LAW AND THE FAMILY

"The Relocation Dilemma Revisited"

Joel R. Brandes and Carole L. Weidman

New York Law Journal

November 23, 1993

IN 1981 THE COURT of Appeals held, in Weiss v. Weiss, [FN1] that a child has a fundamental right to know and associate with both parents and that, to be meaningful, visitation must be frequent and regular. A year later in Friederwitzer v. Friederwitzer, [FN2] the Court held that where a custodial parent wants to relocate with the child to a distant domicile the court must view the "totality of circumstances." It must weigh and balance the relevant considerations, which include the interests of both the custodial parent, those of the parent having visitation and, last but not least, the interests of the child. The once primary concern as to visitation rights of the noncustodial parent became a single factor among many for the Court to weigh and balance. Friederwitzer firmly established the general rule that the best interests of the child would ultimately govern relocation cases. As we shall see this is still the law.

Since Friederwitzer, most New York appellate cases have focused primarily on the custodial parent's burdens to justify the removal by showing a "pressing concern" for the welfare of the child or exceptional circumstances [FN3] such as remarriage of the custodial parent or economic necessity. [FN4] Because of this, many lawyers and clients have been confused as to just what the law requires to be shown to authorize a relocation and have not understood Friederwitzer's holding that the child's best interests prevails. Weiss v. Weiss, [FN5] held that the custodial mother should be enjoined from relocating with the child to Las Vegas. The Court noted the expressed desires of the child, the infringement upon the rights of the noncustodial parent to visitation and the lack of exceptional circumstances requiring such a move.

Variety of Interpretations

As we wrote in this column two years ago, [FN6] reconciling the New York decisions on removal is nearly impossible. Different courts have read a variety of meanings into the ambiguous concepts of "best interests," "pressing needs" and "exceptional circumstances." Most often it becomes a "judgment call." We noted that in determining what is in the child's "best interest," where the appropriate considerations are fairly evenly balanced, weight must be given to the nature of the relationship between the child and the parent having visitation rights.

If such rights were not exercised, or the party having visitation has behaved irresponsibly as a parent or forfeited his or her visitation privileges, the interests of the child and such parent are diminished, but if there has been an ongoing meaningful relationship with the noncustodial party or parent, the interests of the child and such parent are enhanced. We concluded then that the rule was best stated by the Fourth Department in Wodka v. Wodka, [FN7] where the court, in reversing the Supreme Court held that it was an abuse of discretion to direct the mother, who relocated with the child, to return to New York State without considering the child's best interests:

The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered (Friederwitzer v. Friederwitzer, 55 NY2d 89, 95, 447 NYS2d 893, 432 NE2d 765). In the instant case, the Court on numerous occasions stated that it did not consider the child's best interests relevant to its determination of the relocation issue. This was error.

In the past two years many Appellate Courts have unsuccessfully tried to establish a general rule for attorneys to apply in "relocation cases," but it was not until recently that a test to determine if relocation should be permitted under the "best interest" rule of Friederwitzer was articulated.

In Elkus v. Elkus [FN8] the parties' 1990 divorce judgment, which incorporated their Stipulation of Settlement provided for joint custody of their two daughters. The mother remarried. Shortly afterward she moved for permission to relocate with the children to California where her new husband resided with his 17-year-old daughter. The mother was an internationally renowned opera singer who earned about $800,000 a year. The father earned about $90,000 per year and had inherited wealth. He opposed the application on the ground that he and the two children had a close relationship that would be jeopardized by a move to California. Over the previous year and a half, he visited the children in their house on Long Island, every other weekend and twice during the week. The Supreme Court denied the mother's application. It held that the relocation was against the best interests of the children, age 14 and 12, who opposed the relocation because the mother's scheduled operatic engagements

required extended absences from California and since she had no plans to hire a housekeeper, her new husband would be the children's primary caretaker.

The Supreme Court indicated its willingness to grant the mother permission to relocate at the end of the school year in June 1992, when the older child would have graduated junior high school, upon a showing that the children were properly prepared for the move. The Appellate Division affirmed this order. Subsequently, the mother rearranged her professional schedule to minimize her absences from California. She took the children to a therapist to prepare them for the move and offered to assume financial responsibility for visitation- related expenses, including airfare, phone calls and a rental apartment for the father in California. She found suitable educational facilities for the children in California and hired a housekeeper to care for them during her absences.

