

# To Leave or Not to Leave: Child Relocation in Virginia

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## I. Introduction

The issue of child relocation in Virginia—whether a parent may change residences with a child (locally, nationally, or internationally)—is controlled by the “best interests of the child” analysis. However, the impact of a proposed relocation on the parent-child relationship cannot be ignored. In this context, whether the non-custodial parent is able to substantially maintain their relationship with the child post-relocation is given significant weight. Regardless of the distance involved, the parent seeking to relocate with the child bears the burden of proving that such relocation is in the overall best interests of the child.

Of note, a trial court cannot prohibit a parent from relocating; the court only has authority to prohibit (or permit) a parent from taking their child with them to the new location. Such authority, however, may serve to prohibit a parent from relocating given that the parent may not want to leave the jurisdiction without their child.<sup>1</sup>

## II. Legal Analysis

In relocation cases, trial courts must consider both the Virginia Code § 20-124.3 factors as well as controlling case law. However, no provision of the Code specifically governs the analysis of relocation.<sup>2</sup> Relocation of a custodial parent “‘is best understood under traditional constructs governing custody and visitation’ and thus ... the best interests standard governs.”<sup>3</sup>

With respect to an initial custody determination involving two parents who *already* reside in different states, the Virginia Court of Appeals has held that “the trial court need not separately determine whether living out of state is in the best interests of the child .... If the trial court properly conducts

a “best interests of the child” analysis pursuant to Code § 20-124.3, when awarding primary physical custody to an out-of-state parent, its analysis is satisfactory.”<sup>4</sup> For initial custody determinations involving a parent requesting permission to relocate, the analysis is the same.<sup>5</sup>

In contrast to an initial determination, when a proposed relocation is part of a modification proceeding, a broader analysis is required. In such instances, 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: The court must find (1) a material change in circumstances has occurred,<sup>6</sup> (2) the relationship between the non-custodial parent and child would not be substantially impaired<sup>7</sup> (though a balancing of interests is required for this factor<sup>8</sup>), and (3) the child’s best interests would be served by the proposed relocation.<sup>9</sup> The parent seeking to relocate the child bears the burden of proof with respect to all three requirements.<sup>10</sup>

Regarding the issue of substantial impairment, the party opposing the relocation has no burden of proof and is not required to demonstrate that their relationship with the child would be substantially impaired if relocation were granted.<sup>11</sup> “Where a burdened party has presented evidence [sufficient to establish a *prima facie* case], the burden of proof is no longer relevant and the fact finder must decide which party prevails based on the weight of the evidence.”<sup>12</sup>

Decisions by the trial court on relocation are given the same deference applied to initial custody determinations. Accordingly, a trial court’s decision on relocation “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.<sup>13</sup>

### III. Material Change in Circumstances

As noted above, the first consideration in a relocation case seeking to modify custody is whether there has been “a material change in circumstance since the [prior] decree.”<sup>14</sup> Whether such a material change has occurred “is a broad concept and incorporates a broad range of positive and negative developments in the lives of the children.”<sup>15</sup>

The Court of Appeals “has never articulated a precise test for whether a material change has occurred, and for good reason. The standard is necessarily broad and fact-intensive.”<sup>16</sup> Further, “the material change in circumstances must be something other than a mere demonstration that a new arrangement would be in the best interests of the children . . . .”<sup>17</sup> As a result, even where the children may experience positive effects from a relocation, while those positive effects themselves are relevant to the best interest analysis they are not relevant to whether or not a material change in circumstances has occurred.<sup>18</sup>

Further, “whenever the evidence suggests...that the relocation of the custodial parent may not be in the child’s best interests, the relocation of the custodial parent constitutes a material change in circumstances.”<sup>19</sup>

The reason the moving party must demonstrate a material change has occurred since the prior order is because “[i]n the absence of a material change in circumstances, reconsideration [of the prior decree] . . . would be barred by principles of res judicata.”<sup>20</sup>

