

**RESTRAINING THE CUSTODIAL PARENT FROM RELOCATING THE
CHILD TO A DISTANT DOMICILE AND DEPRIVING THE NON-
CUSTODIAL PARENT OF REGULAR AND FREQUENT VISITATION**

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It's an emergency! A new client, Mr. Stayput, telephones you in a panic. His former wife, the custodial parent, has threatened to leave the jurisdiction with their child and relocate to a distant state by the end of the month. She plans to marry and become Mrs. Gogo. Unless you can restrain her from so relocating, Mr. Stayput, at worst, may never see his child again; or, at best, will never see his child as often. Neither option is satisfactory.

The Retainer

Common sense, as well as practical experience, dictates that a substantial, but reasonable, retainer is in order since a compromise between the parties before trial is unlikely. Everyone involved has a lot at stake. The father wants to prevent the potential irrevocable damage to his relationship with his child. The mother may have at stake her remarriage plans, better employment opportunities in the foreign jurisdiction for herself and/or her fiancé (Mr. Gogo), and more time with the child if she plans to work fewer hours after her remarriage.

It is very likely that one or both of the parties, and possibly Mr. Gogo, will be saddled with the expense and inconvenience of plane trips to and from the distant domicile.

In addition to a retainer sufficient to cover your anticipated hours of service, your client should advance the fees for an expert, such as a qualified forensic psychiatrist or psychologist, to interview and evaluate both parties, Mr. Gogo and the child; visit your client's home with the child present so the expert can evaluate the interaction between father and child and the home's suitability; and testify for at least one-half day in court.

As in all matrimonial cases, there should be a written retainer agreement to avoid any confusion between client and attorney concerning their respective obligations.

The Order to Show Cause

It is imperative that an Order to Show Cause be prepared immediately. It must contain a temporary order restraining the mother, pending a hearing and determination of the application, from removing and/or relocating the child outside of New York State or beyond a certain distance (i.e., 50 miles) from her current residence. As in most post-divorce judgment proceedings, the Order to Show Cause must be accompanied by an affidavit or petition of the client. Include in the moving papers a memorandum of law citing cases supporting the non-custodial parent's position.

The permanent relief requested in the Order to Show cause should be given careful consideration. This is a difficult task considering the emergency nature of the proceeding. In addition to seeking to modify the divorce judgment and any intervening visitation/custody orders so as to permanently restrain the custodial

parent from relocating the child, your client may want a transfer of custody in his favor, a joint custody arrangement and/or expanded summer and holiday visitation in addition to the continuance of his current visitation schedule. One should conduct a detailed and thorough initial interview with the client in order to explain these options and make a comprehensive outline of the facts.

The Memorandum of Law

A pre-trial memorandum of law will greatly enhance your chances of obtaining the temporary restraining order and succeeding at trial. You may find, to your dismay, that the initial reaction of the assigned judge and/or his or her law assistant will be to sympathize with the mother.

[Since this article was published in 1988, the case law applicable to child relocation case has substantially changed. Accordingly, it has been redacted from this reproduction of this article. Suffice it to say, New York Courts now focus on the best interest of the child in determining child relocation issues.]

The Trial

You have obtained the temporary restraining order which Mrs. Gogo, who remarried while the case was pending, has obeyed. All of your witnesses have been subpoenaed and are on call. Your expert has supplied you with his resume and knows exactly what you will be asking him on direct. Your expert also knows all of the skeletons in your client's closet, so that there won't be any bombshells during his cross-examination. In fact, you plan to diffuse any potential

bombshells known by Mrs. Gogo by having Mr. Stayput admit to same on his direct examination.

Consider calling Mrs. Gogo as your first witness. She will have to admit to a lot of important facts favorable to your client if he has been a good parent.

Depending on the facts of your case, this may include the following:

(a) That she permitted Mr. Stayput and the child visitation above and beyond the previously Court-ordered schedule. Once she admits to this, how can she later testify that your client was, in any manner, a danger to the child? This is particularly effective if she voluntarily allowed overnight visitation that wasn't court-ordered.

(b) Confronting her with photographs showing Mr. Stayput and the child participating in wholesome activities during visitation. Have her identify the parties and acknowledge that the child benefited, and still benefits, from engaging in such activities with his or her father.

(c) There are relatives of both parties, particularly the grandparents, in the New York area who have a positive relationship with the child. Have her admit to the regularity and frequency of the contact between the child and such relatives.

(d) That Mr. Stayput is current in his support obligations.

All of Mrs. Gogo's admissions are undisputed proofs of facts you may later use when cross-examining Mrs. Gogo's expert and on summation. Any admissions of fact that you are unable to nail down during your cross-examination

of Mrs. Gogo may be subsequently testified to by Mr. Stayput and/or his other witnesses on direct examination.

You may also confront Mrs. Gogo with the substance of any conversations she may have had with Mr. Stayput that you want admitted into evidence. This may include conversations concerning her earlier threats to leave the New York area with the child. If Mr. Stayput happened to tape such conversations, Mrs. Gogo might be more likely to tell the truth if, when posing your questions, you read from a transcript of the taped conversation with a turned-off cassette recorder clearly visible to the witness. You may be surprised at Mrs. Gogo's candor thereby eliminating the need for introducing into evidence the muddled, barely audible, tape recording in which Mrs. Gogo threatened to abscond with the child.

As in all trials, your client and his other witnesses should be thoroughly prepared for the witness stand prior to trial. Cross-examine them yourself before trial so they know what to expect. In addition to Mr. Stayput revealing on direct examination any of his past misdeeds known to Mrs. Gogo (which might have any bearing on his fitness as a parent), have your expert acknowledge on direct examination that Mr. Stayput volunteered such information when interviewed, and that the expert took such misdeeds into consideration when formulating his or her opinions.

Your summation is the great moment you have waiting for to make your final impassioned plea. Have a brief outline of all the key points you want to drive home. Let your natural eloquence and dramatic instincts enhance your argument

as to how the interests of this child will best be served by granting the restraining order which will insure the continuance of your client's regular and frequent visitation.