Relocation after *Baures*: Legal Standards, Analysis and Presentation of Evidence

INTRODUCTION

One of the more challenging counseling problems in our practice pertains to issues involving relocation of children. Our case law has reflected a struggle to accommodate the interests of parents and children in removal situations. In Baures v. Lewis, 167 N.J. 91 (2001) the Supreme Court attempted to provide clarity with articulation of specific standards and procedures because of what it perceived "as confusion among the Bench, Bar and litigants over the legal standards that should apply in addressing a removal application, and particularly over what role visitation plays in the calculus". Baures v. Lewis, *supra*, 167 N.J. at 97-98.

In attempting to eliminate the confusion it perceived, the Court reviewed the status of relocation law after Holder v. Polanski, 111 N.J. 344 (1988); and Cooper v. Cooper, 99 N.J. 42 (1984). These two cases were decided by the Court within a short span of four years and demonstrated a subtle shift in the judicial perception of relocation issues but sowed confusion because most decisions after Holder continued to discuss both the holdings of both cases, even though Holder had modified Cooper.

Justice Long's opinion for the Court in Baures, articulated the Court's perception that New Jersey had developed somewhat of a hybrid scheme that involved four basic tenets:

1. The Court recognized that our relocation law was not based upon a presumption in favor of the custodial parent, but did recognize the identity of the interest of the custodial parent and the child and, as a

result, the law afforded particular respect to the custodial parents' right to seek happiness and fulfillment.

2. At the same time, our relocation law emphasized the importance of the non-custodial parent's relationship with the child, and the need to guarantee regular communication and contact of a nature and quality sufficient to sustain that relationship.

3. Finally, our relocation doctrine incorporated a variation on a best interests analysis by requiring proof that the child would not suffer.

THE HOLDING

It is against this backdrop that the Baures Court articulated a two-pronged analysis to be applied in relocation cases, when joint custody arrangements were not in place. The Court said that, the moving party has the burden of making a prima facie case that he/she has a "good faith reason for the move and that the child will not suffer from it". Baures v. Lewis, *supra*, 169 N.J. at 116-118 . The Court said the initial burden on the moving party will be to produce evidence that relates to those concerns.

The Court listed a series of factors that would be relevant to the burden of proving good faith and that the move would not be inimical to the child's interests. They were:

> (1) the reasons given for the move; (2) the reasons given for the opposition; (3) the past history of dealings between move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is avoided 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 non-custodial 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 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) 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 non-custodial parent has the ability to relocate; (12) any other factor bearing on the child's interest.

See Baures v. Lewis, *supra*, 167 N.J. at 116-117.

Once a prima facie case has been adduced, the burden of going forward reverts to the non-custodial parent who must produce evidence opposing the move demonstrating either that it is not in good faith or inimical to the child's interests. The Baures' Court opined that:

> The critical path to a removal disposition, therefore, is not necessarily the one that satisfied one parent or even splits the difference between the parents but the one that will not cause detriment to the child. (emphasis supplied)

Baures v. Lewis, *supra*, 167 N.J. at 116.

The Supreme Court, however, cautioned that this analysis was not applicable in those cases in which true co-parenting exists between the parents who share physical custody, either de facto or de jure, by formal or informal agreement. (Baures v. Lewis, *supra*, 167 at 116). See Baures v. Lewis, *supra*, 167 N.J. at 116.

In those circumstances the Court concluded that a removal application effectively was a motion for a change in custody to be governed by a changed circumstances inquiry and ultimately by a simple best interests analysis. See Baures v. Lewis, 167 N.J. at 116, citing with approval, Chen v. Heller, 334 N.J. Super. 361, 381-382 (App. Div. 2000).

POST-BAURES CHARACTERIZATION OF CUSTODIAL ARRANGEMENTS

There are two reported cases subsequent to Baures which dealt with the issue of classifying the nature of the custodial relationship. Each case has a different slant with respect to the weight to be afforded to timesharing as opposed to the sharing of custodial responsibilities.

