Removal Litigation: Does *Baures* or *O'Connor* Apply?

by John E. Finnerty

The removal of children by a custodial parent from the state of New Jersey is governed by N.J.S.A. 9:2-2, which, in pertinent part, states:

> [w]hen 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 against 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.

Baures' Two-Pronged Analysis

In 2001, in *Baures v. Lewis*,[1] the Supreme Court articulated specific standards and procedures regarding the appropriate analysis of a removal application. Justice Virginia Long's opinion for the Court attempted to reconcile relocation law after *Holder v. Polanski*[2] and *Cooper v. Cooper*,[3] the holdings of which had instilled confusion regarding the appropriate analytic analysis.

Decisions after *Holder* and *Cooper* continued to discuss the holdings of both cases, even though *Holder* had modified *Cooper*. The *Baures* Court sought to resolve the perceived "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."[4]

The *Baures* Court's opinion recognized that a hybrid scheme had developed in New Jersey for analysis of relocation cases, which had as its premise three basic tenants:

1. There is no presumption of relocation in favor of the custodial parent, but *Baures* acknowledged and recognized what at that time was perceived to be the identity of the interest of the custodial parent and the child, and that the law afforded particular respect to the custodial parent's right to seek happiness and fulfillment.[5]

However, more recent scholarship has questioned the primacy of the assumption that the custodial parent's happiness is always predictive of the child's best interests.[6] This research has introduced a commonsense perspective. A child without two parents obviously is compromised, and recent scholarships suggest that the presumption that if the custodial parent is happy the child will be best served, needs to be balanced by the ability of the child to have significant access to the other parent, if he or she has demonstrated a commitment to parenting and significant prior involvement with the child.

Of course, these are all very subjective issues, and need to be investigated and analyzed on a case-by-case basis, depending upon the reasons for the intended relocation and how the diminution in contact with the parent left behind would impact the child.

2. The importance of the noncustodial parent's relationship with the child, and the need to guarantee regular communication of a nature and quality sufficient to sustain that relationship.
3. A variation of the best interests analysis in connection with a requirement for proof that the child would not suffer.[7]

In *Baures*, the Court rigorously analyzed prior case law, and held that a two-pronged analysis should be applied in relocation cases if a true joint custody arrangement is not in place. In such circumstances, the Court concluded that the moving party has the burden of making a *prima facie* showing that he or she has a "good faith reason for the move and that the child will not suffer from it."[8]

The Court placed the initial burden on the moving party to produce evidence that relates to those concerns. The Court stated that the "initial burden of the moving party is not a particularly onerous one."[9] The Court identified a series of factors that would be relevant to assess in connection with the effort to demonstrate a good faith reason for the move, and that it is not inimical to the child's interest, as follows:

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.[10]

The Court made clear that not all of the factors should be given equal weight. Some factors may be given significantly more weight than others, depending upon the particular issues of each case. But the *Baures* Court also emphasized 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.* (emphasis supplied)[11]

Once the parent who seeks to relocate has made a *prima facie* case, the burden reverts to the noncustodial parent to submit evidence reflecting that the move is not sought in good faith, and/or that it is inimical to the child(ren)'s best interests. The Court stated that parenting time is not, in and of itself, an independent prong of the standard, but it is "an important element of proof on the ultimate issue of whether the child's interest will suffer from the move."[12]

In the unanimous opinion, Justice Long discussed the tension that exists between a custodial parent and a noncustodial parent in removal cases.[13] Further, throughout the decision the competing interests regarding removal that arise between a noncustodial parent and a custodial parent were detailed, including a custodial parent's desire for "autonomy."[14] The Court concluded that this two-pronged analysis would not be appropriate in removal applications where a true co-parenting arrangement existed between the parents (either *de facto* or *de jure*).[15] Therefore, the *Baures* two-prong analysis is only to be applied to cases where one parent is clearly a custodial parent and the other is a non-

custodial parent. In a true joint co-parenting case, the *Baures* Court concluded that a removal application effectively was an application for a change of custody, to be governed by a change of circumstance criteria and, ultimately, a best interest analysis.[16]

O'Connor Removal Test

In contrast to the burden of proof for primary custodial parents who seek removal, the Appellate Division held in *O'Connor v. O'Connor*[17] that in cases where a true joint custody relationship exists, the traditional *Baures* removal analysis is inapplicable. Instead, the application should be analyzed as a change of custody, and the best interests of the child must, therefore, be considered.

