

THE CONDON CONUNDRUM: NEW LEGAL HURDLES AND PRACTICAL CONSIDERATIONS IN INTERNATIONAL MOVE-AWAY CASES

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Introduction

Since the California Supreme Court decided Marriage of Burgess, family law practitioners have witnessed the development of modern case law regarding move-away disputes in custody cases. While Burgess and its progeny provide guidance on the domestic move-away, now there is guidance on the international move-away, the next challenging step in custody litigation -- Marriage of Condon and Cooper. In Condon, the California Court of Appeal created three new criteria that must be considered before a trial court may permit a parent to move out of the United States with a minor child. The trial court must consider and address the unique problems posed by an international move: distance, culture and jurisdiction.

When the California appellate court issued its opinion in Marriage of Condon and Cooper, the authors of this article were in the midst of a trial that involved our client's request to move to Switzerland with the parties' minor children, ages two and four. Our client was born and raised in Switzerland and only came to the United States to become an au pair. Shortly after she arrived in the United States, she met her husband-to-be. The court-appointed custody evaluators testified that it was in the children's best interests for Mother to be the primary custodial parent and that Mother should be permitted to move to Switzerland with the two children. Nevertheless, the trial court would not rule on Mother's request to move with the children until we presented evidence and proposed solutions to address each of the Condon elements, and until we persuaded the court that the move was in the children's best interests.

In this article, we present practical considerations and solutions to address the additional burdens presented by Marriage of Condon and Cooper in an international move-away custody case.

Legal Hurdles In the International Move-Away: Culture, Distance, and Jurisdiction.

Marriage of Condon is the first California case after Marriage of Burgess to address the issue of the international move-away. In Marriage of Condon, Mother requested that she be permitted to move with the minor children to Australia. The trial court found that it was in the children's best interest that the mother be able to relocate to Australia with the children. Father appealed. The California Court of Appeal held that it would not interfere with the trial court's order

allowing the relocation of mother and children, but it reversed and remanded to the trial court to obtain a concession from Mother that the California courts would have continuing jurisdiction over the issue of custody.

While the appellate court upheld the trial court's decision that Mother could move to Australia with the children, it was clearly uncomfortable with its decision. Acting Presiding Judge Johnson wrote for the court: "In our view, a trial court confronted with a parent's request to relocate with her children to a foreign jurisdiction should consider" the following three factors: (1) culture, (2) distance, and (3) jurisdiction, in addition to those factors affecting a domestic move-away. (Id. at 547.)

These are the three concerns that cause a foreign relocation to be different from intrastate and interstate move-away cases. When litigating an international move-away custody case, the family law practitioner must be prepared to address and provide solutions to the three Condon elements.

1. Culture

The California appellate court in Condon commented that to move a child from this country to another is to subject him or her to cultural conditions and practices potentially far different from those experienced by American citizens, and possibly to deprive the child of important protections and advantages not available in the other country. Culture involves the totality of a society, including behavior patterns, arts, beliefs, institutions, and religion of the population. In an international move-away situation, a consideration of culture invokes political issues relating to cultural bias and prejudice as well as language and religion.

According to Condon, the trial court must consider the culture of the country to which the children may move and how the culture affects their well-being. For example, the Condon court posed the question of whether relocating a female child to a country practicing genital mutilation or a country where females are not offered the opportunity for higher education or the freedom to pursue careers represents a "changed condition" requiring an inquiry whether this move is in the best interests of the child.

In presenting evidence to the trial court, the litigant must address how the cultural differences affect the subject children based on their ages and their developmental states. For instance, a younger child may be more susceptible to a country's culture than a teenager. In contrast, a teenager may have more difficulty adjusting to a different culture.

Even a country that is similar in culture can present hurdles. In our case, one may assume that Switzerland is similar to the United States in terms of culture. Both countries are democracies, uphold freedom of religion, practice western medicine, and have similar judicial systems. The language, however, is different. In fact, the dominant language in Switzerland depends upon where one resides. In our case, Mother's dominant language in Switzerland was Swiss German.

The older child was about four and had learned some Swiss German and some English. The Mother often spoke to the children in Swiss German. The younger child, who was about two, was just beginning to learn language. The natural concern arose that if the children moved to Switzerland, they would be learning and speaking Swiss German only and would lose their ability to communicate with Father in English.

The effective litigant must present practical solutions to this serious concern. Practical methods for addressing the language issue include: having the parent accede to orders where he or she must enroll the children in English-speaking schools, hire English tutors, read to the children in English, show the children English videos, hire an English-speaking nanny, or provide the children with English-language computer games.

When presenting and arguing a foreign move-away, litigants must expect to be faced with the bias of nationalistic chauvinism. Regardless of the country to which a parent proposes to move with the children or how similar the culture is to the United States, there may be a court bias that no other country is "better" than the United States. The family law practitioner must recognize this as a bias the court may possess, and shift the court's attention from which is the "better" country to which custody arrangement is in the children's best interest after taking into account the culture of the country in which the child will be living.

The parent who desires the move should have the ability and opportunity to present detailed testimony on the culture of the subject country. If this testimony is not available from the client, you may have to employ an expert to testify about the cultural differences and/or similarities of the country.

