could help raise the child, or that the child will have educational, health, and leisure opportunities at least equal to that, which is available in the state the child resides."

The Bauer's court also held that the moving party must show that a visitation schedule has been thought out that will allow the child to maintain a close relationship with the non-custodial parent. Thus, the moving party has an initial burden of establishing a prima facie case. The Bauers court held that,

"If for some reason the custodial parent fails to produce evidence on the issues to which we have referred, the non-custodial parent will have no duty to go forward and judgment denying the removal should be entered."

The prima facie requirement must be proven by a preponderance of the evidence.

Once the custodial parent has established the prima facie case, the burden of going forward is on the non-custodial parent, who must:

"Produce evidence opposing the move as either not in good faith or inimical to the child's interest."

This can be accomplished by showing the custodial parent's past actions to disrupt the child's relationship with the non-custodial parent or that the opportunities available in the new location are inferior to those available in the child's current location or that the move will take the child from a large extended family.

Note that a different analysis is presented when the parties have joint legal and shared custody. The removal analysis doesn't apply, but rather a change of custody determination must be made, which will be governed by a best interest analysis. See also O'Connor v. O'Connor, 349 N.J. Super. 381 (App. Div. 2002) and Mamolen v. Mamolen, 346 N.J. Super. 493 (App. Div. 2002)

Plenary Hearing Requirement

The Bauer's court held that in assessing whether to grant a custodial parent's application to remove a child from the jurisdiction, over the non-custodial parent's objections, the following factors must be considered:

1. Reasons given for the move.
2. Reasons given for opposition.
3. Past history of dealings between the parties insofar as it bears on reasons advanced by both parties for supporting and opposing the move.
4. Whether 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.
6. Whether a visitation and communication schedule can be developed that will allow the non-custodial parent to maintain a full and continuous relationship with the child.

7. Likelihood that the custodial parent will continue to foster child's relationship with the non-custodial parent if the move is allowed.
8. The effect of the move on extended family relationships here and in the new location.
9. The child's preference.
10. Whether the child is entering his senior year in high school.
11. Whether the non-custodial parent has the ability to relocate.
12. Any other factor.

The Bauer's court held,

"After all evidence is in, in order to warrant removal, the trial court will have to be satisfied by a preponderance of the credible evidence that the moving party has proved a good faith reason to move and that the child will not suffer from the move." Id. at 122.

CAN THE COURT RULE "ON THE PAPERS" OR MUST IT CONDUCT A PLENARY HEARING?

Generally, a motion cannot be decided when there are conflicting affidavits or there is an inaccurate record. Mackowski v. Mackowski, 317 N.J. Super. 8 (App. Div. 1998) *citing* Wilke v. Culp, 196 N.J. Super. 487 (App. Div. 1984) *cert. denied* 99 N.J. 243 (1985). In the absence of conflicting certifications, the court can exercise its authority to permit removal without the necessity of a hearing. The Appellate Division in the case of Pfeiffer v. Ison, held,

"... a Plenary Hearing is not necessary in every case where removal of children is at issue, but rather only where a prima facie showing has been made that a genuine issue of fact exists bearing upon a critical question, such as the best interest of the children, interference with parental rights, or the existence of a good faith reason to move." 318 N.J. Super. 13, 14 (App. Div. 1999).

Although the Pfeiffer case was decided when Holder v. Polanski, 111 N.J. 344 (1988) was the existing law on removal, the holding is still applicable today. A Plenary Hearing is required only after a prima facie showing has been made and there are genuine issues of fact. The need for a hearing in cases involving issues of custody is well founded in our case law. A Plenary Hearing is a necessity, unless there are no facts in issue. See Stern v. Stern, 196 N.J. Super. 540 (App. Div. 1984).

CAN THE COURT PERMIT REMOVAL PRIOR TO AN ORDERED PLENARY HEARING?

If one follows the holding in Pfeiffer v. Ilson, the court can permit removal, if there are no material issues of fact and a prima facie case has been established. When a prima facie case has been established, but there are material issues of fact with regard to the other criteria under Bauers, a hearing is necessary. The issue then becomes whether the custodial parent will be permitted to relocate pending the hearing on removal. There are cases in which a custodial parent must relocate immediately or the reason for the relocation will be lost, as is often the case when the relocation request is based upon a transfer at work or a new employment opportunity for the custodial parent or their spouse. The issue also arises when the new school year is about to begin and changing schools midway through the semester will be detrimental to the child.

Only one reported New Jersey case addresses temporary removal pending the Plenary Hearing. In the case of Macek v. Friedman, 240 N.J. Super. 614 (App. Div. 1990), the trial court permitted the mother of two minor children to move from New Jersey to West Germany pending a Plenary Hearing, because

the mother's new husband, a Chaplain, was on active duty in the United States Air Force. Due to the press of other court business, no Plenary Hearing was ever held. That, in and of itself, is not stare devises. The father filed a motion for custody and for the probation department to conduct a full custody investigation. The mother moved to dismiss the Complaint. The motion judge granted the Wife's application. The father appealed.

The Appellate Division in Macek did not hold that removal was inappropriate before a Plenary Hearing. The Appellate Division merely held that New Jersey retained jurisdiction after the mother had moved to Germany under the Uniform Child Custody Jurisdiction Act. N.J.S.A. 2:34-28 et seq. No other New Jersey case has addressed the Court's decision to permit relocation pending a hearing.

Trial courts have broad discretion and can make rulings regarding the custody of children. N.J.S.A. 9:2-2 and N.J.S.A. 9:2-4. The law in this area is not definitive. The issue of whether to permit the removal of children after a prima facia showing has been established and prior to a Plenary Hearing will turn on the facts of each case and the arguments advanced by counsel.

ARGUMENTS FOR REMOVAL PRIOR TO PLENARY HEARING

- a) Health of Parent and/or Child.
- b) Strong Likelihood of Success.
- c) Parenting Schedule Will Remain Similar to Prior Pattern of Parenting Time.
- d) Child's Strong Preference (subject to age of child).

- e) The reason for the removal will be lost if the move does not occur immediately, i.e., a job, which must commence, before a hearing can be conducted.
- f) School begins in the jurisdiction which you are seeking the removal to and, a change in the middle of the school year will disrupt the child's education.

ARGUMENTS DENYING REMOVAL PRIOR TO PLENARY HEARING

- a) Disruption of Child's Education, If Ordered to Return.
- b) Further Alienation of Child.
- c) Loss of Jurisdiction Under UCCJA and/or PKPA.
- d) Unlikely Ultimate Success.

CONCLUSION

There is no sure answer to the question of whether removal will be permitted on a temporary basis while a hearing is pending. The specific facts of each case may make it reasonable for a court to permit relocation, pending the Plenary Hearing. On balance, it would make the most sense to conduct a plenary hearing before permitting temporary removal.

About the Author

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