

## Relocation Resolved

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[The New York Law Journal](#)

April 23, 1996

**A** TOPIC THAT PROMISES to be the subject of considerable interest in the days ahead is the new Court of Appeals "relocation" decision. Now, more than ever, relocation is part of American life. Consequently, challenges to custodial parents' seeking to relocate have been more frequent and are bound to become commonplace.

An initial framework for the basis of relocation was created in 1981 when the Court of Appeals, in *Weiss v. Weiss*,<sup>1</sup> carefully noted that visitation is a joint right of the non-custodial parent and child, and that the mature, guiding hand and love of a second parent is valuable to a child when the regular parent-child relationship is nurtured by regular, frequent and welcome visitation. In the years that followed, the higher courts focused their attention on the custodial parent's obligation to justify the removal by showing a "pressing concern" for the welfare of the child or "exceptional circumstances,"<sup>2</sup> such as remarriage of the custodial parent or economic necessity. The cases were problematic, and no one rule proved certain, wreaking havoc among those searching for answers.

Just when it seemed all was hopeless and a workable solution would never be found, the Second Department provided *Radford v. Propper*.<sup>3</sup> *Radford* provided the bar with guidelines that could be used in any relocation case. It established a three-prong test that attempted to resolve the relocation dilemma<sup>4</sup>:

- (1) Would the proposed move effectively deprive the non-custodial parent of frequent and regular access to the child? If not, the move will be allowed;
- (2) If so, are there exceptional circumstances permitting the relocation? and
- (3) If there are exceptional circumstances, is the relocation in the "best interest" of the child?

While *Radford* was a profound source of study and analysis, it was only marginally more helpful than its predecessors, leaving much to be desired in simplifying or clarifying matters.

### **'Best Interest' Approach**

The Court of Appeals has now armed us with *Tropea v. Tropea* and *Browner v. Kenwood*.<sup>5</sup> By abandoning the rigmarole, the Court has empowered us with a broader, more customized, "best interest of the child" approach, an approach that has proven itself enormously worthwhile in so many other arenas involving custody. Notably, the opinion tips the balance in favor of the custodial parent, authorizing relocation with the child to begin a new life or get a "fresh start" with a new family unit.

Judge Titone, writing for a unanimous Court of Appeals, drew attention to the Court's decision in *Weiss*, acknowledging the three-step process (*Radford*) as the most commonly used formula to aid the lower courts in relocation cases and one that gave great weight to whether the proposed relocation would deprive the non-custodial parent of "regular and meaningful access to the child." The *Radford* theory is that children can derive an abundance of benefits from "the mature guiding hand and love of a second parent" and that, consequently, geographic changes that significantly impair the quantity and quality of parent-child contacts are to be "disfavored."

In a complete turnabout, the Court of Appeals in its newest decision, an opinion that has no paucity of intelligent reflection, reasoned that the "legal formula that it has spawned is problematic and, in many respects, unsatisfactory." The Court, in devouring prior law, continued its highly effective reasoning stating the three-tiered analysis is difficult to apply and erects artificial barriers to the courts' consideration of all of the relevant factors.

### **No Single Factor**

The Court concludes that cases in which a custodial parent's desire to relocate conflicts with the desire of a non-custodial parent to maximize visitation opportunity are too complex to be resolved by a mechanical analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances. The Court concentrated its appreciation on both the need of the child and the right of the non-custodial parent to have regular and meaningful contact.

Nonetheless, it also proposes that no single factor should be treated as dispositive or be given such weight as to predetermine the outcome. Rather, each relocation request must be considered on its own, with consideration of all the relevant facts and circumstances and with predominant emphasis on what outcome is most likely to serve the best interests of the child. While the rights of the parents are

significant factors that must be considered, the rights and needs of the children must be accorded the greatest weight.

The Court carefully noted that like "... Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way." The relationship between parent and child is different after a divorce and "... it may be unrealistic in some cases to try to preserve the non-custodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit."

In some cases, the interests of the child might be better served if the court grants visitation that maximizes "... the non-custodial parent's opportunity to maintain a positive nurturing relationship while enabling the custodial parent ... to go forward with his or her life."

... in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination. These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and non-custodial parents, the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. (citations omitted)

The Court emphasized that even where the move would leave the non-custodial parent without what may be considered "meaningful access," relocation may still be allowed by weighing the effect of the quantitative and qualitative losses that will result against such factors as the custodial parent's reasons for wanting to relocate and the benefits that the child may enjoy or the harm that may ensue if the move is or is not permitted. While economic or health reasons continue to provide a basis for permitting the relocation, a second marriage of the custodial parent or an opportunity to improve her or his economic situation is now also a valid reason for permitting the relocation if the overall impact on the child would be beneficial.

The Court now suggests that the custodial spouse's remarriage or wish for a "fresh start" can suffice to justify a distant move because of the value to the children that strengthening and stabilizing the new, post-divorce family unit can have.

## Transfer of Custody?

The Court of Appeals offers glimpses into the battling concerns of divorcing parents, suggesting that where the non-custodial parent is interested in securing custody, and a child's ties to the non-custodial parent and to the community are so strong as to make a long-distance move undesirable, the availability of a transfer of custody, as an alternative to forcing the custodial parent to remain "may have a significant impact on the outcome."

