

Relocation and the Constitutional Rights of Parents



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Before considering the complex factual issues that are a part of any relocation case, it is necessary to address the potential for relocation decisions to infringe on certain constitutional rights of the parties involved. A court's decision whether or not to permit relocation may have the effect of infringing on a custodial parent's fundamental right to travel. The United States Supreme Court has long recognized that there exists a protected constitutional right for citizens to travel freely between the states. See Jones v. Helms, 452 U.S. 412, 417-18 (1981) ("It is, of course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution."); Saenz v. Roe, 526 U.S. 489 (1999) (likewise recognizing constitutional right to travel). A party's constitutionally protected right to travel can only be infringed upon if there exists a compelling state interest. Jones, 452 U.S. at 415-16. This potential infringement is compounded by another constitutional right implicated in relocation cases the natural parent's fundamental liberty interest in the care, custody, and control of his or her children. See Troxel v. Granville, 530 U.S. 57 (2000); Santosky v. Kramer, 455 U.S. 745 (1982).

A court's decision that a parent loses custody of his or her child due to a proposed relocation obviously infringes upon that parent's fundamental right to travel, requiring a compelling state interest to support such a decision. However, a handful of courts have essentially ducked the issue by holding that a parent's constitutional right to travel is not infringed upon even if custody must be surrendered.

These courts have reached the somewhat specious decision that a parent's right to travel is not compromised since the parent is still free to relocate, albeit without retaining custody of his or her children. See, e.g., In re C.R.O., 96 S.W.3d 442 (Tex. App. 2002) (mother's constitutional right to travel not affected by order prohibiting her from moving away from the same geographic location of the father where order did not prevent mother from relocating without the children).

The majority of courts, however, have been more forthright and have recognized that if a parent is required to forfeit custody in order to exercise his or her right to travel, the parent's right has necessarily been infringed upon and that such an infringement is only allowable if there exists a compelling state interest. In general, based on the need for a compelling state interest to infringe on these rights, most courts have adopted some form of a balancing standard which weighs the custodial parent's constitutional rights against the state's interest in protecting the best interests of the child.

The validity of such a balancing test was recently addressed by the Court of Special Appeals of Maryland in Braun v. Headley, 131 Md. App. 588, 750 A.2d 624, cert. denied, 359 Md. 669, 755 A.2d 1139 (2000), cert. denied, 531 U.S. 1191 (2001). In Braun, the mother, who was the custodial parent, moved to Arizona with the parties' child. In response, the father petitioned for sole custody of the child. Relying on Maryland precedent that held that the relocation of a custodial parent may justify modification of the custody award, the trial court ultimately found that it was in the child's best interests that custody be awarded to the father. The wife appealed this modification of custody, arguing that the trial court's decision, premised on the principle that her relocation could in and of itself constitute a material change in circumstances, necessarily infringed upon her constitutional right to travel.

The Court of Special Appeals of Maryland noted the fundamental nature of a party's constitutional right to interstate travel and found that this right could not be ignored in relocation cases. However, after reviewing relocation decisions from other jurisdictions addressing this right, the court also noted that the right to travel is not absolute, but that it is qualified "and must be subject to the state's compelling interest in protecting the best interests of the child by

application of the best interests standard." 750 A.2d at 632. The court in Braun found that the mother's constitutional right to travel could properly be balanced against the best interests of the child and that the mother's right did not operate to place her interests above that of the other parent.

There is no constitutional infirmity in giving equal status, in determining the child's best interests, to (1) the custodial parent's right to travel, and the benefit to be given the child from remaining with the custodial parent; and (2) the benefit from the non-custodial parent's exercise of his right to maintain close association and frequent contact with the child. Id. at 635. The court's decision in Braun was appealed to both the Maryland Court of Appeals and the United States Supreme Court. Both courts denied certiorari, allowing the court of special appeals' decision and its balancing test to stand. Thus, the court's conclusion that the best-interests-of-the-child standard that was currently in use in Maryland for the resolution of relocation cases was sufficient to protect the mother's right to travel was allowed to stand by the higher courts. Id. at 636; In re Custody of D.M.G. & T.J.G., 287 Mont. 120, 951 P.2d 1377 (1998) (child's best interests in being loved and supported by both natural parents may constitute compelling state interest allowing infringement on right to travel; however, these interests must be balanced and travel restriction must be shown to be in child's best interests).

