LAW AND THE FAMILY

When the Custodial Parent Relocates

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FOR YEARS, ISSUES surrounding relocation brought a dizzying succession of cases. In 1982, the Court of Appeals caught our attention by holding in Friederwitzer v. Friederwitzer*1 that when a custodial parent wants to relocate with his or her child to a distant place the court must have a view toward the ``totality of circumstances'' with the ``best interests'' of the child ultimately controlling. In the 10 years following Friederwitzer, the appellate cases focused primarily on the custodial parent's burden to justify the removal by showing a ``pressing concern'' for the welfare of the child or ``exceptional circumstances''*2 such as remarriage of the custodial parent or economic necessity. While these general themes flowed throughout the decisions that followed there seemed to be no real rhythm that could be relied on with absolute certainty.*3 Reconciling the cases on removal was a struggle.

In 1990 the Fourth Department began to clarify the blurry picture that had developed. In Wodka v. Wodka*4 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. It held that the standard ultimately to be applied steadfastly remains the ``best interests of the child'' when all of the applicable factors are considered.

In earlier columns*5 on this subject, we concluded 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 if the parent having visitation 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 had been an ongoing

meaningful relationship with the noncustodial party or parent, the interests of the child and such parent are enhanced. This standard continues.

Guidelines Provided

Just when it seemed hopeless and that a workable solution for attorneys would ever be found along came Radford v. Propper,*6 The Second Department in 1993 defied the claim ``it can't be done'' by providing ``some guidelines that may be utilized in any relocation case.'' It 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. [citations omitted]

The three-prong test, established by Radford has been consistently followed,*7 becoming the relocation ``bible'' in assessing the equities in cases. The test is (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?

Adoption in the Departments

In the year-and-a-half that has passed since Radford v. Propper, it appears that other Appellate Departments are adopting its rule. In Rouch v. Rouch*8 the First Department reversed an order of the Supreme Court, which among other things, granted permission for the mother to move the custodial residence to New Haven, Conn., from Manhattan. The parties' 1992 separation agreement provided that for so long as the husband resided in the Radius Area, the Wife agreed not to remove the residence of the children from the Radius Area without first securing the written permission of the Husband or an order of a court of competent jurisdiction of the State of New York. The father worked in Manhattan and structured his work life so as to have the flexibility to maintain his active involvement in his children's lives. The mother was enrolled as a studentin Pace University Law School in White Plains, and there was no issue of economic necessity that would constitute an exceptional circumstance justifying the move. The Supreme Court held that the mother did not have to prove the existence of exceptional circumstances because the move to New Haven is a ``reasonable distance'' that ``will amount to little if any disruption in the father's relationship with the children.'' The Appellate Division rejected this conclusion, holding that any fair reading of the record must lead to the conclusion that the hour-and-45-minute train ride to New Haven would disrupt the substantial involvement of the father in the daily lives of the children. It stated: Where there is a specific agreement limiting the geographical location of the custodial residence and the custodial parent applies for judicial relief from such agreed upon terms, the applicant must not only show exceptional circumstances warranting the change in the best interests of the children (***), but the law also `` . . . requires that the interests which might justify such a relocation by the custodial parent be balanced against the noncustodial parent's fundamental human right to frequent visitation . . . .'' ***).

The Appellate Division concluded, citing Radford v. Propper that the Supreme Court's holding that the mother was not required to demonstrate the existence of exceptional circumstances was `` . . . erroneous as a matter of law . . .'' and found that there was no showing of exceptional circumstances that would warrant abrogation of the geographical limitation in the best interests of the children. The record clearly established that the father was an active parent whose

involvement in his children's lives was extensive. This involvement during the week would be lost if the mother were permitted to move to New Haven.

The court weighed against this involvement the mother's reasons for the proposed move, upon which the Supreme Court based its decision, which was stated as the ability to live in a more suburban environment where the children could enjoy trees and grass and live less structured lives. The Appellate Division held that by not applying the exceptional circumstances test, the Supreme Court improperly avoided the requirement of balancing the rights and interests of both parents in determining what would serve the ``best interests'' of the children.

The `Radford' Rule

During 1994 three cases decided by the Third Department indicate that it has adopted the Radford rule. In Raybin v. Raybin*9 the parties' 1988 agreement, which survived their 1989 divorce, provided for, among other things, joint legal and physical custody of the children, residence in the same school district, and, if either party moved from the ``area,'' the other party would obtain primary physical custody of the children.

The petitioner remarried in October 1991 and lost his position when IBM closed its Glendale Lab in Broome County. Petitioner was asked by IBM to transfer to Westchester County. He accepted the transfer and purchased a residence in New Fairfield, Conn. In August 1992, after petitioner applied to Broome County Family Court for permission to relocate the children to Connecticut, the parties entered into a stipulation, reduced to an order, which provided for joint custody with primary physical custody in petitioner and a fixed schedule of visitation for respondent.

