

# Guaranteed Employment and Relocation: Is It Time to Reexamine New Jersey's *Baures* Standard?

by Cheryl E. Connors

In the recent decision of *Benjamin v. Benjamin*,<sup>1</sup> the court held that it is not a mandatory prerequisite for a parent to have a guaranteed job to prevail in a relocation application. Rather, the court must evaluate whether there is a “likelihood that the custodial parent can provide the child with a financially stable household in the new state, including employment as necessary.”<sup>2</sup> The court reached this decision based on application of the standard established in *Baures v. Lewis*.<sup>3</sup>

In *Baures*, the New Jersey Supreme Court clarified the standard and burden of proof applicable to an application by a custodial parent to relocate outside of the state of New Jersey. Beginning with an analysis of N.J.S.A. 9:2-2, which precludes removal of a child “without the consent of both parents, unless the court, upon cause shown, shall otherwise order,” the Court discussed the progression of case law in evaluating the “cause” provision of the statute.<sup>4</sup> The Court first examined *Cooper v. Cooper*,<sup>5</sup> in which the Court established a requirement that a parent show a “real advantage” to the relocation, and noted the *Cooper* Court’s reasoning that “[t]he custodial parent who bears the burden and responsibility for the child is entitled, to the greatest possible extent, to the same freedom to seek a better life for herself or himself and the children as enjoyed by the noncustodial parent.”<sup>6</sup> The Court next considered *Holder v. Polanski*,<sup>7</sup> in which the Court held that the real advantage test was too great a burden on the custodial parent and that “any sincere, good-faith reason will suffice.”<sup>8</sup>

To clarify confusion regarding the standards discussed in *Cooper* and *Holder*, the *Baures* Court delineated a standard that the moving party bears the burden<sup>9</sup> of proof and “should produce evidence to establish *prima facie* that (1) there is a good faith reason for the move and (2) that the move will not be inimical to the child’s interests.”<sup>10</sup> In making that determination, the Court establishes 12 factors for consideration:

1. the reasons given for the move;
2. the reasons given for the opposition;
3. the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move;
4. whether the child will receive educational, health and leisure opportunities at least equal to what is available here;
5. any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location;
6. whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child;
7. the likelihood that the custodial parent will continue to foster the child’s relationship with the noncustodial parent if the move is allowed;
8. the effect of the move on extended family relationships here and in the new location;
9. if the child is of age, his or her preference;
10. whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent;
11. whether the noncustodial parent has the ability to relocate;
12. any other factor bearing on the child’s interest.<sup>11</sup>

The Court further noted that “[v]isitation is not an independent prong of the standard, but an important element of proof on the ultimate issue of whether the child’s interest will suffer from the move.”<sup>12</sup>

In establishing this standard, the Court relied on various findings by social scientists that “uniformly confirmed that simple principle that, in general, what is good for the custodial parent is good for the child,”<sup>13</sup> and that “so long as the child has regular communica-

tion and contact with the noncustodial parent that is extensive enough to sustain their relationship the child's interests are served."<sup>14</sup> The Court relied on the studies that concluded that no connection exists "between the duration and frequency of visits and the quality of the relationship of the child and the noncustodial parent."<sup>15</sup>

The principles of *Baures v. Lewis* were reaffirmed by the New Jersey Supreme Court in *Mackinnon v. Mackinnon*<sup>16</sup> in the context of an application to relocate to a foreign country. The Court categorized the *Baures* factors into three groups. The Court explained that the first and third factors concern whether the custodial parent has a good faith reason to move.<sup>17</sup> The second, sixth, seventh and 11th factors relate to the noncustodial parent's visitation and continuing relationship with the child.<sup>18</sup> The fourth, fifth, eighth, ninth, and 10th factors address whether there is any potential harm to the child in relocating.<sup>19</sup> Lastly, the Court noted that the 12th catchall factor allows for a flexible standard, and further explained that "not all factors will be relevant and of equal weight in each case."<sup>20</sup>

In light of the standard established by the Supreme Court, the trial court in *Benjamin* addresses the issue of guaranteed employment for the custodial parent in the new state. In *Benjamin*, the parties shared joint legal custody of their 11-year-old daughter.<sup>21</sup> The father had parenting time every other weekend and a mid-week dinner visitation but did not regularly exercise his time. The mother filed an application seeking to relocate from New Jersey to North Carolina. The court's decision focused on one of the father's primary stated reasons for opposing the relocation, namely that the mother had no guaranteed employment in North Carolina and had secure long-time employment in New Jersey.<sup>22</sup>