A minority of jurisdictions addressing the effect of a parent's constitutional right to travel have failed to adopt some form of a balancing test, instead finding that the best interests of the child always control the outcome in relocation cases, regardless of the custodial parent's right to travel. See, e.g., Weiland v. Ruppel, 139 Idaho 122, 75 P.3d 176 (2003) (parent's constitutional rights may have to be forgone in favor of best interests of child); LaChappelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App.), cert. denied, Mitten v. LaChappelle, 531 U.S. 1011 (2000) (the best interests of a child constitute a compelling state interest and allow "burdening a parent's fundamental right to travel"). Much like the jurisdictions that found no infringement on a parent's right to travel, these jurisdictions also essentially minimize a parent's constitutional right in order to avoid addressing the difficult issues present in relocation cases. On that basis, the constitutional analysis of these courts is at best unconvincing.

Conversely, at least one court has gone to the other extreme and has found that a parent's constitutional right to travel may actually serve to trump the best interests of a child in a relocation case. In Watt v. Watt, 971 P.2d 608 (Wyo. 1999), the mother petitioned to modify the initial custody order so that she could relocate with the children to another city in Wyoming. The order provided that custody would automatically transfer to the father if the mother moved more than 50 miles away from where the father resided. The reason for the mother's proposed move was to attend graduate school, which was located over 50 miles away from the father. The trial court concluded that the automatic custody transfer provision was improper but still awarded custody of the children to the father after applying a best-interests-of-the-children test.

On appeal, the mother argued that the trial court's decision to modify custody necessarily infringed upon her fundamental right to travel under the Wyoming Constitution. The Supreme Court of Wyoming agreed and reversed the trial court's decision. The court concluded that the husband, as the party seeking to modify the initial custody award, had the burden to establish that a material change in circumstances had occurred. The court noted that in interstate relocation cases Wyoming has recognized "a strong presumption in favor of the right of a custodial parent to relocate with her children" if the custodial parent has a good-faith motive for the move and the noncustodial parent can maintain reasonable visitation. Id. at 614. The court also noted that relocation by itself does not constitute a change in circumstances.

Turning to the wife's constitutional argument, the court acknowledged that the United States Supreme Court has long recognized a fundamental right to travel. The court noted that the Wyoming Constitution similarly recognized such a fundamental right and that this right should not be infringed upon.

The constitutional question posed is whether the rights of a parent and the duty of the courts to adjudicate custody serve as a premise for restricting or inhibiting the freedom to travel of a citizen of the State of Wyoming and of the United States of America. We hold this to be impossible. The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children. While relocation certainly may be stressful to a child, the normal anxieties of a change of residence and the inherent difficulties that the increase in geographical distance between parents imposes are not considered to be "detrimental" factors.

An inhibition upon the right to travel is never imposed upon the non-custodial parent who is free to move at will

despite the location of the children. The motives of the non-custodial parent will not be questioned by the court with respect to such relocation, and the custodial parent has no power to inhibit it. The inherent inequities of such a situation stand as an additional reason that courts have concluded that custodial parents should be permitted to move with their children. *Id.* at 615-16. In light of the custodial parent's constitutional right to travel, the court concluded that a custodial parent's relocation could never serve as the only basis for a change in custody without intruding on this right.

While jurisdictions that allow the best interests of a child to trump a parent's constitutional rights go too far in one direction, the court's decision in Watt clearly goes too far in the other direction. Although the jurisdictions that essentially allow the best interests of the child to control fail to give proper consideration to the constitutional rights of the parents, the court's decision in Watt clearly swings too far in granting primacy to a parent's right to travel. It is clear that this fundamental right must be considered in relocation cases; however, the majority rule which balances these potentially conflicting interests properly ensures that a court will look at all of the relevant interests without putting its thumb on either side of the scale.



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