2. Distance

The distance factor may prove challenging to overcome. Distance raises the issues of cost, contact, and appropriate timeshare. The Condon court observed that for a person of average income or below, an order allowing a relocation to a faraway country is "ordinarily tantamount to an order terminating that parent's custody and visitation rights." Once the children move to a different country, it may be financially difficult for the non-moving parent and the children to visit on a frequent and continuing basis. You should present to the court creative ideas to fund the cost of travel. In our case, the judge ordered that before Mother could move back to Switzerland, she had to establish a bank account sufficient to cover the cost of travel for the children for one year, and every year she would have to replenish the account to cover another year's worth of travel for the children. Obviously, frequent flyer miles can be used, and some airlines provide coupons for certain trips. The cost of travel will also have to be considered in setting child support.

Staying in contact is critical in any move-away case and can be more difficult in a foreign move-away. Modern technology has provided more avenues to narrow the geographic gap. E-mail is an inexpensive way to communicate on an international basis and provides instant access, even

enabling parents to participate in homework assignments. Other technological options to bridge the geographic gap include video conferencing, exchanging video tapes of the children's daily life and significant events, and frequently scheduled telephone calls.

The goal of any timeshare arrangement is for the non-custodial parent to have significant and meaningful contact with the child. In foreign move-aways, the timeshare usually involves blocks of time. While the children may not be able to visit the non-custodial parent at certain times due to the school calendar, the non-custodial parent and his or her family should have the ability to visit the children in their new home country whenever possible.

3. Jurisdiction

The jurisdiction issue revolves around the enforceability of a California order in a foreign jurisdiction. Once a California court issues an order, can it (and will it) be enforced in another jurisdiction? To what extent, if any, will the new jurisdiction modify the California order? And if the new jurisdiction does modify the California order, what are the factors it will consider in modification and how do they differ from a California modification?

While within the United States, all states have adopted the UCCJA (Uniform Child Custody Jurisdiction Act) or the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act) regarding interstate child custody jurisdiction, there is no uniform full faith and credit law among all countries. About fifty countries, however, are signatories to the Hague Convention, which propounded the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The 1980 Convention is designed to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access.

In addition to the Hague Convention, some countries have their own laws addressing international jurisdiction. For instance, Switzerland has the Swiss Federal Statute on Private International Law, which specifically states that foreign decisions concerning the relationship between a parent and a child are recognized in Switzerland. There may also be an extradition treaty such as the one between the United States and Switzerland.

Presenting argument on the various laws of the United States and the foreign jurisdiction will not suffice to meet the Condon jurisdiction test. The family law practitioner must retain an expert to present evidence regarding the international jurisdiction of the subject country. Potential experts include law professors who specialize in conflicts of law, or legal scholars of a specific country. In our case, we retained the legal advisor to the Consulate General of Switzerland. Your expert should be able to testify about the validity of a California order in the subject country, and the procedure for entering a California order in the subject country.

In Switzerland, for instance, a party can have the California judgment entered and recognized in the Swiss courts. However, the enforceability and longevity of a California order in another jurisdiction is impossible to guarantee, no matter how well-intentioned the laws of the foreign country. While the country may be a signatory to the Hague Convention and have its own laws regarding inter-country jurisdiction, the mere passage of time may make the California order expire, or new allegations may require the country to exert its own jurisdiction to adjudicate a matter. Thus, the expert should be able to discuss the custody laws of the foreign jurisdiction so that the trial court can understand the possible outcomes if the foreign jurisdiction were asked to modify the custody order and if the foreign jurisdiction did undertake the modification request. For instance, does the new jurisdiction have any custody or visitation laws based on the specific age of a child? What are the potential timeshare arrangements the new jurisdiction would order? Does the jurisdiction prefer the mother or the father as primary custodian? The trial court must create a judgment that is as specific as possible. If the court allows the parent to relocate with the children to the foreign jurisdiction, and if the new jurisdiction is ever asked to enforce the judgment, the new jurisdiction must know exactly what to enforce. For example, the trial court must order that its custody and visitation orders will remain enforceable throughout the minority of the subject children in the other country. The court must specify the dates and circumstances for visitation and the provisions for telephone and e-mail contact. Rather than providing the non-custodial parent with two weeks of visitation over the December holiday season, the order should specify the exact dates or provide specific parameters to determine the dates as the school sessions change from year to year.

Unless the new country will guarantee enforceability (which is again very unlikely), the trial court must use its ingenuity to ensure that the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court. For instance, in Marriage of Condon and Cooper, the Court of Appeal remanded to the trial court to obtain a concession from the moving parent of continuing jurisdiction of the California courts. The appellate court also instructed the trial court to create a sanction procedure calculated to enforce the concession of jurisdiction, including the posting of a monetary bond, and the forfeiture of all or some support payments if the moving party disregarded the essential terms of the order or violated the concession of jurisdiction by pursuing modification outside of the California courts.

Conclusion

The initial steps in an international move-away are similar to a domestic move-away. The same factors in Marriage of Burgess and subsequent case law apply, including the best interests analysis and the burden of proof. In an initial custody determination there will have to a custody evaluation.

In a modification proceeding, an evaluation will be necessary if there is a true joint custody situation requiring a trial de novo to determine the custody and visitation arrangement that serves the best interests of the children. Ideally, the evaluators would have experience with international move-aways, along with an understanding of contemporary move-away case law

(including Condon). The order appointing the custody evaluator should clearly define the scope of the assignment for the evaluator, with specific references to the cultural and distance factors. The international aspect of a move-away situation adds another layer of complexity to an already challenging situation. This is a new and evolving area for family courts and practitioners alike. Thus, the practitioner must strive to inform and educate the trial court regarding the issues of culture, distance, and jurisdiction as they relate to his or her case.

A team of consultants and experts, along with creativity and flexibility, are necessary to traverse this difficult and uncertain territory.