

USA - ARKANSAS



Law and Practice

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Bundy Law is a multi-state law firm headquartered in Tulsa, Oklahoma. The firm's Arkansas office is located in Bentonville. Attorneys at the firm advise on high net worth financial disputes, including the valuation and division of professional practices, mineral interests, farms, ranches, artwork, and investment portfolios. The firm is well-known for its heavy emphasis on trial advocacy skills in bench and jury trials. Its trial work includes family law, criminal de-

fence, and civil justice cases involving severe injury or death. Partner Kathleen Egan leads the appellate practice in Oklahoma and Arkansas. Bundy Law employs next-generation technology, with intake, discovery, trial preparation, and briefing processes enhanced by artificial intelligence. The firm is well-suited for high-value, high-stakes financial cases and appellate matters involving novel issues.

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1. The Care Provider's Ability To Take Decisions About the Child

1.1 Parental Responsibility

Arkansas statutes do not specifically articulate the rights of parents concerning their children. Parental rights in Arkansas have been affirmed through case law in appellate decisions. Arkansas appellate courts have confirmed United States Supreme Court precedent holding that the US Constitution protects the fundamental rights of parents to direct and govern the care, custody and control of their children. The law presumes the actions of fit parents concerning their minor children are made in the best interests of the children.

1.2 Requirements for Birth Mothers

Arkansas law provides that the mother of a child born out of wedlock has custody of her child for the duration of the child's minority unless a court enters an order placing custody of the child with someone else (Ark. Code Ann. Section 9-10-113).

1.3 Requirements for Fathers

Fathers have rights equal to mothers with respect to their minor children. In divorce actions, child custody decisions are made without regard to

the sex of either parent. Recent statutory developments confirm that joint custody is presumed for both fathers and mothers, and that presumption may be rebutted by a heightened standard of clear and convincing evidence. Unmarried fathers enjoy the same presumptions of custody and access when a judicial action for paternity is commenced.

1.4 Requirements for Non-genetic Parents

Non-genetic parents, including step-parents, may have rights of access to a minor child in special circumstances. Arkansas law recognises the *in loco parentis* doctrine, which focuses on the relationship between the child and the non-genetic person seeking judicial recognition of their rights of custody and access. The judicial inquiry is to determine the bond between the child and the third party or non-genetic parent. Evidence of pre-separation intent or shared agreement to parent the child is an important element for the non-genetic parent to show the court.

1.5 Relevance of Marriage at Point of Conception or Birth

Married parents share equal rights and responsibilities to their minor children. Neither parent has an advantage based on their gender. In 2021, the

legislature passed a law creating a presumption in favour of joint custody for all child custody orders.

1.6 Same-Sex Relationships

The state is obligated to issue birth certificates to same-sex married parents. Following birth, the non-genetic parent may formally adopt the minor child to fully establish their parental rights and legal interests. Same-sex partners should memorialise in writing their agreement to have children and co-parent.

1.7 Adoption

Adoptions may be granted only after the adoptive parents have complied with rigorous statutory requirements. The prospective adoptive parents and adult household members must all go through extensive state and federal criminal background checks. An extensive home study may be required in certain adoptions. With certain exceptions, a comprehensive report concerning the child's health, genetic and social history must be generated and filed prior to entry of the adoption decree.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

The consent of the non-custodial parent is necessary for the custodial parent to relocate with a minor child. If the non-custodial parent does not consent to the proposed relocation, they must file a formal request for denial of a proposed relocation with the appropriate court having competent jurisdiction. The Arkansas Supreme Court has said that third parties, such as grandparents, are not considered beneficiaries of custody agreements, and therefore cannot contest or object to the relocation of a minor child.

2.2 Relocation Without Full Consent

Either parent may initiate a legal proceeding to authorise or deny a proposed relocation. Typically, relocation cases are commenced by the non-custodial parent, who, knowing the other parent is attempting relocation, seeks a change of custody. In other situations, the custodial parent has already relocated, forcing the non-custodial parent to file a contempt application. Relocation proceedings can also be commenced by the custodial parent filing a petition for permission to relocate.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

The standard for determining the issue of relocation can be found in *Hollandsworth v Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). In *Hollandsworth*, the Arkansas Supreme Court created a presumption in favour of the custodial parent's request for relocation. In creating this presumption, the Supreme Court shifted the ultimate burden of proof to the non-custodial parent. The parent opposing the move must prove that the proposed relocation will negatively impact the minor child.

