

RELOCATION AFTER DIVORCE

How it affects custodial rights

by Samuel H. Angell, Esquire

After a divorce has become finalized, parents with minor children from that marriage may desire to move away from the town, city, county or state where they lived during the marriage. The reasons for the desire to relocate are numerous and often compelling, and may include the following: a job opportunity, a new partner, a desire to be closer to family, a need to create physical and emotional distance from an abusive relationship, a change of climate, or simply the need to "start over". Whatever the reason, if the move is of such a distance as to make the custodial arrangement unworkable, the change in location will require the parties to consider whether and how to change the custodial arrangement as entered into as part of the divorce. This article will address how the Vermont courts have addressed a parent's right to relocate in relation to custodial issues.

When parties to a divorce have a minor child, the divorce order will include provisions regarding custody of the child (called "Parental Rights and Responsibilities" in Vermont). In the context of a divorce, the parties may share parental rights and responsibilities or these rights may be held by one party subject to the other party's right to parent/child contact. If events occur after the divorce which make the existing custody and parent/child contact arrangements contained in the divorce order impossible to follow, one of the parents may wish to have the court change those provisions of the divorce order. In order to modify a custody order, a moving party must traverse two hurdles. First, the moving party must make a showing that a real, substantial and unanticipated change of circumstances has occurred. Second, the moving party must show that annulling, varying or modifying the parental rights and responsibilities determination in the divorce order is in the best interest of the child.

In Vermont, there are no specific statutory definitions as to what constitutes "changed circumstances" for purposes of modifying a custody order. However, while relocation alone is not necessarily a substantial change of circumstances, several Vermont cases decided in the 1990's have held that a move by one of

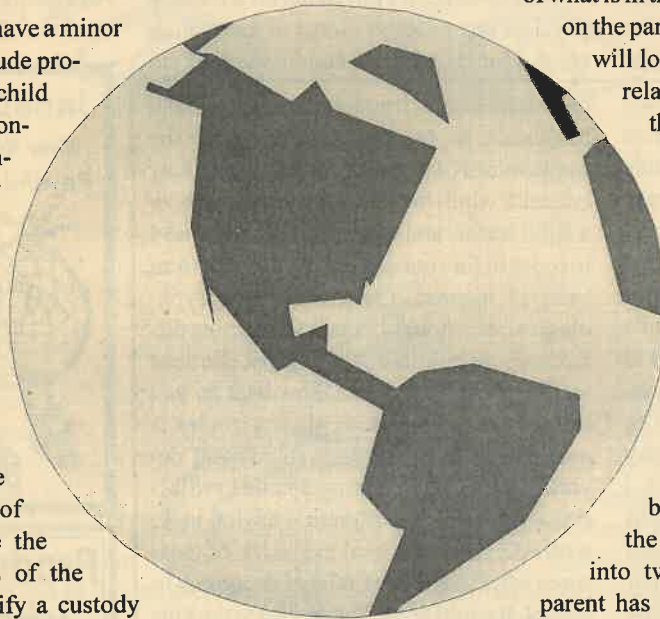
the parents which makes the custodial arrangement in the divorce order unworkable usually will constitute a statutory change of circumstances, as long as that person did not intend to move at the time of divorce. If such a move was known at the time of the divorce, the change would not be unanticipated and arguably the first hurdle would not be met. As a result, the court may decline to modify the divorce order. Therefore, if a move is anticipated at the time of the divorce, the custodial issues should be worked out in anticipation of the relocation.

Assuming the court makes a determination that the relocation by one parent constitutes a change of circumstances, the court must decide what is in the best interests of the child: sole custody with the mother or sole custody with the father. A determination

of what is in the best interests of the child will depend on the particular facts of the situation, but a court will look at the following types of issues: the relationship of the child with each parent, the ability of each parent to provide for the child, the potential effect of any change on the child's housing, school, community, and relationship with other significant people, and the ability of each parent to help the child foster a positive relationship with the other parent. A move by one parent away from the area where the child grew up can obviously have a great impact on these factors.

In deciding what is in the child's best interests when a parent relocates, the courts have separated their analysis into two types of cases: those where one parent has been awarded sole custody under the divorce order, and those where the parents have been granted a shared custody arrangement. In cases where custody has been awarded to one parent, it is usually the custodial parent who moves with the child, since if the non-custodial parent moved away with the child without the consent of the other parent, he or she would then be in violation of state custodial interference and federal kidnapping prevention laws, if they were to move without the custodial parent's consent.

When a custodial parent moves with the child and the other (non-custodial) parent is attempting to modify the custody order on basis of the relocation, the court will have to decide whether the





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best interests of the child would be better served by the child continuing to live with the custodial parent in the new location, or by changing custody and having the child remain with the non-custodial parent in Vermont. Because Vermont courts have recognized that a change in custody involves a "violent dislocation" to the child, in order to change custody to the non-custodial parent, he or she must prove that the child's best interest would be so undermined by relocation with the custodial parent that a transfer of custody is necessary. Thus, in the context of being asked to change custody of a child, the court will not only consider the best interests of that child, but also the dislocation of those interests as result of the change of custody. Additionally, in cases where one parent is awarded sole custody in the divorce order, Vermont courts have given great deference to the custodial parent's decision to relocate and will not interfere with it unless it is absolutely necessary to further the best interests of the child.

In cases where the parents have agreed to, or have been granted, shared parental rights and responsibilities (custody), the court's analysis might be slightly

different. Simply put, it appears that in shared custody cases the courts may be more willing to award custody to the parent remaining in Vermont. This conclusion seems to stem from two sources. First, there is no "change" in custody since neither parent had sole custody to begin with, and there is not the "violent dislocation" of a change of custody from one parent to the other. Second, the courts are not inclined to give deference to the moving parent's decision to relocate since that parent is not the custodial parent. Additionally, a move will mean a child has to change schools, move out of his or her community, and leave friends and perhaps other family members behind, all events which could cause a court to decide the child should remain in Vermont rather than live with the relocated parent.

In addition to all of the other issues, parties to a divorce must consider, if there is a child involved they should be aware that their custodial rights might be affected should one person decide to move out of the area. To the extent possible, parties to a divorce are well advised to resolve their differences between themselves without court intervention, including making ac-

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ceptable custodial arrangements if one parent is planning to move away.

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