### IV. Best Interests of the Child

In terms of the best interests 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.”<sup>21</sup> Therefore, if a trial court determines that a relocation is not in the best interests of the child, the law in Virginia is clear that the relocation must be denied.<sup>22</sup> Further, “[i]f maintaining the *status quo* is in the ‘best interests of the child,’ the court shall deny any requests to change custody and order that the *status quo* be maintained.”<sup>23</sup> The trial court must base its analysis on “the circumstances existing at the time of the deci-

sion,” and “give primary consideration to the best interests of the child.”<sup>24</sup>

With respect to the analysis of the Code § 20-124.3 factors, “[i]mportant factors . . . include the relationship between each parent and each child, the parents’ respective roles in the upbringing and care of [each] child, and the propensity of each parent to actively support [each] child’s contact and relationship with the other parent.”<sup>25</sup>

Benefits of relocation to the custodial parent alone do not create a presumption that the child would also benefit from the relocation. Rather, the Virginia Court of Appeals has held that “the court may consider a benefit to the parent from relocation only if the move independently benefits the children.”<sup>26</sup> The Virginia Court of Appeals has specifically rejected a “unity of interests” analysis whereby the benefits to a parent from relocation would automatically also accrue to the child.<sup>27</sup> Nonetheless, “advantages accruing to a custodial parent from relocation oftentimes inure to the benefit of a child and should be taken into account.”<sup>28</sup>

While the court must consider factors related to the best interests of the child pursuant to Virginia Code § 20-124.3, those factors are not tailored to relocation. Accordingly, as part of the best interests analysis, courts must also look to applicable case law for guidance in determining whether a relocation is in the child’s best interests, and how best to compare two different proposed locations. A review of case law indicates the following factors are deemed important in determining whether relocation is in the best interests of the child:

1. Stability: Perhaps the most important consideration is which location would provide a more stable environment for the child, including:
  - (1) Overall stability for the children including financial stability, emotional stability, social stability, and educational stability;<sup>29</sup>
  - (2) Whether the child could achieve or maintain stability in Virginia, or whether stability is only realistically possible in the new locality;<sup>30</sup> and
  - (3) The location where there is most likely to be “an atmosphere of stability, love and concern.”<sup>31</sup>

As always, the importance of stability is guided by the best interests of the child, since “[t]he best interests of the children dictate that they be raised in a stable and loving environment.”<sup>32</sup>

2. Connections to New Location: The trial court should consider how familiar a child is with a proposed new location, and whether the child has previously spent time in, or has connections to, the new location.<sup>33</sup> Examples include: Moving to a location where both sets of grandparents reside, having a history of spending significant time in the new location including over holidays, having friends and family in the new location, and having attended religious services in then new location.<sup>34</sup>
3. Primary Caretaker: The trial court should consider the nature of relationship between the children and each parent, including who served as the primary caretaker for the children, 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”.<sup>35</sup>
4. Encouragement of Continued Relationship: The trial court should consider whether the relocating parent is likely to actively support the child’s contact and relationship with the other parent post-relocation.<sup>36</sup>
5. Reason for Relocation: The trial court should also consider whether the custodial parent is seeking to relocate, or has already relocated, based on necessity or for an improper purpose.<sup>37</sup> Given that a child’s ability to substantially maintain a relationship with the non-custodial parent is a significant consideration in relocation cases, courts should consider 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.<sup>38</sup>
6. Balance of Interests: There are often competing interests in relocation cases. “[T]he case

is rare in which the removal of children from their noncustodial parent’s state of residency does not result in some detriment .... The relationship between parent and a developing child, no matter how close, affectionate or demonstrative, naturally suffers as the distance between the two increases. As such, questions of custody and removal from the noncustodial parent’s state of residency involve a balancing of interests. More often than not there are advantages and detriments on both sides of the issue. A trial court’s role is to weigh those concerns and conscientiously seek the solution that serves the *best* interests of the children.”<sup>39</sup> Furthermore, while “the parent-child relationship should be fostered to the extent possible, the court must balance whether the positive effects of the visitation sufficiently outweigh the reason for relocating to justify a court in denying the child’s removal from the jurisdiction.”<sup>40</sup>