As with all cases involving minor children, the primary concern is still the best interests of the minor children. In determining whether to allow the proposed relocation, the trial court may consider the following:

- reason for the relocation;
- educational, health and leisure opportunities in the new location;
- non-custodial parent's current visitation and communication schedule and the potential impact on that schedule if the proposed relocation is allowed;

- effect of the move on the extended family relationships; and
- preference of the minor child, if the child is of sufficient age and maturity.

2.3.2 The Wishes and Feelings of the Child

The trial court may consider the preference of the minor child when determining whether to permit a request for relocation. In Arkansas, there is no specific age at which a court may listen to or consider the wishes and preferences of the minor child. The court must make a determination regarding the child's mental capacity, maturity and age on a case-by-case basis. While the wishes and desires of the minor child are not binding on the trial court, they should be properly considered in light of other evidence produced at trial.

2.3.3 The Age/Maturity of the Child

The judge must determine on a case-by-case basis whether the minor child is of sufficient age, maturity and mental capacity to have a reasonable opinion about the proposed relocation. There is no specific age at which the court may consider the minor child's opinion. There have been cases in which the trial court has found that a 12-year-old is not of sufficient maturity to form a reasonable opinion. Typically, the older the child is, the more likely the court is to find the child of sufficient age and maturity. It is important to note that, even if the court finds the child to be of sufficient age and maturity to form a reasonable opinion regarding the relocation, the court is not required to grant that child's request but, rather, must thoroughly consider other best interest factors.

2.3.4 The Importance of Keeping Children Together

In Arkansas, both the legislature and the courts have recognised the unique bond between sib-

lings and, given that bond, have prohibited sibling separation absent exceptional circumstances. However, this prohibition does not exist for half or step siblings. As noted in the appellate case of *Respalie v Respalie*, 25 Ark. App. 254, 756, S.W.2d 928 (1988), courts "cannot always provide flawless solutions to unsolvable problems, especially where only limited options are available".

2.3.5 Loss of Contact

One of the specific things the trial court must consider when deciding a relocation issue is the impact that the relocation would have on the non-custodial parent's visitation and communication with the minor child, as well as the impact that the move would have on the child's relationship with extended family members. While the impact on the non-custodial parent's visitation with the minor child is a factor the trial court must consider, that issue alone is not dispositive of the issue. The trial court must also consider whether an alternative visitation schedule exists which could limit the loss of contact.

In the case of *Benedix v Romeo*, 94 Ark. App. 412, 232 S.W.3d 493 (2006), the custodial parent requested permission to relocate four and a half miles from Conway, Arkansas. Following relocation, the father's visitation with the minor child would remain the same except for his mid-week overnight visit with the child. The Court of Appeals reversed the trial court's ruling denying the mother's request for relocation, finding that there was insufficient evidence to support the trial court's finding that an alternative visitation schedule could not provide for meaningful visitation with the minor child.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

There is a presumption that the custodial parent's request for relocation should be granted

and is being made in the best interests of the minor child. Courts are particularly sympathetic to parents seeking relocation for employment and financial considerations presumably because these considerations would negate any claim that the parent seeking relocation was doing so solely to interfere with visitation.

2.3.7 Grounds for Opposition to Relocation

One of the most powerful grounds for opposing relocation is that the custodial parent is relocating solely to interfere with the non-custodial parent's visitation with the minor child and/or for purposes of alienation. In *Sill v Sill*, 94 Ark. App. 211, 228 S.W. 3d 538 (2006), the mother filed a petition to relocate to Miami, Oklahoma. At trial, the mother testified that she actually earned less at her job in Oklahoma than she did in Arkansas prior to relocation. Following trial, the court found that the father had rebutted the relocation presumption and that the mother attempted relocation solely for the purpose of interfering with the father's visitation and alienating the minor children. The Arkansas Court of Appeals affirmed the trial court's decision.

