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Articles

Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?

Sondra Miller*

Preface

This article is written on behalf of those children who have been, and will be, victims of the law of relocation as it is frequently applied in New York by well-meaning judges who often find themselves constrained by precedent to render custody determinations that disregard the well being of children. The long recognized fundamental truth that "the only absolute in the law governing custody is that there are no absolutes,"¹ has been ignored in many relocation cases which have resulted in custody determinations where the best interest of the child is not even reached, since the

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1. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).

rigid threshold consideration of "exceptional circumstances" has not been overcome.

I. Introduction

In its most elemental form, a relocation case is a custody case that arises from a custodial parent's desire to move, with the children, to a new home, away from the former marital domicile and the noncustodial parent. A custodial parent may seek advance permission to relocate, or, after an unauthorized move away, seek the court's approval *nunc pro tunc*.² A noncustodial parent may seek to enjoin the move by the custodial parent or force their return after the fact.³ Whatever the circumstances under which they may arise, relocation cases are among the most difficult for a court's determination. The results may be devastating for a noncustodial parent who is faced with the loss of convenient visitation. They may be even more traumatizing for the custodial parent who is forced to return or lose custody altogether. They may be most draconian for a child who is torn from the steady care of his or her custodial parent, only to land in the care of the former noncustodial parent, without adequate consideration of whether the custody change is in the child's best interest.⁴

The New York Court of Appeals has spoken only rarely on the guidelines to be used in considering relocation cases. In *Weiss v. Weiss*⁵ and *Daghir v. Daghir*,⁶ the court developed a two-part test to be applied when a custodial parent petitions for relocation: first, the custodial parent must demonstrate "excep-

2. The term means "a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect." BLACK'S LAW DICTIONARY 1069 (6th ed. 1990).

3. See *infra* part IV.

4. See the dissent of Judge Meyer in *Daghir v. Daghir*, 56 N.Y.2d 938, 944, 439 N.E.2d 324, 328, 453 N.Y.S.2d 609, 612 (1982) (Meyer, J., dissenting) ("[C]ustody should not be changed to punish one parent or enforce the rights of the other but only when it has been shown to be in the child's best interests to do so."). Yet, in Judge Meyer's opinion, that is just what the majority did in *Daghir*.

5. 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

6. 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982).

tional circumstances”⁷ necessitating the move, and second, the move must be in “the best interests of the child.”⁸

Since *Weiss* and *Daghir*, the Court of Appeals has not written an opinion in a relocation case,⁹ leaving the task of interpreting these amorphous terms to the lower courts. As one might expect, the wide range of interpretations of both parts of this test has made for a somewhat speckled history. Lacking guidance from the Court of Appeals, the appellate divisions have struggled with the meaning of these terms and, as will be more fully developed herein, have in many instances lost sight of the focal point of the analysis: “the best interest” of the children.¹⁰

The current state of the law governing relocation cases in New York is confused and inconsistent, and frequently the decisions are irreconcilable. The law fails to serve the best interests of children, the parties, or the system. It provides virtually no guidance to the public, the bar, or the bench, and thereby provides fertile grounds for protracted litigation, which clearly serves the legitimate interests of no one. Appellate review and reversal frequently follow.¹¹ The decisions of the four appellate divisions are often in conflict¹² and frequently, so too are the holdings within each department. Although the law as applied ostensibly intends to promote the best interests of the children, because of the courts’ preoccupation with the application of

7. *Weiss*, 52 N.Y.2d at 175, 418 N.E.2d at 380, 436 N.Y.S.2d at 865. See *infra* part III.A. It should be noted that the exceptional circumstances test was apparently first announced by then-Justice Titone in *Strahl v. Strahl*, 66 A.D.2d 571, 574, 414 N.Y.S.2d 184, 186 (2d Dep’t 1979), which was affirmed by the Court of Appeals. 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980).

8. See *Daghir*, 56 N.Y.2d at 940, 439 N.E.2d at 325, 453 N.Y.S.2d at 609. See also *infra* part III.A.

9. In between *Weiss* and *Daghir*, the Court of Appeals considered *Priebe v. Priebe*, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982) (mem.). However, *Priebe* adds nothing to the two-part analysis set forth in the above two cases. Additionally, *Martinez v. Konczewski*, 57 N.Y.2d 809, 441 N.E.2d 1117, 455 N.Y.S.2d 599 (1982), was decided after *Daghir*, but it affirmed on the opinion of the Appellate Division.

10. Indeed, in his dissent in *Daghir*, Judge Meyer recognized the need for the Court of Appeals to formulate comprehensive “guidelines” to steer the lower courts through the “difficult choices involved” in relocation cases. 56 N.Y.2d at 949, 439 N.E.2d at 330-31, 453 N.Y.S.2d at 615 (Meyer, J., dissenting).

11. See *infra* note 272.

12. See *infra* note 271.

static rules of law, what should be the paramount consideration often times is relegated to secondary or even lesser importance.

The application of static thresholds¹³ as prerequisites to a genuine inquiry into the true best interests of children¹⁴ often impedes the ability of the courts to reach equitable solutions in cases where at least one party is going to get less than the desired result. In our modern American society, routinely one-half of all first marriages end in divorce.¹⁵ Children are born to unmarried parents whose relationships may be even more transitory.¹⁶ More mothers choose to or must enter the work force. Ours is a mobile society and career demands often require relocations. This reality becomes even more pressing when combined with the hard facts that remarriages to spouses with established careers may further increase the need to relocate.¹⁷ In short, a law which fails to recognize these and other real concerns that can motivate a parent's need to move away from the former marital domicile should be revisited. Divorce is destabilizing to families. In an ideal world there would be no divorces. This is not an ideal world and judges should not be blind to the reality of the actual circumstances of the cases they decide: pretending that the family is still intact and that geographic proximity is always preferable. This is not always the case.

Part II of this article will discuss the origins of relocation law in New York, examining the landmark cases which set the stage for the law as we know it. Part III will explore the case law that has developed over the past decade or so, paying particular attention to the factors which have been held to constitute exceptional circumstances to permit relocation of the

13. If exceptional circumstances are not shown, the issue of whether or not the move is or will be in the children's best interests is not reached. *Radford v. Proper*, 190 A.D.2d 93, 100, 597 N.Y.S.2d 967, 972-73 (2d Dep't 1993). See *infra* text accompanying note 20; see also *infra* parts II.B, III.B, IV.

14. *Weiss*, 52 N.Y.2d at 174, 418 N.E.2d at 379-80, 436 N.Y.S.2d at 865 (stating that other courts' references to visitation as a "natural parental right . . . ignore[] the primacy of the child's welfare").

15. See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 390 (1994).

16. See Kimberly P. Carr, Comment, *Allison D. v. Virginia M.: Neglecting The Best Interests of the Child in a Non-Traditional Family*, 58 BROOK. L. REV. 1021, 1021 & n.1 (1992).

17. See, e.g., *Hemphill v. Hemphill*, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991).

custodial parent. Part IV will critique the law of New York, highlighting the inconsistencies and troubling aspects of the law as applied. My analysis will illustrate my conclusion that New York courts are not giving proper consideration to the "best interests of the child" factor, and that when courts do actively consider best interests, it is often secondary to the other parts of the relocation test. Part V will examine the relocation law of other jurisdictions, providing a measure for comparison and enabling the reader to appreciate the benefits of the test we shall propose. Finally, Part VI will recommend a different approach to determining relocation cases in New York.

II. Background

Prevailing norms governing custody disputes have changed with the development of the common law. The law has evolved from seeing feudal fathers regularly receive custody of their children as chattel, to children of tender years customarily being placed in the care of their mother.¹⁸ Today the law purports to respect the primacy of the best interests of the child.¹⁹ Unfortunately, because in relocation cases best interests are not considered until after the exceptional circumstances threshold is crossed,²⁰ custody and relocation issues are often decided, with potentially dire consequences, without regard to the best interests of the children involved. To understand this anomalous situation, let us now turn to the Court of Appeals decisions which established the law as we know it today.

A. *The Two-Step Test*

In *Weiss v. Weiss*,²¹ the Court of Appeals' first full opinion on relocation, the Court considered whether a custodial mother should be permitted to relocate with her son from Westchester County, New York to Las Vegas, Nevada.²² The parties had di-

18. For a concise discussion of the changing standards and the development of the law of child custody, see generally 4 HENRY H. FOSTER, JR., ET AL., *LAW AND THE FAMILY NEW YORK* §§ 1:1-1:4 (2d ed. 1989).

19. See *Eschbach v. Eschbach*, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 (1982).

20. See *Radford v. Propper*, 190 A.D.2d 93, 100, 597 N.Y.S.2d 967, 972-73 (2d Dep't 1993); see also discussion *infra* part II.B.

21. 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

22. *Id.* at 173, 418 N.E.2d at 379, 436 N.Y.S.2d at 864.

vorced in 1975 when the child was six, the divorce decree incorporating a separation agreement in which the mother was given custody.²³ While not detailed in the agreement, the record showed that the father had enjoyed liberal visitation rights, seeing his son approximately 150-200 days out of the year.²⁴ In 1980 the mother indicated that she wished to relocate to Las Vegas, Nevada, stating a desire to "make a new life" for herself.²⁵ The father opposed the move, and sought to enjoin his former wife from relocating.²⁶ After a hearing, the supreme court denied the father's application for an injunction.²⁷ The Appellate Division, Second Department, reversed.²⁸ The New York Court of Appeals affirmed the order of the appellate division, focusing on the detrimental effect such a move would have on the father's relationship with the child.²⁹ The court also noted that the mother was not pursuing a unique, or even a particular job offer; it echoed the appellate division's statement that "her search is for no more than an 'opportunity.'"³⁰ Significantly, there was no suggestion that the move was motivated to force a separation of the son from his father.³¹ Finally, the court stated that "absent exceptional circumstances . . . appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of law."³²

23. *Id.* at 172, 418 N.E.2d at 377, 436 N.Y.S.2d at 863.

