

THE LAW OF REMOVAL IN MASSACHUSETTS: WHAT PARENTS AND PRACTITIONERS SHOULD KNOW

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When a parent wants to move with the child outside of Massachusetts, and the other parent does not consent to the removal, a complex legal analysis must be undertaken in order to determine the rights and responsibilities of the parents and the child. If the parties cannot come to an agreement themselves, a Guardian Ad Litem (GAL), usually an attorney, is often appointed to investigate and report on the matter. The parties might settle after the GAL report but, if not, each has a right to pursue the case to trial and have a judge decide the matter.

This article seeks to explain the law of removal – and to be of use to both parties and practitioners.

I. The Removal Statute

The Massachusetts removal statute, G.L. c.208 s.30, provides that:

A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance a probate court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders. The court, upon application of any person in behalf of such child, may require security and issue writs and processes to effect the purposes of this and the two preceding sections.

A. Is a Child of Suitable Age to Consent?

The threshold inquiry in a removal matter is whether the child is of suitable age to signify consent for purposes of G.L. c.208 s.30. There is no case law interpreting the “suitable age” provision of the statute.

B. “Upon Cause Shown”

Assuming that the child is not of suitable age, the second prong of the statute obtains. A child cannot be removed in the absence of mutual parental agreement “unless the court upon cause shown otherwise orders.” “Upon cause shown” means that the removal must be in the best interests of the child. *Yannas v. Frondistou-Yannas*, 396 Mass. 704, 711 (1985).

II. Primary or Shared Custody?

The next inquiry is whether the parent seeking removal was the primary custodial parent or whether the parents shared custody. If the parent is the primary custodial parent, then the *Yannas* “real advantage” test applies. If the parents share physical custody, then the court must use a “best interests of the child” analysis as articulated in *Mason v. Coleman*, 447 Mass. 177 (2006).

The article will primarily focus on the “real advantage” test and, at the end, will briefly describe the much simpler “best interests of the child” removal test of *Mason*.

III. Primary Custody: The “Real Advantage” Test

A. The Basics

Where one parent has primary physical custody, the “best interests of the child” is determined by applying the “real advantage” test. To determine whether a parent has primary physical custody, the court will look to the actual parenting plan – the plan, or the “custodial label” articulated in the agreement, is not dispositive, as the Appeals Court reminds us in *Woodside v. Woodside*, 79 Mass.App.Ct. 713 (2011).

Where the parties have eschewed traditional custodial terminology, the judge must make ‘a factual inquiry’ to determine the approximate custodial arrangement.

Woodside at 717, citing *Altomare v. Altomare*, 77 Mass.App.Ct. 601, 606 (2010) and *Abbott v. Virusso*, 68 Mass.App.Ct. 326, 327-330 (2007).

The Supreme Judicial Court enunciated the “real advantage” test in *Yannas* and the test is premised on the notion that:

the best interests of the child are so interwoven with the well-being of the custodial parent, [that] the determination of the child's best interest requires that the interests of the custodial parent be taken into account.

Yannas at 710.

The first consideration is whether there is a good reason for the move, a "real advantage." The custodial parent must establish a good, sincere reason for wanting to remove to another jurisdiction. "The presence or absence of a motive to deprive the noncustodial parent of reasonable visitation" is also a relevant consideration." *Yannas* at 711.

If the court finds no "real advantage" to the custodial parent from the contemplated move, the analysis ends and the court is compelled to dismiss the complaint for removal (or modification).

Should the court find a "real advantage" to the custodial parent, the inquiry becomes whether or not the move is consistent with the children's best interests. This is the second consideration.

At this point in the inquiry:

It is important to emphasize that consideration of the advantages to the custodial parent does not disappear, but instead remains a significant factor in the equation. "[B]ecause the best interests of a child are so interwoven with the well-being of the custodial parent, the determination of the child's best interest requires that the interests of the custodial parent be taken into account." *Yannas*, 395 Mass. at 710, quoting from *Cooper v. Cooper*, 99 N.J. 42, 54, 491 A.2d 606 (1984). Common sense demonstrates that there is a benefit to a child in being cared for by a custodial parent who is fulfilled and happy rather than by one who is frustrated and angry.

Pizzino v. Miller, 67 Mass. App. Ct. 865, 871(2006).

