To Move or Not to Move – that is the Question

By Rosemarie Boll | September 1, 2012

In 2005, Patrick and Serena signed a Separation Agreement that said they would have joint custody of their 4-year old son, Jason (not his real name). Jason would live primarily with Serena and Patrick had specified access. Neither parent would move out of B.C.'s lower mainland without the consent of the other parent or a court order. Serena then married Steven, and they had two children of their own.

Steven lost his job in 2009. Without informing Patrick, he accepted a new job in Edmonton. Serena phoned Patrick and announced they would be moving four weeks later. Patrick objected and got a court order to keep Jason in B.C. Serena cross-applied to vary the Separation Agreement and relocate to Alberta.

The trial judge said no. He said the parents were equal in some respects – both had fine parenting skills, Jason had a strong relationship with both parents and both locations offered good schools. A couple of factors were in mom's favour – the move would keep Jason with his half-brothers and the Edmonton house was more desirable. But the largest number of factors favoured dad – he had better job security, all of the extended family was in B.C., and moving Jason to his dad's house would be less disruptive than a move to Edmonton. Mom offered lots of access – in fact, a completely unrealistic amount, the judge said. She expected Dad and the extended family to make frequent trips to Edmonton. Mom testified that the move would have absolutely no effect on the relationship between Jason and his other family members. The judge rejected this out of hand and concluded that it was in Jason's best interests to stay in B.C.

Serena appealed. On exactly the same facts, the Court of Appeal let Jason move with his mom. How does this happen?

The primary fault, experts agree, lies with the Supreme Court of Canada in its 1996 decision in *Gordon v Goertz.* The judges said relocation cases must be individualised "best-interests-of-*this*-child" decisions, without any presumptions and with a "full and sensitive inquiry." Although they set out some principles, the case is long on apple-pie statements ("the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake") and short on real legal guidance. The most heavily-criticised principle is the judges' assertion that the reason for the move is generally "irrelevant." Almost every Canadian court has ignored this direction and scrutinized the reason for the move. Unfortunately, this means judges just end up concealing the real reasons for their decisions. So, reading judgments won't necessarily help parents (or lawyers)

figure out where they stand. Because outcomes are unpredictable, settlements are harder to negotiate.

A more helpful way to approach the problem is to review the cases and look for patterns. Nicholas Bala, a leading Canadian legal scholar, summarised his findings in a recent article in the *Canadian Family Law Quarterly* (Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" [2012] *30 CFLQ 271*). He observed:

- Success rates for mothers (51%) and fathers (55%) are similar.
- Reasons matter. The three most frequent reasons are:

1. economic, usually for a job transfer or a better employment opportunity – 52% of applications succeed.
2. to establish a new relationship – 48% succeed.
3. to have better family support, particularly for a custodial parent who wants to move "back home" – 53% succeed.

- Proven spousal violence, particularly when children witness it or are directly affected and the judge believes the move will protect them – 81% succeed.
- Distance — travel time, distance, available resources and the moving parent's willingness to maintain contact are all important. Some provinces are more likely to permit moves (P.E.I. 70%) than others (Newfoundland 38%). Interestingly, international moves are the most successful overall, with a 62% success rate.
- Custody status is important, but not in the way you might think. How a court order or separation agreement is worded is of little importance. What matters is how much time the child spends with each parent and the quality of that time:

1. 'Joint *legal* custody' means both parents have a say in parenting decisions. This can be preserved even over long distances and is not a strong predictor of success – 50% of applications succeed, 50% fail.
2. 'Joint *physical* custody' means each parent has the child at least 40% of the time. The non-moving parent is more involved and their parent-child relationship is usually stronger. Only 30% of the applications succeed.
3. Sole custody cases are the most successful – 64% succeed.

- Age of the child – these cases are complicated when there is more than one child. The only significant age effect was when the only child (or the youngest child) was aged 0 to 5 years – 49% succeed.
- The child's wishes – where a child is mature enough to have a clear view and is willing to

state a preference:

1. 76% succeeded when the child favoured the move,
2. 24% succeeded when the child opposed the move.

What parents had to say about their children's wishes was often conflicting and of little consequence. However, children's wishes are influential when expressed through their own independent lawyer.

- The applicant's conduct is one of the most important factors. If the judge believes the moving parent is well-behaved and will support the child's continuing relationship with the other parent, the judge is more likely to allow the relocation. Indifference to maintaining the contact is a negative factor. If the judge believes the move is in bad faith and the applicant intends to undermine the relationship with the other parent, the application will likely fail.
- A clause in an agreement or order which requires the applicant to get court approval before the move has no effect on the final outcome – 51% succeed.
- Expert opinions are given less weight in relocation cases than in other cases – a 67% acceptance rate, compared to a 75% – 90% acceptance rate for non-relocation cases.
- Interim applications are harder to win. Judges are cautious about granting permission to move when not all of the relevant evidence is presented and tested in court.
- Move first and ask permission later – judges frequently condemn these actions. Nevertheless, they take into account of all of the circumstances and 49% still succeed.
- Appeals have about the same success rate as trial decisions.

British Columbia is the first Canadian province to enact relocation legislation. Bill 16 is expected to become law sometime in 2013. It is intended to reduce the unpredictability of outcomes and thereby encourage settlement and allow parents to plan their lives better.

For the rest of us, Professor Bala thinks we should have *Relocation Advisory Guidelines – RAGs.* More about *RAGs* in my next column.

About Rosemarie Boll

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