In Mamolen v. Mamolen, 346 N.J. Super. 493 (App. Div. 2002) the panel per Judge Fischer appeared to emphasize the time allocation as set forth in the parties' Agreement. Judge Fischer remarked that the parties had agreed to an arrangement whereby the children spent alternating weekends and one overnight every other week with their father, or approximately 29% of their time with him. The Mamolen Court referenced the importance of the factor of continuous physical custody over a child for significant periods of time, in order to characterize the parenting relationship as joint for purposes of a removal application. In Mamolen, the trial judge had found counting days to be artificial. The panel criticized him for disregard of the actual physical timesharing that occurred. The Mamolen panel quite emphatically stated:

> Accordingly, while the Court may look past labels and precise language utilized to describe a custodial arrangement, the element of time is of critical importance in determining the presence of joint physical custody. (emphasis supplied)

See Mamolen, *supra*, 346 N.J. Super. at 499.

It then embraced Pascale v. Pascale, 140 N.J. 583 (1995) and emphasized that joint physical custody means something far closer to 50% than was presented in the case before it.

In O'Connor v. O'Connor, 349 N.J. Super. 381 (App. Div. 2002), decided three months after Mamolen, the Court stated with different emphasis that:

> Although time is a critical factor to consider in determining the presence of a joint physical custodial relationship, we emphasize the importance of analyzing the division of time in the context of each party's responsibility for the custodial functions, responsibilities and duties normally reposed in the primary caretaker, such as those outlined above in Pascale, *supra*, 140 N.J. at 598-99. (emphasis supplied)

The O'Connor Court focused on the trial judge's specific and detailed findings concerning not only the division of the child's time with each parent, but also the division of key custodial responsibilities such as bringing the child to and picking the child up from school; helping the child with homework assignments; bringing the child to and attending his sports and school activities; preparing and planning the child's meals; caring for the child overnight; and attending to the child's medical and other health needs.

CHARACTERIZATION OF THE NATURE OF THE PARENTING ARRANGEMENT

If the nature of the parenting arrangement between the parties dictates the legal standard to be applied by the court, the first phase of your legal representation is to argue the existence of a parenting arrangement that best serves your client's interests. Obviously, if you represent the moving party, it is to your client's benefit to characterize the relationship as one in which no true joint physical custody is shared. Conversely, an attorney representing the opposing party will try to prove the opposite.

Often a client will come to your office with a negotiated parenting agreement or judgment that provides that that the parties shall share "joint legal custody" of the child(ren). Perhaps your client's parenting agreement expressly provides that the parties are to share joint physical custody or perhaps one parent is designated the parent of primary residence.

As counsel, this language cannot be the end of your analysis with respect to characterization of the parenting arrangement. Your role is to marshal the appropriate evidence to prove the characterization that you choose to embrace. Although the amount of time each parent spends with the child(ren) is an important element in characterizing the nature of the parenting arrangement, time spent with the children must be analyzed in the

context of each parent's responsibility for the custodial functions and duties normally reposed in a primary caretaker." (O'Connor v. O'Connor, 349 N.J. Super. 381, 385 (App. Div. 2002)).

CLIENT INTERVIEW AND INTERACTION

Accordingly, when interviewing your client it is essential to gather the necessary information to prove the existence or non-existence of a material and substantial allocation of key day to day custodial responsibilities between the parties. You should learn from your client information such as: the nights per week each parent spends with the child; how each parent assists the child(ren) in homework assignments; which parent is involved with the child's extra-curricular activities and specifically how much time it takes and the ability of the other parent to take over such responsibilities; who normally stays home to care of the child in the event of illness; who is generally responsible for arranging child care and medical and dental appointments; how the parents generally divide up carpooling and scheduling social arrangements; whether one parent or the other party coordinates and facilitates activities and involvements for special needs or special talent children Of course, you must also have your client prepare a thorough schedule of actual timesharing.

In short, the client interview is extremely important. You should provide the client with the criteria articulated by the Court and ask them to prepare a detailed narrative of the child's life and their interactions with their child during varying times in the child's life, emphasizing, of course, most recent patterns. We believe it is important to have the client prepare this in writing so that there can be no recriminations with respect to whether appropriate questions were asked or information shared.

After a client has done this and you have reviewed the narrative, you should meet with the client to fine tune the pursuit of facts. It would not be inappropriate to characterize what you do as an interrogation and cross examination of your client. It has been written that Brandies would not take a case when he was a private lawyer unless his client could withstand his cross examination. Although that tale may be somewhat exaggerated, it is certainly true that the best way for you and your client to be prepared to meet issues and arguments that will be raised, is for you to play a stern devil's advocate with the client. You should step back and look at the problem from the other side's perspective so that you can counsel and marshal evidence, as well as, perhaps get greater insight into the likelihood of success, assuming you know the Judge to whom your case will be assigned.