In order to determine a child's best interests in the *Yannas* test, the court

must consider:

whether the quality of the child's life may be improved by the change (including any improvement flowing from an improvement in the quality of the custodial parent's life), the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent, and the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child. *Yannas*, 395 Mass. at 711.

Pizzino at 871.

Finally, the court must consider the interests of the noncustodial parent. Apart from the benefit to the child of continued association with the noncustodial parent, that parent has an independent interest in continued, meaningful involvement with the upbringing of his or her child. While "[t]he fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling," *Yannas, supra* at 711, the separate right of that parent to a meaningful role in the child's life is a factor that must be taken into account.

An appellate court framed the "real advantage" as a nuanced and sensitive balancing of interests:

The purpose of the statute is to preserve the rights of the noncustodial parent and the child to maintain and develop their familial relationships, while balancing those rights with the right of the custodial parent to seek a better life for himself or herself in another State or country." *Wakefield v. Hegarty*, 67 Mass. App. Ct. 772, 775, 857 N.E.2d 32 (2006).

B. Is there a Good and Sincere Reason for Removal?

The custodial parent must establish a "good, sincere reason" for wanting to remove the child to another jurisdiction. "The presence or absence of a motive to deprive the noncustodial parent of reasonable visitation" is also a relevant consideration." *Yannas, supra* at 711.

Here, the court must both consider the soundness of the parent's reason for removal and the presence or absence of a motive to deprive the non-custodial parent of reasonable visitation. *Wakefield* at 775.

As to the soundness of the reason for removal, this is a fact-intensive inquiry. Below are a few factors that tend to present themselves with regularity in our practice and in the caselaw.

C. Common Reasons for Removal

1. Following a Spouse

A common theme involves a request to move in order to follow a spouse who intends to move often for a job. This fact alone is a *per se* real advantage sufficient to pass the first prong of *Yannas*. It may not be sufficient, ultimately, to justify a removal. See *Dickenson, supra* (affirming denial of removal notwithstanding trial court's conclusion that mother evidenced sincere reason to move to be with new spouse).

Further, a court may consider the fact that the removing parent had the opportunity for employment closer to home, *Prenaveau v. Prenaveau*, 75 Mass.App.Ct. 131, 142-43 (2009) (applying a *Mason* analysis.)

2. Financial Security

Financial security can be a positive indicator for removal. See, e.g. *Signorelli v. Albano*, 21 Mass. App. Ct. 939, 940 (1985) ("new husband had moved from Massachusetts to New Jersey because of . . . an increase in salary from \$60,000 to \$95,000 annually, plus a stock interest of \$1,700,000 . . .").

In some cases, the cost of travel can impact financial security. See, e.g. *Dickenson v. Cogswell*, 66 Mass.App.Ct. 442 (2006) ("The cost of flying the child back and forth will also pose a significant financial burden on the family.")

3. Parent has Family or Support System in the Place to which Removal is Sought

In many cases, that a parent would be closer to relatives, friends, and/or a strong support system can be a factor favoring removal. For example, a mother was permitted to remove to St. Croix where she grew up and where her extended family lived. *Wakefield, supra*.

4. Lack of Family or Support System in Massachusetts

The lack of support system in Massachusetts can be a factor that favors removal. See *Cartledge v. Evans*, 67 Mass.App.Ct. 577, 582 (Trainor, J. dissenting) (parent cannot credibly claim that she has “no support system in Massachusetts.”)

5. Motive or Absence of Motive to Deprive the Non-Custodial Parent of Reasonable Parenting Time

The Court must consider whether a parent’s reason for wanting to remove the children is motivated by a desire to deprive the other parent of parenting time.

D. Can Parent Satisfy Real Advantage Test?

Ultimately, whether a parent has satisfied the real advantage test depends on the soundness of that parent’s desire to move as articulated in *Yannas*. This, of course, is a fact-intensive inquiry. If a parent has satisfied the first prong of the test, then the analysis continues. If a parent does not satisfy the first prong, the inquiry ends.

IV. Interests of the Children

Assuming the parent has satisfied the “real advantage” first prong, a court must next consider the interests of the children, particularly:

whether the quality of the child's life may be improved by the change (including any improvement flowing from an improvement in the quality of the custodial parent's life), the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent, and the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child. *Yannas*, 395 Mass. at 711.

Pizzino at 871.