Improper Standard

Despite these efforts, the children continued to oppose the relocation. A second guardian ad litem appointed by the court opposed this relocation, as did the court-appointed psychologist who concluded that the children's best interests would be served by their remaining on Long Island. The Supreme Court nevertheless granted the mother's motion to relocate. The Appellate Division, First Department, reversed. It held that the Supreme Court applied an improper standard, and the requisite standard of "exceptional circumstances" justifying relocation had not been met. The fact that the new husband resided in California and could not relocate and that the move would be advantageous to the mother's career were insufficient, in the absence of a showing of economic necessity or other exceptional circumstances to justify the relocation of the children. It noted that the mother's frequent absences necessitated by her professional engagements were an important consideration in any "best interest" assessment, underscoring the significance of the children's relationship with their father and the stabilizing influence of their friends, school and surroundings.

The Supreme Court failed to address the reasons advanced by the guardian and the psychiatrist for opposing relocation, all of which revolved around the general rule that disfavors distant geographic relocations tending to frustrate the objective of regular contact with both parents. The quality of the father's visitation could only suffer when frequency and flexibility were diminished. The Appellate Division held that the relocation to California would limit the frequency of visitation with the father and have an adverse effect on the nature and quality of his relationship with the children.

In Atkin v. McDaniel [FN9] the parties executed a separation agreement in 1989, providing for joint custody of their three children. Physical custody was with the husband during the school year and with the wife during the summer. The parties were divorced in 1990. Thereafter, the husband sought a Family Court order confirming the custody and visitation arrangements set forth in the separation agreement. The wife cross-moved to have the children's principal residence with her. After a hearing, Family Court awarded physical custody of the parties' oldest child to the husband and physical custody of the two younger children to the wife. The Appellate Division, Third Department, reversed.

Flawed Analysis

It held that the Family Court's analysis of the children's best interests was flawed because of its failure to take into account that after the parties agreed to the children's primary residence with the husband at the former marital residence in Delaware County, the wife relocated to North Carolina with her boyfriend, where she subsequently obtained employment. It held that in cases where the custodial parent seeks a geographic relocation that substantially affects the noncustodial parent's visitation, "exceptional circumstances" must be shown by the relocating parent. A similar showing was required in this case, where the non-custodial parent relocated to a distant location and thereafter sought custody of the children. The record revealed that the wife and her boyfriend moved to North Carolina to obtain better employment despite the existence of employment opportunities in New York, where they had been residing. It stated that the wife's relocation was also relevant to the issue of stability in the children's lives, which Courts have recognized as an important factor in determining the children's "best interests."

The marital home had been the children's residence since 1984. They had friends and other family members in the area and they attended the local school. Relocation of the two younger children to the wife's new home in North Carolina would not only disrupt the established custody arrangement and separate the children, the wife's decision to move to North Carolina was a voluntary one motivated by purely personal reasons.

In Sanders v. Sanders [FN10] the parties' stipulation, which was incorporated into their 1989 divorce judgment provided for joint custody with primary physical custody to the wife and alternate weekend visitation to the husband. The custody agreement did not address the possibility of either party's relocation. In 1990, without notice to the husband, the wife moved to Florida with the two children, to be with her fiancee. He was a long-time Florida resident who was employed in his family's company. The husband married a woman with two children, who indicated that she would welcome the husband's two children in their new home. The husband

brought an action seeking the return of the wife and children, or, in the alternative, a change of physical custody.

After a hearing, the Supreme Court ordered that, if the wife remained in Florida, physical custody would be granted to the husband as of July 1992. The Appellate Division, Fourth Department, affirmed. It held that the wife's relocation to Florida was not justified by such exceptional circumstances that would excuse her effective termination of the husband's visitation rights under the parties' agreement. The court directed the wife to return the children to New York on or before Aug. 17, 1992, before the start of the school year. If she failed to return with the children by that date, permanent physical custody of the children was to be transferred to the husband.

Economic Betterment

In Leslie v. Leslie [FN11] the parties were married in 1976 and had one child. In 1988, the wife left the marital residence with the child, moved to her parent's home and started a divorce action against the husband. After a non-jury trial, the Supreme Court permitted the wife and child to relocate to Virginia, based on the fact that the maternal grandparents with whom the wife and child had been living were moving to Virginia, the wife and child would be able to live in Virginia as well or better than in New York and the move would not deprive the husband of regular access to his son.

