<u>Eckert Revisited: the Supreme Court's Review of Collingbourne and the Second District Appellate Court's Application of the Law of Removal</u>

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Recently the Illinois Supreme Court has granted a petition for leave to appeal filed by Soryia Collingbourne seeking to review the reversal by the second district Appellate court of an order granting her leave to remove her son Tyler to the State of Massachusetts. Previously, the Trial Court had granted the petition for removal based predominantly on the mother's imminent remarriage. The Second District Court had reversed the trial court utilizing as its rationale the fact that visitation would be irremediably altered if the move were allowed. In concluding same the Court acknowledged that the move may have provided indirect benefits to the child, but nevertheless those benefits were insufficient to support the Trial Court's decision in this regard.

The Second Appellate Court District is the *only* District which rejects as a basis for a removal the consideration of benefits to the custodial parent if the move is allowed. Based upon the inconsistent application of the Eckert decision by the various Appellate Districts, the Illinois Supreme Court has been asked to review and reverse the decision of the Appellate Court in the Collingbourne case. The Second District's intransigence in considering the enhancement of the quality of life to a custodial parent is inconsistent with the Court's ruling in <u>Eckert</u>, and is contrary to virtually every other districts consideration thereof. The result is a patchwork quilt of law, when all Illinois citizens should be treated fairly and similarly under similar circumstances.

In only *one* case since the Eckert decision in 1988, has the Second District Appellate Court allowed a removal petition. In In re Marriage of Gratz 193 Ill. App. 3rd 142, 548 N.E. 2d 1325 (2nd Dist. 1989) the Court allowed a removal to Arizona where a child had a severe allergic condition which improved when the child was in Arizona. All other holdings (excluding one parentage case) by the Second District in the past 14 years have denied a petition to remove a child. The Second District is categorized as a "direct benefit" district.

Post-Eckert, the Second District Appellate Court has consistently refused to consider the benefits to a petitioner seeking leave to remove a child. For example, in In re Marriage of Kutinac 182 Ill. App. 3d 377, 538 N.E. 2d 862 (2nd Dist. 1989) the evidence established substantial benefits to a mother if a removal to Florida were allowed. Because the mother had lost her Illinois driver's license and was epileptic, she could not drive. She relied on public transportation and bicycles to transport both her and the children. The testimony reflected that the public transportation would be easier in Florida. Also, the facile transportation would reduce her stress and general health. The Court denied the removal, despite the benefits to the mother because there was no showing of any direct benefit to the children. Thus, the indirect and obvious benefits to her were deemed an insufficient basis to grant the removal.

Similarly in In re Marriage of Berk 215 Ill. App. 3d 459, 574 N.E. 2d 1364 (2nd Dist. 1991), a custodial mother sought leave to remove children based predominantly on her remarriage to an individual living in Ontrario, Canada. In affirming the denial of the

removal petition, the Court held, "The increase in the custodial parent's quality of life is only important insofar as it increases the children's quality of life and furthers the children's best interests." Id. At 465. Also in In re Marriage of Jaster, 222 Ill. App. 3d 122, 583 N.E. 2d 659 (2nd Dist. 1992), the Court again disregarded the benefits to the custodial parent as a basis in which to grant a removal. This is not the law elsewhere in Illinois.

In absolute polarity to the rigidity of the Second District, the Third District address the reality of modern life. The Third District had consistently allowed removal petitions frequently overturning the trial Court in order to do so. In In re Marriage of Good, 208 Ill. App. 3d 775, 566 N.E. 2d 1001 (3d Dist. 1991); In re Marriage of Carlson, 216 Ill. App. 3d 1077, 576 N.E. 2d 578 (3rd Dist. 1991); In re Marriage of Ballegeer, 236 Ill. App. 3d 941, 602 N.E. 2d 852 (3rd Dist. 1992); and In re Marriage of Taylor 202 Ill. App. 3d 740 559 N.E. 2d 1150 (3d Dist 1990) the Court reversed the trial courts and granted the removal petitions specifically relying on the indirect benefits to the children emanating from the custodian's resultant benefits.

Also appositional from the Second District, the First District Appellate Court regularly considers the direct benefits to the custodial parent and the concomitant indirect benefits to the child if a removal is granted. For example, in In re Marriage of Zamarripa-Gesundheit, 175 Ill. App. 3d 184, 529 N.E. 2d 780 (1st Dist 1988), the Court reversed the trial court's denial of a removal petition filed by a custodial mother whose new husband had a beneficial job transfer opportunity in the state of Washington. The Court, in reversing the trial court held:

> While we recognize the importance of preserving the child's relationship with the father, this factor must be weighed against the factor suggested by Eckert regarding the enhancement of the quality of life for both Susan and Dafna. On balance, we do not think that the interests of the custodial mother should be subordinated to those of the noncustodial father. While different than what Ariel has been accustomed to, we believe that the liberal visitation rights proposed by Susan provide Ariel with an adequate means to foster his relationship with Dafna. Although Ariel would prefer consistent day-to-day contact with Dafna, this preference is insufficient to chain Susan to the State of Illinois.