> If, however, the parents truly share legal and physical custody, an application by one parent to relocate and remove the residence of the child to an out of State location must be analyzed as an application for a change of custody, where the party seeking the change in the joint custodial relationship must demonstrate that the best interests of the child would be better served by residential custody being primarily vested with the relocating parent.[18]

The trial court analyzed the parties' relationship with their child, Ryan. Initially after the divorce, the mother (plaintiff) was the primary caretaker of the child. However, as the plaintiff's employment became more demanding and the defendant's became more flexible, the parties' relationship with the child transformed into a shared parenting time scheme. The trial court found the parties had effectively been enjoying 50/50 custody, and stated that the defendant (father) kept accurate records and effectively proved to the Court that there was a shared parenting relationship. In these records, the defendant was able to demonstrate the exact number of weekend days and weekend day overnights he had with the child. Further, he was able to state specifically how many non-weekend days he had with the child from 1999 through June of 2001.

Therefore, as the Court found there was a 50/50 shared parenting relationship, the determination became one of a best interest analysis in regard to relocation. The trial court had interviewed the parties' child (who was approximately nine or 10 years old). Further, the trial court specifically stated that the child himself acknowledged New Jersey as his "home."

Further, the trial court stated that he found the visitation plan his mother promulgated was really just an "afterthought" to satisfy case law. The trial court also stated that the mother could live anywhere she wanted to. Further, (and stated repeatedly), the trial judge believed the mother was blind to the defendant's attachment to the child, as well as the child's preference.

The trial court held that the plaintiff should not be able to remove Ryan from the state of New Jersey and rejected her application as an "unwarranted change of custody." The Appellate Division affirmed, as the trial judge made specific and detailed findings concerning the custodial relationship, including the child's time with each parent, and also the division of key custodial responsibilities. The parties were found to share these primary custodial responsibilities.

In matters such as these, first a determination must be made regarding whether litigants truly share physical custody of the child(ren). The *O'Connor* court emphasized that while time spent with the child is a critical factor in determining whether or not the parties' have a joint custodial relationship, it must be considered in the *context* in which each party is responsible for "custodial functions, responsibilities and duties normally reposed in the primary caretaker," as was outlined in *Pascale v. Pascale*.[19]

The Court went on to cite *Garska v. McCoy*.[20] In that matter, West Virginia set forth various factors to utilize in determining when the parent is the primary caretaker of a child:

1. Preparing and planning meals;
2. Bathing, grooming and dressing;
3. Purchasing, cleaning, and caring for clothes;
4. Providing medical care, including nursing and taking child to the physician;
5. Arranging for social interaction among peers after school, *i.e.*, transporting to friends houses or to girl or boy scout meetings;
6. Arranging for babysitting or daycare;
7. Putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
8. Disciplining (*i.e.* teaching general manner and toilet training); and
9. Educating (*i.e.* religious, cultural, social, etc.).

In *O'Connor*, the Court expounded upon the duties of the primary caretaker, and identified the following: bringing the child to and picking the child up from school; helping the child with homework assignments; bringing the child to and attending his or her 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.[21]

As the trial judge in this matter had made specific and detailed findings concerning the custodial relationship between the plaintiff and the defendant that centered not only upon the division of the child's time with each parent, but also on the division of key

custodial responsibilities, and found both parties shared these primary custodial responsibilities, the appellate court affirmed.

These factors can assist triers of fact in determining whether or not a parent has discharged his or her duties as primary caretaker in order to resolve whether a joint physical custodial relationship is truly in effect.

In instances where the parties share custody, "the party seeking the change in the custodial relationship must demonstrate that the best interest of the child[ren] would be better served by residential custody being vested primarily with the relocating parent."[22]

In *Barblock v. Barblock*,[23] the defendant father appealed from the trial court's order allowing removal of the parties' children from Passaic County to Buffalo, New York. The case is unusual in that the trial judge decided a relocation application without a plenary hearing or expert evidence, following submission of papers and oral argument.