In January 1993 petitioner learned that his job in Westchester County was being eliminated, and he accepted a position with the company, at the same rate of pay, in Boca Raton, Fla. Petitioner never sought other employment with IBM outside of Westchester County or with any other company. In March 1993, he commenced a proceeding to modify visitation based on his impending relocation to Florida. Petitioner, the children and their stepmother relocated to Florida in early July 1993.

Respondent cross-petitioned to prevent petitioner's relocation and to modify custody. At the fact-finding hearing, a court-appointed psychiatrist refused to give an opinion about what was in the children's best interests but did say that continuity of care was a positive thing. The Law Guardian in addressing ``best interests'' stated that the continuity factor tipped the scales in favor of allowing the move. The Appellate Division reversed the Family Court, which found, among other things, that petitioner showed extraordinary

circumstances and that it was in the best interests of the children to relocate with petitioner to Florida.

In its opinion the court stated that in a ``recent case involving relocation''*10 it had reviewed the pertinent law and quoted from it: [A] geographic relocation which substantially affects the visitation rights of the noncustodial parent gives rise to the presumption that ``such relocation is not in the child's best interest'' (***). The presumption may be rebutted ``upon a showing of exceptional circumstances by the relocating parent'' (***). The emerging trend which justifies relocation requires proof that the move is necessitated by economic necessity rather than economic betterment or mere economic advantage * * * (***) citations omitted] [emphasis in original]).

The exceptional circumstances standard may include ```exceptional financial, educational, employment, or health considerations * * * which necessitate or justify the move' (***). Only when the custodial parent has made a sufficient showing of exceptional circumstances will the focus shift to the standard of whether the best interests of the children will be furthered by the move (id.).'' [citations omitted]

Exceptional Conditions

This is the same as the rule enunciated in Radford v. Propper. The court then went on to state that the primary issue was whether petitioner had sustained his burden of demonstrating exceptional circumstances to justify his relocation, and that ``this case, like every other custody case involving relocation, must be decided on its own facts.'' Initially, it noted that `` . . . the record clearly establishes that respondent has taken full advantage of her visitation rights with her daughters and has maintained an enriching and meaningful relationship with them (see, Matter of Radford v. Propper, 190 AD2d 93, 102).''

It concluded that the relocation to Florida would harm the children's best interests, for they would be deprived of meaningful access to their mother. It rejected petitioner's argument that his move was justified by reason of economic necessity absent proof in the record to support his claim that no other position within or without IBM was available. It held that were it to accept petitioner's relocation without compelling proof of the need therefor, it would be sanctioning all employment-related transfers based on nothing more than the perception that nonacceptance will jeopardize a custodial parent's current income.

In MacCue v. Chartier,*11 the mother who had married her fiance and sold her business sought to relocate from Saratoga, N.Y., to South Carolina. Upon learning of her proposed move, respondent father filed a petition to prohibit her from removing the child from New York. Family Court found that the child's best interest would best be served by

remaining with the mother and found that she demonstrated exceptional circumstances and that the move would be in the best interest of the child. It was undisputed that in the last three-and-a-half years the father had missed only one weekend of visitation. The Appellate Division, Third Department, quoting from Matter of Raybin v. Raybin, stated that its rule had now been well settled: It is now will settled that when a custodial parent seeks a permanent move which will substantially affect the visitation rights of the non-custodial parent a presumption arises that ``such relocation is not in the child's best interest'' (***). To rebut this presumption, the custodial parent bears the heavy burden of showing exceptional circumstances to justify the move (***). Such rule would not apply where relocation is not so distant as to deprive the noncustodial parent of regular and meaningful access, even though the distance may result in a decrease in the frequency of visitation (***).''

In determining whether the proposed move would deprive the respondent of regular and meaningful access to the child the court noted the Family Court found that respondent had a meaningful relationship with the child. It further found that the distance between New York and South Carolina was substantial and that in light of the visitation previously enjoyed by respondent, relocation from New York to South Carolina was so distant as to deprive him of regular and meaningful access to the child.

The issue thus became whether petitioner sustained her burden of demonstrating exceptional circumstances to justify relocation. While Family Court found that exceptional circumstances had been proven, the court noted ``the emerging trend which justifies relocation requires proof that the move is necessitated by economic necessity rather than economic betterment or mere economic advantage.''

In reviewing the record before it, the court found that, notwithstanding petitioner's training in the areas of cosmetology and nursing, she voluntarily sold her business and never attempted to seek other employment opportunities in this state. It further noted that while she now earned about $600 per month at her new employment in South Carolina, she testified that she earned the same amount here and was doing the same kind of work. Petitioner proffered no other testimony concerning exceptional financial, educational or health considerations that might necessitate or justify the move.

