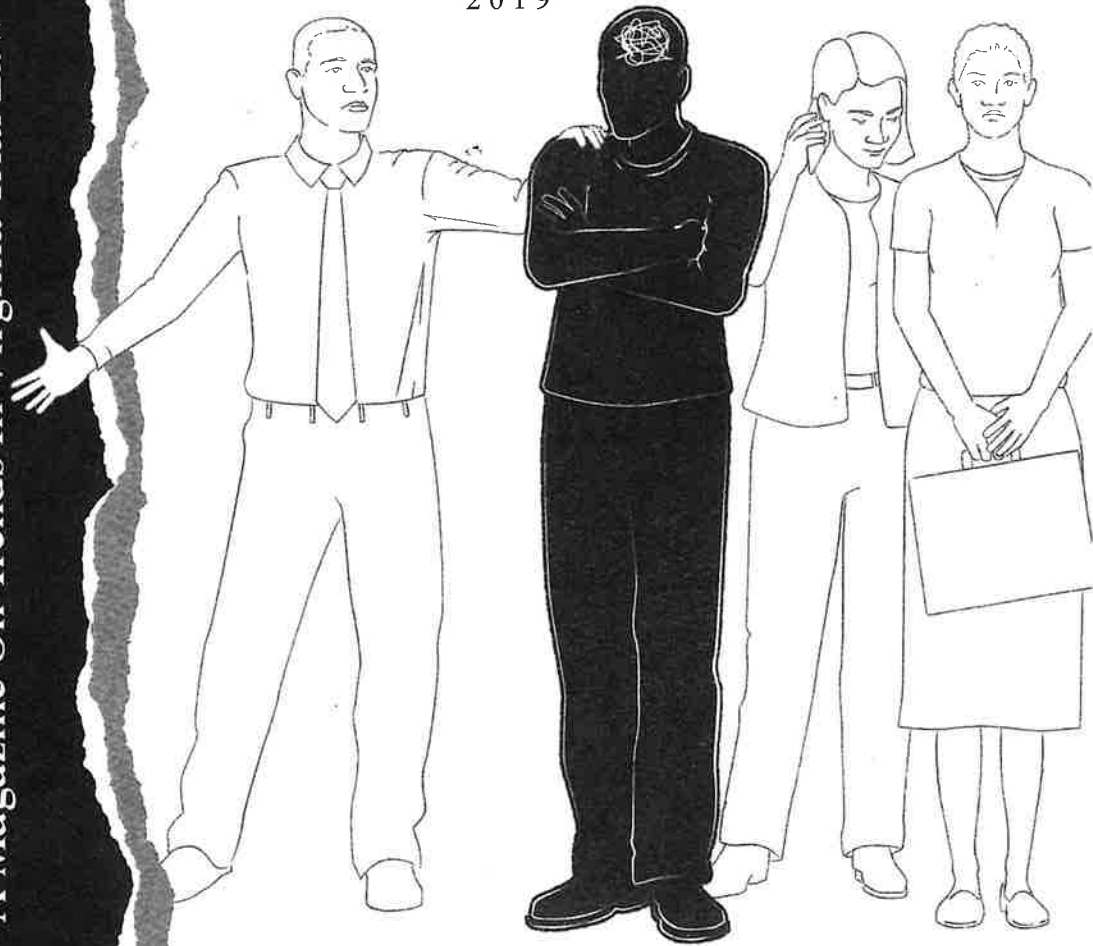


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Family Law

Relocation in Accordance with Virginia Law

by Katharine W. Maddox

Virginia law does not distinguish between domestic relocation of children within the United States and international relocation of children outside of the United States. The same laws and legal analysis apply to both situations and in both situations, the parent seeking to remove the child away from the other parent bears the burden of proof. While distance of the proposed relocation is relevant to the determination of the issue, there is no higher burden of proof nor higher standard with respect to a parent seeking to relocate to a different country versus a different city or state.

