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How STATES DIFFER Making the 'MUST MOVE' case at trial Building the case for STAYING PUT
What a MOVE MAY MEAN FOR THE CHILD DOMESTIC VIOLENCE—The tipping point The INTERNATIONAL MOVE



Relocation
A Delicate Balance
of Competing
Interests



AMERICAN BAR ASSOCIATION

Making the "Must Move" Case at Trial

Arguing that relocation is right for the kids

BY JACQUELINE M. VALDESPINO

When trying a case in favor of relocation, it is imperative to address the parties' fears and present concrete solutions or alternatives that minimize the negative impact.

The most difficult relocation cases are those in which both parents are involved in all aspects of the child's life; the parent who is left behind will suffer a great loss and feel as if his or her ongoing parenting efforts are not being valued. The truth is that whenever a move involves a distance that will affect the custodial arrangement and/or contact and access schedules, sacrifices will be required.

Consider the following fact pattern: The parents meet while attending medical school in New York where they have both lived their entire lives. They pursue residency programs and both receive job offers in Miami, Florida. They marry and move south.

After completing their residency programs, they settle into careers; Dad pursues pediatrics, and Mom is an eye doctor at a local hospital. Mom is in the office from 9:00 A.M. to 5:00 P.M. with very few on-call hours. Dad is in private practice with early morning hours twice a week.

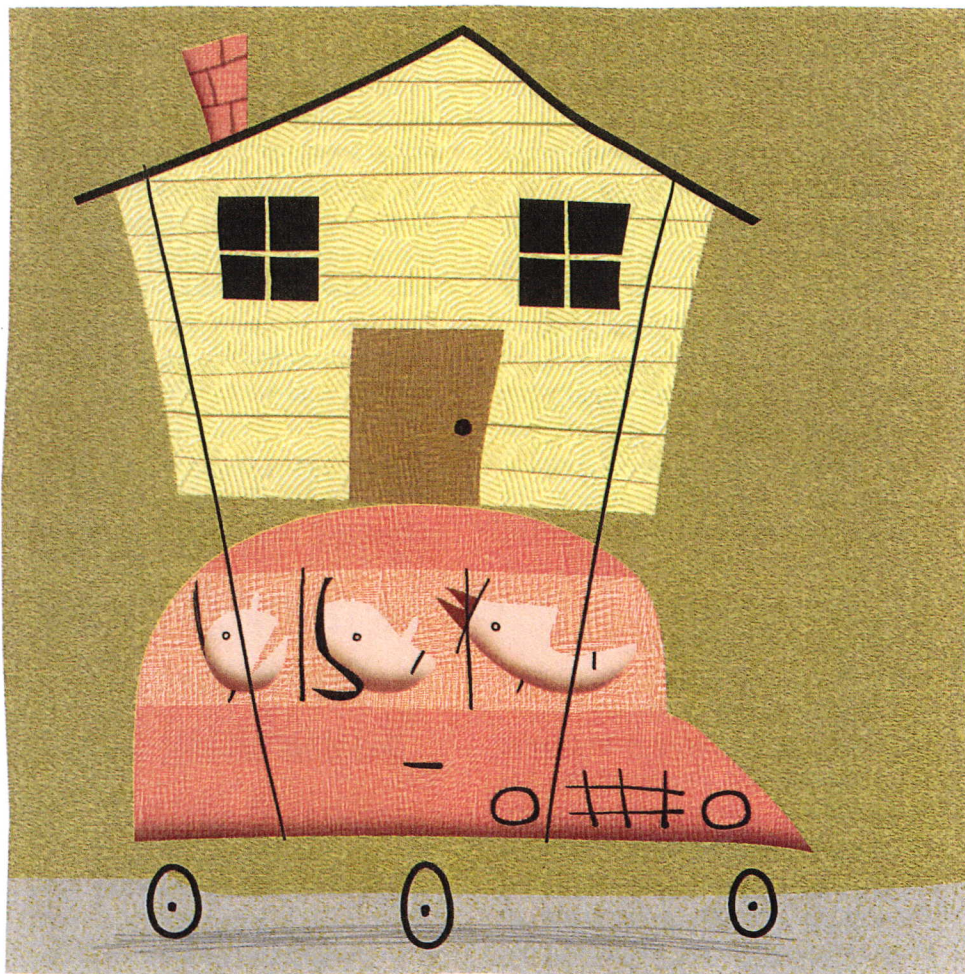
They have a son; Mom takes six months' maternity leave, and they hire a live-in nanny. When the child starts preschool, Mom takes him daily. Dad adjusts his office

hours and picks his son up three times a week, attending to him until Mom gets home. Then Dad returns to work, extending office hours to meet his patients' needs. The nanny picks up the child from preschool when Dad is unavailable.