The Appellate Division, Second Department, reversed and directed that custody be awarded to the husband unless the wife returned to a residence that was within 50 miles of the husband's residence in New York. It found that the wife's desire to move to Virginia was predicated upon her desire to obtain a doctoral degree from the University of Virginia. There was no evidence that she had fully investigated her educational options and opportunities in New York. The wife asserted that the move to Virginia would improve her and her child's standard of living. However, the Appellate Court held that a desire for economic betterment as opposed to economic necessity does not constitute an "exceptional circumstance" sufficient to justify a move that would significantly curtail visitation by the non-custodial parent.

The husband had fully taken advantage of his visitation rights and developed a meaningful relationship with his son. The Appellate Division stated that although the predominant concern is the best interests of the child, the resolution of such disputes requires a careful balancing of the rights and problems of both the child and his/her parents. Significantly it found that the wife's move deprived the husband of regular access to his son, which was not in the best interests of the child, and it directed that the

best interests of the child mandate that the husband be awarded custody unless the wife returned to New York.

In Smith v. Finger [FN12] the parties were divorced in 1989. They had one son. Their separation agreement, which was incorporated by reference but did not merge with the divorce judgment, provided for joint custody, with each parent having physical custody of their son during alternating weeks until the child's fifth birthday, or until he entered kindergarten, whichever last occurred. Thereafter, during the next three years, the mother would have weekday custody during the school year and the husband would have custody every weekend.

After the child's eighth birthday, or when he entered third grade, whichever last occurred, the custody arrangement would be reversed with the father having week-day custody during the school year and the mother having custody on weekends and vice versa.

In December 1990, the wife married a dentist with an established practice in Virginia. In 1991, just before the son's fifth birthday, the mother applied to the Supreme Court, pursuant to the parties' agreement, for authorization to relocate with the child to Virginia. By separate motion, the father sought to enjoin the mother from moving or to transfer custody of the child to him. During the pendency of these motions, the parties agreed that the child would reside with the mother in Virginia during the week and visit with the father on weekends. The wife moved to Virginia in June 1991. After a hearing, Supreme Court held that the joint custody arrangement was not in the child's best interest and granted the mother sole custody with liberal visitation to the father.

The Appellate Division, Second Department, affirmed. It found that the mother's relocation would not effectively curtail the visitation rights of the father, nor deprive him of regular and meaningful access to the child. The father had been awarded liberal visitation. The trial court found that the mother's desire to relocate to Virginia was not motivated by a bad faith desire to curtail the father's visitation. The court-appointed psychiatrist testified that the mother was the one who was more likely to encourage the child to maintain a healthy relationship with the father. Both parties had the financial resources to pay for the travel entailed in continuing the father's role in the child's life. The mother's move to Virginia, was permitted pursuant to the terms of the parties' separation agreement that specifically authorized a move to the Washington, D.C., area. The recommendation of the court-appointed psychologist favored the relocation.

Disrupted Relationship

Recently, in Radford v. Propper, [FN13] Justice Vincent R. Balletta of the Second Department dealt with the "thorny problem" that arises where the custodial parent wants to relocate to a distance that is far enough (90 miles) to disrupt the relationship between the non-custodial parent and the child. His opinion attempted to "provide a framework for the analysis of situations."

The parties were married in June 1982 and had one child, Steven, born on May 10, 1983. In early 1985, the mother moved out of the marital home in Brooklyn. They were divorced in May 1986. Pursuant to a separation agreement, which was incorporated but not merged in the judgment of divorce, the father and mother shared joint custody of the child, with the child's primary residence being with the father. The mother was to have visitation on every Tuesday and Thursday evening from 6 p.m. to 8 p.m., alternate weekends, alternate holidays and four weeks in the summer. The judgment of divorce provided that the parties agreed that neither party could take Steven out of New York, except for day trips to New Jersey and Connecticut, without prior notice to the other party. After the divorce, the father and child continued to reside with the child's paternal grandmother, who was the child's primary caretaker.

In March 1990, the mother commenced a proceeding to modify the judgment of divorce to obtain sole custody. After forensic examinations and a hearing, the Family Court denied the mother's application. The court concluded that while neither parent was unfit, it was in the child's best interests to remain in the physical custody of his father since, in its view, his father could better provide him with a stable environment and continuity. A few weeks after the Family Court's decision, the father informed the mother that he intended to remarry and would be relocating with the child to New Jersey. On Dec. 18, 1991, the parties stipulated to a modification that allowed the father to take Steven to New Jersey provided that it did not interfere with the mother's visitation, that Steven continue to attend his school in Brooklyn and that Steven's permanent residence remain in Brooklyn.