175 Ill.App.3d 184 at 190.

In In re Marriage of Roppo 225 Ill. App. 3d 721, 587 N.E. 2d 1031 (1st Dist. 1991), the court reversed the trial court's denial of a removal petition based upon a custodial parent's desire to move to her home town together with her new husband, in Wisconsin. Of significant import is the Court's holding that "it is permissible for the trial court to analyze the benefits to be derived by the custodial parent who desires to move because the existence of such direct benefits will indirectly enhance the quality of life enjoyed by the child involved." 225 Ill.App.3d 721 at 728.

The Roppo Court relied on its prior decisions in In re Marriage of Zamarripa-Gesundheit, 175 Ill. App. 3d 184, 529 N.E. 2d 780 (1st Dist 1988), In re Marriage of Gratz, 193 Ill.App.3d 142, 139 Ill.Dec. 611, 548 N.E.2d 1325, (reversal of the trial court's denial of petitioner's petition to remove her child to Arizona finding that the petitioner presented abundant evidence that the move would enhance the general quality of life for her and her son), In re Marriage of Taylor (1990), 202 Ill.App.3d 740, 559 N.E.2d 1150, (where a move significantly enhances the general quality of life for the custodial parent, it therefore, indirectly beneficially affects the child's quality of life.) In re Marriage of

Carlson (1991), 216 Ill.App.3d 1077, 159 Ill. Dec. 909, 576 N.E.2d 578. (a determination of the best interest of the child depends largely on whether the move is likely to enhance the general quality of life of the children and their mother.) In re Marriage of Shelton (1991), 217 Ill.App.3d 26, 159 Ill. Dec. 939, 576 N.E.2d 862, (enhancement of family financial situation supports granting of removal).

In In re Marriage of Miroballi, 225 Ill App. 3d 1094, 589 N.E. 2d 565 (1st Dist. 1991) the custodial mother petitioned the Court to remove her minor children to Michigan where her new husband lived and owned a business. In addition to being able to live with her husband, the mother would have had more time available to be with her children as a result of the marriage and move. The Court held:

> We are satisfied that, all else being equal, the children's general quality of life will be directly enhanced by the mother not having to work and by living in a traditional family setting. We also believe that the children's quality of life would be indirectly enhanced by moving to Michigan. This court has consistently recognized that where the general quality of life for the custodial parent is enhanced the child's quality of life is indirectly enhanced … Having acknowledged that petitioner will be happier by moving, it is reasonable to conclude that the children's lives will be indirectly enhanced. We therefore find that the children's general quality of life will be indirectly enhanced by permitting removal.

225 Ill.App.3d 1094at 1098.

The Fourth District Court's analysis of removal actions is consistent with the approach taken by the Third and First Districts. In In re Marriage of Eaton 269 Ill. App. 3d 507, 646 N.E.2d 635 (4th Dist. 1995), the Court reversed the Trial Court's denial of a removal petition where a custodial mother's new husband was an attorney practicing in the state of Florida. In reversing the Court opined:

> The best interests of children cannot be fully understood without also considering the best interests of the custodial parent. When a move would improve the quality of the custodial parent's life, we conclude the trial judge must consider the benefits to be realized by the child or children from such enhancement of the custodial parent's circumstances. If the trial court finds no benefits will be realized by the children from such an improvement to the custodial parent, the reasons for so finding should be stated. The nature and extent of these benefits will vary depending on the facts of a particular case, but must be considered

269 Ill.App.3d 507at 516.

More recently in the case of In re Marriage of Ludwinski, 312 Ill.App.3d 495, 727 N.E.2d 419 (4th Dist. 2000) the Fourth District Court affirmed it's consideration of the impact to the custodial parent's well being in granting a removal petition. In reversing the trial court's denial of a petition seeking leave to remove children to Utah, the Court held that the benefits to the custodial parent need to be considered as they directly affect, albeit indirectly, the welfare of the children:

> Even if we were to conclude that the boys' quality of life would not be enhanced directly, we find that it would be indirectly, also a factor to be considered. If only the direct benefits that affected children were considered, rarely would a situation arise where removal would be permitted where children were in a good environment with good schools, good parents, and good friends. The move to Utah will significantly affect the general quality of life for David, the custodial parent, and Rochelle, therefore indirectly enhancing the boys' quality of life, and this indirect benefit should be considered

312 Ill.App.3d 495 at 499.

Consistent with the Third, First and Fourth Districts, the Fifth District also allows the consideration of indirect benefits to the child based upon resulting benefits to a

custodial parent. In In re Marriage of Pribble and Wagenblast, 239 Ill.App.3d 761, 607 N.E.2d 349, (5th Dist. 1993), the Court reversed the Trial Court's denial of a removal petition seeking leave to remove the children to Iowa. The mother had remarried a Doctor practicing in Ames, Iowa. In determining the propriety of the move, the Appellate Court specifically noted the enhancement of the quality of life of the mother and the practical necessity of the move in light of her remarriage.

