

INTRASTATE REMOVAL RELOCATION AND ILLINOIS LAW

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On January 1, 2016 Illinois law changed dramatically changes regarding *intrastate* relocation (moving within the state). Even in light of the *Collingbourne* Illinois Supreme Court decision, Illinois law had been restrictive in terms of the ability of parents to seek removal. The threat heard by Illinois lawyers in McHenry County and Lake County, where I practice, (which border Wisconsin) had been that if the other spouse refuses to agree is that if there is not an agreement to move to Wisconsin, etc, then the person will move downstate – to Cairo Illinois. [Cairo is the southern most city in Illinois – which has a border with southern Kentucky. Driving distance is approximately seven hours]. Under current Illinois family law, relocations are prohibited to far more restrictive boundaries. No longer is the question of whether the move is out of state. Instead, the focus is on whether the move is essentially 25 or 50 miles measured by an internet mapping service.

A feature of Illinois law regarding relocation provides anticipates that within the parenting plan, the parties may address relocation. This permissive factor states that “At a minimum, a parenting plan must set forth the following...” “(12) provisions for resolving issues arising from a parent's future relocation, if applicable;”

Illinois removal / relocation standards are more restrictive than what had been in the American Law Institute’s (ALI) Principles of the Law of Family Dissolution at Section 2.09 where the custodial parent was permitted to relocate where the requesting parent has exercised the majority of custodial responsibilities and the location is reasonable in light of the reason of the request.

Illinois law also drew on the American Bar Association’s Model Relocation of Children Act, dated February 2012. The Act recited that prior to its adoption it had reviewed:

When preparing drafts of this act, the reporter reviewed: (1) Current state statutes on the subject of relocation; (2) Case law on relocation; (3) The American Academy of Matrimonial Lawyers Proposed Model Relocation Act (1997); (4) The American Law Institute Principles of the Law of Family Dissolution, § 2.17 (2002); (5) The "Declaration on International Family Relocation," which was issued at an "International Judicial Conference on Cross-Border Family Relocation" held in Washington D.C., March 23 - 25, 2010; and (6) Articles from

mental health professionals, sociologists, and law professors on the subject of relocation.

Most states (37) have laws addressing child relocation. In those states without laws, the primary residential parent can simply move. Then the court determines how to change the non-residential parent's parenting time (or there might be a counter-suit for modification of custody). The ABA Act provided no presumption against or in favor of relocation.

In its comment, the ABA Model Act explained:

Presumptions in favor of or against relocation are the most controversial issues regarding the law of relocation. This act takes a middle-ground approach and directs that there will be no presumption in favor of or against the relocation. In the early years of relocation law, it was common to apply a presumption in favor of allowing the custodial parent to relocate with the child. In more recent years, many states placed the burden of proof on party seeking to move with the child. Several states follow the approach of this act and declare an equal burden of proof between the parents or direct that there be no presumption in favor of or against relocation. Courts, regardless of the burden or presumption applied, generally emphasize that relocation cases need to be decided on the facts of each case.

Clearly, under the IMDMA until 2006 the burden of proof was on the parent seeking removal to demonstrate that the move is in the best interest of the children. Illinois caselaw has begun to address the issue of whether the law changed the burden of proof. See: Gitlin on Divorce: § 12-1[h] "Burden of Proof under Removal Statute and Relocation Statute." Our book addresses the fact that not complying with the notice requirements can change the burden of proof in modification proceedings (the potential counter-suit scenario). We also address the post-Relocation Act caselaw involving the burden of proof for any relocation—including intrastate removal. This includes:

- *Alley v. Dufelmeier* (In re P.D.), 2017 IL App (2d) 170355, ¶30.
- *In re Kavchak*, 2018 IL App (2d) 170853, ¶65.
- *In re Marriage of Prusak*, 2020 IL App (3d) 190688, ¶38.
- *In re Marriage of Levites*, 2021 IL App (2d) 200552 (addressing burden of proof in entail divorce cases and placing it on the parent seeking relocation)

The ABA Model Act explains:

Although the burden of proof regarding whether relocation is in the best interests of the child is placed equally on both parents, the parent who has filed the action has the burden of going forward (sometimes referred to as the burden of production). Thus, a parent who objects to the relocation has the initial obligation to present evidence regarding why relocation is not in the child's best interests.

The parent who seeks to relocate would then present evidence regarding why relocation is in the child's best interests, and the court would decide the issue by a preponderance of the evidence. Similarly, if the parent who seeks to relocate has filed the action, that parent would present his or her evidence first, and the other parent would respond. An analogy regarding the burden of proof can be made to an initial determination of custody in which both parents have an equal burden of proof, and the court decides custody by a preponderance of the evidence.

