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CUSTODY ON THE MOVE

The three-factor *Gruber* test isn't always required, an appeals panel has said

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Does a custody matter spanning two jurisdictions necessarily mean that the three-pronged test of *Gruber v. Gruber*, 583 A.2d 434 (Pa. Super. 1990) concerning custody relocation must be applied? The answer is no.

Unless a petition for relocation has been filed, there need not be a *Gruber* analysis. On Jan. 4, the state Superior Court affirmed the trial court in *Kelleher v. Cartrite*, in a memorandum decision. Although this matter spanned the jurisdictions of Pennsylvania and Michigan, the trial court only considered an initial custody order, no petition for relocation having been filed.

In the landmark case of *Gruber*, the mother sought permission to move from Pennsylvania to Illinois and the lower court denied her request. The mother appealed and the Superior Court developed a three-prong test to be applied by a trial court in determining when a parent who has an order of primary physical custody may relocate outside the jurisdiction. In *Kelleher*, neither parent had secured an order of primary physical custody.

Under what circumstances then must a *Gruber* analysis be applied? Pursuant to *Gruber*, when a parent already has an order of primary physical custody and files, seeking to relocate, a court considering such petition for relocation, must weigh three factors:

- The potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the non-custodial parent;
- The integrity of the motives of both custodial and non-custodial parents in either seeking the move or seeking to prevent it; and
- The availability of realistic, substitute visitation arrangements that will adequately foster an ongoing relationship between the child and the non-custodial parent.

Subsequent to *Gruber*, the Superior Court has expanded upon and fine-tuned the factual custody situations for the application of a *Gruber* analysis. See *Kaneski v. Kaneski*, 604 A.2d 1075 (Pa. Super. 1992); *Baldwin v. Baldwin*, 710 A.2d 610 (Pa. Super. 1998); *Clapper v. Harvey*, 716

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A.2d 1271 (Pa. Super. 1998) (non-custodial parent filed for modification and for relocation); *Thomas v. Thomas*, 739 A.2d 206 (Pa. Super. 1999) (*Gruber* factors to be applied where parties share custody and one files for modification and for relocation); *Maurer v. Maurer*, 758 A.2d 711 (Pa. Super. 2000) ; *Goldfarb v. Goldfarb*, 861 A.2d 340 (Pa. Super. 2004); *Johns v. Cioci*, 865 A.2d 931 (Pa. Super. 2004); *Masser v. Miller*, 913 A.2d 912 (Pa. Super. 2006), (*Gruber* tests to be applied governing intrastate relocation); *Klos v. Klos*, 934 A.2d. 724 (Pa. Super. 2007).

In *Collins v. Collins*, 897 A. 2d, 466 Pa. Super 2006); reargument denied, (Pa. Super, May 18, 2006); appeal denied, 903 A.2d 1232 (Pa. 2006), the Superior Court was faced with a matter where a trial court had to decide an initial primary physical custody order as well as a petition to relocate and stated as follows:

"Where a custody order exists prior to the Petition to relocate, the parent who desires to relocate bears the burden of proving the aforementioned elements (citations omitted). On the other hand, where the Trial Court is to formulate a Primary Physical Custody Order as well as to decide a Petition for Relocation, both parents stand on equal footing, sharing the burden of production and persuasion to demonstrate that the living situation that they will provide to the children serves the children's best interest (citations omitted). Consequently, while important, the *Gruber* factors are but one aspect of the overall best interest analysis that is required when the Trial Court is formulating a Primary Physical Custody Order as well as deciding a Petition for Relocation."

An Unusual Fact Pattern

Kelleher v. Cartrite had a factual situation unlike any of the matters just referenced. In *Kelleher*, the parties and their small children had resided in Philadelphia, but moved to Michigan in the summer of 2005. the father had done his post-doctoral studies at the University of Pennsylvania and, with the mother's agreement, had purchased a home and had moved the family to Michigan to pursue a tenured track position. However, on Jan. 3, 2006, the mother, Nancy Kelleher, without the father's knowledge, left with the children and went to Philadelphia to be with her boyfriend. The children would have resided in Michigan for a full 180 days on Jan. 16, 2006. By leaving with the children when she did, the mother knowingly cut off 13 days from the children's being Michigan residents for a full six months.