Subsequently, a hearing was held before the Family Court at which, it was established that after Steven's father had remarried, he and his new wife decided to move to her condominium in Lawrenceville, N.J., which was about 90 miles away from Steven's mother's home in Bethpage, N.Y. They had also contracted to purchase a new home, which was under construction in nearby Cranbury, N.J. The father testified that he wanted to move to New Jersey because it would save his wife commuting time, they could afford more in New Jersey, it was a better environment for Steven, and the school districts were excellent.

He further testified that he was "flexible" regarding any new arrangements for visitation and stated that he would even meet Steven's mother halfway at some point on Staten Island. However, he did state that he would not be willing to transport Steven the entire way to the mother's house in Bethpage because the two-hour trip would be "unduly burdensome."

Steven's mother testified that she attended Steven's Little League games, his school plays and his school conferences. She also testified that while it was only 32 miles from her home in Bethpage to Steven's residence in Brooklyn, it was more than 90 miles to Lawrenceville, N.J., and that the ride could take up to three hours. The Family Court found that the father's move was solely for his convenience and for that of his new wife. The court further found that although the move was not intended to foreclose visitation, it would have the practical effect of terminating the weekday visitation and limit the mother's ability to be involved in Steven's school life. Moreover, the father was better able to visit Steven since the mother had to care for another infant, and he regularly worked in Manhattan. The Family Court determined that it was in the best interests of the child for his physical custody to be transferred to his mother. The court also established a visitation schedule for the father.

Regular Access

Justice Balletta set forth the principles applicable to such cases and considered that although each case had its own set of circumstances:

... one principle cannot be ignored in favor of another. The evaluation of these cases has proven to be difficult; indeed, some commentators have noted that "reconciling the New York decisions on removal is nearly impossible (see Freed, Brandes and Weidman, "Relocation: A Child's Dilemma," NYLJ, Dec. 31, 1991, at 3, Col. 1; compare, Rybicki v. Rybicki, 176 AD2d 867, supra [move from Northport, N.Y., to Fairfield County, Conn., a distance of 84 miles, not allowed] with Conte v. Conte, 176 AD2d 247 [move from Queens County to Sullivan County, a distance of 125 miles, allowed.]

He then went on to articulate "some guidelines that may be usd in any relocation case." He stated that:

... the threshold question that must be answered is whether the proposed move would effectively deprive the noncustodial parent of that frequent and regular access to his or her children so as to require the relocating parent to demonstrate exceptional circumstances. Will the move be unduly disruptive of, or substantially impair, the noncustodial parent's visitation rights? *** In considering this question, the court should not look solely at numerical distance, but it should also take into account other factors such

as travel time, the burdens and expense involved in traveling, *** the number of visitation hours that would ultimately be lost, the frequency of visitation, the regularity with which the noncustodial parent exercised visitation, and the involvement of the noncustodial parent in the lives of his or her children. *** Where a proposed move may, or is likely to deprive a noncustodial parent of regular and meaningful access to and interaction with his or her children, two further tests must be satisfied by the custodial parent wishing to relocate. First, the relocating parent must establish the existence of exceptional circumstances to warrant the relocation. Accordingly, there must be shown some compelling concern for the welfare of the custodial parent or the children. *** Exceptional or compelling circumstances have been stated to include "exceptional financial, educational, employment, or health considerations *** which necessitates or justify the move." *** The burden of providing such exceptional circumstances is upon the custodial parent who seeks relocation, and it is a heavy burden. ***

It should be noted that the remarriage of the custodial parent alone is rarely a sufficient justification for allowing the custodial parent to remove the child from the State. *** Further, neither economic betterment nor the offer of a promotion and salary increase has been found to constitute an exceptional circumstance justifying a relocation.

Further, even if it can be shown that exceptional circumstances exist, the relocating parent must than establish that the relocation is in the best interests of the child. ***

Here the court found that the drive to Staten Island, where the proposed meeting point was to be, could take two or three hours when considering the traffic through Brooklyn and Queens. Additionally, the father's move would terminate the mother's weekday visits and limit her ability to be involved in Steven's schooling. As such, the father's relocation would deprive the mother of meaningful access to Steven without considering numerical mileage. It was clear, therefore, that the circumstances of this case required a showing of exceptional circumstance.