7. Catch-All: Trial courts should consider a broad range of factors when making relocation determinations, including, “[T]he 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.”<sup>41</sup> Further, factor 10 of Virginia Code § 20-124.3 specifically provides a catch-all authority for the court to consider any facts deemed relevant to the issue: “In determining best interests of a child... the court shall consider...[s]uch other factors as the court deems necessary and proper to the determination.”<sup>42</sup>

## V. Consideration of the Relationship with the Non-Custodial Parent

It is commonly accepted that a child moving further away from a non-custodial parent will create additional challenges to maintaining that relationship. However, the Court of Appeals has held that so long as the non-custodial parent's relationship with the child can be *substantially* maintained, those challenges caused by an increased distance will not necessarily preclude a 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 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.<sup>43</sup>

The Court of Appeals has not adopted a specific analysis to determine whether a child's relationship with the non-custodial parent is capable of being "substantially maintained" post-relocation. As a result, it is a fact-based determination unique to the circumstances of each case. Any inconvenience to the non-custodial parent in maintaining the parent-child relationship is simply one of many factors the court must consider.<sup>44</sup>

While the difficulty in maintaining the relationship may increase with distance, even relocations to a nearby state may be denied when it is found that the relationship could not be substantially maintained.<sup>45</sup> This is because "[t]he beneficial relationship between the child and [parent] must not be placed at risk to disadvantage the child."<sup>46</sup>

For example, the Court of Appeals affirmed a trial court's denial of relocation only four hours away, finding that the non-custodial parent would not be

able to substantially maintain his relationship with the children post-relocation.<sup>47</sup> The Court of Appeals focused on the fact that "the evidence established that father was an active participant in the children's lives on a daily basis and their current environment was a positive one."<sup>48</sup> The court focused on the following facts:

- The current time-sharing schedule was working well;
- The father was actively involved with the children and their activities;
- The father attended the children's educational and athletic functions;
- The father assisted the children with homework;
- The father met the children's needs generally;
- The children were doing well academically;
- The children were doing well socially; and
- The children were happy and well-adjusted.<sup>49</sup>

While the relocating parent bears the burden of proof to show that the non-custodial parent's relationship with the child will not be substantially impaired post-relocation, as a practical matter the parent opposing relocation would be well served by presenting evidence on this issue.<sup>50</sup> This is because the trial court is required to consider the issue of substantial impairment.<sup>51</sup>

## VI. No Consideration of "Harm" Required

Virginia does not require a finding on whether the relocation would cause harm to the child.<sup>52</sup> Further, the Court of Appeals has specifically held that there is no "presumption of harm in cases involving relocation and joint or shared custody."<sup>53</sup> Instead, "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."<sup>54</sup>

## VII. Prospective Relocation

Generally, trial courts should not consider speculative changes in circumstances which may or may not occur in the future as part of the relocation analysis. "A custody determination must be based on the child's best interests under the circumstances prevail-

ing at the time of the decision.”<sup>55</sup> Accordingly, while “a change of location may be a material change in circumstances, if the evidence at the time so indicates ... a predetermined automatic reversal of primary custody, based on an undetermined move in the future, is clearly an abuse of discretion.”<sup>56</sup>

### VIII. Retroactive Approval

There is no specific Virginia statute which requires a parent to obtain the consent of the other parent or permission of a court prior to relocating with a child. Such “unauthorized” relocation does not “bar [the non-custodial] parent from thereafter seeking modification of the trial court’s order of custody; nor does the [relocating] parent’s action bar a motion seeking approval of the relocation retroactively.”<sup>57</sup> As such, the law in Virginia permits retroactive approval of relocations that are in the best interests of the children.