Once you are in possession of the essential information, you will form an opinion as to whether or not a true joint physical custody arrangement exists. If you determine that it is uncertain how the court will characterize the parenting arrangement - - which probably will be most of the time - - you must argue your client's position under both legal standards.

Of course, in any relocation case, like in any case involving matrimonial issues, of critical importance is the identity of the judge that you draw. The law in these areas gives vast discretion to a fact finder who assesses events, experiences, and relationship interactions, based upon his or her own upbringings, values, and biases. The same case presented the same way to judges assigned to the Family Part in adjoining courtrooms could result in different dispositions.

WHEN NO TRUE JOINT PHYSICAL CUSTODY ARRANGEMENT EXISTS

The Baures Court has expressly acknowledged that it is not an onerous task for a moving party to establish both a *prima facie* case of good faith and that the move will not be

inimical to the child(ren). As such, once this seemingly moderate showing has been made, the burden shifts on the opposing party to convince the court not to permit the relocation.

In counseling your client, you should prepare and provide to him a copy of the factors the Court will consider and which all trial judges now must make findings about when they render relocation decisions. You should instruct your client to provide a complete historical narrative and analysis of the pros and cons of his position and his former spouse's position in connection with each of these criteria. You must ask him to provide for you any email communications between the parents that address these issues. You must also instruct your client to provide you with any telephone tape recordings that bear upon all of these issues. In fact, once a decision has been made to move, then you should instruct your client, be it the person seeking to move, or the one opposing relocation, to tape record all telephone conversations with the other spouse because powerful evidence can come from such interactions that go to issues pertaining to motivation and sincerity. The focus is similar to the focus required when providing proof about whether a joint custody relationship exists, except the emphasis now becomes the criteria cited by the Court.

It is presumed that if such an application is going to be made, it has not been able to be addressed by the parties in negotiation or face to face discussion. It is presumed that by the time you are consulted, the situation between the litigants is such that it has become a hostile environment because resolution has been impossible. In that connection, it is important to preserve all evidence of the realities that relate to the factors set forth by the Court. The information that must come from the litigants goes to the fabric of their daily lives. "It is as varied as human nature itself". See Baures v. Lewis, *supra*, 167 at 120.

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Whether a proponent or opponent of relocation is represented, a lawyer must imbue his or her client with the importance of evidence gathering—getting the facts—and also presenting the evidence in a compelling manner. The lawyer and client must form an evidence gathering and presentation team. Typical of the kinds of evidence that the relocating client should be instructed to gather are: a written offer form a prospective employer, a transfer order form a current employer, official materials or correspondence from the school in which the child will be enrolled, written third-party information about the demographics or social, cultural, educational, developmental, and/or recreational opportunities available in the foreign state, as they pertain to the unique needs of the children with whom the parent seeks to relocate.

It is just as important to demonstrate that the new state has extended family members with whom the relocating child(ren) will interact and relate. Demonstrations of those relationships may be offered by way of photographs of the child(ren) and the extended family members who reside in the foreign state. Such evidence is even more compelling when the parties and the relocating child(ren) have no real familial ties to the original jurisdiction. Of course, if you represent the opposing party, your arguments should incorporate the same sorts of evidence to support the preservation of the status quo.

The Court has specifically set forth the obvious. It stated:

> Obviously not all factors will be relevant and of equal weight in every case. For example, in a case in which the parties have no extended family in either location, that factor will not be considered. Likewise, when the children are not of the age of reason, consent will not come into play. Contrariwise, 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.

Baures v. Lewis, *supra*, 167 N.J. at 118.

However, it also correctly noted that the main objection which would be lodged by the majority of non-custodial parents will be the change in the visitation structure, which therefore, will become the primary factor for consideration in most cases. See Baures v. Lewis, *supra*, 167 N.J. at 117. It emphasized that a change or reduction in visitation was not an independent basis to deny removal. However, it acknowledged that it was an important consideration as to whether or not the child's interests would be impaired. It reiterated the importance of mutual efforts to develop an alternative visitation scheme that can "bridge the physical divide between the non-custodial parent and the child".

