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Appeals Court: Divorced Mom's Work Commute is Grounds for Changing Child's School Despite Shared Custody

By Nicole K. Levy | July 24, 2018

Family Law Child Custody

Divorce lawyer Nicole K. Levy reviews an Appeals Court case in which a parent's commute in traffic-clogged Massachusetts triggered a child custody dispute.

Decisions about custody affect more than just parenting time. Even for parents residing in the same state, custody can affect where the children go to school, and a change in custody can trigger a change in enrollment. While this primarily arises in the context of public schools, even children in private schools – where public school jurisdiction is not an issue – can be subject to a change in school enrollment, depending on where the parents reside.

In a recent unpublished Appeals Court case, *Hue v. Soderstrom (2018),* the Appeals Court affirmed the decision of a Probate and Family Court judge ordering the parties' minor child to transfer to a school district centrally located between the home of the child's father and the mother's new workplace. The father appealed this decision, alleging that the judge failed to consider the best interests of the child and only considered the mother's commute between her home, the child's school, and her new place of employment. The Appeals Court affirmed the Probate and Family Court decision, allowing the child's move to the equidistant school.

School Changed in Judgment of Modification After Trial

In Hue, the Court modified a 2013 judgment granting primary physical custody of the children to the father. However, Footnote 1 of the decision included the following interesting detail:

> The mother had physical custody of the child from February of 2010 until January of 2013, but the father was granted physical custody after the mother left the Commonwealth with the child in December of 2012.

As we have covered extensively on our blogs about the permanent removal and relocation of minor children from the Commonwealth, a parent with primary custody may only permanently relocate from Massachusetts with a child if the other parent agrees, or with an order from the Court. Footnote 1 of the decision suggests that the mother originally had primary custody of the child, but the father may have been awarded custody after the mother relocated from Massachusetts with the child without satisfying the requirements of the removal statute, Ch. 208, s. 30. How this history might have affected the 2018 decision is difficult to determine.

According to the Appeals Court, after the father was granted primary custody in 2013, both parties filed Complaints for Modification of the custody arrangement in 2015, resulting in the trial court ordering shared physical custody of the child. The trial was heard in Bristol Probate and Family Court by Hon. Peter Smola, J. The Appeals Court decision offers scant details on the trial, focusing instead on terms of the Judgment of Modification dated December 5, 2016, which the Court describes as follows:

> In addition to ordering shared legal and physical custody of the child, the judge ordered the parties to transfer the child from her Mendon elementary school to "the Sharon public school system effective January 2017, unless the parties agree otherwise."

Notably, Footnote 3 tells us that “[t]he parties did not request the school transfer in their pleadings, and the father did not object when the judge brought it up at trial.” When a judge orders relief that was not requested by either party, it is known as a “*sua sponte*” decision. Such decisions by judges are sometimes the subject of serious controversy, where one building block of our legal system is each party’s right to know the potential relief that may be ordered in favor of the other party. That said, Probate and Family Court judges are given significant latitude by appellate courts to exercise their discretion in child custody cases. Although the Appeals Court notes that the school decision was made, *sua*

sponte, in Hue, the appellate ruling nevertheless affirms the Probate Court decision.

Child to Attend School That is Equally Positioned Between Parents Towns

In Hue, the Court ordered the parents to enroll their child in school in a town that represented midpoint between the two parents' homes. The decision tells us that the child, who was in first grade at the time of trial, originally attended school in Mendon, Massachusetts, approximately ten minutes from the father's home. The mother lived in Sharon, Massachusetts. According to Google Maps, Mendon and Sharon are about 27 miles apart, and a typical drive between the two towns is around 40 minutes, depending on traffic.

Complicating matters was the fact that the mother was about to begin a job in Brockton, which would require mother to drive another 30 minutes or so – in the opposite direction of Mendon – to get to and from work. The Court observed:

> Once the mother began working, in order to transport the child to the Mendon school and then drive to work for her 8:00 A.M. start time, her "morning commute would be more than two hours and require her to leave home before 6:00 A.M." As the mother testified at trial, she would most likely need to have someone other than herself transport the child to school.

