## 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.