The Court concluded that mutuality precluded the non-custodial parent from rejecting every alternate visitation scheme offered without advancing other suggestions. It suggested the use of new technology, such as email, phone calls, and utilization of school recesses. It emphasized the importance of nurturing and maintaining the connection between the non-custodial parent and the child. See Baures v. Lewis, *supra*, 167 N.J. at 117-118. It concluded that although children generally are resilient and able to adapt to removal, non-custodial parents are fully able and free to adduce evidence that will demonstrate the contrary. It further acknowledged that a non-custodial parent who had been lackadaisical and sporadic in his visitation would ordinarily not be able to prevail in opposing removal, not because of retaliation because of a parent's inadequacies, but because there would be no ability to show particularized harm. See Baures v. Lewis, *supra*, 167 N.J. at 120.

Having stated all that, however, the Court concluded at the very end of its decision with the following comment:

> In a removal case, the burden is on the custodial parent, who seeks to relocate, to prove two things: a good faith motive and that the move will not be inimical to the interests of the child. Visitation 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. (emphasis supplied)

Baures v. Lewis, *supra*, 167 N.J. at 122.

In all relocation cases, it is necessary to involve a mental health professional to evaluate the impact of the move on the child and to comment on the proposed alternative visitation proposal. Whether such an expert is engaged privately or designated jointly, is a question of tactics and strategy decided by the attorney and client. Even though a joint expert is engaged, a party retains his right under the Rules to engage a private expert, but of course, the perception will be that the private expert is a hired gun, even though that may not be the fact.

CONCLUSION

The Court's discussion in Baures offers something for each side in a relocation dispute. The person proposing relocation will cite the Court's commentary regarding a mobile society; the child's best interests correlating with the happiness of the primary parent; that reduction in visitation is not significant because it can be bridged by an alternative visitation scheme, which the Court defined as, "vacations, holidays, school breaks, daily telephone calls and email". See Baures v. Lewis, *supra*, 167 N.J. at 117-118. The proponent of relocation can argue from the Court's own decision, that all that is "necessary is that communication and visitation is extensive enough to maintain and nurture the connection between the non-custodial parent and the child". See Baures v. Lewis, *supra*, 167 N.J. at 117-118. The proponent also can argue the Court's reference to studies

that show no particular visitation configuration is necessary to foster the child's belief that he/she is "loved by the custodial parent". The proponent of relocation can further emphasize that portion of the Court's decision that said that it would only be unique facts surrounding a relationship with the child that would cause removal to be rejected, and that removal, therefore, should be favored. See Baures v. Lewis, *supra*, 167 N.J. at 120.

The opponent of relocation can point to those portions of the Court's decision which said that, although visitation is not an independent prong of the standard, it is an important element of proof on the ultimate issue which is: "whether the child's interests will suffer from the move". See Baures v. Lewis, *supra*, 167 N.J. at 122. The opponent can also point to that section of the decision which declared emphatically that "the critical path to a removal disposition, therefore, is not necessarily the one that satisfies one parent, or even splits the difference between the parents, but the one that will not cause detriment to the child". See Baures v. Lewis, *supra*, 167 N.J. at 116.

Although one reading of Baures can indicate that those opposing relocation are in a disadvantaged position, another reading reasonably supports the proposition that a change in contact between a child and a parent who is regularly involved in his life, cannot be replaced by emails or video teleconferencing. It is hard to imagine that a child who has seen a parent regularly, will not suffer from the end of that kind of contact. Of course, defining the nature of regular contact which if modified, will cause detriment to the child, will certainly require the assistance of mental health professionals.

At the end of the day, however, in family's where non-primary custodial parents have remained motivated and involved on a regular basis, it will be the creativity and human insight of the lawyer working with his client that will tip the scales in favor or against such

applications. Their mutual awareness, selection and presentation of significant facts, with the effective assistance of sincere and wise mental health professionals will dramatically impact on the resolution. As the Court acknowledged, "the possible evidential proffers in a case like this are as varied as human nature itself". See Baures v. Lewis, *supra*, 167 N.J. at 120. Of course, in the last analysis, the human nature of the judge drawn also will be critical.