Although the child attended school in Mendon, the Court noted that the child was still in first grade at the time of trial. The Appeals Court affirmed the decision based on several factors identified by the Probate and Family Court judge in "a thoughtful memorandum that demonstrated his consideration of the child's best interests".

Why Did the Probate and Family Court Order a First Grader to Change Schools?

The Hue decision requiring the child to attend school in a location equidistant between her father's home and mother's new job appears to have been motivated by the Probate and Family Court judge's concern that the child have meaningful parenting time with both parents. It is not clear if the judge modified the parenting plan to grant the mother additional parenting time, or the judge believed the mother's new job in Brockton would make the existing schedule unworkable. (The Appeals Court decision does not provide the specific schedule under the 2013 judgment granting father primary custody, nor do we learn the schedule under the new judgment.) Regardless, the Appeals Court suggests that

the school change was important for the maintenance of the child's relationship with the mother:

> The judge found, it is in the child's "best interest that both of her parents have significant time with [her] on a regular basis in order for [the child's] relationship with them to continue to flourish." The school transfer enables that goal, since, presumably, the Sharon school's centralized location will enable the mother herself, rather than a secondary caretaker, to transport the child to school or to the bus stop near her house.

In its decision, the Appeals Court acknowledged several points raised by the father at trial, observing that the Probate and Family Court judge could have ruled the other way based on the father's concerns:

> The father expressed concern that changing the child's school will deprive her of the opportunities both to further her Spanish language studies and to foster her existing friendships. It would not have been an abuse of discretion for the judge to take these concerns into consideration …

However, the Court concluded that the father's concerns were outweighed by countervailing arguments made by the mother, including:

> [T]he Mendon school's Spanish language program only continues until fifth grade (at the time of trial, the child was in first grade), and the child's nanny regularly speaks Spanish with the child. Furthermore, the child has friends in the mother's neighborhood and has playdates outside of school with her Mendon school friends.

Ultimately, the Court seemed to be most convinced that the change was warranted due to the mother's new job in Brockton, which it found would have frustrated the mother's parenting time with the child:

> Once the mother began working, in order to transport the child to the Mendon school and then drive to work for her 8:00 A.M. start time, her "morning commute would be more than two hours and require her to leave home before 6:00 A.M." As the mother testified at trial, she would most likely need to have someone other than herself transport the child to school.

Order for Shared Legal Custody Enables School Change Decision

The second basis cited by the Appeals Court for affirming the order requires a little more speculation. The Court held:

> [I]n ordering joint legal custody of the child, the judge found that the "parties [did] not agree on one specific major issue affecting [the child], namely, which school [the child] should attend," but because he resolved that issue within his judgment, he found that this disagreement would "not be an obstacle to joint decision-making going forward." It was within the judge's discretion to fashion a remedy that better enables the parties to cooperate in the future in the best interests of the child.

At the outset, the decision noted that the father had “sole physical custody” of the child under the 2013 judgment. The quote above suggests that that the father may have also had sole legal custody under the judgment, possibly as a result of the mother’s attempt to relocate the child. Legal custody is a somewhat amorphous term under the law. As we have noted before:

> Under the Massachusetts divorce statute, "shared legal custody" is defined as the “continued mutual responsibility and involvement by both parents in major decisions regarding the child’s welfare including matters of education, medical care and emotional, moral and religious development.” Meanwhile, the statute defines "sole legal custody" as when "one parent shall have the right and responsibility to make" the same "major decisions" regarding the child. (The Massachusetts unmarred parent statute references “legal custody”, but does not separately define the term.)

What is clear is that a parent with sole legal custody has sole decision-making authority over issues like school attendance. Assuming the father in Hue had sole legal custody under the 2013 order, the Probate and Family Court judge may have felt it was necessary to order joint legal custody in order to overrule the father’s objection to the child’s attendance at the Sharon school.