On weekends Dad coaches soccer; Mom attends every practice and game, providing the team with snacks and drinks. The family returns to New York regularly and has strong relationships with family and friends there. The paternal and maternal grandparents, as well as

aunts, uncles, and cousins on both sides live in New York, and the child enjoys a close relationship with his extended family.

After ten years of marriage, the parties separate. As part of her petition for dissolution of marriage, Mom seeks primary residential custody of their six-year-old son and permission to relocate to New York where she has been offered a job in her field, doubling her income. Dad objects to the relocation and seeks primary residential custody. The first step in preparing any relo-



cation case for trial is to interview the client extensively and read all documents relevant to the case: final judgment of dissolution; marital settlement agreement; postdissolution pleadings and orders; employment search records and offers; attempts to seek employment in the current jurisdiction; the child's school, medical, and extracurricular records; journals or calendars documenting past visitation, etc. Next have the client prepare a list of potential witnesses with a synopsis of each witness's testimony.

Relocation cases rarely settle out of court because the advantages of the move to the relocating parent and the disadvantages to the nonrelocating parent are perceived as paramount and insurmountable by each of them. The relocating parent often seeks to move because of a career opportunity (the parent's or the new spouse's), better benefits, or enhanced earning capacity. If that parent declines the move, sacrifices are far-reaching. The parent who stays behind feels the loss of the right to raise the child and argues that involvement is not adequately replaced by infrequent, although extended, visitation.

In trying the case in favor of relocation, highlight the advantages and downplay the disadvantages by providing solutions or minimizing negative consequences. Encourage your client to attempt to negotiate an agreement governing the move prior to filing the petition. Depending on the jurisdiction, evidence of such efforts may be relevant at trial or on the issue of attorney's fees and costs.

Know the law

• **Pay careful attention to the burden of proof.** If the petition for relocation is presented during the initial dissolution proceedings, rather than as a petition for modification, the burden of proof may be different. Some states have a clear policy opposing relocation requests. Learn your state's standards. Does the burden shift after the parent seeking relocation demon-

strates that the reason for the move is valid? Educate the judge on which parent must carry the applicable burden and demonstrate how it is that your client carries it or that the other parent has failed to do so. Highlight any presumptions that may fall in your client's favor.

Before filing, know what procedures must be followed in your jurisdiction. In some states a petition for relocation requires the nonrelocating parent to seek custody if he objects to the relocation. Is your client able to defeat a request for custody by the other parent? What notice requirements does your state impose on the parent seeking relocation? If your state imposes one, make certain that your client complies in a timely and complete manner. Notice is generally required in advance of the move.

Encourage your client to attempt to negotiate an agreement governing the move prior to filing the petition

In addition to knowing the specific law on relocation, familiarize yourself with evidentiary rules. To authenticate e-mails, Web site material, or chat room evidence use the same standard and procedure as for any other type of documentary evidence. Under the Federal Rules of Evidence, documents must be authenticated properly as a condition precedent to their admissibility "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Pursuant to Rule 803, you may be able to

overcome a hearsay objection by arguing that the contents of a Web site are a public record or report. Many Web-based records also may be admissible pursuant to the business records exception to the hearsay rule. As an alternative, counsel may stipulate to the admissibility of Web material after providing the URL. Attempt to resolve challenges to admissibility in advance of trial so as to avoid lengthy evidentiary battles during the testimony.

Each state has different factors that judges consider when presented with a request for relocation. Research the law carefully and address each factor. Although factors vary, some of the most common are:

• **Is the move in the best interest of the child?** The more clearly you present evidence of a better life in the new location, the more likely the trier of fact will find that the new home will serve the child's best interest. Highlight all advantages of the move. Concentrate on better schools, a bigger or better home, a nicer community/neighborhood with children the same age as your client's, less traffic, less crime, the availability or affordability of extracurricular activities for the child, the ability to continue activities, such as ballet or karate, without compromising previous achievements.

