THE PRACTITIONER

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Far and Away

Establishing a Child's Best Interest in 'Move' Cases

The California Court of Appeal has issued conflicting standards for determining when a parent may move with a child — the so-called "move-away" cases. The most recent opinion on this issue is *Marriage of Shaw*, 95 Daily Journal D.A.R. 15305 (1st Dist. Nov. 22, 1995), in which the court upheld the trial court's order preventing the child from moving with the mother to Pittsburgh, and granting primary custody to the father.

This case deserves attention because it adds to the growing number of move-away cases that are arising as residents leave California. The case also demonstrates the importance of pursuing all favorable witnesses and making sure they present their opinion to a child-custody evaluator, who is usually appointed in move-away cases.

The lesson of 'Shaw' may rest in the importance of marshaling witnesses and facts.

In *Shaw*, both parents were equally caring and competent parents living in Marin, Calif. The parties separated in 1989 when the child was 14 months old. The mother remarried and had two more boys. In 1993, the mother's new husband, an attorney, was laid off. As a result the mother, also an attorney, had to increase her work hours. The new husband was unable to find employment in Northern California, but he did find a job in Pittsburgh, where both his and the mother's families resided.

With respect to the custody of the minor child, the mother had approximately 60 percent and the father had the remaining 40 percent. The trial court found this plan was a "successful, shared parenting arrangement."

The father would not agree to the move, and he sought an order restraining the mother from removing the child from the county and state, or in the alternative, an order giving him primary care, custody and control of the child. The court ordered mediation and a child-custody evaluation.

The opinion cited at length the testimony of the child-custody evaluator. The evaluator found that both parents were caring and that either would be an adequate primary custodial parent. The child was equally bonded to both parents as well as to his stepbrothers. The evaluator testified that being in the role of older brother would benefit the child. Moreover, the mother's new husband could provide an adequate role model. There was no evidence that either parent would prevent the child from visiting with the other if the move were allowed.

The evaluator had no recommendation, however, concerning with which family the child should be placed if the mother moved to Pittsburgh. The trial court asked the evaluator the following question, which went to the heart of the issue: "Which of the two environments would be in [the child's] best interest, the 'traditional' family with a mother, father and 'three little boys,' or the less traditional unit with the father as single parent?" The evaluator could offer no opinion.

The Court of Appeal began its analysis by stating: "We must honor the trial court's resolution unless the court abused its wide discretion." The court then presented what it called the "legal framework," essentially making two key points:

- "[I]t is the policy of this state 'to assure minor children frequent and continuing contact with both parents ... and to encourage parents to share the rights and responsibilities of child rearing'" (quoting Family Code Section 3020).
- The parenting plan must be in the best interest of the child. Family Code Section 3040(b).

The court then stated: "[T]here is some confusion in the case law concerning the exact nature of the burden of proof borne by the moving parent in a move-away case." The court followed *Marriage of Selzer*, 29 Cal.App.3d 637, 645 (1994), and held that the party seeking to move away must "show not only that the move is necessary to the custodial parent, but that it will be in the child's best interest."

The court refused to follow the "different, more onerous test" set forth in *Marriage of McGinnis*, 7 Cal.App.4th 473 (1992) ("parent has the burden of proof to demonstrate that the move is in the best interests of the children, i.e., that it is essential and expedient and for an imperative reason").

As in other move-away cases, the *Shaw* court dismissed the mother's claim that the trial court's decision violated her right to travel. The court also held that its decision was consistent with Family Code Section 7501, which states: "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." The court reasoned that this section, in existence for more than 100 years (see former Civil Code Section 213), must be interpreted in light of newer code sections (Family Code Sections 3020 and 3024, which give the court authority to order a parent to notify the other parent before the intended move) pursuant to which it is in the best interests of children to maintain frequent and continuing contact with both parents.

In applying the best-interest test, the *Shaw* court relied on a statement by the child's teacher contained in the evaluator's report. The teacher noted that the father spent time in class each week, which was "helpful" to the child, and described the relationship between the father and child as "special."

The trial court found that the child was "very strongly bonded" to the father, and the evidence showed that the father was "intimately and actively involved in parenting the child."

The Court of Appeal, describing the trial court's decision as "Solomonic," found it was in the child's best interest to remain with the father and granted his request for primary custody, with visitation to the mother. Apparently, the court was persuaded by the teacher's observation that the father-son relationship was special, although this observation had not swayed the evaluator.

In any shared-parenting arrangement that is working well, it is reasonable that an evaluator will recommend that the best interest of the child is served by the parent not moving, which is a logical decision. Still, faced with facts similar to those in *Shaw*, the evaluator might offer no opinion.

The lesson of *Shaw* may rest in the importance of marshaling helpful witnesses and facts, especially children's teachers. The father's case appears to have been won by the teacher's statement that his relationship with his son was "special." This is certainly not earth-shattering testimony. Since the mother was an equally caring and loving parent, it is possible the teacher would also have characterized the mother-son relationship as "special."

Move-away cases present one of the most difficult challenges to family law attorneys. The following cases have allowed a move: *Marriage of Selzer*, 29 Cal.App.4th 637 (1st Dist. 1994); *Marriage of Roe*, 18 Cal.App.4th 1483 (2d Dist. 1993); *Marriage of Battenburg*, 28 Cal.App.4th 1328 (2d Dist. 1994).

The following cases have not allowed the move: *Marriage of Carlson*, 229 Cal.App.3d 1330 (5th Dist. 1991); *Marriage of Rosson*, 178 Cal.App.3d 1094 (1st Dist. 1986).

The California Supreme Court has granted review of *Marriage of Burgess*, 32 Cal.App.4th 1786 (5th Dist. 1995) (mother's move would have adverse impact on father's "beneficial" parental role).

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