With this established, the court concluded that the father had failed to show that circumstances exist that would justify relocation with the child. The relocation to New Jersey was solely for the commuting convenience of the father and his new wife and did not take into consideration the best interests of the child. As a consequence thereof the Order was affirmed.

Radford v. Propper, established a three-prong test to determine if relocation should be permitted: (1) Would the proposed move effectively deprive the non- custodial parent of frequent and regular access to the child? (2) If so, are there exceptional circumstances permitting the

relocation? and (3) If there are exceptional circumstances, or not, is the relocation in the "best interest" of the child?

This is exactly what the Court of Appeals said in Friederwitzer in 1981. [FN14]

FN1. 1981, 52 NY2d 170, 436 NYS2d 862, 418 NE2d 377.

FN2. 1982, 55 NY 89, 447 NYS2d 893, 432 NE2d 765.

FN3. Courten v. Courten (1983, 2d Dept.), 92 AD2d 579, 459 NYS2d 464; Daghir v. Daghir (1982), 56 NY2d 938, 453 NYS2d 609, 439 NE2d 324, affg (82 AD2d 191, 441 NYS2d 494); Savino v. Savino (1985, 2d Dept.), 110 AD2d 642, 487 NYS2d 378; Schwartz v. Schwartz (1982, 2d Dept.), 91 AD2d 628, 456 NYS2d 811.

FN4. See also, Savino v. Savino, supra; Cataldi v. Shaw (1984, 2d Dept.), 101 AD2d 823, 475 NYS2d 480; Martinez v. Konczewski (1981, 2d Dept.), 85 AD 717, 445 NYS2d 844, app dismd 56 NY2d 592, 450 NYS2d 308, 435 NE2d 678 and affd 57 NY2d 809, 455 NYS2d 599, 441 NE2d 1117.

FN5. 1980, 2d Dept. 76 AD2d 863, 428 NYS2d 506, affd 52 NY2d 170, 436 NYS2d 862, 418 NE2d 377.

FN6. See Freed, Brandes and Weidman, "Relocation: A Child's Dilemma," New York Law Journal, Dec. 31, 1991, P.3, Col. 3

FN7. 1990, 4th Dept. 168 AD2d 1000, 565 NYS2d 354.

FN8. 1992, 1st Dept. 182 AD2d 45, 588 NYS2d 138.

FN9. 1992, 3d Dept. ___ AD2d ___, 585 NYS2d 849.

FN10. 1992, 4th Dept. ___ AD2d ___, 585 NYS2d 891.

FN11. 1992, 2d Dept. 180 AD2d 620, 579 NYS2d 164.

FN12. 1992, 2d Dept. ___ AD2d ___, 590 NYS2d 301.

FN13. Radford v. Propper (2d Dept., 1993) ___ AD2d ___, 597 NYS2d 967.

FN14. And so did the Third Department in Clark v. Dunn (1993, 3d Dept.) ___ AD2d ___, 600 NYS2d 378, which was decided July 15, 1993, where the move by the mother and her new husband was to Alaska. The Third Department held that a presumption arises that "such out-of-state

relocation is not in the best interest of the children." In language similar to that of Justice Balletta the court stated: " ... and, where, as here, the move would deprive the noncustodial parent of regular and meaningful visitation, compelling or exceptional circumstances must be shown by the relocating parent (***). Only after determining that exceptional circumstances exist must the best interest of the children also be shown (***)." [citations omitted]

See also Murphy v. Murphy (1993, 3d Dept.) ___ AD2d ___, 600 NYS2d 373, decided the same day, where the Third Department reiterated the same rule in prohibiting a move by the mother from Ulster County to Monroe County, where it would deprive the noncustodial parent of regular and frequent visitation. It stated that the mother had to demonstrate compelling or exceptional circumstances that required her to relocate and that the relocation was in the children's best interest.

Joel R. Brandes and Carole L. Weidman have law offices in New York City and Garden City. Mr. Brandes is a co-author, with the late Doris Jonas Freed and Henry H. Foster, of Law and the Family, New York (Lawyers' Co-Operative, Publishing Co., Rochester, N.Y.) Ms. Weidman co-authors the annual supplements with him.

11/23/93 NYLJ 3, (col. 1)

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