The decision noted that the school appeared to be the only major issue involving the child that the parties disagreed about. This is relevant because Massachusetts courts are generally hesitant to order shared legal custody to parents who cannot cooperate on child related issues:

> There have been numerous appellate decisions in Massachusetts detailing when parents **should not have shared legal custody**. *See Smith v. McDonald*, 458 Mass. 540, 554 (2012) (shared legal custody appropriate “only if the parties demonstrate an ability and desire to cooperate amicably”); *Carr v. Carr*, 44 Mass. App. Ct. 924 (1998), (shared legal custody inappropriate where parents’ relationship was “dysfunctional, virtually nonexistent, and one of continuous conflict”); *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981) (“in order for joint custody or shared custody to work, both parents must be able mutually ‘to agree on the basic

> issues in child rearing and want to cooperate in making decisions for [their] children.'").

The Court concluded that joint legal custody was appropriate because the Probate and Family Court decision resolved the dispute over the school. Indeed, it would have likely been problematic for the Court to order the change in school over the father's objection if the father had retained sole legal custody.

This case demonstrates how the "best interest of the child" standard melds with parental factors The case shows how a child's best interest can be partially independent for his or her parents' interests, while also being intertwined with the lives of each parent. Ordering a child to switch schools (absent an agreement otherwise) was within the court's discretion; in fact, the trial judge noted that it would be up to him to make this decision if the shared legal custodians were unable to do so. In doing so, the judge considered not just the social impacts on the child, but the logistical challenges for the child, mother and father.

Of note, neither party in this case specifically plead for a change in schools in their respective modifications. However, once physical custody was decided, this issue was likely to arise, as it did in the midst of trial.

Motion Seeking Recusal of Appeals Court Judge Denied

In addition to the decision itself, the Hue docket includes an interesting order arising out of the father's motion seeking the recusal of one of the three Appeals Court judges, Hon. Peter J. Rubin. The order makes clear that the parties had previously been to the Appeals Court in their case, including a matter heard by Judge Rubin in 2015. The father sought Rubin's recusal from the new appeal on this basis. Rubin addressed the motion directly in an order dated February 21, 2018 and entered on the Appeals Court docket:

> The appellant has filed a motion asking that I recuse myself. He argues that "there is an appearance of impropriety in Justice Rubin reviewing the consequences of a decision he was a part of in the previous case. Multiple and repeated studies of the effects of confirmation bias indicate that,

> however unconscious, there will be an inclination for Justice Rubin to rule in a way consistent with and supportive of his earlier decision." … “Simply put, he is not comfortable with Justice Rubin reviewing his case in this matter." The question of disqualification is ordinarily committed to the individual judge's sound discretion. … As a matter of basic fairness, a party does not get to select which Justices he or she would prefer to have sit on his or her case, nor does a party have the power to veto one or another Justice he or she might not prefer. A motion to recuse, however, will be allowed "in any proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned." … [B]efore a judge will be required to recuse himself, a litigant "ordinarily must show that the judge demonstrated a bias or prejudice arising from an extrajudicial source, and not from something learned from participation in the case." .... I know nothing about this matter other than what I learned through sitting on the case when it was previously before the court. And, although the appellant suggests that there is some appearance of impropriety in my hearing this case after a remand ordered by a panel of this court of which I was a member, all appellate judges routinely hear matters after remand whether or not they sat on the panel that sat on the original appeal. … Having consulted my own "emotions and conscience," id., I have concluded that I do not lack the capacity to act fairly and impartially in this matter. I have also undertaken an objective appraisal of whether this is a proceeding in which my impartiality might reasonably be questioned, id., and have determined it is not. Consequently, the appellant's motion is denied. (Rubin, J.). (Citations omitted.)

Motions to recuse are quite rare at the Appeals Court level, in part because of the fairly limited in-person contact between appellate judges and litigants. Judge Rubin’s denial of the father’s motion illustrates how a judge’s prior involvement in a case is not grounds for disqualification of that judge. Interestingly, this issue comes up occasionally in the Probate and Family Court, where subsequent modification and contempt actions are generally heard by the same judge who decided an initial divorce or 209C action involving unmarried parents. In most cases, parties are unsuccessful when arguing that a Probate and Family Court judge should be disqualified because of the judge’s prior involvement in the case.

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