Unsympathetic attitudes toward the plight of the non-custodial parent are voiced by the Court however, when it offers that, "where the custodial parent's reasons for moving are deemed valid and sound, the court in a proper case might consider the possibility and feasibility of a parallel move by an involved and committed non-custodial parent as an alternative to restricting a custodial parent's mobility."

Other factors enumerated by the Court of Appeals, which appear to have been systematically developed with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life are:

- (1) the good faith of the parents in requesting or opposing the move;
- (2) the child's respective attachments to the custodial and non-custodial parent;
- (3) the possibility of devising a visitation schedule that will enable the non-custodial parent to maintain a meaningful parent-child relationship;
- (4) the quality of the lifestyle that the child would have if the proposed move were permitted or denied;
- (5) the negative impact, if any, from continued or exacerbated hostility between the custodial and non-custodial parents;
- (6) the effect that the move may have on any extended-family relationships; and
- (7) any other facts or circumstances that have a bearing on the parties' situation.[6](#)

In *Tropea* the parties' 1992 divorce judgment, which incorporated their separation agreement, gave the petitioner-mother custody of the two children and the respondent-father was granted visitation on holidays and "at least three \* \* \* days of each week." The parties were barred from relocating outside of Onondaga County, where both resided, without prior judicial approval.

Petitioner sought permission to relocate to the Schenectady area because of her plans to marry an architect who had a firm in Schenectady. She and her fiancé had purchased a home in the area and were expecting a child of their own. Petitioner stated that she was prepared to drive the children to and from their father's

Syracuse home, about 2 hours away from Schenectady. The distance made mid-week visits during the school term impossible. Respondent established he maintained frequent and consistent contact with his children.

### **'Meaningful Access'**

The JHO found that petitioner's desire to obtain a "fresh start" with a new family was insufficient to justify a move that would "significantly impact upon" the close and consistent relationship with his children that respondent had previously enjoyed. The Appellate Division reversed, holding that petitioner had made the necessary showing that the requested relocation would not deprive respondent of "regular and meaningful access to his children" and that the move would be in the best interests of the children.

The Court of Appeals found no reason to upset the Appellate Division's determinations on these points.

In *Browner* the parties' 1992 Agreement, which was incorporated in and survived their 1992 divorce judgment, gave the mother custody of the child and gave the father liberal visitation, including midweek overnight visits and alternating weekends. Petitioner was required to seek prior approval of the court if she intended to move more than 35 miles from respondent's residence in Westchester.

Petitioner sought permission to relocate to Pittsfield, Mass., 130 miles from respondent's home, because her parents were moving there and she wished to go with them.

Petitioner testified that she had tried to find work in New York but was unable to do so and that her prospects of finding affordable housing in the Purchase area were bleak. She located a job in Pittsfield that would give her sufficient income to rent a home. A motivating factor was the emotional support and child care that she received from her parents and that she expected to receive from her extended family in Pittsfield.

Petitioner was somewhat dependent on her parents for financial and moral support, and her son had become especially close to his grandparents after the parties had separated. The boy had a long-standing close relationship with his Pittsfield cousins. Respondent argued that the relocation would deprive him of meaningful access to his child.

The Family Court found that respondent had been "vigilant" in visiting his son and was "sincerely interested in guiding and nurturing [the] child." Nonetheless, it authorized the move, granting respondent liberal visitation rights. It noted that the move would not deprive respondent of meaningful contact with his son and that, in light of the psychological evidence, the move would be in the child's best interests. It stated that the parents' separation from each other would reduce the

bickering that was causing the child difficulty and would enable the child to have the healthy peer relationships that he needed.

The Appellate Division affirmed, stating only that "the relocation did not deprive [respondent] of regular and meaningful access to the child" and, thus, petitioner was "not required to show exceptional circumstances to justify relocation."

Respondent's only argument in the Court of Appeals was that the Appellate Division misapplied the *Radford* test to his case and that the 130-mile move from Westchester to Pittsfield would eliminate his mid-week visitation, reduce his ability to participate in his son's religious worship and diminish the quality of the weekend visits with his son. The Court held that while these losses were real and far from trivial, it could not be said that they operated to deprive respondent of a meaningful opportunity to maintain a close relationship with his son. Thus, he was not entitled to reversal.

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Notes

(1) (1981) 52 NY2d 170, 436 NYS2d 862, 418 NE2d 377.

(2) See *Freiderwitzer v. Freiderwitzer*, (1982) 55 NY2d 89, 447 NYS2d 893; *Daghir v. Daghir* (1982), 56 NY2d 938, 439 NE2d 324, affg (82 AD2d 191); *Savino v. Savino* (1985, 2d Dept.), 110 AD2d 642.

(3) 2d Dept., 1993; 190 AD2d 93.

(4) See Freed, Brandes and Weidman, "Relocation: A Child's Dilemma," *New York Law Journal*, Dec. 31, 1991, p.3, col. 1; Brandes and Weidman, "The Relocation Dilemma Revisited," *NYLJ*, Nov. 23, 1993, p.3, col. 1; Brandes and Weidman, "When the Custodial Parent Relocates," *NYLJ*, Feb. 28, 1995, p.3, col.1.

(5) \_\_ NY2d \_\_, *NYLJ*, March 27, 1996, 1996 N.Y. Int. 48. March 26, 1996

(6) In a footnote the court stated that a geographical relocation restriction agreed to by the parties and included in their separation agreement might be an additional factor relevant to a court's "best interests" determination.

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