In their article Post-Eckert Trends in Child Removal: A Review of Appellate Cases, 84 Ill. B. J. 76, (1996) Gilmore & Gitlin, denote what they define as the economic necessity doctrine common to the First, Fourth and Fifth Districts. Their careful analysis of the Post Eckert case law in these Districts establishes a trend by the Court's to allow a removal where there is a showing of some economic need/benefit to the custodial parent consistent with the move. According to Gilmore & Gitlin, "Economic necessity is usually shown when the custodial parent must choose between the child or a new spouse who works in the distant state" 84 Ill. B.J. 76 at 81. This is an objective and accurate statement of Illinois law, except in the Second Appellate District, where oddity exists.

In addition, the Second District's removal analysis' needlessly confuses this Honorable Court's Eckert decision, which clearly does not require the movant show a direct benefit to a child. To consistently make a custodial parent choose between a new spouse and her child is a Hobson's choice that no parent should be forced to make. Simply put, the Second District requirement is virtually impossible to prove in all but the most exceptional removal situation.

The Second District Court's pertinacious refusal to allow removal actions also ignores the transciency of modern society. In the past year, Court's have increasingly relied on "internet visitation" in removal and other visitation cases. In McCoy v. McCoy, 336 N.J. Super 172, 764 A.2d 449 (App. Div. 2001), a New Jersey mother sought leave to relocate to California and remove her child. She proposed a visitation schedule giving the father the same number of days that he had in New Jersey and she proposed creating a website with streaming video that allowed the father and child to see each other over the internet in real time. The father objected to the move as being contrary to his child's best interest.

The Appellate Court held that the move was in the child's best interest. In reaching its conclusion the Court noted that whenever a parent moves to a far off location, visitation will be adversely impacted. However, that fact alone may not otherwise be contrary to the child's best interest as long as an appropriate visitation schedule can be created that maintains the relationship between the child and the non-custodial parent. The Court also noted that the use of internet visitation was an appropriate vehicle to maintain the relationship:

> We believe that the mother's suggested use of the Internet to enhance visitation was both creative and innovative. In dismissing that suggested use, the Trial Court never focused on the actual alternative visitation schedule proposed by the mother and whether it was comparable to the father's schedule or inimical to the best interest of the child.

McCoy v. McCoy, 336 N.J. Super 172 at 181. It appears from the decision that the Appellate Court favored internet visitation as an appropriate supplement to traditional

visitation where the non-custodial parent had a similar number of days with the child after a relocation.

The same reasoning was utilized by an Iowa Court in permitting a mother to relocate. In In re Marriage of Thielges, 623 N.W. 2d 232 (Iowa Ct. App. 2000), the Trial Court granted the petition to relocate and the Appellate Court affirmed. In doing so the Appellate Court noted that in light of a substantial visitation schedule and access to "liberal telephone and *Internet communications*...the parties children have been assured the opportunity for maximum continuous physical and emotional contact with both of their parents…" Id at 239.

In Burke v Burke 2001 WL 921770 (Tenn. Ct. App.), the Appellate Court approved an internet visitation schedule which included use of webcams and e-mail where the parents resided 70 miles from each other. A specific schedule for internet contact was incorporated into the parties parenting agreement which was approved by the Court. The Court noted, " We agree with the trial court that Mr. Burke's proposal of internet-based communications is a "unique, forward thinking and viable communication alternative." Furthermore, this "unique" alternative will give both parents the opportunity not only to speak to the children, but see them as well…" Burke at page 5.

While none of these cases suggest that the internet is an appropriate substitute for visitation, when used as a supplement to a reasonable visitation schedule, it is a vehicle to help maintain a relationship between a non-custodial parent and a child where a removal petition is allowed. By utilizing streaming video for example, a child and parent can maintain virtually daily visual contact during periods that there is no regular visitation

due to geographical constraints. This resource available virtually to all parents in an era when computers are so prevalent should expand the analysis of this last Eckert factor which typically is the most problematic aspect of a removal case, i.e. how to craft a reasonable visitation schedule in order to preserve a relationship with a non-custodial parent and a child if a removal petition is granted.

The challenge for the Supreme Court will be to fashion an appropriate standard for removal cases that resolves the conflict among districts. In doing so, the Court must embrace the reality of modern life which needs to balance the needs of a custodial parent to possibly relocate and the needs of children to maintain and ongoing relationship with the non-custodial parent in the event of a move. Hopefully the Supreme Court will be able to transcend the various goals and resolve the tension in favor of a predictable and universal standard applicable to all citizens of this state.