Describing the benefits that can be derived from a plenary hearing in removal cases, including evaluation of the parties' credibility, interviews with children, and expert testimony, the Appellate Division cautioned family part judges to "bear in mind the costs both financial and personal, that the litigants will incur in preparing for and participating in such proceedings."[24] In reviewing such steps, such as retention of experts, discovery, psychological tests, etc., the court stated:

> All of these steps will consume time and money. In the meantime, the children and their parents are placed in an anxious state of limbo, unsure if the removal application will be granted or denied, and unable to make solid plans for the future. Indeed, the job offer or other opportunity that sparked the removal application may dissipate in the interim.[25]

The Appellate Division also criticized the defendant for failing to offer an alternative visitation plan, although there is no evidence in the reported opinion that the plaintiff came forward with a proposed plan either. The Appellate Division criticized the defendant for, although stating he would hire an expert to perform a psychological study, failing to follow through on the retention. He was further criticized for failing to document his criticisms of the Buffalo school system with competent expert proof, as well as providing no corroboration for his allegations that his former in-laws had antipathy for him and that they drank excessively. The defendant further failed to ask the court to interview the children, or to provide the court with proposed questions to be used during such an interview.

The defendant argued that the court was obligated to conduct a plenary hearing to determine if, in fact, the parties shared a *de facto* shared parenting arrangement, as he asserted they had. Depending upon the resolution of that issue, the defendant requested an assessment of the pertinent factors under either the *O'Connor* removal test or the *Baures* two-pronged analysis. The appellate court disagreed, holding that there is no reported case requiring that a plenary hearing occur to resolve a contested application to relocate a child from the state of New Jersey.[26]

Further, the Appellate Division concurred with the trial court's assessment that there was *not* a shared parenting arrangement between the parties, and that the plaintiff alone served as the primary caretaker, even though there appear to have been contested factual issues. The court found many deficiencies in the defendant's application, including a failure to advise in his moving papers, "who regularly cooked [the children's] meals, who helped with their homework, who got them ready for school, who took them to doctors visits, and so on."[27]

In fact, the defendant stated that he spent three weeknights with the parties' children so the plaintiff would not have to "hire a babysitter." The defendant's use of the term "babysitter" was to his detriment, as the trial court inferred that his usage of this terminology suggested he was "fulfilling a subordinate, rather than joint caretaking role."[28] Moreover, the defendant never asserted that he was ready, willing and able to take on the role of primary caretaker in the event the plaintiff relocated to Buffalo without the children. There was no indication that he was prepared to accept responsibility for the children as a primary custodial parent, and this omission was used as further justification for the trial judge's application of the *Baures* two-pronged analysis.

The Appellate Division decision is instructive on procedures that should be followed by a person objecting to a relocation application. Despite this decision, generally speaking, it is the law that custodial determinations and relocation applications generally should not be decided in the face of material contradictory assertions of fact without an opportunity for testimony. It is believed the case is the exception to the general rule.

Application of *Baures* Relocation Standards to Other Procedural Scenarios

In *MacKinnon v. MacKinnon*,[29] the Supreme Court concluded that the *Baures* factors were sufficiently flexible to accommodate the intricacies of international removal cases, and held that *Baures* applies to removal cases in the international context, meaning applications to relocate to a different country. The Court reaffirmed the conclusion of the appellate panel in *Abouzahar v. Matera-Abouzahar*,[30] that it would not impose a bright-line rule prohibiting removal to a

country that was not a signatory to the Hague Convention because to do so would unnecessarily penalize a law-abiding parent and could conflict with a child's best interests.

The Court did suggest that in international removal cases, trial courts must consider the question of enforceability of visitation and other court orders in the international context. Although it found that a foreign nation's Hague Convention status was a pertinent factor, it concluded that it was by no means a dispositive factor. It suggested that where there is a concern raised about future proceedings and the enforceability of New Jersey orders, trial courts should pursue alternative solutions by encouraging parties to obtain appropriate orders in the foreign nations or enter into contractual agreements that are definitively enforceable in foreign nations.