Procedural requirements and considerations

Relocation is not governed by a specific Virginia statute;¹ instead the analysis turns on case law in conjunction with the statute which governs custody (Va. Code Ann. §20-124.3) and the best interests of the child generally.²

A trial court does not have authority to prohibit a parent from relocating; however, the trial court may prohibit a parent from relocating the minor child. Such power, as a practical matter, may serve to prohibit the parent from moving.³

In order for a parent to prevail on a request to relocate the child over the objection of the other parent, there are three requirements: “[T]he court must find (1) a material change of circumstances since the [prior] decree;” (2) “that relocation would be in the child’s best interests”⁴ and (3) that the proposed “relocation will not cause a ‘substantial impairment’ to the relationship between the non-

moving parent and the child.”⁵ The parent seeking to relocate the child bears the burden of proof in all respects.⁶

A material change in circumstances “is a broad concept and incorporates a broad range of positive and negative developments in the lives of the children.”⁷ The reason a parent must prove that a material change in circumstances has occurred since entry of the prior custody decree is that “[i]n the absence of a material change in circumstances, reconsideration [of the prior decree] ... would be barred by principles of *res judicata*.”⁸

In terms of the best interest analysis, “the Code §20-124.3 factors govern whether relocation is in a child’s best interests and that the interests to be assessed are solely the child’s and do not include the custodial parent’s interests.”⁹ Therefore, if the trial court determines that the proposed relocation is in the best interests of the child, then the trial court should permit the relocation regardless of the wishes of the non-custodial parent.¹⁰

Virginia law is clear that a trial court must deny a request to relocate if the proposed relocation is not in the best interests of the child and/or if maintaining the *status quo* in Virginia is in the child’s best interests.¹¹ Overall, the trial court is required to “give primary consideration to the best interests of the child” based upon “the circumstances existing at the time of the decision.”¹² However, failure by a party to provide evidence as to the *status quo* in Virginia, including the child’s current social and academic circumstances, is not necessarily sufficient to deny a proposed relocation.¹³

The trial court's determination as to whether the child's best interests support the parent's request to relocate "is a matter of discretion to be exercised by the court, and, unless plainly wrong or without evidence to support it, the court's decree must be affirmed" on appeal.¹⁴ The consideration of the child's best interest does not require a finding that relocation would cause "harm" to the child.¹⁵ Further, there is no "presumption of harm in cases involving relocation and joint or shared custody."¹⁶ "To the contrary, Virginia law simply requires the court to consider and weigh the necessary factors in order to determine both whether a change in custody is in the best interest of the child, and whether relocation is in the best interest of the child."¹⁷

Factors for consideration

In deciding a relocation case, the trial court must consider the factors delineated in Virginia Code §20-124.3. However, because no specific statute governs the issue of relocation, courts must also look to decisions from the Court of Appeals to determine what factors are most relevant when deciding whether a relocation is in the child's best interests. A review of case law indicates that the following are all important factors in deciding whether a request to relocate should be granted:

1. **Stability:** The court must take into consideration the location which provides the children the most stability, including: (1) Overall stability such as a parent's ability to provide for the child financially and otherwise;¹⁸ (2) whether stability for the child may be maintained in Virginia, or whether stability is only realistically possible in the new locality;¹⁹ and (3) the location where there is most likely to be "an atmosphere of stability, love and concern."²⁰ This is because overall, "[t]he best interests of the children dictate that they be raised in a stable and loving environment."²¹
2. **Familiarity with new location:** The trial court should consider whether the child is familiar with the new location and/or has previously spent significant time in and/or has a connection to the new location.²²
3. **Intersection of parent-child relationship and custodial parent's ability to financially provide for the child:** The trial court should consider the "nature of relationship between the children and each parent, including" who the primary caretaker for the children was; "the children's needs"; and any "improvement of the [the relocating parent's] ability to provide for the children financially that would result from the relocation".²³
4. **Support of child's relationship with the non-custodial parent:** The trial court should con-

sider whether the relocating parent is likely to "actively support the child's contact and relationship with the other parent."²⁴