“If 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 ... would be in the best interests of the children, the court would be required to act contrary to the best interests of the children.”<sup>58</sup> The Court of Appeals has therefore declined to establish such a rule.<sup>59</sup>

With respect to retroactive approval of a relocation, “the trial court may consider any positive or negative changes in the child’s life, even those changes occurring after the relocation.”<sup>60</sup>

Accordingly, the Court of Appeals has found that even where a parent violated a custody order and relocated with a child, an automatic reversal of the relocation would not be appropriate given the trial court must “act only in furtherance of [the children’s best] interests.”<sup>61</sup> In such instances, the appropriate remedy is for the aggrieved party to request sanctions related to a violation of an injunction or court order.<sup>62</sup>

### IX. Conclusion

The best interests of the child determine whether a relocation should be permitted or denied.

Where parents already live in different states and are seeking custody as part of an initial determination,

the best interests analysis pursuant to Virginia Code § 20-124.3 is sufficient and a separate consideration of whether a child should live outside of Virginia is unnecessary.

Where both parents reside within Virginia and a parent seeks to relocate as part of the initial custody determination, the court must still focus on the best interests of the children.

Where a parent seeks to relocate after entry of an initial custody order, a more nuanced analysis is applicable. The party seeking to relocate bears the burden of proof to demonstrate that: (1) there has been a material change in circumstances since the last custody order was entered; (2) the existing relationship between the child and the non-custodial parent can be substantially maintained despite the proposed relocation; and (3) that relocation is in the best interests of the child.

The non-custodial parent opposed to relocation does not bear any burden of proof and is not required to present evidence demonstrating why the proposed relocation would not be in the children’s best interests. However, given the thorough fact-based analysis required, it behooves the non-custodial parent to present evidence as to why relocation would not be in the best interests of the children, as well as any applicable evidence relating to whether the non-custodial parent’s relationship with the child could be substantially maintained.

Overall, relocation matters are fact-based and unique to each family.

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### Endnotes

- 1 *Hale v. Hale*, 1994 Va. App. LEXIS 35, \*6.
- 2 *Petry v. Petry*, 41 Va. App. 782, 789 (2003).
- 3 *Judd v. Judd*, 53 Va. App. 578, 588 (2009).
- 4 *Brandon v. Coffey*, 77 Va. App. 628, 631 (2023).
- 5 *See de Haan v. de Haan*, 54 Va. App. 428, 446 n.12 (2009) (“when a trial court evaluates relocation for the first time in the initial custody order, it need only consider the best interests of the children, which is the test regularly used to determine custody,” citing *Petry*, 41 Va. App. at 790).