Nothing will make a greater impact on the court than a visual presentation of the proposed location. Introduce into evidence and play for the court a video of the new community. If your client can afford it, have it filmed professionally. But remember, the videographer must be called to testify in court to properly introduce the video into evidence.

If a video is not financially feasible, use photographs. Consider putting the photographs into a PowerPoint presentation so that images can be projected onto a large-screen format. Have the judge "see" the school, community, parks, and proposed new home while your client testifies. Make sure that the visual presentation is rehearsed and that you verify that the

video equipment works in advance of trial to avoid any glitches.

Explain that the child will continue religious education and practices in the new community and have your client commit to continuing religious training, particularly if the relocating parent and child have different religious affiliations. Ask the priest, min-

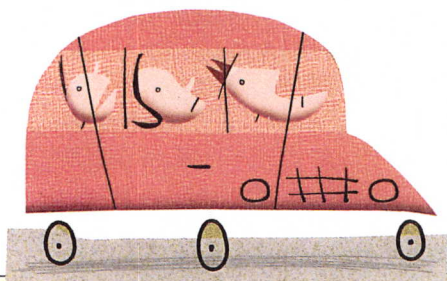
ister, or rabbi if he or she would be willing to meet with your former spouse to discuss the child's religious training. If the parent and child have different religious affiliations, this factor may gain importance, particularly if the parent who stays behind has been active in the child's religious upbringing.

Religious education

Prepare your client for cross-examination regarding a commitment to the child's faith. Have your client research available houses of worship, service schedules, and any religious preparation that may be available for the child.

One benefit of a move may be that the child can more seriously pursue a sport that could lead to a college scholarship. For example, a move from Miami to Boston would benefit a child's passion for hockey. If this is the case, have your client introduce into evidence all documentation, including the cost of the extracurricular activity.

If your client has been the "psychological parent," show that he or she is and has been the primary nurturer and, therefore, that relocating with this parent is in the child's best interest. Highlight the stability of the parent/child relationships with each



A Child Removal Checklist BY CHARLES C. ABUT

The following five areas of inquiry are essential in focusing the legal and factual issues in a child removal case.

- 1. Is there a removal statute?** The first step is to determine the controlling statutory provision.
- 2. Is there a custody statute?** Every removal case involves the same issues that are likely to arise in a child-custody setting. Examine and address custody criteria set forth in the applicable statute.
- 3. What is the relevant case law?** Naturally, there are leading cases in every jurisdiction governing child removal, including burden of proof and procedural concerns. Generally cases focus on the best interests of the child, viewed against the background of the parents' reasons for advocating or opposing the removal.
- 4. What are the local procedural rules?** No removal case can be prosecuted without a fundamental understanding of the litigation track:
 - ☐ What discovery will be allowed? Will depositions be permitted? What is the procedure for deposing an out-of-state party or witness? What is the deadline for concluding

discovery?

- ☐ What psychological or other experts may be called? May those experts be subjected to pretrial depositions? Must those experts submit a written report in advance of trial?
- ☐ Will state agencies be involved in monitoring or interviewing the parties or the child?
- ☐ Will or may a judge interview the child? On the record? May the interview be audio or video recorded? In chambers? With or without counsel? May counsel submit questions or areas of inquiry?
- ☐ How quickly will the case proceed to trial?
- ☐ What is the procedure for compelling an award of *pendente lite* counsel fees and costs? How are counsel fees and costs assessed and awarded?
- ☐ How are emergent and interlocutory appeals handled? How lengthy is the plenary appellate docket? Is there a means to accelerate or expedite matters?

- 5. What are the facts?** There is literally no limit to the facts that bear on the "best interests" of a child. In effect, the only limitations are the practical considerations of time

and money and the resourcefulness of the client and attorney, filtered through the law of evidence.

For a detailed list of fact-gathering factors to consider in a relocation case, see Viken, page 12.

