CHILD CUSTODY LAW IN GEORGIA JEOPARDIZES THE RIGHT OF CUSTODIAL PARENTS TO RELOCATE: BODNE V. BODNE

by:

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Parents in Georgia may need to reconsider moving out of state, or they could risk losing custody of their children. The November 10, 2003 decision by the Supreme Court of Georgia in Bodne v. Bodne, 588 S.E.2d 728 (2003) (Benham, J., dissenting) has overruled or otherwise affected nearly one hundred years of child custody law, and it has rescinded the well established presumption that custodial parents have a *prima facie* right to retain custody.

In Bodne v. Bodne, the parties, Rachel Ann Bodne and Dr. David Bodne, divorced in 1999. The divorce decree provided them joint legal custody of parties' two minor children and granted primary physical custody of the children to Dr. Bodne. The parties agreed to share the children in an equal amount of time, and they anticipated alternating time with the children every two (2) weeks. In 2001, Dr. Bodne remarried, and he informed his ex-wife that he planned to move with the children from Georgia to Alabama. Dr. Bodne filed a petition to modify Rachel Ann Bodne's visitation in contemplation of his upcoming move. Rachel Ann Bodne filed a counterclaim in which she opposed the move and sought primary physical custody of the children. The trial court awarded primary physical custody to Rachel Ann Bodne, and Dr. Bodne appealed.

The Court of Appeals reversed the trial court, finding that the evidence did not support a change in custody. Applying Ormandy v. Odom, 217 Ga.App. 780(1), 459 S.E.2d 439 (1995), the Court of Appeals held that a trial court may presume that relocation by the custodial parent is in the best interests of the child. The Supreme Court granted Rachel Ann Bodne's petition for writ of certiorari to determine how much weight should be given to the move from Georgia to another state by a custodial parent in an action by the non-custodial parent seeking a change in primary physical custody.

The Supreme Court reversed the Court of Appeals and overruled Ormandy v. Odom, *see supra*, and "any other Georgia case [that] presumes the custodial parent has a prima facie right to

retain custody unless the objecting parent shows that the environment of the proposed relocation endangers a child's physical, mental or emotional well-being." As a result of the Bodne decision, when a custodial parent relocates from Georgia, this relocation will allow the non-custodial parent to petition the trial court for custody. The relocating parent will not lose custody automatically, but the relocation is a sufficient change in condition to enable the non-custodial parent to seek a change of custody. The Court further held that "in relocation cases, as in all child custody cases, the trial court must consider the best interests of the child." "[A]ll other rights are secondary, and . . . any determination of the best interests of the child must be made on a case-by-case basis." The trial court may not "presume that a custodial parent's decision to move is affirmatively in the best interests of the child." In addition, "[t]his analysis forbids the presumption that a relocating custodial parent will always lose custody, and conversely, forbids any presumption in favor of relocation." Bodne, *supra* at 729.

Before Bodne, a custodial parent had a *prima facie* right to retain custody, and the trial court was required to favor the custodial parent. In order to change custody, the trial court had to determine either that: (1) the original custodian was no longer able or suited to retain custody; or (2) that conditions surrounding the child had so changed that modification of the original judgment would promote the child's welfare. *See* Ormandy, *supra* at 440. These standards contemplated a change for the worse in the custodial parent's environment, not an improvement in the non-custodial parent's environment. Relocation out of state was not, in and of itself, a sufficient change in condition that would enable a court to change custody. However, appellate courts had undertaken to define, on a case by case basis, whether relocation from Georgia, when combined with other certain other factors, constituted a sufficient change in condition that enabled the trial court to modify custody.

The majority of these appellate court decisions held that relocation plus other factors did not justify custody changes. For example, a change in custody was not justified where the custodial mother moved to a new county and refused to allow the children to continue their education at the Hebrew Academy where they had attended school for the previous two years. Bisno v. Bisno, 238 Ga. 328, 232 S.E.2d 921 (1977). Relocation by the mother, her husband and the child from Georgia to Mississippi, more than four hundred miles from their Georgia residence, and the resulting inconvenience and expense to the father, did not support a change of custody. Moore v. Wiggins, 230 Ga. 51, 195 S.E.2d 404 (1973). An increase in the child's age by nine years and a move by the non-custodial father from Georgia to Oregon, more than 3,500 miles from the child, did not authorize a custody change. Grubbs v. Dowse, 226 Ga. 763, 177 S.E.2d 237 (1970). In Harrison v. Kelly, the mother's relocation that required the non-custodial father to travel approximately two hundred and fifty miles instead of twenty miles in order to exercise visitation, and the father's subsequent inability to retrieve and return the child in the same day, were not changes in conditions affecting the child's health, welfare, or best interests, and the mother's relocation did not warrant a change in custody. 209 Ga. 537, 74 S.E.2d 546 (1953). In Helm v. Graham, the mother's remarriage and her plan to move to North Carolina were insufficient changes to authorize a change in custody. 249 Ga.App. 126, 547 S.E.2d 343 (2001). The mother's refusal to allow more visitation rights than provided by divorce decree, her failure to consult with the father on important decisions affecting the children in violation of the divorce decree, and her move to Massachusetts did not provide a basis for changing custody from the mother to the father. Mahan v. McRae, 241 Ga.App. 109, 522 S.E.2d 772 (1999). A custodial mother's move to Virginia, solely in support of her husband's career, in which the child had numerous relatives in Georgia and none in Virginia, and which would effectively terminate the father's ability to exercise visitation did not warrant a

