

**You Can't Just "Pick Up and Move" Anymore...
The New Challenges Facing Custodial Parents Who Wish to Relocate**

By Charles M. Medlin

Relocation typically makes adhering to an original child custody arrangement difficult, if not impossible. This is especially true if the relocation is out of state or requires the parents to travel a great distance to exchange the children. Therefore, after a divorce with children, either party's wish to relocate often proves contentious, especially if it is the *custodial* parent who wishes to relocate with the parties' children. Yet, despite the custody difficulties inherent in relocating, it is often unavoidable for many parents.

There are two primary reasons why a parent may hope to relocate. First, the parent may wish to relocate for financial reasons. A parent may be financially unable to stay at his or her current location, possibly after losing a job or falling behind on mortgage payments.

Alternatively, a parent may have financial incentives to relocate such as the ability to take a higher paying job. Second, a parent may wish to relocate to be near a stronger support system. Often, a parent will think he or she has enough support nearby when he or she divorces, only to realize that as time goes on, the support system necessary for a single parent to raise a child is not sufficient. As a result, he or she may want to move closer to family and friends in another city or state.

If a parent wants to relocate after a divorce, he or she must typically give at least 30 days' notice to the other parent per their Parenting Plan. (A custodial parent should also give such notice to any other person granted visitation rights under the court order.) But, custodial parent be warned! When a custodial parent attempts to relocate, the non-custodial parent often files to modify their Divorce Decree to try to obtain primary custody of the children. Note that when the non-custodial parent files such a modification, the court cannot prevent a *parent* from moving,

but it is within the court's discretion to decide whether the *children* can move with the parent. The decision of whether the children can move is governed by the guidelines provided in the landmark Supreme Court of Georgia case *Bodne v. Bodne*, 277 Ga. 445, 588 S.E.2d 728 (2003).

The parties in *Bodne* were divorced parents of minor children. The father had primary physical custody of the children, and parenting time was split equally between the parents. The father wanted to move from Georgia to Alabama, but the mother opposed the move and sought a modification to obtain primary physical custody of the children. The mother provided multiple witnesses who testified that the move would negatively affect the children. Evidence also showed that the father's move was based primarily on his own interests and would greatly affect the mother's ability to continue her equal involvement in the children's lives.

The Supreme Court of Georgia's decision in *Bodne* overturned years of Georgia case law which assumed that the custodial parent's decision to move was in the best interests of the child unless and until the objecting parent could show the move endangered the child's well-being. *Id.* at 447. In other words, there had been a presumption that if you had primary custody of the children, you could move with the children. But, since *Bodne*, the Court held instead that the standard in Georgia for determining custody is "the best interests of the child," without any presumption of custody in favor of either party. *See* O.C.G.A. §19-9-3(a)(2). The trial court must make a determination of custody on a case by case basis and without applying a bright-line test. *Bodne* at 446. This presented a radical change to a custodial parent wishing to move.

A lengthy list of factors for the court to consider in determining the best interests of children can be found at O.C.G.A. §19-9-3(a)(3). These factors include: the bonds between the child and each parent; each parent's knowledge of the child's needs; the importance of continuity in the child's life; the home, school, and community record and history of the child; and the

capacity of each parent to provide for the child. The guidelines also state that the court may consider other relevant factors. In the end, the Court in *Bodne* awarded custody to the mother, holding that the trial court did not abuse its discretion in basing its decision on the best interests of the children. *Bodne* 277 Ga. at 447.

In the years since the *Bodne* decision, the courts have clarified the standards to be used in deciding custody disputes. While the trial court has discretion to determine custody based on the best interests of the child, “a change of custody may be granted only if a ‘new and material change in circumstances...affects the child.’” *Cousens v. Pittman*, 266 Ga. App. 387, 389-90, 597 S.E.2d 486, 488 (2004) (citing *Bodne*, 277 Ga. at 446). The material change does not necessarily have to be for the worse, and courts have typically found that relocation, especially to another state, is a material change for the children. *Weickert v. Weickert*, 268 Ga. App. 624, 602 S.E.2d 337 (2004).

Since *Bodne*, Georgia courts have frequently awarded custody to the non-relocating parent after looking at the best interests of the children. For example, in *Weickert*, the court found that remaining in Georgia with the father after the mother moved to California would promote the children’s best welfare. The court based this decision on factors such as the father “prov[ing] to be quite capable as a single parent” for a full school year and the mother’s financial irresponsibility. *Id.* In *Haskell v. Haskell*, 286 Ga. 112, 686 S.E.2d 102 (2009), the mother moved from Georgia to Pennsylvania. There too, the Supreme Court of Georgia held that the trial court did not abuse its discretion in determining that living with the father was in the child’s best interests. The court based this decision on the child’s close relationship with his father and “other evidence related to stability, continuity, and the child’s adjustment to relocation.”

Of course, the courts will not always find that it is in the child's best interests to remain with the parent who is not relocating. For instance, the Supreme Court of Georgia noted that "[t]here are situations, such as...the relocation of residence to a superior school district or a safer neighborhood, where the change in circumstances clearly would promote the child's best interests and welfare." *Scott v. Scott*, 276 Ga. 372, 376, 578 S.E.2d 876, 880 (2003).

Some divorce settlement agreements contain a self-executing clause which automatically transfers custody of children from one parent to the other in the event the custodial parent relocates. But, these provisions are invalid in Georgia. In *Scott*, the Court held that any self-executing provision "that fails to give paramount import to the child's best interests in a change of custody as between parents violates this State's public policy as expressed in O.C.G.A. § 19-9-3." *Id.*

In terms of timing, if a non-custodial parent has filed for a modification to transfer custody to him or her after a custodial parent has expressed interest in relocating, the court does not need to wait until the custodial parent actually relocates to determine the best interests of the child or rule on the custody modification. *Gallo v. Kofler*, 289 Ga. 355, 711 S.E.2d 687 (2011). For example, in *Gallo*, the custodial mother wished to relocate with her daughter from Georgia to New York and the father filed a Complaint for Modification before the mother moved. On the same day the father filed his Complaint, the trial court issued an order providing that the parties were not to take their child out of state without written permission of the court. *Id.* at 356. The trial court then made the determination that it would be in the best interests of the child to remain in Georgia with the father based on the child's quality of life in Georgia and the living arrangements the child would have in New York.

As a result of these decisions, an initial custody award will not always control after any material change, such as a relocation, that affects the child. *Bodne* 277 Ga. at 446. If either parent seeks a modification due to relocation, he or she must be prepared to show the trial court that his or her proposed modification is in the best interests of the child. It is also worthy to note that once the trial court makes a determination concerning the best interests of the child, that determination is difficult to reverse on appeal. “[T]he Solomonic task of assigning the custody of children lies squarely upon the shoulders of the judge who can see and hear the parties and their witnesses, observe their demeanor and attitudes, and assess their credibility.” *Gordy v. Gordy*, 246 Ga. App. 802, 803, 542 S.E.2d 536, 537 (2000) (internal quotation marks omitted). “If the record contains any reasonable evidence to support the trial court's decision on a petition to modify custody, it will be affirmed on appeal.” *Weickert* 268 Ga. App. at 627.