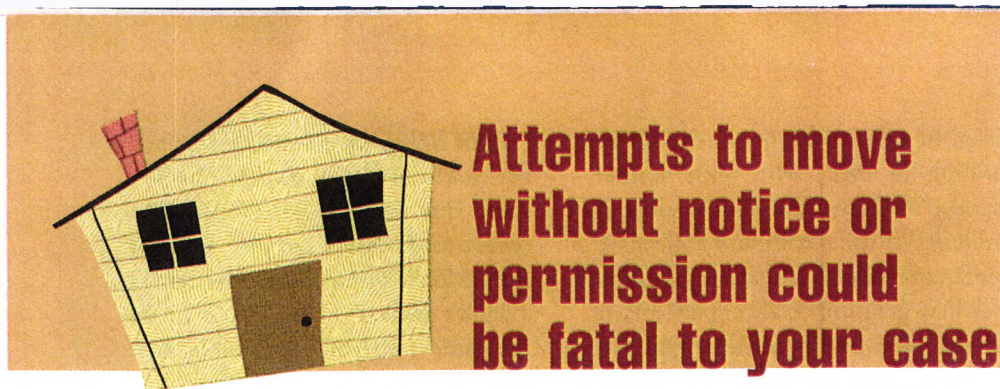
Conclusion

Child removal cases are as challenging as any cases presented to the matrimonial practitioner. As in every other difficult litigation, early mastery of the facts of the case and anticipation of the procedural and substantive issues cannot be over estimated. A thorough mastery of these five areas of inquiry should assist the family law litigator in anticipating and preparing for the legal and factual issues in a child removal case.



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parent. If the other parent has been heavily involved since notice of the relocation was provided, as opposed to previously, point that out.

If the reason for the move is proximity to a support system, demonstrate how this support system will serve the child's best interest. If after-school care will be provided by the extended family or the child will be transported to and from school by extended family, have your client testify as to the specifics. If the minor child has routinely returned to the locale and the parents have promoted relationships with long-distance family members, be certain to present this as a "family plan" that would be promoted by the move. In the above example, the move would nurture relationships with extended family, including grandparents on both sides.

If health concerns may impact the move, be certain to introduce all relevant medical documentation. Provide the court with the proximity of health-care providers, including experts in the field. Research whether the current health insurance can remain in place and, if not, the availability and cost of a new policy.

If there has been ongoing postdissolution hostility between the parents, it may not be in the child's best interest to remain in the geographic area where the negative impact may be greater. Consider introducing evidence of your client's attempts to resolve conflicts. Call teachers or school counselors to testify as to the child's school record. If the child's grades or social interactions have changed, tie any decline to the conflict and argue that distance between the parents may help improve their relationship and the

child's performance in school.

Be creative and clear in your presentation of the better life the child will have in the new location. This one factor often tips the scale in favor of relocation.

• What is the motive of the parent seeking relocation? The court will not reward a parent who is disingenuous in seeking to relocate. Generally, a history of postdissolution litigation or an ongoing acrimonious relationship between parents will be used by the other side as evidence of the past relationship to impugn relocation motives. To prove that your client's motive is genuine, introduce evidence that your client attempted to settle visitation issues before filing.

Interview your client carefully regarding motives and give guidance as to the impact of particular motives on the court. Find out what, if any, steps have been taken in furtherance of the move. Has the home been sold or the rental agreement altered? Has the child been enrolled in a new school or the current school notified of the move in advance of the noncustodial parent? These actions may prove fatal as they give credence to the notion that your client attempted to move without requisite permission or approval.

If your client has acted as if relocation is a forgone conclusion, his or her motive for doing so may be suspect. Consider hiring a mental-health professional to uncover any underlying issues before the court must rule on your client's credibility. Attempts to move without notice or permission could be fatal to your case.

Present evidence of your client's attempts to resolve a troubled rela-

tionship with the other parent, including attending therapy. If resolving a fractious coparenting relationship is the primary motive for the move, it is unlikely that the court will allow the move unless your client has taken steps to resolve the problems in counseling.

If your client has remarried, ask questions about the stability of the current marriage. Inquire specifically about domestic violence; check police and court records to ensure that the police have not been called to the home or that there have not been previous requests for protection. A court is unlikely to allow a child to move with a new family in which domestic violence has been documented.

If the motive for the move is a new job or a transfer with the same company, call the employer to confirm the terms of the offer and that the transfer is mandatory. Establish the income and benefits your client will receive in the new location. If the reason for the move is an economic one, be certain to tie the increase in funds to the child.

Your client must persuade the court that his or her motives are legitimate. Have your client assert all reasons in the hopes that the scale will tip in favor of the move.