Section (f) of our Relocation Act addresses what occurs if the parent seeking relocation submits her or his notice seeking relocation. One first submits the notice. Then if one of three things stated occurs, the parent seeking relocation must file a petition seeking permission to relocate. The circumstances are: "If the non-relocating parent objects to the relocation, fails to sign the notice provided under subsection (c), or the parents cannot agree on modification of the parenting plan or allocation judgment..."

The critical language of Illinois relocation law provides, "(g) The court shall modify the parenting plan or allocation judgment in accordance with the child's best interests." What does this mean? Does it mean that the burden of proof and going forward is on the parent seeking relocation? Or is only the burden of going forward on that parent?

Illinois is a large state which has borders on five states. In fact, 40 of the 102 counties in Illinois border other states! Consider this in light of the fact that your parenting plan might be able to tweak the language of a parenting plan including a more lenient burden of proof if a move is relatively nearer and a higher burden of proof if the relocation is to a more distant location.

Because Illinois Relocation Act still has unanswered questions, consider our Illinois' caselaw regarding intrastate removal prior to these amendments.

IRMO SEITZINGER

A 2002 case addressing of intrastate removal was [*IRMO Seitzinger*](#), 333 Ill.App.3d 103 (4th Dist. 2002). This case involved a contested custody trial where each parent sought sole custody. But the trial court awarded joint custody finding that "the parties exhibited an ability to communicate with each other regarding the interest of their child." The trial court's award was creative, "The court awarded primary physical custody to Kimberly so long as she remained in Sangamon or adjacent Cass County (where Ashland is located). If she elected to move from either of those counties, primary physical custody was to change to Roger. If Roger moved from either of those counties and Kimberly remained there, Kimberly was to have sole custody of Sabrina."

The appellate court ultimately held that the trial court's conditioning mother's primary residential custody on her living in a two county area was reversed because such ruling was not made on the basis of the child's best interest. The *Seitzinger* appellate court agreed that the physical custody award to the mother was appropriate, but reversed the trial court's conditioning the mother's

primary physical custody and the parties' having “joint” (decision making) custody on the parents remaining in Sangamon or Cass County. The opinion pointed out that IMDMA Section 608 states:

Except as otherwise agreed by the parties in writing at the time of the custody judgment, or as otherwise ordered by the court, the custodian may determine the child's upbringing ***.

The appellate court was of the opinion that the trial court's order, *automatically* changing the primary physical custody or terminating joint parenting upon either parent moving from Sangamon or Cass County, without consideration of the best interest of the child, was an abuse of discretion. The court of review pointed out: “Here, the restriction of (the mother's) residence to Sangamon or Cass County is arbitrary if the purpose is ease of visitation. Geographical location is not *per se* determinative of ease of visitation. Ease of transportation may be just as important.”

In so ruling, the appellate court reasoning first pointed to the language in Section 608(a) which provides that, “Except as otherwise agreed by the parties in writing at the time of the custody judgment or as otherwise ordered by the court, the custodian may determine the child's upbringing ***.” (Emphasis added.) 750 ILCS 5/608(a).” Then the court stated:

As we recently noted in *In re Marriage of Means*, 329 Ill. App. 3d 392 (2002), two aspects of this language are significant: (1) the custodian has broad power to determine the child's upbringing, including residence; and (2) the parties may agree otherwise or the court may order otherwise.

The joint-parenting agreement in this case did not place a restriction on Kimberly's residence, **but the trial court did so in its order**. A trial court has broad powers in custody matters, including conditioning custody upon a custodian living within a reasonable distance from the noncustodial parent so visitation may be facilitated. *In re Marriage of Manuele*, 107 Ill. App. 3d 1090, 1096 (1982). The trial court in *Manuele* conditioned physical custody under an award of joint custody upon the children continuing to “reside in the Springfield” area, which was defined in the custody order as being within Sangamon County. *Manuele*, 107 Ill. App. 3d at 1092. On appeal, we found the limitation of residence to Sangamon County to be unreasonably restrictive. *Manuele*, 107 Ill. App. 3d at 1096. (Emphasis added.)

The appellate court then discussed the trial court’s tying the award of primary residential care with the mother’s living in the two county area and stated:

More important, however, the trial court erroneously conditioned not only Kimberly's primary physical custody of Sabrina on her remaining in Sangamon or Cass County but also the continuation of joint custody. The trial court's order, as

to both parties, was contingent solely on geography because joint custody terminated upon Roger's or Kimberly's removal from Sangamon or Cass County. The custody status of a minor child should not change automatically with the removal of a parent from his or her present location. Instead, the best interests of the child should be considered when a change of custody is anticipated.

Section 610 of the Dissolution Act provides for the modification of joint custody judgments upon a finding by clear and convincing evidence of facts that have arisen since the prior judgment, that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child. 750 ILCS 5/610(b) (West 2000). Even the move out of state of the parent having primary physical custody under a joint parenting order, while obviously a change of circumstances, does not necessarily provide grounds for termination of a joint parenting order, or the change of one primary custodian for the other, if it is not in the best interest of the child. *In re Marriage of Good*, 208 Ill. App. 3d 775, 778 (1991).

