

THE MAKING OF A MODEL RELOCATION ACT: A COMMITTEE MEMBER'S PERSPECTIVE

By
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I. Introduction

The Special Concerns of Children Committee (hereinafter "SCC Committee") was founded in 1991 after the American Academy of Matrimonial Lawyers completed the *Bounds of Advocacy*. In 1994, the Academy adopted the Standards for Representing Children ["Representing Children: Standards for Guardians ad Litem in Custody and Visitation Proceedings"¹]. These Standards were drafted by the SCC Committee with Professor Martin Guggenheim as Reporter.²

The SCC Committee undertook a study of relocation law geared towards presenting a Model Relocation Act³ (hereinafter "Relocation Act" or "Model Act"). I was the first Co-chair of the SCC, a member of the Committee which drafted both the Standards as well as the Model Relocation Act and am the current Chair of the SCC Committee. As the immediate past Editor in Chief of this Journal, it is my honor and privilege to present this brief introduction to the Relocation Act. The principal functions of this article are to describe the process by which the Academy adopted the Relocation Act, highlight some goals of the SCC Committee and discuss some salient provisions.

II. Focus of Committee on Special Concerns of Children

After completing the Standards the SCC Committee wanted to study and formulate policy in the area of relocation law. The

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¹ Hereinafter "Standards."

² The Standards for Representing Children and Commentary appears in 13 J. Am. Acad. Mat. Law. 11995). Copies of the Standards are available by calling 800-422-6595.

³ 15 J. Am. Acad. Mat. Law 1 (1998).

Committee had a diverse membership with representation from various states. The co-chairs came from Florida and Texas, and members came from Pennsylvania, New York, California and Wisconsin, among other states.

A reporter was selected to assist the Committee in its study. Professor John J. Sampson from the University of Texas School of Law in Austin was retained and consulted for his legislative drafting experience.

The SCC initially undertook its investigation by studying cases⁴ and law review articles.⁵ Individual committee members submitted major decisions from their jurisdictions giving the Committee a sense of the diversity of litigation approaches throughout the United States.

The SCC had numerous committee meetings where the diverse membership at first exchanged personal views on issues of relocation law. These meetings were held in connection with national Academy meetings and also included free standing debates and study sessions. The Committee met in Chicago, Orlando, Austin, San Antonio and New York City.

The Committee also believed it was important to reach out to the mental health disciplines for input. Consequently at the San Antonio meeting the Committee engaged in a lengthy teleconference with Judith Wallerstein, Ph.D., and part of the New York City meeting included a personal discussion with Alan Levy, M.D., who represented somewhat diverse views as to relocation and the impact upon a child's best interests. Discussions with these professionals and a review of some of the psychological literature led the Committee to conclude that limited hard

⁴ The Committee read and discussed many cases including *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996); *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996); *Browner v. Kenward*, 665 N.E.2d 145 (N.Y. 1996) and the Wallerstein brief which appears in Judith S. Wallerstein & Tony J. Tanke, *To Move or Not To Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996).

⁵ Nancy Berg & Gary Debele, *Post-decree Custody Modification: Moving Out of State*, 10 AM. J. FAM. L. 183 (1996); Barbara Handschu, *Custodial Removal: May a Custodian Leave the Jurisdiction With the Child?*, 8 WOMEN'S RTS. L. REP. 247 (Fall 1985); Sondra Miller, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?*, 15 PACE L. REV. 339 (1995); Blair W. Hoffman, Note, *Restrictions on a Parent's Right to Travel In Child Custody Cases: Possible Constitutional Questions*, 6 U.C. DAVIS L. REV. 181 (1973).

data exists on the psychological impact of relocation on children and that mental health professionals often were guided by their ultimate views as to what was best for children: having primary concern for the happiness (or desires) of the primary custodian (the Wallerstein view) or emphasizing a continued relationship for the conscientious, non-primary parent who had meaningful prior involvement (the Levy position).⁶

In addition to the numerous committee meetings, the SCC met for lengthy telephone conferences on many occasions. Such conferences became necessary when members expressed differing views in drafting portions of the Act.

The input of the entire Academy was solicited. A Relocation Questionnaire was circulated which called for responses of the membership. The Committee received an extraordinarily high rate of responses.⁷ Some of the responses were quite interesting. For instance, ninety-four percent of those responding believed that restrictions should be placed on the ability of the custodial parent to relocate with the child and eighty percent thought that the original custody order should restrict future relocations. One hundred percent of the Fellows agreed that the parent seeking to move should be required to give notice; eighty-nine percent would impose notification requirements on the non-primary parent who moved without the child. On other crucial issues, sixty-five percent of the Academy Fellows believed that there should be no presumption favoring relocation and fifty-nine percent wanted no presumption opposed to relocation. Ninety-three percent of the Fellows supported the proposition that the parent seeking relocation should have the burden of proof. The membership was not specifically queried as to the burden of going forward and whether a request to relocate should trigger a custody modification proceeding.