5. **Reason for relocation:** The trial court should also consider whether the custodial parent is seeking to relocate for an improper purpose.²⁵ It is therefore incumbent upon a court to look to the reason for the relocation, and whether the relocating parent is attempting to remove the child for an improper purpose such as frustrating or interfering with the other parent's visitation with the child.²⁶
6. **Overall considerations / catch-all:** Trial courts should consider a broad range of factors which can include: "[Th]e relative economic advantages and disadvantages between the two locations; the educational and cultural opportunities available at both locations; the presence and availability of extended family members or support persons to assist the parent at both locations; the present physical, emotional and cognitive development of the children in their present Virginia location; the present involvement and roles played by the respective parents in the care, education and development of the children; and the effect on visitation by the noncustodial parent if the move were allowed."²⁷

Virginia rejects a unity-of-interests analysis

The Virginia Court of Appeals has specifically declined to hold that benefits to the custodial parent necessarily also benefit the child: "The court may consider a benefit to the parent from relocation only if the move independently benefits the children. We decline to adopt a 'unity of interests' approach."²⁸

These findings do not mean that the trial court will ignore advantages to the custodial parent from the relocation; if the advantages also benefit the child, such advantages should be considered when determining the best interests of the child.²⁹

Consideration of substantial impairment to child's relationship with non-custodial parent

The Court of Appeals has held that difficulty associated with distance does not, on its own, necessitate a denial of relocation:

The added difficulty in maintaining the parental relationship is not unique....It is common to all parents whose children live some distance away. This increased difficulty alone should not be allowed to deny a custodial parent the freedom to

choose where he or she and the children will reside. To hold otherwise would give a non-custodial parent the option of choosing [sic] the residence of a custodial parent. Therefore, the added difficulty in maintaining a beneficial relationship between a child and a non-custodial parent should not be the sole basis for restricting a custodial parent's residence except where the benefits of the relationship cannot be substantially maintained if the child is moved away from the non-custodial parent.³⁰

Unfortunately, the Court of Appeals has not defined exactly what *does* constitute "substantial impairment." Accordingly, whether a relocation will result in substantial impairment to the non-custodial parent's relationship with the child is a fact-based determination which will be unique to each family / situation. Inconvenience to the non-custodial parent of maintaining the parent-child relationship is but one of many factors the court must consider in the substantial-impairment analysis.³¹

Further, distance alone does not determine whether there will be substantial impairment following a relocation. For example, the Court of Appeals affirmed a trial court's denial of relocation on the basis that father's relationship with the child would be substantially impaired if the mother moved approximately 4-hours away where: "the evidence established that father was also an active participant in the children's lives on a daily basis and their current environment was a positive one."³² In that case, the court focused on the following facts:

- The current time sharing schedule was working well;
- The non-custodial parent was actively involved with the children and their activities;
- The non-custodial parent attended the children's educational and athletic functions;
- The non-custodial parent assisted the children with homework;
- The non-custodial parent met the children's needs generally;
- The children were doing well academically; and
- The children were doing well socially.³³

Even where there will be general impairment to the child's relationship with the non-custodial parent on the basis of significant distance, trial courts may still permit a relocation if the facts so justify. For example, where a mother was enlisted in the United States military and received orders to relocate across the country, and where the mother was the only parent to earn income, and where the father was mentally unstable and unable on his own

to care for the children, the trial court found that relocation was justified and was the only way to ensure stability for the children.³⁴

Overall, analysis of relocation issues is very fact-specific. Whether a court will find substantial impairment often directly correlates to the non-custodial parent's day-to-day involvement with the child's life and upbringing: Case law demonstrates that the more actively involved the non-custodial parent is, the more likely the trial court is to make a finding of substantial impairment.