24. *Id.* at 176, 418 N.E.2d at 381, 436 N.Y.S.2d at 866.

25. *Id.* at 172, 418 N.E.2d at 378, 436 N.Y.S.2d at 863.

26. *Id.*

27. *Id.*

28. *Weiss v. Weiss*, 76 A.D.2d 863, 863-64, 428 N.Y.S.2d 506, 507 (2d Dep't 1980).

29. *Weiss*, 52 N.Y.2d at 176, 418 N.E.2d at 380-81, 436 N.Y.S.2d at 866. The court stated:

Gainsaying the expense of travel across the country, given the unavailability of batches of time for making longer trips and the large gaps that will intervene between meetings of father and son, it cannot be said that paternal input, if not the quality of the filial relationship itself, will not suffer.

Id. at 176, 418 N.E.2d at 380, 436 N.Y.S.2d at 865-66.

30. *Id.* at 177, 418 N.E.2d at 381, 436 N.Y.S.2d at 866 (citing *Weiss*, 76 A.D.2d at 864, 428 N.Y.S.2d at 507).

31. *Weiss*, 52 N.Y.2d at 176, 418 N.E.2d at 380, 436 N.Y.S.2d at 865.

32. *Id.* at 175, 418 N.E.2d at 380, 436 N.Y.S.2d at 865. Interestingly, in this case, the mother had voluntarily agreed that the father's visitation rights, while less frequent, would be longer in duration. *Id.* at 176, 418 N.E.2d at 380, 436 N.Y.S.2d at 865. The Court was unmoved, however, stating that, "such a trade off,

One year later, in *Daghir v. Daghir*,³³ the Court of Appeals again had the opportunity to consider the issue of relocation. In *Daghir*, the new husband of the custodial mother had been transferred to France for two years, and the mother wished to accompany him with her three children.³⁴ The children's father sought to restrain the move, and in the alternative, requested custody while the mother was in France.³⁵ The family court permitted the mother to relocate with the children, noting the temporary nature of the move and finding that although the frequency of the father's visitation would be reduced, an accommodation could be reached by increasing the length of visits and reducing the child support so that he could travel to France.³⁶

The Appellate Division, Second Department, reversed;³⁷ and the Court of Appeals affirmed the appellate ruling, prohibiting the removal of the children from New York and awarding custody to the father during the mother's absence.³⁸ The Court of Appeals' one-paragraph majority opinion stated that the best interests of the child is "the legally dispositive issue."³⁹ The court found that the family court had erred as a matter of law by basing its decision "only on a balancing of the interests of the husband and the wife without making any determination as to the best interests of the children."⁴⁰ However, the court qualified this statement by noting that this case was not a "classic custody case in which we are often called on to choose between

whether voluntarily offered or judicially imposed, does not necessarily meet the needs of the child or father." *Id.*

33. 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982).

34. *Daghir v. Daghir*, 82 A.D.2d 191, 192, 441 N.Y.S.2d 494, 495 (2d Dep't 1981).

35. *Daghir*, 56 N.Y.2d at 941, 439 N.E.2d at 326, 453 N.Y.S.2d at 610.

36. *Daghir*, 82 A.D.2d at 193, 441 N.Y.S.2d at 495-96. The Family Court may also have looked at the judgment of divorce which was awarded to the plaintiff wife by reason of the cruel and inhuman treatment by her husband. The judgment also included findings that the father had left his wife and children in 1974 and lived in Lebanon for a period of 18 days. *Daghir*, 56 N.Y.2d at 941, 439 N.E.2d at 326, 453 N.Y.S.2d at 610. There had also been much disagreement over the children's religious upbringing, and the father had threatened to move to Lebanon and take the children with him. *Id.* at 942, 439 N.E.2d at 326, 453 N.Y.S.2d at 610. Further, it was found at the time of divorce that the husband was unable to properly take care of the children because of his full-time work schedule. *Id.*

37. *Daghir*, 82 A.D.2d at 196, 441 N.Y.S.2d at 497.

38. *Daghir*, 56 N.Y.2d at 940, 439 N.E.2d at 325, 453 N.Y.S.2d at 609.

39. *Id.*

40. *Id.*

differing factual assessments as to the best interests of the children,"⁴¹ since the change of custody was "for the purpose of giving effect to the father's right of visitation."⁴²

Judge Meyer, the sole dissenter, strongly disagreed with the majority's conclusion, believing that it was error as a matter of law for the appellate division to "conc[eive] that the custody of a child can be changed 'for the purpose of giving effect to the father's right of visitation' without consideration of any of the many other factors involved in the determination of the child's best interest."⁴³ In my view, Judge Meyer's thoughtful dissent is right on target.

While *Weiss* and *Daghir* are credited for introducing New York's two-part relocation test, those thirteen-year-old pronouncements of this State's highest court do not necessarily require the rigid application of that test adopted by the courts subsequently. A careful reading of *Weiss* expressly suggests a more moderate approach, noting:

[T]he law does not insist that the parents make every possible sacrifice no matter how disproportionate it may be to the benefit it would bestow upon the child. The parents too are entitled to consideration. . . . [T]he quest, if possible, is for a reasonable accommodation of the rights and problems of both.⁴⁴

Thus, the Court of Appeals in 1981 and 1982 apparently recognized the legitimacy of considering a parent's right to a "fresh start,"⁴⁵ among other factors bearing on the child's best interest.⁴⁶

The most significant message contained in those cases is, however, the court's clear unequivocal concern for the child's welfare above all else. In *Weiss*, the Court of Appeals criticized the concept of a "natural parental right" to visitation, as "too narrow," since "it ignores the primacy of the child's welfare."⁴⁷

41. *Id.*

42. *Id.*

43. *Id.* at 940-41, 439 N.E.2d at 326, 453 N.Y.S.2d at 610 (Meyer, J., dissenting).

44. *Weiss*, 52 N.Y.2d at 176-77, 418 N.E.2d at 381, 436 N.Y.S.2d at 866.

45. *Contra* Myrna Felder, *Geographic Relocation Cases*, N.Y. L.J., July 29, 1994, at 3, 4.

46. Similar sentiment was expressed generally in *Daghir*, 56 N.Y.2d at 940, 439 N.E.2d at 325, 453 N.Y.S.2d at 609.

47. *Weiss*, 52 N.Y.2d at 174, 418 N.E.2d at 379, 436 N.Y.S.2d at 862.

Moreover, the facts in *Weiss* reveal that the child's best interest was not disserved by the court's denial of the move, since in that case the child expressed his preference to remain in New York with his father, the father had availed himself of frequent, regular meaningful parenting time, and the mother's motivation to move to Nevada, while motivated in good faith by a desire to make a "fresh start," was not justified by any specified economic, educational, career, social, health, or familial advantage.⁴⁸ Even applying the more liberal approach which I will recommend,⁴⁹ the move in *Weiss* would probably be disallowed, since the father might well successfully contend that the child would suffer emotionally from the removal, which appeared to offer no significant benefit. Nevertheless, as applied by the appellate divisions, New York's relocation law leaves much to be desired.

B. *The Threshold Inquiry*

When considering relocation cases, courts do not automatically inquire whether the custodial parent has demonstrated exceptional circumstances or whether the move is in the best interests of the child. To the contrary, courts have consistently held that underlying this two-part test is the fundamental question of whether relocation would deprive the noncustodial parent of "regular and meaningful access to the child."⁵⁰ If there is no deprivation, the custodial parent need not show exceptional circumstances. The definition of "deprivation of meaningful and regular access" is, however, far from clear or consistent, and existing case law provides little guidance even within the same department.⁵¹ However, if the court finds that the relocation

48. *Id.* at 177, 418 N.E.2d at 381, 436 N.Y.S.2d at 866.

49. *See infra* part VI.

50. *Lake v. Lake*, 192 A.D.2d 751, 596 N.Y.S.2d 171 (3d Dep't 1993); *Schaefer v. Brennan*, 170 A.D.2d 879, 566 N.Y.S.2d 705 (3d Dep't 1991); *Cassidy v. Kapur*, 164 A.D.2d 513, 564 N.Y.S.2d 581 (3d Dep't 1991); *Schouten v. Schouten*, 155 A.D.2d 461, 462, 547 N.Y.S.2d 126, 128 (2d Dep't 1989); *Blundell v. Blundell*, 150 A.D.2d 321, 324, 540 N.Y.S.2d 850, 853 (2d Dep't 1989); *Murphy v. Murphy*, 145 A.D.2d 857, 858, 535 N.Y.S.2d 844, 845-46 (3d Dep't 1988); *Zaleski v. Zaleski*, 128 A.D.2d 865, 865-66, 513 N.Y.S.2d 784, 786 (2d Dep't), *appeal denied*, 70 N.Y.2d 603, 512 N.E.2d 552, 518 N.Y.S.2d 1026 (1987); *Klein v. Klein*, 93 A.D.2d 807, 808, 460 N.Y.S.2d 607, 608 (2d Dep't 1983).

51. *See supra* note 50. In some cases, the courts have permitted relocations over greater distances predicated upon findings that the noncustodial parents' visi-

will deprive the noncustodial parent of meaningful visitation, a presumption arises that relocation is not in the best interest of the child.⁵² The definition of deprivation of meaningful visitation has depended as much upon the philosophy of the particular court as upon the mileage involved.⁵³

III. Judicial Interpretation of the *Weiss-Daghir* Test

A. *The "Exceptional Circumstances" Prong*

While in theory, the two-step analysis applied in relocation cases purports to protect the rights of both parents and children, it is not so easily applied. Courts are presented with innumerable considerations. Are relocations economically necessary, or merely beneficial? Is relocation required as a result of the remarriage of the custodial spouse, or is there a need for emotional support from friends and family, or the opportunity for a "fresh start"? These factors, and others, in varying combinations, represent the exceptional circumstances the courts must consider in deciding relocation cases. Let us now consider the categories into which these relocation factors fall.

