

# New Jersey Appellate Court Compels Divorced Father To Return Children To New Jersey After Deeming Removal To South Carolina Improper

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October 16, 2018 | by Jessie Mills

Can a divorced parent, who is the parent of primary residence<sup>[1]</sup>, remove his/her child from the State of New Jersey without a Court Order and over the objection of the other parent? The Trial Court decided no and its decision was affirmed by the New Jersey Appellate Division.

In the case of *Deaver v. Howell*, \_\_\_\_ N.J. Super. \_\_\_\_ (App. Div. 2018)<sup>[2]</sup>, Plaintiff gave Defendant less than one day's notice of his move to South Carolina with the parties' children. Defendant objected, but Plaintiff moved over Defendant's objection and without first obtaining a court order. The Trial Court concluded in its sixty-six (66) page decision that Plaintiff unlawfully removed the children without first complying with N.J.S.A. 9:2-2 and required Plaintiff to return to New Jersey with the children from South Carolina.

Pursuant to N.J.S.A. 9:2-2, the statute that governs the removal of children from New Jersey, a showing of "cause" is required "before a court will authorize the . . . removal of a child to another state without the consent of both parents . . . ." *Bisbing v. Bisbing*, 230 N.J. 309, 323 (2017)(emphasis added). Plaintiff argued on appeal that "[n]othing in the actual statute requires that an order allowing relocation must precede the actual move." Clearly Plaintiff was mistaken, as the court held that "[t]he plain text of the statute prohibited plaintiff from removing the children from New Jersey without consent or a court order."

Plaintiff made the following additional arguments in support of his application, for which he is awarded +1 for creativity, and which are as follows:

- Plaintiff argued he had no obligation to file a motion seeking to relocate because the parties had previously entered into a consent order permitting him to relocate to Florida.

- Since Florida and South Carolina are very different places, this argument fails.
- Plaintiff argued that once he relocated with the children to South Carolina that the burden shifted to Defendant to show that Plaintiff lacked cause to remove the children from New Jersey before the judge could mandate their return.
  - This argument fails because it would encourage individuals to first remove children and then seek court approval; Plaintiff was required to establish cause before removing the children under the plain text of N.J.S.A. 9:2-2.

Based on the foregoing, the Appellate Court affirmed the Trial Court's decision requiring Plaintiff to return to New Jersey with the children and holding that he unlawfully removed the children from New Jersey.

But, what would have happened if Plaintiff filed a motion seeking to relocate with the children instead of unlawfully removing them over Defendant's objection? There is an interesting answer to this question, as set forth in the Appellate Court's decision, thanks to the Appellate Practice group at Einhorn, Barbarito, Frost & Botwinick and their victory in New Jersey's landmark case on child relocation, *Bisbing v. Bisbing*, 230 N.J. 309 (2017). Prior to *Bisbing*, the standard used by courts to determine whether a parent could relocate with the children was set forth in *Baures v. Lewis*, 167 N.J. 91 (2001). That standard was based on twelve factors, as well as the ability of the parent seeking removal to demonstrate that the move was being made in "good faith and that the move w[ould] not be inimical to the [children's] interest." *Bisbing*, 230 N.J. at 324 (quoting *Baures*, 167 N.J. at 116).

After the Supreme Court of New Jersey decided *Bisbing* on August 8, 2017, the standard for removal was changed completely. The Court concluded that "under N.J.S.A. 9:2-2, 'cause should be determined by a best interests analysis'" in which the court will consider whether the move is in the best interest of the child, while also taking additional statutory factors into consideration. In other words, if Plaintiff had not unilaterally removed the children and instead sought an order permitting the removal of the parties' children, the standard for removal would have depended on whether Plaintiff filed his application before or after the Supreme Court of New Jersey decided *Bisbing* on August 8, 2017.

[1] The phrase "parent of primary residence" is a legal designation identifying the parent with whom the children physically reside with more than 50% of the time. The phrases "residential custodian" and

“primary physical custodian” are synonymous.

[2] Decision approved for publication, docket no. A-0468-17T3.