With respect to the burden of proof, as stated above the moving-party bears the burden of proof to show that the proposed relocation will not substantially impair the child's relationship with the non-custodial parent. This is because the "beneficial relationship between the child and [parent] must not be 'placed at risk' to disadvantage the child."³⁵ The Virginia Court of Appeals has specifically held that the party opposing the relocation is *not* "required to prove by a preponderance of evidence that a 'substantial impairment' of his relationship with the children would result from their removal from Virginia."³⁶

However, inasmuch as the Court of Appeals has held that added difficulty in maintaining a relationship post-relocation is not, by itself, sufficient to deny the relocation request,³⁷ as a practical matter it may be imperative for the *non-custodial* parent to present his/her own evidence that the relationship with the child would be substantially impaired post-relocation.³⁸ This is in part due to the fact that the court is *required* to consider the issue of substantial impairment.³⁹

Timing of request to relocate / change in circumstances created by voluntary act of primary custodian

There is no requirement in Virginia that a parent must seek consent or permission prior to relocating with the child, whether as part of an initial custody determination or following a custody determination. There is a *de facto* change in circumstances where a custodial parent relocates with the child (provided the relocation is meaningful). Further, the court must consider the child's wellbeing in the child's current locality, regardless of whether the custodial parent was initially permitted to relocate.⁴⁰ The rationale is that the child's best interests remains paramount, and the child should not be punished for the act of his/her custodial parent.⁴¹

The Court of Appeals has specifically held that "[i]f the court could not retroactively approve a move or order a change in custody after an unapproved relocation has taken place, having before it evidence that the relocation of the children or the modification of custody would be in the best interests of the children, the court would be required to act contrary to the best interests of the children,"

which is prohibited.⁴² Therefore, “Where the party seeking to relocate has already moved . . . , the trial court may consider any positive or negative changes in the child’s life,⁴³ even those changes occurring after the relocation.”⁴⁴

Virginia courts may not make advisory opinions relating to possible future, undetermined, relocations

A Virginia court may only make a decision relating to a current request to relocate and may not prospectively state what the court would do should a parent seek to relocate in the future.⁴⁴

Conclusion

Where relocation is raised as part of the initial custody determination and where one parent will him/herself be relocating regardless of the outcome, the court will determine custody on the basis of the Virginia Code §20-124.3 factors.⁴⁵ However, where a parent’s relocation is not a foregone conclusion and/or where the proposed relocation is subsequent to a custody determination, a much more detailed analysis is required. This is the most typical relocation scenario.

It is incumbent upon the moving-parent to prove that it is more likely than not that: (1) there has been a material change in circumstances since entry of the prior custody order, (2) that the proposed relocation is in the child’s best interests, and (3) that the proposed relocation will not substantially impair the existing relationship between the non-custodial parent and the child.

Despite the burdens of proof in relocation cases, failure by the party opposing the relocation to provide evidence regarding the benefits available to the child in the current jurisdiction and/or failure to demonstrate that his/her relationship with the child cannot be substantially maintained following a relocation can have devastating results. Further, it is good practice for the parent opposing the relocation to present evidence to the court that it is in the child’s overall best interests to remain within the current jurisdiction even if the custodial parent moves. To this end, the party opposing the relocation should be prepared to ask the court to transfer custody of the child to him/her should the custodial parent relocate regardless of the court’s decision.

