

Trends and Developments

Contributed by:

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Schiller, DuCanto & Fleck

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Anita Ventrelli is a senior partner at Schiller DuCanto & Fleck, where she specialises in providing personalised legal strategies to clients in various fields, including professionals in

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Changes in Statutes Affecting Child Relocation in Illinois

Most parents do not think about what would happen if they could not agree on where their child will live. In cases where parents do not live together and do not align when it comes to life-planning, one parent may want to relocate with a child while the other parent does not or cannot join in the move. Prior to 2016, Illinois courts used a statute referred to as “the removal statute” – which required a finding that letting the child move would serve the child’s best interests – to decide questions raised when a parent wanted to relocate with a child to another state. That statute put the burden on the parent who wanted to make the move to prove the case for best interest.

The statute raised more questions than it provided answers, given that:

- it did not list factors for courts to consider;
- it did not have any process for required notice;
- it did not say how court-ordered evaluations should deal with relocation when evaluating which parent would make decisions for a

- child and how much time each parent would spend with a child; and
- it did not state how high a legal standard of proof the parent needed to meet.

By way of an example, legal proof standards range from lowest to highest as follows – preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. Eventually, a preponderance of the evidence standard was specified when answering these questions in cases decided in the Illinois appellate courts.

Traditional factors in court decisions

Based on case law, the main factors to consider when making the decision in the child’s best interest include:

- whether the proposal will enhance the general quality of life for both the custodial parent and the child;
- the motives of the custodial parent for seeking the move (ie, determining whether the move is merely a ruse intended to defeat or frustrate visitation);

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- the motives of the non-custodial parent for resisting removal;
- the visitation rights of the non-custodial parent (including the child's relationship to each parent and other family members); and
- whether a realistic and reasonable visitation schedule can be reached if the move is allowed.

New relocation statute

In keeping with societal evolution, the Illinois legislature updated the removal statute and redesignated it as a statute on relocation. In broad terms, the new relocation statute contemplates not only relocation outside Illinois but also relocation within Illinois – thereby recognising that a move across a state line to a new home that is an hour away does not disrupt a family as much as a move within the same state, where children could live as much as four or five hours away from a parent.

This new iteration of the statute passed the Illinois legislature in 2016. It added structure to how courts decide the issues and determined an order for making such decisions by:

- defining a parent's relocation as a substantial change in circumstances – meaning parents no longer have to fight an initial battle to prove that moving entitles them to ask to change parenting schedules, given that they must prove a substantial change in circumstances in order to make changes to their children's schedules;
 - stating that only a parent with the majority of parenting time or 50% of the parenting time can seek relocation – meaning any parent concerned about the possibility of relocation affecting a decision on parenting time may consider first seeking a majority or 50% of parenting time before requesting permission to relocate so as to keep the issues distinct from one another, whereas previously a court faced with making a decision about how to allocate parenting time and a decision on relocation did not have a mandate to make decisions about parenting time first;
- adding a requirement for a parent to give notice when asking to relocate with a child;
 - stating when a parent asking to relocate must give notice;
 - stating what a parent asking to move must include in the notice;
 - stating that, if a parent does not give the proper notice and just moves the child, the court can take it into account when assessing the good faith of the request and this may impact awards of attorney's fees;
 - stating factors that courts should consider when considering whether a move aligns with a child's best interests; and
 - including a distance requirement where a move will keep the case in Illinois.

Decisions after the change to the statute

Even with all that the updated statute includes, it elected not to incorporate or override the prior appellate court decisions on relocation issues. Those decisions differed from one appellate court district to another, giving rise to the belief that decisions in this area turn exclusively on the facts of each case. Decisions after the change in the statute include the following.

- In re Marriage of Fatkin – the appellate court overturned a trial court decision to allow relocation where:
 - (a) the father trying to relocate to live with his parents when his mother had a terminal illness did not give the court enough proof that he could not find employment without moving;
 - (b) the father did not provide the court with

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- evidence of the quality of schools the children would attend;
- (c) the mother provided 44% of the child-care; and
- (d) the children would have to leave their friend networks.
- In re Parentage of PD – the appellate court affirmed a decision denying relocation where the mother seeking to relocate to where her husband planned to work:
 - (a) did not appear to support the father’s role as a parent; and
 - (b) over-stated the case in the evidence she submitted for a number of the factors listed in the statute, including her allegation that her husband would lose his job if he did not relocate.
- In re Marriage of Kavchak – the appellate court affirmed a decision allowing relocation where the mother had the opportunity to change jobs and where none of the evidence demonstrated the mother having any history of inappropriate conduct with regard to the father’s relationship with the child.