2.3.8 Costs of an Application for Relocation

The cost of relocation proceedings, like the cost of all family law matters, is difficult to predict given the unpredictability of the behaviour of the opposing party. If the parties are able to negotiate and/or mediate the issue of relocation and come to an agreement relatively quickly, the costs will be less than those cases that are actively litigated and result in a trial before the court.

2.3.9 Time Taken by an Application for Relocation

While there is no specific time frame within which the court must decide or hear a relocation request, Arkansas courts make a concerted effort to deal with family law matters expedi-

tiously. It is important for litigants to keep the court informed if there is a specific proposed date for relocation so that the court can attempt to hear the matter prior to that date.

2.3.10 Primary Caregivers Versus Left-Behind Parents

As a result of the Supreme Court creating the presumption in favour of the party seeking relocation in the *Hollandsworth v Knyzewski* case, trial courts are necessarily more sympathetic to custodial parents. Notwithstanding the presumption, trial courts are still required to consider the reason for relocation as a factor in reaching a determination regarding relocation. If the trial court finds that the custodial parent is relocating for purposes of interfering with visitation, it can deny that parent's request.

2.4 Relocation Within a Jurisdiction

Arkansas law makes no distinction between a parent seeking to relocate to a different state or to another county within the state. While the presumption and factors remain the same for either an international or a domestic relocation, providing continued contact between the child and the non-custodial parent could potentially be more challenging for an international relocation, resulting in greater scrutiny of the proposed relocation by the trial court.

3. Child Abduction

3.1 Legality

A parent absconds with a child either by taking the child without the consent of the other parent when there is no custody order in place or by violating a custody agreement between the parents. If the latter occurs – a parent leaves the jurisdiction with a child in violation of the terms of a custody agreement and order – the

removing parent may be charged with contempt of court. Most custody orders prohibit either parent from taking the child to another state without the consent of the other parent. If found guilty of contempt of court, the parent could be sentenced to a period of up to six months in jail.

If there is no custody order in place, the situation becomes more nuanced, as the absconding parent has not technically violated any court order or law. The left-behind parent may file an emergency custody application if there is a reasonable belief that the child is in danger. The parent may also seek a writ of habeas corpus requiring the return of the child.

3.2 Steps Taken to Return Abducted Children

If a parent takes a child to another country without the consent of the other parent, a Hague proceeding would need to be commenced. In that situation, the parent should file a petition for the return of the child under the Hague Convention either in the court in the country where the child has been taken, in the court in the country of the child's habitual residence, or both. It is important to commence these proceedings within one year of the abduction, as it can be more difficult to get a court to return the child after they have become well established in the new jurisdiction.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

The United States of America is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Arkansas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which provides for the enforcement and return of the child under the Hague Convention. The United States Department of State, Office of Children's Issues in the Bureau of Consular Affairs

is the Central Authority to carry out the duties of the Hague Convention.

The International Child Abduction Remedies Act (ICARA) is United States federal law implementing the Hague Convention on the Civil Aspects of International Child Abduction. It provides that federal district courts have concurrent jurisdiction with state courts in child abduction cases. A petition or complaint for the return of a child may be filed in an Arkansas circuit court or in the appropriate federal district court.

Once a Hague petition is filed, the court is required to act expeditiously. If a decision has not been made within six weeks of filing, the Central Authority can request a statement asking for the reason for the delay. When deciding the case, a court is empowered to take judicial notice of the law and decisions in the state of the child's habitual residence.

Arkansas courts have confirmed state policy to rigorously apply and follow the Hague principles of immediate return of the child. Both circuit and appellate courts give careful attention to the treaty's requirements and its underlying philosophy, and case law reflects that the courts are not easily distracted by attempts of wrongfully retaining parents to make inappropriate child custody or best interests arguments inapplicable in a Hague analysis.

3.4 Non-Hague Convention Countries

The United States of America is a signatory to the Hague Convention.