1. *Economic Betterment—The Desire to Make a "Fresh Start"*

Many proposed relocations are, in the custodial parent's view, necessitated by economics. A new, higher paying job may

tation rights were not impaired by the relocation. Thus, in *Lake v. Lake*, 192 A.D.2d 751, 596 N.Y.S.2d 171 (3d Dep't 1993), a relocation of 120 miles was held not to interfere with the noncustodial father's ability to continue a close and meaningful relationship with the child, while in *Cassidy v. Kapur*, 164 A.D.2d 513, 564 N.Y.S.2d 581 (3d Dep't 1991) and *Murphy v. Murphy*, 145 A.D.2d 857, 535 N.Y.S.2d 844 (3d Dep't 1988), similar conclusions were reached as to relocations of 190 and 340 miles respectively. In *Schouten v. Schouten*, 155 A.D.2d 461, 547 N.Y.S.2d 126 (2d Dep't 1989), the court held a 258 mile relocation not to constitute a significant obstacle to the noncustodial parent's visitation rights; and in *Smith v. Finger*, 187 A.D.2d 711, 590 N.Y.S.2d 301 (2d Dep't 1992), a similar determination was made with regard to a relocation to a suburb of Washington, D.C. While each of these cases turns on their own unique facts, it is conceptually difficult to reconcile such comparatively long distance relocations with, for example, *Rybicki v. Rybicki*, 176 A.D.2d 867, 575 N.Y.S.2d 341 (2d Dep't 1991), where a relocation of 84 miles was enjoined.

52. *Lake*, 192 A.D.2d at 752, 596 N.Y.S.2d at 172; *Lavelle v. Freeman*, 181 A.D.2d 976, 581 N.Y.S.2d 875, 876 (3d Dep't 1992); *Hathaway v. Hathaway*, 175 A.D.2d 336, 337, 572 N.Y.S.2d 92, 94 (3d Dep't 1991).

53. See *infra* note 271.

be awaiting the custodial parent in a new locale with a lower cost of and higher perceived standard of living. Or perhaps there is the unsubstantiated hope that a change of scenery will result in a better life. As the cases in the following two sections demonstrate, the current exceptional circumstances test generally requires hard evidence of actual improvements anticipated in advance of the move. Anything less generally will not suffice.

In *Bonfiglio v. Bonfiglio*,⁵⁴ the Appellate Division, Second Department, considered the custodial mother's application for modification of visitation because she wished to relocate to Tennessee.⁵⁵ The family court had granted the mother's application, and the noncustodial father appealed.⁵⁶ On appeal, the court found that the mother had "failed to demonstrate economic necessity for the move."⁵⁷ The appellate division noted that even though the mother's desire to relocate "appear[ed] to be [based upon] a good faith desire to improve the lifestyle of her family,"⁵⁸ she had "neither a job nor permanent housing in Tennessee and [was] not in danger of losing her job in New York."⁵⁹

The mother in *Stec v. Levindofske*⁶⁰ shared joint custody with the father, but was the primary physical custodian.⁶¹ The supreme court granted her petition to allow removal with the children to Ohio.⁶² The Appellate Division, Fourth Department, reversed, holding that "the desire of the custodial parent and her husband to change careers and to make a fresh start elsewhere does not amount to an exceptional circumstance or pressing concern."⁶³

54. 134 A.D.2d 426, 521 N.Y.S.2d 49 (2d Dep't 1987).

55. *Id.* at 426, 521 N.Y.S.2d at 49.

56. *Id.*

57. *Id.* at 428, 521 N.Y.S.2d at 50.

58. *Id.* at 427, 521 N.Y.S.2d at 50.

59. *Id.* at 428, 521 N.Y.S.2d at 50; *see also* *Ellor v. Ellor*, 145 A.D.2d 774, 775, 535 N.Y.S.2d 643, 644-45 (3d Dep't 1988) (denying permission for the custodial mother to relocate to Ohio despite her claims that the relocation was based on financial, employment, and medical reasons, where she did not attempt to seek employment in New York before moving, had no job in Ohio, and did not show that Ohio was more conducive for her or the child's health).

60. 153 A.D.2d 310, 550 N.Y.S.2d 966 (4th Dep't 1990).

61. *Id.* at 311, 550 N.Y.S.2d at 967.

62. *Id.*

63. *Id.* at 312, 550 N.Y.S.2d at 968. The Appellate Division, Fourth Department, in *Holsberg v. Shankman*, 171 A.D.2d 1067, 569 N.Y.S.2d 44 (4th Dep't

In *Hathaway v. Hathaway*,⁶⁴ the mother, who was the primary custodian of the children under a joint custody order, moved with the children to Virginia and then to Hawaii.⁶⁵ The supreme court ordered the mother to return to New York within sixty days.⁶⁶ When she failed to return, the court awarded custody of the children to the father and demanded that the children be immediately returned to New York.⁶⁷ The mother appealed, claiming that "she had moved to Hawaii essentially for better employment opportunities and because her family was relocating there, . . . and [because] she was dependent upon her family for financial support."⁶⁸ The Appellate Division, Third Department, agreed with the Supreme Court's ruling that the mother had failed to adequately show the existence of exceptional circumstances.⁶⁹ The Appellate Division found that the cost of living in Hawaii exceeded that which was previously incurred⁷⁰ and, further, that "plaintiff moved to Hawaii at least two months before the rest of her family with the only person she apparently knew there being her boyfriend."⁷¹

The supreme court in *Leslie v. Leslie*⁷² allowed the custodial mother to relocate to Virginia with the child of the marriage, and the father appealed.⁷³ The court found that the mother's wish to move "was essentially predicated upon her desire to return to school"⁷⁴ and her hope that the move would improve her and the child's standard of living.⁷⁵ Reversing the lower court, the Appellate Division, Second Department, reiterated that "a desire for economic betterment, as opposed to economic necessity, does not constitute an exceptional circumstance sufficient

1991), cited its prior decision in *Stec*, wherein it held that a "custodial parent's desire to start a new life in a distant location for her own personal happiness does not constitute an exceptional circumstance or pressing concern warranting relocation of the children." *Holsberg*, 171 A.D.2d at 1067, 569 N.Y.S.2d at 44.

64. 175 A.D.2d 336, 572 N.Y.S.2d 92 (3d Dep't 1991).

65. *Id.* at 337, 572 N.Y.S.2d at 93.

66. *Id.* at 337, 572 N.Y.S.2d at 94.

67. *Id.*

68. *Id.* at 337-38, 572 N.Y.S.2d at 94.

69. *Id.* at 338, 572 N.Y.S.2d at 94.

70. *Id.*

71. *Id.*

72. 180 A.D.2d 620, 579 N.Y.S.2d 164 (2d Dep't 1992).

73. *Id.* at 621, 579 N.Y.S.2d at 164.

74. *Id.* at 622, 579 N.Y.S.2d at 165.

75. *Id.*

to justify a move that would significantly curtail visitation by the child's noncustodial parent."⁷⁶

In *Lavelle v. Freeman*,⁷⁷ the Appellate Division, Third Department, affirmed a family court order enjoining the custodial mother from removing her six-year-old daughter to Missouri, when her new husband was offered a promotion at the Missouri branch of the company where he worked.⁷⁸ The appellate division also affirmed the lower court's ruling that if the mother did relocate, physical custody of the child would be awarded to the father.⁷⁹ And while the appellate division emphasized at the outset that the "primary consideration in any custody matter is the best interest of the child,"⁸⁰ in denying the move, the court stated that "in situations such as the one herein involving employment-related relocations, the focus is on the nature of the transfer, i.e., whether it simply affords the opportunity for economic betterment or whether it is economically necessary."⁸¹

In *Atkin v. McDaniel*,⁸² the mother and father shared joint custody, the child's primary residence being with the father.⁸³ The mother moved to North Carolina and petitioned the court for custody.⁸⁴ The family court awarded the mother partial custody and the father appealed.⁸⁵ In reversing the family court's decision, the Appellate Division, Third Department, applied the same standard to both the noncustodial and custodial parent, stating: "We see no reason not to require a similar showing where, as here, the noncustodial parent has relocated to a distant location and thereafter seeks custody of the children."⁸⁶ The appellate division found that the mother "and her boyfriend

76. *Id.* (citing *Hemphill v. Hemphill*, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991); *Bonfiglio v. Bonfiglio*, 134 A.D.2d 426, 521 N.Y.S.2d 49 (2d Dep't 1987); *Morgano v. Morgano*, 119 A.D.2d 734, 501 N.Y.S.2d 146 (2d Dep't 1986)).

77. 181 A.D.2d 976, 581 N.Y.S.2d 875 (3d Dep't 1992).

78. *Id.* at 976, 581 N.Y.S.2d at 876.

79. *Id.*

80. *Id.*

81. *Id.* at 977, 581 N.Y.S.2d at 876.

82. 181 A.D.2d 188, 585 N.Y.S.2d 849 (3d Dep't 1992).

83. *Id.* at 189, 585 N.Y.S.2d at 850.