Thus, in negotiating resolutions in such cases, it is important to assure that counsel is retained in the country to which relocation is sought, so the parties will be fully informed of whatever procedural requirements need to be put into place to assure compliance in that country with the New Jersey order.

In *Shea v. Shea*,[31] the court concluded that if a removal application comes shortly after the settlement of a final judgment of divorce, and the material facts and circumstances forming the good faith reason for the removal requests were known at the time of the entry of the final judgment, the party opposing the removal should be able to contest custody under the best interest analysis, regardless of whether the parties had a true shared parenting arrangement. The ability to do this would prevent manipulation by a person seeking removal who waits until after an agreement for custody has been put in place, thereby potentially obtaining an advantage if designated as the parent of primary residence in the agreement. If the other party knew the relocation application was immediately forthcoming, he or she may not have agreed to the custody determination.

Conclusion

The threshold determination in these removal cases is whether or not the parties truly enjoy a shared custody arrangement. This is analyzed by not only considering the amount of time each parent spends with the child(ren), but also the caretaking responsibilities undertaken during their time with the child(ren). As stated in *O'Connor*, "in determining the standard to be applied to a parent's removal application, the focus of the inquiry is whether the physical custodial relationship among the parents is one in which one parent is the 'primary caretaker' and the other parent is the 'secondary caretaker.'"[32]

Endnotes

1. *Baures v. Lewis*, 167 N.J. 91 (2001).
2. 111 N.J. 344 (1988).
3. 99 N.J. 42 (1984).
4. *Baures, supra* at 97 -98.
5. *Id.* at 97.
6. Braver, S.L., Elman, I.M., Fabricius, W.B. (2003), Relocation of Children After Divorce in Children's Best Interest: New Evidence and Legal Considerations, *Journal of Family Psychology, 17,* 206 – 219 at 215; Mart E. G. & Bedard, R.M., (2005) Child Custody and Post Divorce Relocation in Light of Braver, et. al., *The Vermont Bar Journal,* Fall 2005, 1"; Kelly, J., Lamb, M., (2003), Developmental Issues in Relocation Cases Involving Young Children: When, Whether and How?, *Journal of Family Psychology,* 17, 193-205.; Austin, W.G. (2008) Relocation, Research, and Forensic Evaluation, Part 2, Research in Support of the Relocation Risk Assessment Model, *Family Court Review,* 46, 347-365.
7. *See* Finnerty, John E., (2003) "Relocation After *Baures*: Legal Standards, Analysis and Presentation of Evidence, 12 *NJL,* 91.
8. *Id.* at 116-18.
9. *Id.*
10. *Id.* at 116-17.
11. *Id.* at 116.
12. *Id.* at 122.
13. *Id.* at 110-11.
14. *Id.* at 97.
15. *Id.* at 116.
16. *Id.* at 116, *citing with approval Cher v. Heller,* 334 N.J. Super. 361, 382 (App. Div. 2000).
17. 249 N.J. Super. 381 (App. Div. 2002).
18. O'Connor, *supra* at 385.
19. *Pascale v. Pascale,* 140 N.J. 583 at 598-99 (1995). *O'Connor, supra* at 400.
20. 167 W. Va. 59, 60-70 (1981).
21. *O'Connor, supra* at 400.
22. *Id.* at 398. *See also Chen v. Heller,* 334 N.J. Super. 361, 380-82 (App. Div. 2000).
23. 383 N.J. Super. 114 (App. Div. 2006).
24. *Id.* at 123.
25. *Id.*
26. *Barblock, supra* at 122.
27. *Id.* at 125.
28. *Id.*
29. 191 N.J. 240 (2007).
30. 361 N.J. Super. 135 (App. Div. 2003).
31. 384 N.J. Super. 266 (Ch. Div. 2005).
32. *O'Connor, supra* at 385.

John E. Finnerty *is a senior partner in Finnerty, Canda & Drisgula, P.C. in Bergen County. He is a senior editor of the* New Jersey Family Lawyer, *a former chair of the New Jersey State Bar Association's Family Law Section, and was the prevailing attorney in* Lepis v. Lepis *and* Schiffman v. Schiffman. *The author acknowledges the valuable editorial assistance of Jamie Ellen Reid, who assisted in the research and preparation of this article.*