Relying on *Baures v. Lewis*, the court noted that no mandatory requirement exists for a custodial parent to have a specific job or promise of guaranteed employment in the new state.<sup>23</sup> Although employment is not a specific factor, the issue of a custodial parent's employment is relevant to the fourth factor under *Baures*, which directs the court to consider "whether the child will receive educational, health and leisure opportunities at least equal to what is available here,"<sup>24</sup> as well as the 12th catchall factor. The court aptly explained hypothetical scenarios under which a mandatory job requirement would not make sense: "if a moving parent (a) has significant financial support from other family members such as parents or a new spouse, or (b) has traditionally been

a homemaker with young children and no remarkable work history, or (c) is disabled and out of the labor force, or (d) is independently wealthy."<sup>25</sup>

The court further noted the impracticality of requiring a custodial parent to have a guaranteed job in light of the time gap between filing a motion for relocation and a decision being rendered after the conclusion of a hearing.<sup>26</sup> In light of the economic downturn, the court reasoned that it would be an unrealistic hurdle to expect an employer to hold a position for a new employee who cannot commit to a start date while still residing in New Jersey, and further cannot commit to accept the job due to an ongoing custody litigation.<sup>27</sup> The custodial parent in *Benjamin* presented evidence that she had been offered a job in North Carolina but was unable to accept it because of the ongoing litigation.

The court held "[t]he most practical and relevant inquiry is not whether the moving parent has a guaranteed job, but rather whether she has a reasonable plan for providing the child in her care with an economically stable home in the new state."<sup>28</sup> In that vein, a court must examine "employability" and "work history" as relevant considerations in a party's overall financial stability.<sup>29</sup> In addition to considering employability, a court must examine whether other financial considerations make the move financially reasonable, such as family members who are available to provide daycare, affordability of housing, a less competitive job market or a reasonably calculated risk to undertake a potentially lucrative opportunity.<sup>30</sup> Although a guaranteed job is not necessary, the court averred that a custodial parent should not be permitted to leave a stable economic environment in New Jersey to relocate to an unstable economic environment, because such a move may be financially inimical to a child's interests.<sup>31</sup>

The court granted the custodial parent's application to relocate with the child, concluding her application was reasonable and the move was not financially inimical to the child's interests despite her lack of employment.<sup>32</sup> The court found that it was likely the custodial parent would obtain employment in light of her work history, her previous offer of employment and her marketable skills. It further noted the custodial parent had a goal to buy a home in North Carolina, which she could not afford to do in New Jersey, and that her husband was likely to find employment in North Carolina, as he worked as a department head at a national chain store. As such, the court found the move was not inimical to the child's interests.

While the *Benjamin* decision is in line with the standard established by the New Jersey Supreme Court in *Baures*, the question is whether the pendulum has swung too far. Is it more important for the custodial parent to be able to relocate so she can own a home one day or more important for a child to have regular, weekly contact with the father? The *Benjamin* decision makes a practical point that the time lapse between a parent making an application and a court being able to make a decision in large part prevents a parent from being able to secure guaranteed employment, unless there is some connection between the potential employer and parent or the parent possesses some highly specialized skill.

While this may be a practical reality, should the unavoidable shortcomings of the judicial system be a basis to make it easier for a parent to move a child away from the other parent? In the *Benjamin* matter, the court makes note that the father was not regularly exercising his parenting time, and as such, the court may have considered that the lack of weekly visitation resulting from a move would not have an adverse impact on the child in that case. Likely, granting the application for relocation was the appropriate result in that case, but the decision has far more sweeping implications.

On the opposite end of the spectrum from the *Benjamin* decision, many out-of-state courts, applying a more stringent standard than New Jersey, have denied an application to relocate despite evidence that an employment opportunity would result in increased earnings and would be beneficial to children because of the impact on the relationship with the noncustodial parent.<sup>33</sup> Likewise, some out-of-state courts have actually transferred custody to the noncustodial parent where a custodial parent moved due to an out-of-state employment opportunity.<sup>34</sup> One state, which applies a best interests standard, includes a specific factor relating to employment, namely “the extent to which the relocating parent’s income or employment will be enhanced” by the relocation.<sup>35</sup> The author believes, at the very least, New Jersey should consider adding such a specific factor to the *Baures* standard.

It is the author’s opinion that the *Benjamin* decision demonstrates the progression of New Jersey case law, which has now reached a point where a parent is permitted to relocate with a child on the sheer speculative hope that life in another state will be less expensive, they will

be able to find employment, and some day they will be able to own a home. The *Benjamin* court is correct that this is an adequate and good faith reason to move under the current standard.