84. *Id.*

85. *Id.*

86. *Id.* (citing *Farmer v. Dervay*, 174 A.D.2d 857, 571 N.Y.S.2d 148 (3d Dep't), *appeal dismissed*, 78 N.Y.2d 1041, 582 N.E.2d 593, 576 N.Y.S.2d 210 (1991)).

decided to move to North Carolina to obtain better employment," and thus failed to show exceptional circumstances.⁸⁷

The custodial mother in *Sanders v. Sanders*⁸⁸ moved with the children to Florida without notifying their father, and he brought an action seeking the return of the children and, alternatively, a change in custody.⁸⁹ The supreme court ordered the mother to return with the children or lose custody.⁹⁰ The Appellate Division, Fourth Department, affirmed,⁹¹ concluding that the mother had not shown exceptional circumstances, since "[t]here [was] nothing regarding either child that necessitated relocation to Florida. Rather, defendant relocated seeking a fresh start where her fiance was employed."⁹²

In *Clark v. Dunn*,⁹³ after being laid off from their jobs, the mother and her new husband moved with the children to Alaska⁹⁴ in violation of the judgment of divorce.⁹⁵ The noncustodial father appealed the Family Court order granting the mother sole custody of the children.⁹⁶ The Appellate Division, Third Department, found that the new husband's "efforts to find new employment were indeed meager[;] . . . [n]or [did] it appear that the [mother] did any more to find employment."⁹⁷ Thus, the Appellate Division concluded that the mother had not demonstrated exceptional circumstances warranting the move.⁹⁸

The mother in *Blundell v. Blundell*,⁹⁹ wanting to move to New Hampshire, appealed the supreme court's ruling conditioning her award of custody upon her remaining within a thirty mile radius of the former marital home.¹⁰⁰ At trial, the mother had testified that the motive for the move was to be close to her

87. *Id.*

88. 185 A.D.2d 716, 585 N.Y.S.2d 891 (4th Dep't 1992).

89. *Id.* at 717, 585 N.Y.S.2d at 892.

90. *Id.*

91. *Id.* at 718, 585 N.Y.S.2d at 893.

92. *Id.*

93. 195 A.D.2d 811, 600 N.Y.S.2d 376 (3d Dep't 1993).

94. *Id.* at 813, 600 N.Y.S.2d at 378.

95. *Id.* at 811-12, 600 N.Y.S.2d at 377.

96. *Id.* at 812, 600 N.Y.S.2d at 378.

97. *Id.* at 813, 600 N.Y.S.2d at 378.

98. *Id.*

99. 150 A.D.2d 321, 540 N.Y.S.2d 850 (2d Dep't 1989).

100. *Id.* at 322, 540 N.Y.S.2d at 851.

family, who would provide free babysitting and emotional support, and because the cost of living would be reduced.¹⁰¹ On appeal, the Appellate Division, Second Department, found that "the [mother's] desire to relocate to New Hampshire was not intended to inhibit the [father's] reasonable access to the children but was an attempt to seek a better living environment, economic and otherwise, for her children, as well as herself." Taking this factor, together with the fact that the father was "permitted to maintain reasonable access to his children," the court concluded that, "upon a balancing of the equities of this case, the [mother] should be permitted to move to New Hampshire subject to liberal visitation by the [father]."¹⁰²

2. *Economic Necessity*

The cases decided under this theory are generally distinguished from the "economic betterment" cases by more compelling financial pressures which frequently will convince a court to permit a relocation. The difference is one of degree.¹⁰³

In *Klein v. Klein*,¹⁰⁴ the noncustodial father appealed the supreme court's order granting custody to the mother and permitting her to relocate to Chicago.¹⁰⁵ On appeal, the mother contended that the money the father offered would be insufficient to allow her and their child to maintain a residence in New York City.¹⁰⁶ The Appellate Division, Second Department, found that "in Chicago, however, [the mother] and the child would be able to reside rent-free with her parents and two adult brothers, who would assist her in caring for the child"¹⁰⁷ "Additionally, her family, friends and community would provide her with the emotional support which she lacked in New York."¹⁰⁸ For these reasons, the appellate division concluded

101. *Id.* at 322-23, 540 N.Y.S.2d at 851-52.

102. *Id.* at 324, 540 N.Y.S.2d at 853.

103. See *Atkinson v. Atkinson*, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 955 (3d Dep't 1993) ("The emerging trend which justifies relocation requires proof that the move is necessitated by *economic necessity* rather than economic betterment or mere economic advantage.").

104. 93 A.D.2d 807, 460 N.Y.S.2d 607 (2d Dep't 1983).

105. *Id.* at 807, 460 N.Y.S.2d at 608.

106. *Id.* at 808, 460 N.Y.S.2d at 609.

107. *Id.*

108. *Id.* See also discussion *infra* part III.A.5.

that the mother had shown exceptional circumstances and that it was in the child's best interests to allow the move to Chicago.¹⁰⁹

In *Coniglio v. Coniglio*,¹¹⁰ the custodial mother wished to relocate to Florida with her son.¹¹¹ The mother had fled her marriage to escape her husband's physical brutality, and she was struggling to provide for her son on her minimal salary as a nurse.¹¹² The husband had a history of chronic drug and alcohol abuse,¹¹³ and had little contact with his son for five years.¹¹⁴ The mother also believed that despite her ex-husband's treatment for substance abuse, he was under the influence of drugs during several visits with their son.¹¹⁵ The mother's parents were moving to Florida, and as she was reliant on them to babysit for her son while she worked, she desired to move with them.¹¹⁶ The Appellate Division, Second Department, stated that the "predominant concern is the best interest of the child,"¹¹⁷ but denied the move solely because the mother had failed to demonstrate exceptional circumstances.¹¹⁸

The supreme court in *Goodwin v. Goodwin*¹¹⁹ granted the custodial mother's petition to move with the children to Florida.¹²⁰ On appeal, the Appellate Division, Second Department reversed, holding that there were no exceptional circumstances warranting the move.¹²¹ The court reasoned that although the wife "submitted proof indicating that she could not afford to

109. *Klein*, 93 A.D.2d at 808, 460 N.Y.S.2d at 609.

110. 170 A.D.2d 477, 565 N.Y.S.2d 834 (2d Dep't 1991).

111. *Id.* at 478, 565 N.Y.S.2d at 835.

112. *Id.* at 480, 565 N.Y.S.2d at 837 (Miller, J., dissenting).

113. *Id.* at 479, 565 N.Y.S.2d at 836 (Miller, J., dissenting).

114. *Id.* at 480, 565 N.Y.S.2d at 837 (Miller, J., dissenting).

115. *Id.* at 479, 565 N.Y.S.2d at 836 (Miller, J., dissenting). The husband had presented negative drug test results indicating he was not using drugs in April 1989, but as the dissent pointed out, this evidence was not dispositive of his status for the other months when the mother believed him to be under the influence of drugs. *Id.*

116. *Id.* at 480, 565 N.Y.S.2d at 837 (Miller, J., dissenting).

117. *Id.* at 478, 565 N.Y.S.2d at 836.

118. *Id.* I dissented from the majority's holding in *Coniglio*, believing that at the least a hearing should have been held to determine whether exceptional circumstances existed. *Id.* at 481, 565 N.Y.S.2d at 837 (Miller, J., dissenting).

119. 173 A.D.2d 769, 570 N.Y.S.2d 637 (2d Dep't 1991).

120. *Id.* at 769, 570 N.Y.S.2d at 638.

121. *Id.* at 769-70, 570 N.Y.S.2d at 638.

purchase a house in the area near the former marital residence, . . . the record was devoid of proof regarding the cost of renting a house in the area.”¹²² The court concluded that “upon the present record, therefore, . . . the relocation to Florida [was not] economically necessary.”¹²³

In *Rybicki v. Rybicki*,¹²⁴ the noncustodial father petitioned the supreme court to enjoin the child’s mother and her new husband from relocating to Connecticut, and the mother cross-moved for permission to move.¹²⁵ The mother claimed that since her new husband was not a United States citizen, he had great difficulty obtaining employment in the area where they lived.¹²⁶ The supreme court denied the mother’s petition.¹²⁷ On appeal, the Appellate Division, Second Department, affirmed, stating that the new husband’s “commute to Connecticut from Long Island, while tedious, would not be impossible.”¹²⁸

The father in *Wiles v. Wiles*¹²⁹ petitioned the family court to enforce his visitation rights after the custodial mother informed him that she intended to move to Florida with her new husband and the parties’ child.¹³⁰ The family court permitted the mother to relocate.¹³¹ The father appealed and the Appellate Division, Fourth Department, reversed, reasoning that the mother’s relocation “was the result of her [new] husband’s decision to accept a job offer in Florida.”¹³² The appellate division concluded that “the relocation of the custodial parent to Florida with her new spouse was not warranted by such exceptional circumstances as would justify the undue interference with the [father’s] visitation rights with the child.”¹³³

122. *Id.* at 770, 570 N.Y.S.2d at 638.

123. *Id.*

124. 176 A.D.2d 867, 575 N.Y.S.2d 341 (2d Dep’t 1991).

125. *Id.* at 869, 575 N.Y.S.2d at 342-43.

126. *Id.* at 868-69, 575 N.Y.S.2d at 342.

127. *Id.* at 867, 575 N.Y.S.2d at 341.

128. *Id.* at 871, 575 N.Y.S.2d at 344.

129. 171 A.D.2d 398, 578 N.Y.S.2d 292 (4th Dep’t 1991).

130. *Id.* at 399, 578 N.Y.S.2d at 293.

131. *Id.* at 398, 578 N.Y.S.2d at 292.

132. *Id.* at 400, 578 N.Y.S.2d at 293.