• To what extent have contact and access been allowed and exercised? If the noncustodial parent has not exercised all available timesharing in the past, make certain that your client and the other parent testify to that. Prepare charts showing how much time was forfeited; include tardy pickups and/or early drop offs as those too result in lost time. Where applicable, present evidence that your client has offered contact over and above the scheduled time. Graph the contact exercised in the past and compare it with the proposed schedule. It may very well be that the new schedule actually provides more contact and access.

• Will the substitute contact and access schedule be adequate to

foster the parent/child relationship?

This factor presents a difficult challenge as almost every relocation will result in less frequent contact between the nonmoving parent and the child. Your presentation to the court must focus on how the parent-child relationship will continue despite the distance.

Assuming that the child is old enough to have established a parent-child bond and that he or she understands that distance does not mean a parent ceases to exist, present expert testimony regarding the child's psychological development. Obviously, a move with a child younger than three years old who has not established object permanence presents more challenges. Have your expert explain the scientific data on child development and why distance alone will not compromise the existing parent-child relationship.

Your client needs to know from the inception of the case that if a geographical relocation is granted, the child will spend most summer breaks as well as most extended school breaks with the other parent. Your client will assume 100 percent of the day-to-day school, extracurricular, and medical responsibilities for the child, whereas the other parent will share most of the "fun" time. Thus, your client's relationship with the child also will change. While both parents have lived in the same locale, the burden of daily childcare has been shared. The proposed move will require the relocating parent to carry the full load.

Remember, if the court denies relocation with the child and your client must nonetheless move or if in your state a denial of the request triggers a change of custody, the visitation offered might be the visitation received. Offer more visitation than the court is likely to award. On direct examination, your client should testify that the stay-behind parent should have the child for at least 70 percent of the summer and 100 percent of spring break and Thanksgiving week-

end every year. In addition, since most schools have at least one long weekend a month, offer those weekends as well. Highlight that while the contact may be less frequent than in the past, the extended periods allow for more quality time.

Offer the other parent the ability to travel to the new home for visitation on short notice. With respect to "contact," offer to have a private telephone line with a toll-free number installed in the child's room, a computer with Internet access, e-mail, and other conferencing software, a scanner or fax to e-mail homework, projects, or report cards.

Many schools now offer online services for parents to review student assignments and contact teachers; if the new school provides such interaction, be certain to present evidence of it to the court, explaining that it will serve as another level of "contact" between parent and child. Explain that although virtual visitation is not optimal, it is adequate to keep the stay-behind parent connected with the child. Making these offers also shows that the move is not motivated by an intent to frustrate the other parent's contact rights.

• **Can the parties afford the transportation costs?** Your client will need to assume some, if not all, of the transportation costs. Sometimes child support is reduced to meet the cost of exercising contact and access.

If the new home is within driving distance of the other parent's home, your client should offer to drive at least some of the time. Driving times are often unpredictable. Consider hiring a private investigator to drive the route from the new home to the other parent's home on random days that correlate to the expected visitation days. Have the investigator testify as to when he drove the route, the distance logged, and the time it took, as well as driving conditions.

If airline travel is required, hire a travel agent to testify as to the average cost of airline tickets as well as the fre-

quency of the routes between the two locations. Address any seasonal changes or restrictions in airline travel between the two locations. Check with airlines to determine if the child is of sufficient age to travel as an unaccompanied minor and remember to factor that cost into travel expenses. (For general rules governing unaccompanied minors traveling alone, see Eisel page 28.)

If the stay-behind parent conducts business in the proposed location, argue to the court that the parent can travel to the jurisdiction without incurring added expenses. If your client's new home has a guesthouse, offer accommodations to the stay-behind parent at no charge during visitations with the child. The goal is to show the court that your client is willing to shoulder the cost and/or responsibility of transportation to accommodate visitation.

• **What is the child's preference?**

Most jurisdictions do not allow children to testify. Even if your jurisdiction allows consideration of the child's preference, such testimony requires a finding that the child is of sufficient age and maturity to express a preference worthy of consideration. The challenge here is how to present the child's preference to the court. Consider seeking the appointment of a guardian *ad litem* who may testify as to the child's preference. If your jurisdiction limits a guardian *ad litem's* testimony and the report by the guardian is subject to hearsay rules, consider stipulating to the child's preference.