Even if the court finds that the parent has satisfied the first prong of “real advantage” test, the removal may not be permitted unless the “interests of the

children” prong is satisfied.

A. Child’s Preference

A relevant factor in cases, depending on the age and maturity of the child, is whether the child wishes to move. Of course, it can be difficult to assess whether the child is being pressured by a parent to articulate a particular preference.

B. Child’s Roots in Massachusetts

The child’s relationships in Massachusetts are, of course, a significant factor in any removal analysis. In a removal case involving a very young child with no significant peer relationships, the Appeals Court noted:

With respect to the child's quality of life in Massachusetts, the judge found that the child was attending a ‘prestigious’ daycare program at the time of the trial. However, there is no indication as to whether the child had developed any friendships or was involved in any activities in Massachusetts.... Moreover, it appears from the record that the child has little, if any, extended family in Massachusetts.

Rosenwasser v. Rosenwasser, 89 Mass.App.Ct. 577, 583 (2016) (emphasis supplied).

In another case involving older children with deep roots:

Here, the judge found that the children had many friends . . . and were engaged in a variety of activities, and that a relocation would negatively affect those relationships and activities.

Altomare, supra at 608.

C. Impact on Child’s Relationship with Non-Removing Parent

Examining the relationship and bond between the child and the non-removing parent is a significant part of the analysis. A move, in most cases, will impact such a relationship – to varying degrees depending on the case. However, as one court has noted, “disruption in visitation with the noncustodial

parent cannot be controlling or no removal petition would ever be allowed.”
Cartledge, supra.

Here, consideration must be given to the distance from Massachusetts. Does the parent want to go to New Hampshire or California? The impact of distance and frequent travel on the child was a concern to the *Dickenson* court:

if his mother moves to California, this pre-teen would be forced into a bicoastal existence in which he would take frequent ‘red eye’ flights across the country, including trips by himself with layovers in Las Vegas. These trips would be tiring for him and, particularly when he traveled alone, stressful.

Dickenson at 449.

VI. Interest of the Non-Custodial Parent

Finally, the court must consider the interests of the noncustodial parent. Apart from the benefit to the child of continued association with the noncustodial parent, that parent has an independent interest in continued, meaningful involvement with the upbringing of his or her child. While “[t]he fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling,” *Yannas, supra* at 711, the separate right of that parent to a meaningful role in the child's life is a factor that must be taken into account.

Depending on the case, the children’s time with the non-custodial parent may decrease significantly if removal is permitted. The inquiry, then, is whether “reasonable alternative visitation arrangements” might achieve ongoing and meaningful contact appropriate to the circumstances. See *Yannas* at 711.

These alternative parenting time arrangements must meet the “meaningful and ongoing contact” contemplated by *Yannas*.

VII. The Ultimate Question: After Applying “Real Advantage,” should the Removal be Allowed?

As noted earlier, the balancing test in removal cases is a sensitive and nuanced one. Assuming the parent requesting removal clears the first hurdle, “real advantage” prong of the test, the court needs to weigh all the competing interests at stake and decide the ultimate issue of whether the parent requesting removal meets the burden to remove.

In some cases, the benefits that would inure to the removing parent would outweigh the other interests and, in some cases, they would not. Appellate courts can find that a trial court undervalues or overvalues the interests of either of the parents or the child. For example:

While the father here is an involved and caring parent, the judge's findings and emphasis on disruption of visitation reflect 'a Mason-like approach to removal,' to the diminution of 'the mother's [effective] role as sole physical custodian.' *Katzman v. Healy*, ante 589, 595-596 (2010).

See, e.g. Altomare at 609

VIII. Shared Custody: *Mason v. Coleman*

In *Mason, supra.*, the Supreme Judicial Court noted that “[w]here physical custody is shared, the “best interest” calculus pertaining to removal is appreciably different from those situations that involve sole physical custody.” In such cases, “[t]he importance to the children of one parent’s advantage in relocating outside the Commonwealth is greatly reduced.” In cases of shared physical custody, the “fortune of simply one custodial parent [is no longer] so tightly interwoven with that of the child; [rather,] both parents have equal rights and responsibilities with respect to the children.

To put it simply, in shared physical custody removal cases, the “real advantage” standard of *Yannas* does not apply. The court, instead, must analyze the case based on a straightforward “best interests of the child” test.