133. *Id.*

In *Hollington v. Cocchiola*,¹³⁴ the family court allowed the custodial mother to move to California with the parties' child.¹³⁵ On appeal, the Appellate Division, Second Department, found that the relocation was based on economic necessity,¹³⁶ since the mother had made an adequate showing that the job market in New York was depressed and she was having great difficulty supporting herself and her child on whatever support the father could provide.¹³⁷ At trial, the mother had established that she had a permanent job waiting for her in California which paid \$1000 per month.¹³⁸ Additionally, a move to California would allow her to live rent-free with her parents.¹³⁹ The appellate division also emphasized that the custodial mother and the father had never married, had never lived together with the child, and it appeared that the father's relationship with his son "was that of a mere visitor."¹⁴⁰

In *Ladizhensky v. Ladizhensky*,¹⁴¹ the Appellate Division, Second Department, held that the "totality of circumstances" were "extraordinary" when the custodial mother moved to Kansas City with her child.¹⁴² The court reasoned that the mother's desire to relocate "was not intended to inhibit the defendant's reasonable access to his son."¹⁴³ Rather, the move was based on "her new husband's job with the United States Department of Agriculture located in Kansas City, . . . her failure to find suitable employment or an accredited chiropractic school in the New York metropolitan area, and her good faith desire to improve the quality of life for her child."¹⁴⁴ Additionally, the court gave great weight to the fact that the parents were divorced when

134. 180 A.D.2d 635, 579 N.Y.S.2d 700 (2d Dep't 1992).

135. *Id.* at 636, 579 N.Y.S.2d at 701.

136. *Id.* at 637, 579 N.Y.S.2d at 702.

137. *Id.* at 636-37, 579 N.Y.S.2d at 702.

138. *Id.* at 637, 579 N.Y.S.2d at 702.

139. *Id.*

140. *Id.*

141. 184 A.D.2d 756, 585 N.Y.S.2d 771 (2d Dep't 1992).

142. *Id.* at 757, 575 N.Y.S.2d at 772.

143. *Id.*

144. *Id.* at 757, 585 N.Y.S.2d at 772-73. The court further noted that the defendant had on a previous occasion consented to the plaintiff's move to Florida for employment reasons, and was apparently "willing to permit his son to live out of State with [his mother] at the time." *Id.* at 758, 585 N.Y.S.2d at 773.

their son was eighteen months old, and that the son had never resided with his father except for visitation periods.¹⁴⁵

Upon remarriage, the custodial mother in *Elkus v. Elkus*¹⁴⁶ applied to the supreme court for permission to move to California with the parties' two children.¹⁴⁷ The supreme court granted the mother's petition and the father appealed.¹⁴⁸ The Appellate Division, First Department, reversed, concluding that the fact that "the mother's new husband resides in California and cannot relocate and that the move will be advantageous to [the mother's] career are insufficient, in the absence of a showing of economic necessity or other exceptional circumstances to justify relocation of the children."¹⁴⁹

In *Radford v. Propper*,¹⁵⁰ the custodial father wished to relocate from Brooklyn to New Jersey, a distance of about fifty miles.¹⁵¹ The court, having determined that the move would disrupt the mother's regular and meaningful access to the child,¹⁵² then found that the father had failed to show exceptional circumstances which would justify the move.¹⁵³ The court stated that the father's proposed relocation to be near his and his new wife's company in New Jersey was solely for their own commuting convenience.¹⁵⁴ The court also described the father's testimony that he would have increased purchasing power and thus be able to provide the child with a better environment as "self-serving,"¹⁵⁵ and his move predicated on economic betterment rather than economic necessity.¹⁵⁶

145. *Id.* at 757, 575 N.Y.S.2d at 773. The court cited *Aberbach v. Aberbach*, 33 N.Y.2d 592, 593, 301 N.E.2d 438, 439, 347 N.Y.S.2d 456, 456 (1973), wherein the Court of Appeals cautioned courts to be reluctant to transfer custody of a young child from the primary custodian who has cared for the child since birth. *Cf. Lavelle v. Freeman*, 181 A.D.2d 976, 976, 581 N.Y.S.2d 875, 876 (3d Dep't 1992), wherein the Third Department was not so reluctant to permit relocation, even though the child had not resided with his father since birth.

146. 182 A.D.2d 45, 588 N.Y.S.2d 138 (1st Dep't 1992).

147. *Id.* at 47, 588 N.Y.S.2d at 139.

148. *Id.* at 46, 588 N.Y.S.2d at 139.

149. *Id.* at 49, 588 N.Y.S.2d at 140.

150. 190 A.D.2d 93, 597 N.Y.S.2d 967 (2d Dep't 1993).

151. *Id.* at 94, 597 N.Y.S.2d at 969.

152. *Id.* at 101, 597 N.Y.S.2d at 973.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

Consequently, the court affirmed the family court's transfer of custody to the mother.¹⁵⁷

The custodial mother in *Atkinson v. Atkinson*¹⁵⁸ moved to Florida with the children and her paramour,¹⁵⁹ but was ordered by the family court to return with the children.¹⁶⁰ Upon her failure to return, custody was awarded to the father.¹⁶¹ The Appellate Division, Third Department, in upholding the family court's decision, stated that "[t]he emerging trend which justifies relocation requires proof that the move is necessitated by *economic necessity* rather than economic betterment or mere economic advantage."¹⁶² The appellate division agreed with the family court's determination that "[t]here [was] no evidence of economic necessity which would justify the relocation."¹⁶³

In *Lavane v. Lavane*,¹⁶⁴ the supreme court permitted the mother to relocate with the children to Florida and the father appealed.¹⁶⁵ On appeal, the Appellate Division, Second Department, concluded that the mother had proved the existence of exceptional circumstances upon a showing that the mother's employment opportunities in New York were limited, whereas in Florida she could work at her uncle's insurance agency and receive rent-free housing and free babysitting.¹⁶⁶ The court also noted that the father did not spend substantial time with the children.¹⁶⁷

A mother's petition to relocate to Idaho with the children was granted by the supreme court in *Amato v. Amato*.¹⁶⁸ On appeal, the Appellate Division, Second Department, found that during the marriage the family "led a transient lifestyle,"¹⁶⁹ but that in Idaho the mother "could be closer to her family and have

157. *Id.* at 103, 597 N.Y.S.2d at 974.

158. 197 A.D.2d 771, 602 N.Y.S.2d 953 (3d Dep't 1993).

159. *Id.* at 771, 602 N.Y.S.2d at 954.

160. *Id.*

161. *Id.*

162. *Id.* at 772, 602 N.Y.S.2d at 955.

163. *Id.*

164. 201 A.D.2d 623, 608 N.Y.S.2d 475 (2d Dep't 1994).

165. *Id.* at 623, 608 N.Y.S.2d at 475.

166. *Id.* at 624, 608 N.Y.S.2d at 476.

167. *Id.*

168. 202 A.D.2d 458, 458, 609 N.Y.S.2d 51, 52 (2d Dep't 1994).

169. *Id.* at 459, 609 N.Y.S.2d at 52.

reduced living expenses.”¹⁷⁰ Thus, the appellate division found that the mother had shown economic necessity for the move.¹⁷¹

In *Raybin v. Raybin*,¹⁷² the father petitioned the family court to allow him to move to Florida with the children and the mother cross-petitioned to prevent the relocation.¹⁷³ The family court granted the father’s petition and the mother appealed.¹⁷⁴ On appeal, the Appellate Division, Third Department, reversed, having determined that the father had made a “self-serving claim,”¹⁷⁵ and stated, “we cannot conclude that [the father’s] employment-related relocation rises to the level of economic necessity.”¹⁷⁶

3. *Specific Job Opportunities*

The burden of establishing exceptional circumstances is frequently eased when a custodial parent can demonstrate a specific employment opportunity awaiting that parent in the proposed new domicile. When a new job is coupled with the loss of former employment and the unavailability of comparable local employment, economic necessity is more easily established. However, the following cases demonstrate that absent a specific job opportunity and a need to take advantage thereof, relocations are generally not permitted.

In *Kozak v. Kozak*,¹⁷⁷ the custodial mother accepted a promotion that required her to move to Kentucky with the chil-

170. *Id.*

171. *Id.*

172. 205 A.D.2d 918, 613 N.Y.S.2d 726 (3d Dep’t 1994).

173. *Id.* at 919, 613 N.Y.S.2d at 727.

174. *Id.*

175. *Id.* at 921, 613 N.Y.S.2d at 728.

176. *Id.* at 919, 613 N.Y.S.2d at 728. The father’s position with IBM in New York was being eliminated, and he was offered a position at the same rate of pay in Florida. *Id.* at 920, 613 N.Y.S.2d at 727. In denying the father permission to relocate to Florida with the child, the appellate division noted that the father had “made no effort to secure other employment before accepting his company’s offer to transfer to Florida.” *Id.* at 920-21, 613 N.Y.S.2d at 728. In addition, his “immediate acceptance of the transfer” was motivated by “company tenure and personal preference” *Id.* The court stated, “[w]ere we to accept petitioner’s relocation without compelling proof of the need therefor, we would be sanctioning all employment-related transfers based upon nothing more than the perception that nonacceptance will jeopardize a custodial parent’s current income.” *Id.*

177. 111 A.D.2d 842, 490 N.Y.S.2d 583 (2d Dep’t 1985).

dren.¹⁷⁸ The father petitioned for a change of custody which was dismissed and he appealed.¹⁷⁹ The Appellate Division, Second Department, found that the mother's sole reason for the move was her promotion and salary increase.¹⁸⁰ Having testified that she would not have lost her job if she remained in New York and not accepted the promotion in Kentucky, the court concluded that "the move was not a necessity for either [the mother] or the children."¹⁸¹ The court awarded custody to the father unless the mother, within ninety days, relocated with the children to New York.¹⁸²

The mother in *Morgano v. Morgano*¹⁸³ moved to California with the child and the father made a motion to the supreme court for a change in custody.¹⁸⁴ The supreme court granted the father's motion and the mother appealed.¹⁸⁵ The Appellate Division, Second Department, found that "the sole basis for the [mother's] move to California was to take advantage of a job opportunity which would substantially increase her salary and fringe benefits while permitting her to work from her home."¹⁸⁶ The appellate division concluded that this was not economic necessity and thus, the mother had failed to show exceptional circumstances.¹⁸⁷

In *Kuzmicki v. Kuzmicki*,¹⁸⁸ the custodial mother sought permission to move with her child to California and the father cross-moved to enjoin the removal and petitioned for custody.¹⁸⁹ The supreme court denied the mother's petition and she ap-

178. *Id.* at 842, 490 N.Y.S.2d at 584.