Joint parenting is a tool to maximize the participation and responsibility of both parents in a child's life. It need not be automatically terminated upon the removal of one parent from close geographical proximity from the other. Thus, we find that portion of the trial court's order automatically changing the primary physical custodian or terminating the joint parenting order upon the removal of either parent from Sangamon or Cass County, without consideration of the best interests of Sabrina, to be an abuse of discretion, and we reverse that condition.

CONCLUSION

Case law creates or at least suggests the following flow chart:

Parenting Plan Contents:

- The Parenting Plan should provide, “[*](8) a requirement that a parent changing his or her residence provide at least 60 days prior written notice of the change to any other parent under the parenting plan or allocation judgment, unless such notice is impracticable or unless otherwise ordered by the court. If such notice is impracticable, written notice shall be given at the earliest date practicable. At a minimum, the notice shall set forth the following:
 - (A) the intended date of the change of residence; and
 - (B) the address of the new residence;”

The exception is, “[*] The personal information under items ... (8) of this subsection is not required if there is evidence of or the parenting plan states that there is a history of domestic violence or abuse, or it is shown that the release of the information is not in the

child's or parent's best interests.”

Do the Relocation provisions Apply?

Parent who has either:

- equal access; or
- primary parenting time

Initial Mileage Restrictions:

- Collar Counties = 25 Miles: Child's primary residence is in a collar county (defined as Cook, DuPage, Kane, Lake, McHenry, or Will) to another residence in the state greater than 25 miles. Relocation initially prohibited.
- Other Areas = 50 Miles: For those outside of the collar counties, then there is a 50 mile rule.
- Outside State But within 25 Miles: When the child's current primary residence can be changed outside the borders of Illinois but within 25 miles of the current primary residence, this would be allowed.
- Miles are measured by “an” internet mapping service. The implication is that one uses lowest miles measured by that service, even if a longer distance, but no caselaw addresses this gradual occasional issue.

Written Notice:

The parent who has either equal or primary parenting time must jump through the hoops that apply to relocation cases.

- Written notice of the relocation to the other parent under the parenting plan or allocation judgment.
 - A copy of the notice must be filed with the clerk of the court.
 - The written notice must then provide at least 60 days' notice unless this is "impracticable."
 - **Minimum Contents of Notice:**
 - (1) the intended date of the parent's relocation;
 - (2) the address of the parent's intended new residence, if known; and
 - (3) the length of time the relocation will last, if the relocation is not for an

indefinite or permanent period.

Non-Relocating Signs Notice:

“The relocation must be allowed.” The court then modifies the parenting plan or allocation judgment to accommodate a parent's relocation as agreed by the parents, as long as the agreed modification is in the child's best interests.

Non-Relocating Parent Does not Sign or Parents Cannot Agree on Modification of Parenting Plan or Allocation Judgment: Parent seeking relocation must file a petition seeking permission to relocate.

Temporary Relocation.

<https://legiscan.com/IL/bill/SB0259/2021> (Jan 1, 2022)

Pub. Act 102-143 amends IMDMA §603.5 Temporary Parental Allocation Orders.

Subsection (a-5) now allows a court to order temporary relocation of a child before entry of a final allocation judgment if in the child's best interests. It provides that a temporary relocation does not prejudice either parent in the allocation of parental responsibilities contained in a final allocation judgment. It states:

(a-5) A court may order the relocation of the child on a temporary basis before the entry of a final allocation judgment if it is in the best interests of the child. Any relocation shall be considered temporary in nature and shall not prejudice either parent in the allocation of parental responsibilities contained in a final allocation judgment. Any relocation shall be made in accordance with the protocol set forth in subsections (c) through (g) of Section 609.2.

Based on this and the *Levites* decision, the burden of proof remains on the parent seeking temporary relocation. *IRMO Levites*, 2021 IL App (2d) 200552, ¶ 52.

Further subrules per our caselaw:

- A parent who moves and does not allow parenting time can be held in contempt of court. (See line of cases in parentage cases prior to adoption of removal standards of Section 609 of the IMDMA.)
- The parties can likely agree to a potential relocation outside of the boundaries set forth in Illinois law involving minor children’s relocation if they agree to do so in their parenting plan.
- Your allocation judgment or agreed parenting plan agreement should not provide for an automatic change of primary residential care based upon one parent moving outside of a geographic area.

- Relocation provisions should not result in a forfeiture of the parent allocated primary parenting time;
- Based on our four Supreme Court cases addressing removal / relocation, the trial court's ruling provides a "strong and compelling" presumption with all published appellate court decisions thus far affirming the trial court's results;

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