These decisions do not necessarily signal a relaxation in the quality of facts that will lead to a successful relocation, although (or regardless of whether) they signal a difference in what prompts a parent to seek relocation. The decisions remain fact-specific – with no one factor having any greater importance than any other factor – and turn largely on having evidence for each factor and an absence of poor attitude on the part of the relocating parent towards the other parent’s relationship with the child.

On the procedural side, the appellate court discussed the principles determining the kinds of removal decisions a parent can appeal right after a decision and which kinds of removal decisions must wait until all case issues resolve. A deci-

sion on relocation that modifies parenting time or parental decision-making does not have to wait for all case issues to be resolved before an appeal. A decision that denies a request for relocation does not qualify under the Supreme Court Rule that allows the immediate appeal of decisions about custody judgments, parenting allocation judgments, and orders that modify such judgments.

Another procedural rule discussed in relocation decisions under the new iteration of the statute relates to the standard of review the appellate court applies. One standard of review decides whether the trial court abused discretion, whereas another – known as “de novo review” – allows the appellate court to decide the issue as though hearing the case for the first time. Owing to the fact-intensive quality of these decisions and the trial court being the only court to observe the demeanour of witnesses, appellate courts will only reverse if they decide that the trial court made a decision that was clearly against the manifest weight of the evidence and it appears that manifest injustice occurred. This makes a decision of the trial court in a relocation matter among the most difficult to overturn.

Role of unpublished opinions in relocation matters

Illinois Supreme Court Rule 23 (“Rule 23”) mandates that appellate courts enter summary written orders instead of full opinions in certain types of cases. They only decide a case in an opinion when a majority of the panel deciding the case determines that the case satisfies at least one of the following criteria:

- the decision establishes a new rule of law or modifies, explains or criticises an existing rule of law; or

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- the decision resolves, creates or avoids an apparent conflict of authority within the appellate court.

Most relocation cases that turn on facts will not satisfy the criteria for an opinion, so the rule requires that they be decided by a written order. These concise written orders must succinctly state:

- a concise syllabus of the court’s holding(s) in the case (in a separate introductory paragraph);
- the germane facts;
- the issues and contentions of the parties when appropriate;
- the reasons for the decision; and
- the judgment of the court.

Any opinion or order entered under the portion of the rule requiring a written order is not precedential, except to support contentions of double jeopardy, *res judicata*, collateral estoppel, or law of the case. A non-precedential written order entered on or after 1 January 2021 may be cited for persuasive purposes. When cited, a copy of the order must be furnished to all other counsel and the court. Written orders will have a notice on the first page that reads “NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(l)”.

Since the passage of the new relocation statute, appellate courts have decided the lion’s share of relocation cases using Rule 23 written orders instead of opinions. This stands as testament to the tendency of relocation cases – apart from those that decide against parents who act in bad faith – to resist trends, instead letting each case’s facts drive the analysis.

Practical considerations

Although not part of the relocation statute, the portions of the Illinois statutes that deal with children use the nationwide principles of the Uniform Child Custody Jurisdiction Enforcement Act to decide which of the 50 states will have the right to make decisions about a child. They call this “continuing exclusive jurisdiction”. It means that whichever state has the jurisdiction to make decisions about custody or parenting allocation issues also gets to make the decision about relocation.

At the time of writing (September 2023), no federally mandated uniform law requires all the states to make decisions about relocation using the same set of rules. As a result, trends in this area include the need for parents thinking about both divorce and relocation at the same time to consider the differences between the laws that direct how courts decide parenting issues in their state of residence and those of the destination state when deciding whether:

- to try to relocate with consent of the other parent before beginning litigation; or
- to litigate in their state of residence before moving.

When parents – whether married or not – finish court proceedings concerning who gets to make parenting decisions and what parenting schedule they will use while they live in the same geographic area, they do not anticipate possible later court proceedings over a move. Court orders or judgments on parenting cannot be locked in stone, which makes the possibility of change inevitable. For this reason, parents should continue to track aspects of their parenting relationship, such as:

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- one parent's attitude towards the other parent's involvement in parenting;
- missed parenting time;
- the time each of the parents can spend with their child, given work and other commitments;
- the contact the child has with family members (and where family members live);
- issues a child faces at school and in the community; and
- whether a child has any issues with either parent.

Many parents who reach agreements about their children never experience court proceedings. The court process involves putting testimony into evidence. To structure testimony effectively, the questions and answers need to lay the foundation by providing certain background information, which can be difficult to recall with the passage of time. Making notes of dates, locations and persons present during conversations or occurrences and being sure to retain copies of records and communications from school and activity providers and medical professionals can help meet the criteria for getting evidence before a court.

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