179. *Id.* at 842-43, 490 N.Y.S.2d at 584.

180. *Id.* at 843, 490 N.Y.S.2d at 585.

181. *Id.* at 843-44, 490 N.Y.S.2d at 585.

182. *Id.* at 842, 490 N.Y.S.2d at 583.

183. 119 A.D.2d 734, 501 N.Y.S.2d 146 (2d Dep't 1986).

184. *Id.* at 735, 501 N.Y.S.2d at 146.

185. *Id.* at 734, 501 N.Y.S.2d at 146.

186. *Id.* at 737, 501 N.Y.S.2d at 148.

187. *Id.* While this case focuses on the fact of the mother's new job opportunity, it might also be categorized as an "economic betterment" case. See *supra* part III.A.1. The court, after discussing the mother's new job opportunity, concluded: "While economic betterment is a factor which should be considered, it must be balanced against the best interests of the child and the rights of the noncustodial parent." *Morgano*, 119 A.D.2d at 737, 501 N.Y.S.2d at 148.

188. 171 A.D.2d 843, 567 N.Y.S.2d 779 (2d Dep't 1991).

189. *Id.* at 843, 567 N.Y.S.2d at 780.

pealed.¹⁹⁰ The Appellate Division, Second Department, affirmed, stating that “[w]hile the [custodial parent] has a home with her mother and a job with her brother waiting for her out in California, she has made minimal efforts to secure a job in New York.”¹⁹¹ The appellate division continued, “[i]t is indeed speculation, at best, as to whether the proposed move to California would add any stability and security to the mother’s and child’s life.”¹⁹²

The family court in *Wiles v. Wiles*¹⁹³ allowed the custodial mother to move with her child to Florida, where her new husband had accepted a job.¹⁹⁴ The father contested the ruling and sought custody of their son.¹⁹⁵ The Appellate Division, Fourth Department, reversed, stating that the family court had erred in not considering the “best interests of the child as relevant to a determination on the relocation issue.”¹⁹⁶ The appellate division remanded the case to family court for an immediate hearing on the “fundamental issue of the best interests of the child.”¹⁹⁷

In *Lavelle v. Freeman*,¹⁹⁸ the father brought an action seeking to enjoin the mother from relocating with the child and the mother cross-moved for permission to relocate.¹⁹⁹ The family court enjoined the mother’s relocation and she appealed.²⁰⁰ In affirming the family court, the Appellate Division, Third Department, stated, “the proposed transfer of the [mother’s] husband is purely voluntary and involves only economic betterment.”²⁰¹ The court further stated that where the impetus for the relocation is employment related, “the focus is on the

190. *Id.*

191. *Id.* at 844, 567 N.Y.S.2d at 780-81.

192. *Id.* at 844, 567 N.Y.S.2d at 781.

193. 171 A.D.2d 398, 578 N.Y.S.2d 292 (4th Dep’t 1991).

194. *Id.* at 398-99, 578 N.Y.S.2d at 292.

195. *Id.* at 399, 578 N.Y.S.2d at 293.

196. *Id.* at 400, 578 N.Y.S.2d at 294. The family court had held that the custodial parent could relocate to Florida and ordered that custody remain with her pending a further hearing as to the child’s best interests. *Id.* at 399, 578 N.Y.S.2d at 293.

197. *Id.* at 400, 578 N.Y.S.2d at 294.

198. 181 A.D.2d 976, 581 N.Y.S.2d 875 (3d Dep’t 1992).

199. *Id.* at 976, 581 N.Y.S.2d at 876.

200. *Id.*

201. *Id.* at 977, 581 N.Y.S.2d at 876.

nature of the transfer, i.e., whether it simply affords the opportunity for economic betterment or whether it is economically necessary."²⁰²

4. *Remarriage*

Where relocation is necessitated by remarriage, the tensions are among the greatest of any relocation cases. The custodial parent and new spouse may find their very liberty tethered by the noncustodial parent's visitation rights. A denial of relocation due to remarriage forces a custodial parent to choose between the child and the new spouse. Remarriage alone is generally not considered to be an exceptional circumstance,²⁰³ but where the new spouse's employment is factored in, the threshold may be crossed.

In *LoBianco v. LoBianco*,²⁰⁴ the mother had moved to Canada with the child and married a Canadian citizen.²⁰⁵ The father sought a transfer of custody, which was granted.²⁰⁶ The mother appealed, claiming that the "hearing court erred in failing to consider her remarriage and obligation thereunder to relocate, as an exceptional circumstance warranting the change of domicile of the child to the new location."²⁰⁷ The Appellate Division, Second Department, affirmed, stating that "the best interest of the child would more likely be effectuated by transferring her custody to the father."²⁰⁸ In this case, the court held a best interest hearing assessing all relevant considerations prior to transferring custody.²⁰⁹

In *Richardson v. Howard*,²¹⁰ the mother petitioned for removal with the children and the father sought to enjoin the move.²¹¹ The family court granted the mother's petition to relo-

202. *Id.*

203. See, e.g., *Cooper-Jones v. Williams*, 162 A.D.2d 1001, 557 N.Y.S.2d 214 (4th Dep't 1990); *Richardson v. Howard*, 135 A.D.2d 1140, 523 N.Y.S.2d 272 (4th Dep't 1987).

204. 131 A.D.2d 642, 516 N.Y.S.2d 724 (2d Dep't 1987).

205. *Id.* at 643, 516 N.Y.S.2d at 725.

206. *Id.*

207. *Id.*

208. *Id.* at 644, 516 N.Y.S.2d at 725.

209. See *id.* at 643, 516 N.Y.S.2d at 725.

210. 135 A.D.2d 1140, 523 N.Y.S.2d 272 (4th Dep't 1987).

211. *Id.* at 1140, 523 N.Y.S.2d at 273.

cate and the father appealed.²¹² The Appellate Division, Fourth Department, reversed, finding that no exceptional circumstances existed where the mother's "sole reason for wanting to move to Michigan [was] to marry her fiance and move to his home."²¹³

The mother in *Cooper-Jones v. Williams*²¹⁴ sought the court's permission to relocate with the children.²¹⁵ The supreme court denied her petition and she appealed.²¹⁶ The Appellate Division, Fourth Department, affirmed, holding that "[t]he desire of the custodial parent and his or her new spouse to reside in a particular area does not, by itself, amount to an exceptional circumstance or pressing concern justifying relocation of the children and the consequential interference with the noncustodial parent's visitation rights."²¹⁷

In *Hemphill v. Hemphill*,²¹⁸ upon remarriage to a British citizen, the mother wished to relocate with the children to London.²¹⁹ When the father brought an action to enjoin the move, the supreme court denied the father's petition and he appealed.²²⁰ The Appellate Division, Second Department, upheld the supreme court's conclusion that the mother's remarriage constituted an exceptional circumstance since the new husband's "business and livelihood depend[ed] upon his living and working in England."²²¹

In *Cataldi v. Shaw*,²²² the father appealed the supreme court's ruling that denied him a change in custody after the custodial mother's remarriage and relocation to Alabama with their children.²²³ The Appellate Division, Second Department,

212. *Id.*

213. *Id.*

214. 162 A.D.2d 1001, 557 N.Y.S.2d 214 (4th Dep't 1990).

215. *Id.*

216. *Id.*

217. *Id.*

218. 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991).

219. *Id.* at 30, 572 N.Y.S.2d at 690.

220. *Id.* at 31, 572 N.Y.S.2d at 691.

221. *Id.* at 32, 572 N.Y.S.2d at 691. For a discussion of international relocation considerations, see James Grayson, *International Relocation, The Right to Travel, and the Hague Convention: Additional Requirements for Custodial Parents*, 28 FAM. L.Q. 531 (Fall 1994).

222. 101 A.D.2d 823, 475 N.Y.S.2d 480 (2d Dep't 1984).

223. *Id.* at 823, 475 N.Y.S.2d at 481-82.

affirmed the denial of custody, stating, "a divorced parent does not forfeit the right to remarry by accepting custody of his or her children and that in proper circumstances the need to relocate occasioned by the marriage of the custodial parent will not necessitate a change in the custody arrangement."²²⁴ The appellate division found that the move was motivated by good faith and was not orchestrated to deprive the noncustodial father of access to his children.²²⁵ Finally, the court noted that "relatives, who are located in Alabama, can provide the added support, love, and guidance that only an extended family can foster."²²⁶

5. Emotional Support

In *Murphy v. Murphy*,²²⁷ the supreme court denied the mother's application to relocate to the Rochester, New York area and she appealed.²²⁸ The Appellate Division, Third Department, affirmed, reasoning that "[t]he evidence does not support any conclusion that [the mother's] need for contact with and emotional support from her close friends in the Rochester area rises to the level of a compelling circumstance."²²⁹

Several other cases discuss the importance of "emotional support" as a factor to be considered in determining whether exceptional circumstances exist, even though the courts' holdings are premised on other factors.²³⁰

6. Health Concerns

While not often used as a ground for demonstrating the need to relocate, health concerns can, in appropriate circumstances, constitute a sufficient showing. In *Deutsch v. Deutsch*,²³¹ the Appellate Division, Second Department, af-

224. *Id.* (citations omitted).