The Committee sought the input of the Fellows at the Academy National Meeting in Hawaii in 1996, through issues and discussion questions submitted to the membership. The presumption issue was framed by this author as follows:

⁶ See Alan M. Levy, *Fathers and Custody Determination*, 12 FairShare 3 (Sept. 1992); Wallerstein, *supra* Note 3.

⁷ Almost 500 Fellows responded, representing approximately one-third of the Academy membership.

- (1) Is there a presumption in favor of the CP or PCP being able to relocate so long as it is a non-malicious move which improves the standard of living for the child?
- (2) Or, is there a presumption in favor of continued, frequent, meaningful access by the NCP where that previously has existed?

The Fellows discussed presumptions at the Hawaii meeting in terms of the impact upon various issues including the level of proof, who should have the burden of proceeding, the quantum of proof and whether a relocation request triggered a best interests custody proceeding. The Fellows also discussed several hypothetical situations, many of which produced a variation in responses.

III. Goals

When the Committee initially undertook this study and investigation there was Committee consensus to draft a Model Act for consideration by state legislatures. As set forth in the Introductory Comment,

... the suggested statute is not intended to be a uniform act; several significant issues are presented in the alternative in order to facilitate independent consideration of controversial issues by state legislators. Rather, the proposed act is meant to serve as a template for those jurisdictions desiring a statutory solution to the relocation quandary. Finally, the proposed act is definitely not intended to be the basis for federal legislation. Family law issues are properly addressed by state law.⁸

Michael Ostrow, the President of the Academy when it enacted the Model Act, indicated that it was his hope that the model statute would help states arrive at increased rationality and consistency with difficult relocation decisions. President Ostrow felt that the Model Act included important commentary and footnotes which would assist state legislators in understanding the Academy's analysis. While the Model Act was passed under the tutelage of President Ostrow, it is in keeping with the priorities of subsequent leadership of the Academy including past President Michael McCurley who dedicated his Presidency to addressing what he saw as "one of the country's most pressing

⁸ AAML *Proposed Model Relocation Act*, *supra* note 3, Introductory Comment at 3.

problems: the devastating effects of divorce on our nation's children.”⁹

IV. Issues in Model Act

The SCC and the Executive Committee were in general agreement on many issues. The Committee reached consensus on such issues as notice, the parties, the type of move and the nature of the hearing. A variety of factors also were included for a court's consideration. Each of these issues is briefly discussed.

Every person who has a right to establish a child's principal residence is required to notify every person who has visitation with the child.¹⁰ The Act goes beyond traditional concepts that the person wishing to move must give notice only to the other parent. It imposes a notification requirement on any adult who is entitled to visitation if that person intends to change her/his primary residence.¹¹ When imposing this requirement, the drafters of the Act took into consideration the fact that persons other than a parent (a grandparent, for example) might have legal rights to access. However, these persons do not have the right to challenge a change in a child's residence.¹² Additionally, in imposing a notification requirement upon persons who were not seeking to change the child's residence, the Act did not look to limit those persons' right to travel and select another residence. The Act imposes only a notification requirement which also informs the child's primary parent about the child's whereabouts during periods of visitation.¹³

The Act covers *any* move in the child's primary residence. Relocation is defined to cover any change regardless of the distance.¹⁴ The Act was designed to provide a mechanism for ad-

⁹ Michael McCurley, *A Message from the President*, AAML Newsletter, Winter, 1997-1998.

¹⁰ *Model Act*, *supra* note 3, § 201 at 7.

¹¹ *Model Act*, *supra* note 3, § 202 at 8.

¹² *Model Act*, *supra* note 3, Commentary to § 202 at 8.

¹³ *Id.*

¹⁴ *Model Act*, *supra* note 3, § 101(5) at 5 provides: “relocation means a change in the principal residence of a child for a period of [60] days or more, but does not include a temporary absence from the principal residence.”

justing the custodial schedule when either the child or the non-custodian moves.¹⁵

Notification is accomplished by mail to the last known address.¹⁶ The exact type of notification (first class, registered or certified mail) was left to the states.¹⁷ The time requirement also was left to the states, although sixty-day advance notification was favored.¹⁸

A person wishing to relocate the child's residence must give detailed written notification, including a proposed revised access schedule.¹⁹ Standard court orders would require notification, specifying the areas to be covered in future notices when a move was intended.²⁰ A domestic violence exception was included, dispensing with notice when necessary to protect the health, safety or liberty of a person or a child.²¹