The courts established this standard based, in large part, on social science in 2001, which taught that a happy parent means a happy child. The *Benjamin* decision brings to light that it may be time to re-examine the 12-year-old social science the Supreme Court relied upon in reaching its decision in *Baures*. The same countervailing interests that existed when *Baures* was decided remain at odds today in a relocation application, specifically the custodial parent’s right to establish a new life post-divorce and the noncustodial parent’s relationship with the child post-divorce.<sup>36</sup> Perhaps more recent social science studies have examined the theory that technological advances make it easier to sustain a parent-child relationship over long distances. Can technology replace a hug hello or goodbye, the smiling face of a parent cheering on their child at a soccer game, or the talks between parent and child that happen every day in the car rides between two homes and school sufficiently to sustain the noncustodial parent’s relationship with the child? It is the author’s opinion that the good faith basis should require something more than a speculative hope that life will be better; it should require an actual and tangible good faith reason for the move to better the life of the family in the new state.

In this author’s opinion, the impact of a relocation on a child is profound, and when a parent has chosen, for better or for worse, to marry and have children with someone in New Jersey, they made that decision voluntarily and knowingly. The decision to raise children in New Jersey should not be lightly discarded because they wish to establish a new life. In light of the impact on a child’s relationship with the noncustodial parent, any move out of state by the custodial parent should be a carefully weighed decision, and at a minimum, include a well-thought-out plan for employment, housing, schooling, etc., which will be superior to life in New Jersey where the child resides near both parents. ■

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## Endnote

1. 430 N.J. Super. 301 (Ch. Div. 2012).
2. *Id.* at 303.
3. 167 N.J. 91 (2001).
4. *Id.* at 109 (quoting N.J.S.A. 9:2-2).
5. 99 N.J. 42 (1984).
6. *Baures*, 167 N.J. at 110-11 (quoting *Cooper*, 99 N.J. at 55-58).
7. 111 N.J. 344 (1988).
8. *Baures*, 167 N.J. at 112-13 (quoting *Holder*, 111 N.J. at 352-53).
9. *Id.* at 118-19. The Court notes that it is “not a particularly onerous one,” and once it is established, “the burden of going forwards devolves upon the noncustodial parent.”
10. *Id.* at 118.
11. *Id.* at 116-117.
12. *Id.* at 122.
13. *Id.* at 106.
14. *Id.* at 107.
15. *Id.*
16. 191 N.J. 240 (2007).
17. *Id.* at 251.
18. *Id.*
19. *Id.*
20. *Id.* at 250 (quoting *Baures*, 167 N.J. at 117).
21. *Benjamin*, 430 N.J. Super. at 303.
22. *Id.* at 304.
23. *Id.* at 305.
24. *Id.* at 304.
25. *Id.* at 305.
26. *Id.*
27. *Id.* at 305-306.
28. *Id.* at 307.
29. *Id.* at 308.
30. *Id.*
31. *Id.* at 308.
32. *Id.* at 310-311.
33. See, e.g., *Foehy v. Knickerbocker*, 130 S.W.3d 730 (Mos. Ct. App. E.D. 2004) (denying application for relocation despite evidence of new job with an increased salary because the custodial parent did not present evidence of where she would live, where the child would attend school or how her increased salary would benefit the child); *Hardin v. Hardin*, 618 S.Ed. 2d 169 (Ga. Ct. App. 2005) (denying custodial mother’s application to move out of state due to the fact that mother could only find suitable employment outside the state and would have an increase in income which was beneficial to children because relocation deprived children of contact with father); but see *Woodside v. Woodside*, 949 N.E.2d 447 (Mass. App. Ct. 2011) (applying the “real advantage” test and granting relocation application despite custodial parent’s speculative job prospects because custodial parent would be close to family members and her quality of life would be improved). See also *In re Martin & Martin*, 8 A.3d 60, 62 (N.H. 2010) (finding that relocation would not result in an improvement to custodial parent’s financial status because she currently had full time employment in New Hampshire and showed no comparable job prospects in Rhode Island).
34. See, e.g., *Ex parte Monroe*, 727 So. 2d 104 (Ala. 1999) (transferring custody from mother to father because mother accepted an employment opportunity in Michigan and child would be detrimentally affected by ceasing contact with his father and extended family); *In re Marriage of Downing*, 432 N.W.2d 692 (Iowa Ct. App. 1988) (holding that the child’s special needs required continuity in a secure and stable environment requiring that custody be transferred to the father despite mother’s request to move for advancement in her nursing position); *Lavelle v. Freeman*, 181 A.D.2d 976 (N.Y. App. Div. 3d Dep’t 1992) (approving change of custody to noncustodial father despite custodial mother’s husband’s transfer from New York to Missouri to accept a promotion because transfer was for economic betterment rather than economic necessity); *Burr v. Emmett*, 249 A.D.2d 614 (N.Y. App. Div. 1998) (transferring custody despite custodial mother’s well intentioned plans to move from New York to California to pursue a career as a lyricist because her plans were speculative and did not justify relocation).
35. See *Wild v. Wild*, 737 N.W.2d 882, 903 (Neb. Ct. App. 2007).
36. *Baures*, 167 N.J. at 110.

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