225. *Id.* at 823, 475 N.Y.S.2d at 482.

226. *Id.* at 824, 475 N.Y.S.2d at 482.

227. 195 A.D.2d 794, 600 N.Y.S.2d 373 (3d Dep't 1993).

228. *Id.* at 794, 600 N.Y.S.2d at 373.

229. *Id.* at 795, 600 N.Y.S.2d at 374 (citations omitted).

230. See, e.g., *Amato v. Amato*, 202 A.D.2d 458, 459, 609 N.Y.S.2d 51, 52-53 (2d Dep't 1994); *Lavane v. Lavane*, 201 A.D.2d 623, 624, 608 N.Y.S.2d 475, 476 (2d Dep't 1994); *Cataldi v. Shaw*, 101 A.D.2d 823, 475 N.Y.S.2d 480 (2d Dep't 1984); *Klein v. Klein*, 93 A.D.2d 807, 808, 460 N.Y.S.2d 607, 609 (2d Dep't 1983).

231. 53 A.D.2d 861, 385 N.Y.S.2d 357 (2d Dep't 1976), *appeal denied*, 40 N.Y.2d 808, 360 N.E.2d 1108, 392 N.Y.S.2d 1026 (1977).

firmed the family court's grant of the custodial mother's petition to relocate to Florida with the parties' son.²³² The mother testified that she had undergone breast surgery, a hysterectomy for "another mass," and had been "injured and hospitalized as a result of a major automobile accident."²³³ The appellate division stated: "[t]he evidence clearly does not establish that her principal reason for removing to Florida was to flee her creditors, to simply enjoy a vacation or to spite [the child's father]."²³⁴

7. Domestic Violence

Physical and emotional abuse by one parent of the other has been held to constitute an exceptional circumstance justifying relocation. In view of the New York courts' increased awareness of and sensitivity to the prevalence and seriousness of family violence in our society, it is likely that this factor will be recognized with growing frequency.

In *Sheridan v. Sheridan*,²³⁵ the Appellate Division, Third Department, affirmed the family court's determination that domestic violence as well as economic necessity constituted an exceptional circumstance justifying the mother's removal with the child to Puerto Rico, despite the fact that the relocation would deprive the former husband of regular and meaningful visitation.²³⁶ The appellate division noted that in Puerto Rico, the mother could "ensure a stable home environment which is free from domestic violence."²³⁷

In *Jacoby v. Carter*,²³⁸ the Appellate Division, Third Department, affirmed the supreme court's denial of the father's petition for custody and injunctive relief, holding that the father's physical and emotional abuse of the mother constituted exceptional circumstances warranting the mother's removal of herself and the child to Pennsylvania.²³⁹ The court noted the

232. *Id.*

233. *Id.* at 862, 385 N.Y.S.2d at 357.

234. *Id.*

235. 204 A.D.2d 771, 611 N.Y.S.2d 688 (3d Dep't 1994).

236. *Id.* at 773, 611 N.Y.S.2d at 690.

237. *Id.* at 774, 611 N.Y.S.2d at 690; *see also* *Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dep't 1982).

238. 167 A.D.2d 786, 563 N.Y.S.2d 344 (3d Dep't 1990).

239. *Id.* at 787, 563 N.Y.S.2d at 345.

mother's testimony that she left without telling the father because he had threatened to hurt her if she were to leave.²⁴⁰

In *Desmond v. Desmond*,²⁴¹ the court found the mother's abrupt move to Virginia was justified by the physical, sexual, and emotional abuse inflicted by the father, which constituted exceptional circumstances.²⁴² The court stated:

While this holding must be construed in light of the particular facts herein, it is also intended to signal the acceptance by this court of the view that severely and/or repeatedly abused parents ought not to be penalized, in the context of a custody-visitation case, for seeking refuge out of the easy reach of their oppressors.²⁴³

B. *The "Best Interests" Prong*

Once it has been determined that the custodial parent has demonstrated the requisite exceptional circumstances to justify the relocation, the focus then turns to whether the relocation is in the child's best interests. Indeed, the courts in this state are unanimous and unhesitating in the assertion that the best interests of the child is the paramount concern.²⁴⁴

The analysis of whether or not a move is in the child's best interests is similar to that employed in any custody case, with the added factor that the relocating parent must demonstrate how the relocation will positively impact upon the child. Thus, the usual considerations such as parental fitness, continuity of care, educational opportunities, the child's preference, the child's physical, intellectual, emotional, and social well-being, and continued contact with siblings remain factors, but are con-

240. *Id.*

241. 134 Misc. 2d 62, 509 N.Y.S.2d 979 (Family Ct. Dutchess County 1986) (Marlow, J.).

242. *Id.* at 66, 509 N.Y.S.2d at 982-83.

243. *Id.*

244. See, e.g., *Lavane v. Lavane*, 201 A.D.2d 623, 623, 608 N.Y.S.2d 475, 476 (2d Dep't 1994); *Klein v. Klein*, 93 A.D.2d 807, 808, 460 N.Y.S.2d 607, 608 (2d Dep't 1993); *Radford v. Propper*, 190 A.D.2d 93, 100, 597 N.Y.S.2d 967, 973 (2d Dep't 1993); *Daghir v. Daghir*, 82 A.D.2d 191, 193, 441 N.Y.S.2d 494, 496 (2d Dep't 1981).

sidered in the context of whether the proposed move will have a positive impact on the child.²⁴⁵

Obviously, when relocation to a distant domicile is factored into the equation, no best interest analysis would be complete without consideration of how the child will be affected by the reduction in visitation with the noncustodial parent that frequently follows. This requires a delicate balancing in its own right.²⁴⁶ Assuming that a custodial parent has demonstrated exceptional circumstances justifying a move, a proposed otherwise beneficial relocation may be denied due to the loss of the close, nurturing relationship between the noncustodial parent and the child.²⁴⁷ The move could be beneficial in all other respects and still not be in the child's best interests.²⁴⁸ Conversely, exceptional circumstances warranting a relocation may be demonstrated, and such a move may be in the child's best interests notwithstanding a significant impact on visitation.²⁴⁹

Whether a given relocation will be in the best interests of a child is a *sui generis* matter; each case turns on its own facts. Assuming that a relocation is otherwise compatible with a child's best interests, the focus is on, to the extent it is ever ascertainable, just how the child's life will be affected by the positive attributes of permitting the move, balanced against the losses the child may suffer as a result of the increased distance from the noncustodial parent. Central to this inquiry is an

245. See, e.g., *Eschbach v. Eschbach*, 56 N.Y.2d 167, 172-73, 436 N.E.2d 1260, 1263-64, 451 N.Y.S.2d 658, 661-62 (1982) (parental fitness, continuity of care, child's preference, child's physical, intellectual, and emotional well-being, and continued contact with siblings); *In re Ebert*, 38 N.Y.2d 700, 702-04, 346 N.E.2d 240, 241-43, 382 N.Y.S.2d 472, 473-75 (1976) (parental fitness, educational opportunities, child's preference, and continued contact with siblings); *Koppenhoffer v. Koppenhoffer*, 159 A.D.2d 113, 116-17, 558 N.Y.S.2d 596, 598-99 (2d Dep't 1990) (educational opportunities, child's preference, and child's physical, intellectual, emotional, and social well-being); *Bistany v. Bistany*, 66 A.D.2d 1026, 1026-27, 411 N.Y.S.2d 728, 729-30 (4th Dep't 1978) (child's preference, child's emotional well-being, and continued contact with siblings).

246. See *Radford v. Propper*, 190 A.D.2d 93, 98, 597 N.Y.S.2d 967, 971 (2d Dep't 1993).

247. *Id.* at 100, 597 N.Y.S.2d at 973.

248. *Id.* at 99, 597 N.Y.S.2d 971-72.

249. See, e.g., *Hemphill v. Hemphill*, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991) (sanctioning a mother's relocation to England, where it was coupled with lengthy visitation abroad by the father at the mother's expense). See also *Cataldi v. Shaw*, 101 A.D.2d 823, 475 N.Y.S.2d 480 (2d Dep't 1984) (sanctioning a relocation to Alabama).

analysis of the quality and quantity of visitation enjoyed by the noncustodial parent and child prior to the proposed move,²⁵⁰ and whether the relationship can adequately be preserved at a greater distance with less frequent, but more intensive prolonged visitation.²⁵¹ Indeed, the rewards of a summer vacation shared by a noncustodial parent and child may offset the loss of weekly Wednesday evenings and alternating weekends; or they may not. However, this is a factual issue that should be developed at a hearing with expert testimony. This is not an issue which should be decided on the basis of a presumption that anything less frequent than the extant local visitation schedule will be inimical to the child's best interests.

Notwithstanding some decisions to the contrary,²⁵² a custodial parent's relocation without court permission, or even in violation of an injunction, should not result in a summary change of custody to the "aggrieved" former noncustodial parent, without determining that the change of custody is in the child's best interests.²⁵³ Indeed, in an excellent example of judicial restraint and foresight, the Fourth Department in *Wodka v. Wodka*,²⁵⁴ reversed a change of custody to a father due to a mother's unlawful relocation to Oregon in violation of a court order, because the family court did not consider whether the change of custody was in the child's best interests.²⁵⁵ Indeed, the court noted that "defiance of a court order is but one factor to be considered when determining the relative fitness of the parties and what custody arrangement is in the child's best interest."²⁵⁶

250. See, e.g., *Strahl v. Strahl*, 66 A.D.2d 571, 414 N.Y.S.2d 184 (2d Dep't 1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980).