The person receiving notice has to object in a timely manner or relocation is permitted without further court proceedings.²² The Act acknowledges that many moves are unopposed, thereby not necessitating court proceedings.²³ The parent objecting to relocation must file a court proceeding.²⁴ A non-parent may only seek court intervention for a revised access schedule. The non-parent may not seek any court order preventing the move.²⁵ Once court proceedings are filed, either party may request a full evidentiary hearing.²⁶

A number of factors are set out in the Act for the court's consideration when making the ultimate relocation determination.²⁷ The factors were not ordered or prioritized since each relocation decision rests on individualized facts.²⁸ The factors in

¹⁵ *Model Act, supra* note 3, Commentary to § 101 at 5.

¹⁶ *Model Act, supra* note 3, § 203 at 9.

¹⁷ *Model Act, supra* note 3, § 203 Footnote 4 at 9.

¹⁸ *Model Act, supra* note 3, § 203 Footnote 5 at 9.

¹⁹ *Model Act, supra* note 3, § 203(b)(6) at 10.

²⁰ *Model Act, supra* note 3, § 204 at 11-12.

²¹ *Model Act, supra* note 3, § 205 at 13.

²² *Model Act, supra* note 3, § 301 at 15.

²³ *Model Act, supra* note 3, Commentary to § 301 at 15.

²⁴ *Model Act, supra* note 3, § 302 at 16.

²⁵ *Model Act, supra* note 3, § 302(b) at 16.

²⁶ *Model Act, supra* note 3, § 403 at 19.

²⁷ *Model Act, supra* note 3, § 405 at 20.

²⁸ *Model Act, supra* note 3, Commentary to § 405 at 21.

the Act include such considerations as the age, developmental stage and needs of the child and the feasibility of preserving the child's relationship with the non-relocating parent.²⁹

Two critical issues were set forth in the Act with alternatives, leaving the final choice and selection for state legislative debate and determination. These issues were whether relocation was a modification factor³⁰ and the burden of proof.³¹ In reviewing statutes and cases from various jurisdictions, the Committee discovered significant variations. Some states treat a relocation request as reason to convene a full custody proceeding; others treat a request to move as a narrow "best interests" or "relocation reasons" proceeding.³² The state which may adopt the Act during the legislative process (or the jurist using the Act as a template) must decide whether a custody proceeding must be tried along with any relocation request.³³

Three alternatives are set forth as to the burden of proof and attendant presumptions. The alternatives are:

[Alternative A]

The relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interest of the child.

[Alternative B]

The non-relocating person has the burden of proof that the objection to the proposed relocation is made in good faith and that relocation is not in the best interest of the child.

[Alternative C]

The relocating person has the burden of proof that the proposed relocation is made in good faith.

If that burden of proof is met, the burden shifts to the non-relocating person to show that the proposed relocation is not in the best interest of the child.³⁴

The Act emphasized that courts should not consider whether the person seeking relocation will move if the child is not allowed to leave the state.³⁵ Similarly in making a final determination,

²⁹ *Model Act, supra* note 3, § 405(2)&(3) at 20.

³⁰ *Model Act, supra* note 3, § 404 at 19.

³¹ *Model Act, supra* note 3, § 407 at 23.

³² *Model Act, supra* note 3, Commentary to § 404 at 19.

³³ *Id.*

³⁴ *Model Act, supra* note 3, § 407 at 23.

³⁵ *Model Act, supra* note 3, § 406(b) at 22.

undue weight should not be given to the fact that a temporary relocation initially was granted.³⁶

V. Conclusion

The Model Act was not designed as a template for unitary adoption. It was passed by the Academy to stimulate discussion and debate. The limited adoption by only a few states³⁷ has not encumbered Academy Fellows in jurisdictions as diverse as Utah, Alaska, Massachusetts, Washington, Kentucky and New York who have attempted to gain the introduction of the Act in their legislative sessions. It remains to be seen what the legislative impact of the Act which attempts a unique approach to relocation issues will be.

The drafting of the Act was an exciting intellectual experience for the Committee and the entire Academy. The Academy vigorously debated the issues and produced a coherent, thorough draft of legislation. The Act may serve in guiding jurists and litigators in deciding and framing issues. It should heighten the understanding of relocation issues. On a personal level, it marked a highlight in my years of addressing relocation issues. I am honored to author this Introduction.

³⁶ *Model Act*, *supra* note 3, § 406(a) at 22.

³⁷ See Louisiana enactment found at LA. REV. STAT. ANN. § 9:355.1-355.17.