- 6 *Sullivan v. Knick*, 38 Va. App. 773, 781, 781 (2002).
- 7 *Goodhand V. Kildoo*, 37 Va. App. 591, 602 (2002).
- 8 *Hale*, 1994 Va. App. LEXIS at \*7.
- 9 *Sullivan*, 38 Va. App. at 781, citing Va. Code Ann. § 20-108; *Bostick v. Bostick-Bennett*, 23 Va. App. 527, 534-35 (1996).
- 10 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.
- 11 See generally, *Stockdale v. Stockdale*, 33 Va. App. 179, 185 (2000).
- 12 *Id.*
- 13 *Dolan v. Dolan*, 2000 Va. App. LEXIS 758, \*4.
- 14 *Sullivan*, 38 Va. App. at 781 (2002), citing *Bostick*, 23 Va. App. at 534-35.
- 15 *Sullivan*, 38 Va. App. at 781, citing *Parish v. Spaulding*, 26 Va. App. 566, 573 (1998).
- 16 *Gulley v. Brinkley*, 2022 Va. App. LEXIS 39, \*2.
- 17 *Id.* at \*11.
- 18 See *Id.* at \*14 “[T]he positive effects from a relocation were relevant to the best interests of the child analysis, but not whether a material change had occurred.”)
- 19 *Sullivan*, 38 Va. App. at 782, FN 4 (internal citations omitted).
- 20 *Sullivan*, 38 Va. App. at 782, citing *Hiner v. Hadeed*, 15 Va. App. 575, 580 (1993).
- 21 *Judd*, 53 Va. App. at 588, citing *Cloutier v. Queen*, 35 Va. App. 413, 427-430 (2009).
- 22 *Cloutier*, 35 Va. App. at 423-24.
- 23 *Id.* at 423-24, citing *Brown*, 30 Va. App. 532, 538 (1999).
- 24 *Id.* at 425.
- 25 *Bedell v. Muller*, 2016 Va. App. LEXIS 294 \*6 citing Virginia Code § 20-124.3(3), (5), (6).
- 26 *Cloutier*, 35 Va. App. at 430. See also *Sullivan v. Jones*, 42 Va. App. 794, 811 (2004) (Noting Virginia 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.”).
- 27 *Id.*
- 28 *Wheeler v. Wheeler*, 42 Va. App. 282, 291 (2004), citing *Sullivan*, 38 Va. App. at 784.
- 29 See e.g., *Wheeler*, 42 Va. App. at 291-92; *Parish*, 26 Va. App. at 573-75; *Scinaldi v. Scinaldi*, 2 Va. App. 571, 576 (1986); *Simmons v. Simmons*, 1 Va. App. 358, 364 (1985).
- 30 See e.g., *Wheeler*, 42 Va. App. at 292.
- 31 *Simmons*, 1 Va. App. at 364.
- 32 *Id.* at 362.
- 33 See generally, *Petry*, 41 Va. App. at 793-94.
- 34 *Id.* at 793.
- 35 *Stockdale*, 33 Va. App. at 186.
- 36 *Bostick*, 23 Va. App. at 530.
- 37 See generally, *Bedell*, 2016 Va. App. LEXIS \*18.
- 38 See generally, *Hale*, 1994 Va. App. LEXIS 35 at \*6-7.
- 39 *Simmons v. Simmons*, 1 Va. App. 358, 364 (1986) (emphasis in original).
- 40 *Hale*, 1994 Va. App. LEXIS at \*7.
- 41 *Dolan*, 2000 Va. App. at \*5, citing *Carpenter v. Carpenter*, 220 Va. 299, 302 (1979).
- 42 Virginia Code § 20-124.3(10).
- 43 *Scinaldi*, 2 Va. App. at 575.
- 44 See generally, *Wheeler*, 42 Va. App. at 295-96 (2004).
- 45 See *Cloutier v. Queen*, 35 Va. App. 413, 427-430 (2001).
- 46 *Sullivan*, 38 Va. App. at 783, (citing *Bostick*, 23 Va. App. at 534).
- 47 See, *Cloutier*, 35 Va. App. 413.
- 48 *Id.*, at 429.
- 49 *Id.* at 428-29.
- 50 See generally, *Scinaldi*, 2 Va. App. at 575 (the Court of Appeals overturned the trial court’s denial of the custodial parent’s request to relocate to New York and noted “[t]here was no evidence that the benefits of Mr. Scinaldi’s relationship with his children could not be maintained while they lived in New York”); See also *Stockdale*, 33 Va. App. at 187 (the Court of Appeals upheld a trial court’s permission for the custodial parent to relocate to New Jersey and noted that “father presented no evidence to controvert the mother’s evidence that his relationship with the children would not be substantially impaired).
- 51 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.
- 52 *Garner v. Ruckman*, 2011 Va. App. LEXIS 369, \*9.
- 53 *Goodhand*, 37 Va. App. at 602.
- 54 *Id.*
- 55 *Wilson v. Wilson*, 12 Va. App. 1251, 1255 (1991).
- 56 *Id.*
- 57 *Parish v. Spaulding*, 26 Va. App. 566, 572, 496 (1998).
- 58 *Id.*
- 59 *Id.*
- 60 *Bedell*, 2016 Va. App. LEXIS 294 at \*19, quoting *Surles v. Mayer*, 48 Va. App. 146, 175 (2006).
- 61 *Parish v. Spaulding*, 257 Va. 357, 363 (1999).
- 62 *Id.*