The father promptly filed for divorce and custody in Michigan and the mother filed a complaint for custody in Philadelphia. However, the mother did not file a petition for relocation. Pending the outcome of the decision of the Michigan court, the Pennsylvania court declined to accept jurisdiction.

During the summer of 2006, the Michigan court declined jurisdiction, citing its statute which required the full 180 days residency requirement in order for Michigan to take jurisdiction. Philadelphia then accepted jurisdiction. By order of the Philadelphia court, the children resided with the father during the summer and were with him for blocks of time during the fall. A trial

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began in December of 2006, and the Philadelphia court took testimony on five different dates from witnesses for both parties, including the two children, ages 6 and 8. On Jan. 3, 2007, one year after the mother surreptitiously left with the children from Michigan and moved to Philadelphia, the Philadelphia court awarded primary physical custody to the father, a Michigan resident. The mother appealed to the Superior Court, raising as one of her issues, that the trial court had committed error by failing to conduct a *Gruber* analysis.

The Superior Court in *Kelleher v. Cartrite* stated as follows: "In the present case, Mother did not file a petition to relocate with the children. Instead Mother moved with the children from Michigan then filed a Complaint in Pennsylvania seeking custody of the children. In these circumstances, Mother has waived the issue of the application of the *Gruber* factors and cannot now raise that issue on appeal."

Had the mother filed a petition for relocation at the same time as she filed the complaint for custody, would the trial court have conducted a *Gruber* analysis when neither parent had an initial order of custody? Yes. In *Collins*, the situation was such that there had been no initial primary physical custody order and therefore, the court was obliged to enter an order of primary physical custody and consider the petition for relocation. However, *Kelleher* involved only the entry of an order for primary physical custody which, by definition, would either confirm Mother's relocation from Michigan to Philadelphia or would take the children from Philadelphia and place them back in Michigan. Because no petition for relocation was filed, the court conducted a "best interest" analysis, which is the standard courts employ to determine custody. See *Clapper v. Clapper*, 578 A.2d 17 (Pa. Super. 1990); *Lozinak v. Lozinak*, 569 A.2d 353 (Pa. Super. 1990). The factors considered by the *Kelleher* court included the primary caretaker doctrine; the educational, physical, and cultural environments of the children in both places; the friendship with other children in both Michigan and Philadelphia; the fact that the mother never took the children to counseling and the father did; the testimony of the children; and which parent offered the children a more stable and child-friendly environment. Due to the geographical distance, the father testified to the third prong of *Gruber*, which was how he would facilitate a significant partial custody arrangement for the mother and tendered a proposed order to the court.

No Petition, No *Gruber*

The *Kelleher* court did not apply *Gruber* because there was no petition for relocation pending. As in *Collins*, the *Kelleher* parties shared the burden of persuasion and proof. The mother testified to her motives for coming to Philadelphia, which is the first prong of the *Gruber* analysis. The father testified as to why he believed the children should return to Michigan and the advantages there for them. Therefore, the parties did testify to their motives in opposing why the children should be either in Michigan or in Philadelphia. Finally, the parties testified as to the partial custody arrangements each would make. The *Kelleher* court emphasized that the mother had not filed a petition to relocate and that therefore she had waived the application of the *Gruber* factors. This writer queries whether a "best interest" analysis hasn't come full circle

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because in situation such as *Kelleher*, where parents live considerable distances from each other, *Gruber* automatically becomes part of the best interest analysis. When *Gruber* was decided, the Superior Court found itself with a fact situation where a parent having an order of primary physical custody sought to relocate to another jurisdiction so that her life would become better and therefore the advantages would flow to the child. In the 18 years that have passed since *Gruber*, the *Gruber* tests have been greatly expanded. *Kelleher* addressed a situation where neither party filed a petition to relocate but both parties sought primary physical custody. Because the "best interest" analysis required testimony about the living conditions in both Michigan and Pennsylvania; the responsibilities of each parent as caretaker in both jurisdictions; the cultural, physical, and educational environments; the desires of the children, the travel arrangements and partial custody schedules which would be available for the partial physical custodian; the telephone and computer access of the children to the parent not in-custody, availability of counseling, and so many other factors, the *Gruber* analysis was subsumed by the "best interest" analysis regarding competing jurisdictions *Kelleher* demonstrated that even when a court did not formally apply the *Gruber* tests, the evidence nonetheless addressed the *Gruber* factors. •

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