The court found that petitioner's decision to move to South Carolina was a voluntary one motivated by purely personal reasons and did not demonstrate the requisite exceptional circumstances to overcome the presumption that relocation was not in the child's best interest. The court stated that: ``Since petitioner, as the custodial parent, has not made a sufficient showing of exceptional circumstances, there remains no need to determine whether the best interest of the child will be furthered by the move.

The Benchmark

In Bennett v. Bennett,*12 the former wife, sought to move 180 miles from Broome County to New York City to pursue her educational goals. Petitioner and respondent were divorced in 1986 and had two children. Respondent was granted custody of the children and lived in Broome County. Petitioner resided in Broome County and had regular visitation with the children, which included alternating weekends, alternating Tuesday and Thursday week nights, four weeks in the summer and various holidays. While studying for a degree in criminal justice at Broome County College, respondent developed an interest in forensic psychology. She was accepted in such a program in John Jay College of Criminal Justice in New York City and desired to relocate there with the children for at least three years to attend that college. Petitioner opposed the relocation contending that the move would significantly affect his visitation.

Family Court found that respondent failed to show exceptional circumstances and prohibited her from removing the children's residence from the Sixth Judicial District. Respondent argued on appeal that she was not required to demonstrate exceptional circumstances as the 180-mile move from Broome County to New York City was not a distant one. She relied on cases in which relocation by a custodial parent was permitted without a showing of exceptional circumstances even though the geographic distance was greater than that which she proposed. The Appellate Court affirmed in reliance upon Raybin and Radford. It held that: The benchmark against which applicability of the relocation rule is measured is meaningful access, i.e., the ability of a noncustodial parent to continue to maintain a close and meaningful relationship with his or her children (see, Matter of Lake v. Lake, supra; see also, Matter of Raybin v. Raybin, supra), and not when a particular numerical distance is exceeded (see, Matter of Radford v. Propper, 190 AD2d 93, 597 NYS2d 967; Murphy v. Murphy, supra). Each case must be decided on its own facts and the determination must take into account other factors such as travel time, the burdens and expense involved in traveling *** and the involvement of the noncustodial parent in the lives of his or her children'' (Matter of Radford v. Propper, supra, at 100, 597 NYS2d 967). Neither is the relocation rule automatically triggered whenever a proposed move requires a change in a noncustodial parent's customary pattern of frequent contact (see, Matter of Lake v. Lake, supra, 192 AD2d at 753, 596 NYS2d 171).

As it was clear that petitioner would not enjoy the same level of weekly involvement with the children if they were living in New York City, the Appellate Court found that: ``the relocation would substantially disrupt petitioner's ability to continue a close and meaningful relationship with his children. Therefore, respondent had

the burden of establishing exceptional circumstances, which she failed to do."

(1) 1982, 55 NY 89, 447NYS2d 893, 432 NE2d 765.

(2) Courten v. Courten (1983, 2d Dept.) 92 AD2d 579, 459 NYS2d 464; Daghir v. Daghir (1982) 56 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.

(3) 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.

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

(5) See Freed, Brandes and Weidman, ``Relocation: A Child's Dilemma,'' New York Law Jouranl, Dec. 31, 1991, p. 3, col. 1; Branes and Weidman, ``The Relocation Dilemma Revisited,'' NYLJ, Nov. 23, 1993, p. 3, col. 1.

(6) Radford v. Propper (2d Dept., 1993) 190 AD2d 93, 597 NYS2d 967.

(7) The rule has been followed in all Second Department cases decided since then. See Amato v. Amato, 202 AD2d 458, 609 NYS2d 51 (2d Dept., 1994); Lavane v. Lavane, 201 AD2d 623, NYS2d (2d Dept., 1994); Acevedo v. Acevedo, 200 AD2d 567, 606 NYS2d 307 (2d Dept., 1994); Temperini v. Berman, 199 AD2d 399, 605 NYS2d 363 (2d Depte., 1993); Moorehead v. Moorehead, 197 AD2d 517, 602 NYS2d 403 (2d Dept.,1994).

(8) ---- AD2d ----, NYS2d (1st Dept., 1994).

(9) ---- AD2d ----, 613 NYS2d 726 (3d Dept., 1994).

(10) See Hathaway v. Hathaway, 175 AD2d 336, 572 NYS2d 92 (3d Dept., 1991).

(11) ---- AD2d ----, 617 NYS2d 544 (3d Dept., 1994).

(12) ---- AD2d ----, 617 NYS2d 931 (3d Dept., 1994).

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Included graphic: Photos of authors.