## LAW AND THE FAMILY

When the Custodial Parent Relocates

By Joel R. Brandes and Carole L. Weidman

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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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Joel R. Brandes and Carole L. Weidman have law offices in New York City

and Garden City. They co-authored, with the late Doris Jonas Freed and

Henry H. Foster, Law and the Family, New York (Lawyers' Co-Operative

Publishing Co., Rochester, N.Y.) Mr. Brandes and Ms. Weidman coauthor the

annual supplements.

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Included graphic: Photos of authors.