

Ruling Guides Parents on Legal Conundrum of Moving a Child.

By Mitchell A. Jacobs and David L. Marcus *

In its most recent child custody "move-away" case, the California Supreme Court in In re Marriage of Brown & Yana (2006) 37 Cal. App. 4th 947, addressed two important issues. The Court first held that a parent with sole legal and physical custody does not have the absolute right to move with the children. Second, the court addressed the issue of when the parent opposing the move is entitled to a hearing for the trial court to hear oral testimony. The general answer is that such an evidentiary hearing is allowed only when "necessary." As explained in this article, the court elaborated on some circumstances when an evidentiary hearing is necessary. In the case before it, the Court held that an evidentiary hearing was not necessary, and allowed mother to move with the minor child.

The parties' marriage was dissolved in 1994. In 1999 mother was awarded sole legal and physical custody of their son. The determination was made following a psychological child custody evaluation and a contested evidentiary hearing. Since that hearing, both parties resided in San Luis Obispo County.

In June of 2003, father filed an Order to Show Cause ("OSC") seeking joint legal custody, and to increase his

visitation time. He alleged that his relationship with their twelve year old son had improved significantly, that his son expressed an interest to spend more time with him, and that his son was doing well in school and with his social relationships.

Shortly after father filed this OSC, mother informed father she was moving with their son to Las Vegas. Father then filed another OSC asking to restrain mother's move pending a psychological evaluation and a "contested evidentiary hearing." On that same day, mother filed an OSC seeking to modify father's visitation schedule upon her move to Las Vegas. She alleged that her new husband had accepted a job in Las Vegas, their son was very close to his half siblings, and their son was doing well in her sole custody. She also argued that her move is not a "change of circumstances" justifying a change of custody, and that the family should not be subjected to a third custody evaluation.

The trial court denied father's request to change custody, and his request for an evidentiary hearing. The Court of Appeal reversed (in a split decision), holding that father was entitled to an evidentiary hearing. The Supreme Court reversed the Court of Appeal.

Mother argued that she, as the parent with sole legal and physical custody, as a matter of law has the right to move the

residence of the child. The Supreme Court rejected this argument, holding that "where a final custody order had awarded sole legal custody to the parent seeking to relocate with a child, the noncustodial parent opposing the relocation may seek and obtain a custody modification based on a proper showing pursuant to the changed circumstance rule." The court reasoned that if parents cannot agree upon the best interests of their child, the court must make that decision. Relying on Family Code Section 7501, the court also reasoned that "even a parent with sole legal and sole physical custody may be restrained from changing a child's residence, if a court determines the change would be detrimental to the child's rights or welfare." The Court also noted that no California decision supported wife's position. Finally, the seminal case on this issue (In re Marriage of Burgess), and the subsequent cases all qualify the custodial parent's right to move if the move would cause detriment to the child.

With respect to the issue of a right to a hearing in which oral testimony will be taken, the court held that "[w]here, as here, one parent has been awarded sole legal and physical custody of a child, and the noncustodial parent opposes the custodial parent's decision to relocate with the child, a trial court may deny the noncustodial parent's requests to modify

custody based on the relocation without holding an evidentiary hearing to take oral evidence if the noncustodial parent's allegation or showing of detriment to the child is insubstantial in light of all the circumstances presented in the case, or is otherwise legally insufficient to warrant relief."

The court added that "an evidentiary hearing serves no legitimate purpose or function where the noncustodial parent is unable to make a prima facie showing of detriment in the first instance, or has failed to identify a material but contested factual issue that should be resolved through the taking of oral testimony." The purpose of not holding such an evidentiary hearing is to foster the goal of judicial economy, to reduce litigation costs and unnecessary distress for the parents and children. Avoiding a hearing with live witnesses also protects the policy considerations of the changed circumstances rule where the court has determined that one parent has the right to make decisions regarding the health, education and welfare of the child.

In this case, the Supreme Court found that the trial court provided father with a reasonable opportunity to present his case before denying the evidentiary hearing. The trial court reviewed the pleadings and declarations, and "diligently inquired into whether or not [father] would be able to prove

detriment if he were granted the full evidentiary hearing." The trial court allowed father to make an offer of proof showing that the planed moved would be detrimental to the child, even though he did not allege any such facts in his declaration.

The Supreme Court agreed that father's supporting declarations did not show the require detriment. Father did not allege that mother's move was in bad faith, or to deprive father of time with their son (she offered an increase in visitation time during the summer). The evidence father sought to introduce at a hearing was "a lot of evidence about Las Vegas Nevada, such as the high student-to-teacher ratio; the fact that the state of Nevada has one of the highest dropout rates in junior high and high school of any state in the nation; the amount of crime over there; the volume of people moving in and out of the community of Las Vegas, Nevada, and what the transient effect has upon people in that community." The court held that even if this evidence was admitted into evidence and was uncontroverted, it would only establish certain general facts about Las Vegas and not specific facts regarding the child. These facts, alone, without specific reference to the child do not show that the move to Las Vegas would be detrimental to the child. These general facts do not show that the child would not do well in Las Vegas with his mother,

stepfather and two half siblings.

Although there was evidence from minors' counsel that the child had conflicted feelings regarding the move, there was nothing to indicate that the child's discomfort from the move would be anything unusual for a move. Also, father "made no effort to offer facts or evidence showing that the relocation would detrimentally affect [the child's] rights or well-being, or that it would alienate the father-son relationship. Because these "circumstances disclosed no need for further assessment," a hearing to take oral testimony was not necessary.

Finally, the Supreme Court held that the case of In re Marriage of Campos (2003) 108 Cal. App. 4th 839, did not require an evidentiary hearing as a matter of law. The Court of Appeal in this case had held that Campos required an evidentiary hearing. The Supreme Court held that "[w]here, as here, a trial court in a move-away case diligently inquires into the matter of detriment in a formal court hearing, and duly considers the noncustodial parent's claims, evidence, and offers of proof but properly finds them insufficient to establish the detriment required for a custody modification under the changed circumstance rule, the court does not err or abuse its discretion in denying custody modification without taking the further step of holding an evidentiary hearing with live

testimony.”

This case guides parties who seek or oppose a hearing in a move away case in which live testimony is sought. A parent requesting a hearing to take oral testimony should address all of the concerns raised by the court regarding the proposed testimony. It should be argued that the proposed testimony addresses a material and contested fact that should be resolved through oral testimony. For example, the credibility of witnesses could be an issue, which is best decided by the court hearing the witnesses testify and being cross-examined. The witness may need to explain testimony by charts, photos or videos, which would be very difficult or impossible by declaration. It could be argued that it would be more efficient for the court to hear live testimony and the Court’s questions can be answered, than receive a lengthy declaration.

One of the strongest arguments the party opposing the presentation of live testimony can make is that even if the issue to which the live testimony addresses is decided in the other parties’ favor, the outcome will be the same. It should also be argued that the evidence can be introduced by declaration. If there is truly an issue of credibility for which the court needs to hear from the witnesses, the hearing time can be minimized by having the witnesses submit

declarations for the their moving testimony. The live witness testimony would then be limited to cross-examination.

Finally, some may conclude that this case makes it easier for a custodial parent to move. It appears, however, that the father did not gather evidence which may have helped his case, such as a comparison of the children's current school with the proposed school, and expert testimony to support his claims. Nevertheless, this case substantially assists a custodial parent seeking to move with the children.

- * Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to marital dissolution and other family law matters. David Marcus, an attorney with the Law Offices of Mitchell A. Jacobs, also practices exclusively in the area of family law.