Endnotes

1. *Petry v. Petry*, 41 Va.App. 782, 789 (2003).
2. *Judd v. Judd*, 53 Va.App. 578, 588 (2009).
3. *Hale v. Hale*, 1994 Va.App. LEXIS 35, *6.
4. *Sullivan v. Knick*, 38 Va.App. 773, 781 (2002), citing Va. Code Ann. §20-108; *Bostick v. Bostick-Bennett*, 23 Va.App. 527, 534-35 (1996).
5. *Goodhand v. Kildoo*, 37 Va. App. 591, 602 (2002).
6. See *Cloutier v. Queen*, 35 Va.App. 413, 427 (2001), *Goodhand*, 37 Va.App. at 602, *Sullivan*, 38 Va.App. at 781, *Judd*, 53 Va.App. at 588.
7. *Sullivan*, 38 Va.App. at 781 (internal citations omitted).
8. *Sullivan*, 38 Va.App. at 782 (internal citations omitted).
9. *Judd* 53 Va.App. at 588, citing *Cloutier* 35 Va. App. At 427-430.
10. *Id.* at 423.
11. *Cloutier*, 35 Va.App. at 423-24.
12. *Id.* at 425.
13. See generally, *Scinaldi v. Scinaldi*, 2 Va.App. 571, 576 (1986).
14. *Dolan v. Dolan*, 2000 Va.App. LEXIS 758, *4.
15. *Garner v. Ruckman*, 2011 Va.App. LEXIS 369, *9.
16. *Goodhand*, 37 Va.App. at 602.
17. *Id.* 602.
18. See e.g., *Wheeler v. Wheeler*, 42 Va.App. 282 (2004); *Parish v. Spaulding*, 26 Va.App. 566 (1998); *Scinaldi v. Scinaldi*, 2 Va.App. 571 (1986); *Simmons v. Simmons*, 1 Va.App. 358 (1985).
19. See e.g., *Wheeler v. Wheeler*, 42 Va.App. 282 (2004).
20. *Simmons v. Simmons*, 1 Va.App. 358, 364 (1985).
21. *Simmons v. Simmons*, 1 Va.App. 358, 362 (1985).
22. See generally, *Petry*, 41 Va.App. at 793-94.
23. *Stockdale v. Stockdale*, 33 Va.App. 179, 186 (2000).
24. *Bostick*, 23 Va.App. at 530.
25. See generally, *Bedell v. Muller*, 2016 Va.App. LEXIS 294 *6.
26. See generally, *Hale*, 1994 Va.App. LEXIS 35 at *6.
27. *Dolan*, 2000 Va.App. at *5, citing *Carpenter v. Carpenter*, 220 Va. 299, 302 (1979).
28. *Cloutier*, 35 Va.App. at 430. See also *Sullivan v. Jones*, 42 Va.App. 794, 811 (2004) (Noting that Virginia has rejected “[t]he unity of interests doctrine – which holds that whenever the best interests of the parent are served, so too are the best interests of the child.”).
29. See *Wheeler*, 42 Va.App. at 291 (2004) quoting *Sullivan*, 38 Va.App. at 784 (“‘advantages accruing to a custodial parent from relocation oftentimes inure to the benefit of a child’ and should be taken into account”).
30. *Scinaldi*, 2 Va.App. at 575 (1986).
31. See generally, *Wheeler*, 42 Va.App. at 295-96 (2004).
32. *Cloutier*, 35 Va.App. at 429.
33. *Cloutier*, 35 Va.App. at 428-29.
34. *Wheeler v. Wheeler*, 2015 Va.App. LEXIS 173, *5-6.
35. *Sullivan*, 38 Va.App. at 783, (citing *Bostick*, 23 Va.App. at 534).
36. *Stockdale*, 33 Va.App. at 185.
37. *Scinaldi*, 2 Va.App. at 575.
38. See generally, *Id.* at 187 (the Court of Appeals noted that “father presented no evidence to controvert the mother’s evidence that his relationship with the children would not be substantially impaired” and the court permitted the relocation).

39. See generally, *Takacs v. Takacs*, 2016 Va.App. LEXIS 83, *12-13 (2016) (Court of appeals remanded the issue of relocation to the trial court to “determine whether mother has met her burden of demonstrating that the relocation will not substantially impair the relationship between the children and father, which the circuit court never specifically addressed), *citing*, *Stockdale*, 33 Va.App. at 184.
40. See *Parish v. Spaulding*, 26 Va.App. 566 (1998).
41. See generally, *Scinaldi v. Scinaldi*, 2 Va.App. 571 (1986); *Parish v. Spaulding*, 26 Va.App. 566 (1998); *Sullivan v. Jones*, 42 Va.App. 794 (2004).
42. *Parish v. Spaulding*, 26 Va.App. 566, 572 (1998).
43. *Bedell*, 2016 Va.App. LEXIS 294 at *19, quoting *Surles v. Mayer*, 48 Va.App. 146, 175 (2006).
44. See generally, *Wilson v. Wilson*, 12 Va.App. 1251, 1255 (1991) (holding that a predetermined automatic transfer of physical custody which, based on an undetermined relocation / move in the future, would constitute an abuse of discretion by the trial court and would therefore be subject to reversal by the Court of Appeals).
45. See, *Petry* 41 Va.App. at 791.



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