modification of custody. Ofchus v. Isom, 239 Ga.App. 738 , 521 S.E.2d 871 (1999). In Tenney v. Tenney, 235 Ga.App. 128, 508 S.E.2d 487 (1998), the trial court was not authorized to change primary custody from the father to the mother only if the father moved to Florida, but allow the father to remain primary physical custodian if he did not move to Florida. Failure to give notice of relocation to the non-custodial parent did not support finding a change in condition and subsequent change in custody. In the Interest of R.R., 222 Ga.App. 301, 474 S.E.2d 12 (1996).

Only a handful of appellate decisions have held that relocation, even when combined with other factors, supported finding a change in condition and subsequent change in custody, as follows:

(1) Mother relocated frequently with the children, the children lived with three step-siblings with whom they did not get along, and evidence existed of improper contact between stepfather and young girls; Adams v. Heffernan, 217 Ga. 404, 122 S.E.2d 735 (1961);

(2) Father relocated with the children more than one thousand miles away from the mother, he refused to allow the mother to see the children when she traveled the distance to visit with them, he interfered with mother's telephone access to the children, and he prejudiced the children against their mother; Jones v. White, 209 Ga. 412, 73 S.E.2d 187 (1952);

(3) Father absconded with the child to Alabama, denied the mother visitation on approximately six occasions and was sometimes found in contempt as a result, and attempted to alienate the child from his mother; Holt v. Leiter, 232 Ga.App. 376, 501 S.E.2d 879 (1998);

(4) Father, father's children, the former wife of father's former wife's new husband, her two children, and another young woman moved to a trailer in a location where the children had no other contacts. Fortson v. Fortson, 152 Ga.App. 325, 262 S.E.2d 599 (1979).

The Bodne decision continues an apparent shift in the perspectives of the Georgia appellate courts with respect to child custody laws and demonstrates the renewed attention to implementing the best interests of the child standard. In 2001, the Court of Appeals held that, in a joint physical custody arrangement, relocation by one parent to another county constituted a sufficient change in condition to authorize a change of custody. In Lewis v. Lewis, 252 Ga.App. 539, 557 S.E.2d 40 (2001), the parties' divorce decree provided for joint legal and shared physical custody. The divorce decree did not designate either parent as primary physical custodian, yet the court found that the mother had the children approximately 60% of the time and the father had the children approximately 40% of the time. The Court of Appeals determined that the parties had joint physical custody in which neither parent was entitled to deference because each parent had a *prima facie* right to custody. Therefore, the trial court was required only to apply the best interests of the child standard. *See* Lewis, *supra*, 557 S.E.2d at 42.

In Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003), the Supreme Court of Georgia disapproved self-executing custody provisions which were previously authorized under Carr v. Carr, 263 Ga. 451, 435 S.E.2d 44 (1993). The Scott's divorce decree provided them with joint custody with Ms. Scott having primary physical custody. The divorce decree also provided that if Ms. Scott moved out of Cobb County, her move would constitute "a material change in circumstances detrimentally affecting the welfare of the minor child and that . . . primary physical custody of the minor child shall automatically revert to [Mr. Scott]." Scott v. Scott, *supra* at 878. The Court determined that self-executing custody provisions failed to provide for a determination of the best interests of the child at the time the change of custody would occur. Because the best interests of the child are paramount, an automatic custody determination violates Georgia public policy, and the best interests of the child must be evaluated at the time the modification is sought.

In a lengthy dissenting opinion in Bodne, Justice Benham, joined by Justice Carley and Justice Thompson, predicts the problems that may arise in child custody modifications due to the changed law and the Court's present direction. First, the dissent anticipates increased litigation due to our mobile society in which parental relocation has become common and the new law which eases the standard to enable non-custodial parents to seek a change in custody. Second, the dissent criticizes the majority opinion for substituting concrete and defined guidelines with vague rules for resolving conflicts regarding the custody of children. The dissent notes that parents, including Dr. Bodne, often relocate in order to obtain better employment and increased financial stability. The dissent disapproves of the majority opinion's view that relocating to enhance economic opportunity is a negative factor and indicates that financial stability may foster children's well-being. *See* Bodne, *supra* at 732.

In contrast to the dissent's criticisms, one benefit of the Bodne decision may be the greater discretion allowed to trial court to make decisions. Trial courts will no longer be prevented from changing custody, even in cases when relocation would have a detrimental effect on the child. Whether the dissent's anticipated problems will materialize or whether children will benefit from the Bodne decision, this decision will certainly have broad and dramatic consequences for families, children of divorce, and family law practitioners.