• **Will the move enhance the standard of living of the custodial parent and the child?**

Here you should focus on the limitations of the current location. Perhaps your client cannot afford to own a home if required to remain in the current jurisdiction. If the demographics of the new community are more cosmopolitan or diverse than the current one, emphasize social opportunities the new location will afford. Perhaps the child will learn a foreign language and/or be exposed to

different people and cultures.

Research schools and day-care providers; present testimony on the differences between the schools/day-care providers in each locale highlighting the shortcomings of the current school/provider. Get statistics on classroom sizes and the ratio of students to teacher. Find out how many teachers in each school have postgraduate degrees. Determine if the schools have won awards. Compare curriculums and standardized test results. What types of extracurricular activities and competitive sports are offered at each school. If the child is in high school, get statistics on how many students are admitted to Ivy League colleges, four-year universities, and community colleges.

If the child is going into middle or high school and must change schools, present evidence showing how many classmates are likely to go with the child to the new school. By showing that the child will, in any event, have to make new friends, the court may find that staying in the current locale to preserve peer relationships is less important.

Prepare demonstrative graphs comparing the cost of maintaining the family's lifestyle in both places. If the noncustodial parent's child support payments are routinely late or minimal, emphasize that payments are not enough to sustain the predissolution lifestyle.

The new location may have a higher cost of living; however, your client may have free housing with family or a support system that would provide day care. Perhaps the public school is better than the private one thereby reducing monthly expenses even further. The move may result in significant reductions in costs and may lead to major savings, allowing resources to be funneled to other needs.

Investigate the crime rates in both locations; highlight violent crimes or crimes against children. Remember to check the registry of sex offenders in both locations. Argue that the other

parent only opposes the move because of a desire to remain in a superior financial position.

• **Once outside the jurisdiction is the nonresidential parent likely to comply with a substitute contact and access schedule?** Generally speaking the best measure of future behavior is past behavior. If your client has not denied the other parent contact in the past, your client's ability and/or willingness to comply with the substitute contact and access should not be questioned. If the opposite is the case, offer to post a bond to secure compliance. (See "Child Custody Bonds" on page. 42.)

Returning to our fact pattern, it was important that Mom, who sought permission to relocate, acknowledge that being separated from his son was heartbreaking for Dad. Mom testified that she understood that Dad was a great father; in fact she acknowledged that they made a good team and that she expected the teamwork to continue irrespective of the distance. She also testified that she knew that he would continue to be a great dad, and she would do everything to ensure his involvement. She facilitated that involvement by offering substantial visitation.

In our fact pattern, finances were a nonissue. Mom found a home in an upscale suburban community with a guesthouse, which she offered to Dad whenever he flew to New York for visitation. She provided a toll-free telephone number with a private line in the child's room as well as a computer with Internet access. She declined to provide a Web cam for video conferencing because of recent reports involving the misuse of such devices by child sexual predators.

She researched and agreed to purchase interactive games that father and son could play in real time over the Internet as well as a scanner for sending the child's homework, report cards, progress reports, artwork, and other documents to his dad on a daily basis. Mom agreed that Dad could

check and sign homework and e-mail it back after scanning it with his signature. Mom also suggested that Dad could accompany their son on field trips whenever his schedule permitted. Since Dad was in private practice and testified as to his ability to manipulate his schedule, the court was persuaded that he could accommodate considerable contact and access in both Miami and New York.

The fact that both extended families lived in New York also tipped the scales in favor of relocation. Mom testified that she would allow their son to spend time with his paternal relatives; including on Jewish Holidays so that he could participate in traditions celebrated by his dad's family.

With a heavy heart, the court granted the request for relocation.

When a parent seeks to relocate with children, there is always a loser. Even in the above example where Mom was so accommodating, Dad would feel the real loss of not being able to read a book to his son every night and tuck him into bed. Dad could no longer pick up his son from school routinely and coach his soccer team. For Dad the loss of participation in his son's day-to-day activities and of spontaneous contact was heartbreaking. The fact that the motive for the move was pure or that the child would benefit from the move did little to lessen the loss.

Relocation cases are fact intensive. All relevant facts must be presented in a clear manner. Prepare your case carefully using all available resources, including demonstrative evidence. Despite the existence of statutes and case law, no bright-line rules allow either party to predict with any certainty the end result. With thorough preparation, you can present a viable, persuasive move-away plan for your client. **FA**

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