251. See, e.g., *Hemphill v. Hemphill*, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991); *Cataldi v. Shaw*, 101 A.D.2d 823, 475 N.Y.S.2d 480 (2d Dep't 1984).

252. See, e.g., *Kozak v. Kozak*, 111 A.D.2d 842, 490 N.Y.S.2d 583 (2d Dep't 1985); *Daghir v. Daghir*, 82 A.D.2d 191, 441 N.Y.S.2d 494 (2d Dep't 1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982).

253. See *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 94, 432 N.E.2d 765, 767-68, 447 N.Y.S.2d 893, 895-96 (1982) (stating that "self-help through abduction by the noncustodial parent must be deterred but even that 'must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child . . .'" (quoting *Nehra v. Uhlar*, 43 N.Y.2d 242, 250, 372 N.E.2d 4, 8, 401 N.Y.S.2d 168, 172 (1977))).

254. 168 A.D.2d 1000, 565 N.Y.S.2d 353 (4th Dep't 1990).

255. *Id.* at 1000, 565 N.Y.S.2d at 354.

256. *Id.* at 1001, 565 N.Y.S.2d at 354.

While respect for court orders is critical to our system of jurisprudence, a summary custody change without consideration of whether such a change is in the child's best interests cannot be permitted to stand. Such a reflexive sanction ignores the primary concern and can have disastrous consequences for the affected child. Obviously, a custodial parent's wrongdoing should not be used to punish a child or to address the noncustodial parent's grievance. Rather, the high stakes attendant to any relocation case necessitate a thoughtful, comprehensive consideration of all relevant factors to ascertain whether the relocation or a proposed change of custody will serve the child's best interests.

IV. Critique of New York Relocation Law

It is important to recognize that relocation cases can arise in one of several different contexts. First, a custodial parent may seek court approval in advance of a relocation, giving the court the greatest latitude to fashion an equitable remedy. In such cases, the parties present evidence regarding their projections as to the need for the move and the consequences thereof, and the court attempts to render a decision taking all relevant factors into consideration.²⁵⁷ Closely related are cases in which the noncustodial parent, having been informed by the custodial parent of a desire to relocate, seeks to enjoin the move in advance.²⁵⁸ Again, the focus is on what is likely to result from the move.

At the other end of the spectrum are cases in which the custodial parent has moved, without obtaining court permission, and the noncustodial parent seeks to compel the custodial par-

257. See, e.g., *Murphy v. Murphy*, 195 A.D.2d 794, 600 N.Y.S.2d 373 (3d Dep't 1993); *Kuzmicki v. Kuzmicki*, 171 A.D.2d 843, 567 N.Y.S. 2d 779 (2d Dep't 1991); *Coniglio v. Coniglio*, 170 A.D.2d 477, 565 N.Y.S.2d 834 (2d Dep't 1991); *Cooper-Jones v. Williams*, 162 A.D.2d 1001, 557 N.Y.S.2d 214 (4th Dep't 1990); *Bonfiglio v. Bonfiglio*, 134 A.D.2d 426, 521 N.Y.S.2d 49 (2d Dep't 1987).

258. See, e.g., *Lavelle v. Freeman*, 181 A.D.2d 976, 581 N.Y.S.2d 875 (3d Dep't 1992); *Rybicki v. Rybicki*, 176 A.D.2d 867, 575 N.Y.S.2d 341 (2d Dep't 1991); *Wiles*, 171 A.D.2d 398, 578 N.Y.S.2d 292 (4th Dep't 1991); *Hemphill v. Hemphill*, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991); *Richardson v. Howard*, 135 A.D.2d 1140, 523 N.Y.S.2d 272 (4th Dep't 1987).

ent to return with the children.²⁵⁹ In such "after the fact" cases, the court may have the benefit of actual evidence of how the move has impacted upon the children so that their best interests may be assessed with reference to concrete proof, as opposed to only future projections and probabilities. In very rare instances, courts may sanction temporary relocations subject to further proceedings at which the children's adjustment to their new domiciles may be considered.²⁶⁰ Finally, custodial parents may seek "after the fact" permission sanctioning their prior unauthorized relocation.²⁶¹ It must be noted that any relocation in violation of a court order or divorce judgment may have perilous consequences such as contempt penalties and even a loss of custody if otherwise appropriate.²⁶²

There is inherent in relocation cases an often irreconcilable tension between the welfare of the child and the legitimate interests of the custodial and noncustodial parent. The child's entitlement is, as I view it, to be raised in an environment which maximally serves the child's emotional, intellectual, social, and physical needs. The identification of that environment will require consideration of the totality of the circumstances which surround the child's removal from the noncustodial parent, the restraint of that removal, or most significantly, the reversal of custody.

The custodial parent's legitimate interests may be in conflict with those of the child, where the move would benefit that parent (and even the child) economically, socially or educationally, yet would still be detrimental to the child's overall best in-

259. See, e.g., *Sanders v. Sanders*, 185 A.D.2d 716, 585 N.Y.S.2d 891 (4th Dep't 1992); *Hathaway v. Hathaway*, 175 A.D.2d 336, 572 N.Y.S.2d 92 (4th Dep't 1991). Sometimes the noncustodial parent may also seek to obtain custody of the children, gaining leverage and raising the stakes of the controversy, whereas other times, the noncustodial parent merely wants the children accessible for visitation purposes—in effect holding the custodial parent hostage. See, e.g., *Sanders v. Sanders*, 185 A.D.2d 716, 585 N.Y.S.2d 891 (4th Dep't 1992).

260. See, e.g., *Libranti v. Libranti*, 619 N.Y.S.2d 599 (2d Dep't 1994). But see *Wodka v. Wodka*, 168 A.D.2d 1001, 565 N.Y.S.2d 353 (4th Dep't 1990); see also *supra* notes 254-56 and accompanying text for a discussion of *Wodka*.

261. See, e.g., *Schwartz v. Schwartz*, 91 A.D.2d 628, 456 N.Y.S.2d 811 (2d Dep't 1982).

262. See generally *Radford v. Propper*, 190 A.D.2d 93, 597 N.Y.S.2d 967 (2d Dep't 1993); *Ideman v. Ideman*, 168 A.D.2d 565, N.Y.S.2d 353 (4th Dep't 1990); *Wodka v. Wodka*, 168 A.D.2d 1000, 565 N.Y.S.2d 353 (4th Dep't 1990).

terest in depriving the child of a closely bonded relationship with the noncustodial parent, whose frequent consistent nurturing role is of overriding significance to that child.

Similarly, the noncustodial parent's resistance to the move may be justified by a strong, positive relationship with the child, which also satisfies the emotional needs of the parent. Yet, effectively restraining the custodial parent's move or even reversing custody may be traumatic to that child whose primary attachment is to the custodial parent. From personal experience I can state without hesitation that these are the conflicting interests that render relocation cases among the most gut-wrenching to decide.

While New York courts pay lip service to doing that which serves the best interests of the child, they commonly first consider the visitation rights of the noncustodial parent.²⁶³ In fact, *Radford v. Propper* cites the interference with the noncustodial parent's visitation as a threshold that precedes inquiry into the question of relocation.²⁶⁴

It is noteworthy that in *Weiss*, the Court of Appeals found, given the frequency of the visits between the noncustodial father and his son, that "sparser" but longer visits would not suffice to meet the child's needs.²⁶⁵ However, while that may have been true in *Weiss*, and may be true in other cases, we cannot rationally conclude that a given relationship between a noncustodial parent and a child might not flourish with "sparser" but longer periods of visitation over summers and other school vacations in all cases. During these periods of extended visitation, the noncustodial parent may well assume the role of a de facto, albeit temporary, custodian, enabling both parent and child to explore new facets of their relationship. By placing undue emphasis on the visitation rights of the noncustodial parent, convenience becomes, in effect, the paramount consideration. When one begins with the perspectives, however, that the fact of a divorce necessarily must increase the familial inconven-

263. See *Daghir v. Daghir*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *Radford v. Propper*, 190 A.D.2d 93, 597 N.Y.S.2d 967 (2d Dep't 1993); *Kozak v. Kozak*, 111 A.D.2d 842, 490 N.Y.S.2d 583 (2d Dep't 1985).

264. *Radford*, 190 A.D.2d at 94, 597 N.Y.S.2d at 969. This decision faithfully digests many of the earlier cases and follows their precedent.

265. *Weiss v. Weiss*, 52 N.Y.2d at 176, 418 N.E.2d at 380, 436 N.Y.S.2d at 865 (1981).

ience of all concerned, and that extended but less frequent visits may actually be preferable in a given case, the courts can focus on what is truly best for the children involved.

As has been demonstrated thus far, there is an inherent contradiction in all relocation cases which purport to be concerned with the "primacy of the child's welfare,"²⁶⁶ yet which fail even to reach this "predominant concern"²⁶⁷ until after an extraordinary circumstances threshold has been crossed.²⁶⁸

Moreover, the current state of the law permits a noncustodial parent to exercise a complete veto over the custodial parent's attempts to better the lives of the children and themselves absent proof of extraordinary circumstances.²⁶⁹ Although the cases routinely cite the need to balance all relevant factors,²⁷⁰ by creating a need for a threshold showing of extraordinary circumstances *before* the other relevant factors are even entertained, obviously the scales are heavily tipped against the relocation, regardless of its possible merits. Indeed this application of the law creates, in effect, an irrebuttable presumption²⁷¹ that continued, convenient, local visitation with the

266. *Id.* at 174, 418 N.E.2d at 380, 436 N.Y.S.2d at 865.

267. *Ladizhensky v. Ladizhensky*, 184 A.D.2d 756, 757, 585 N.Y.S.2d 771, 772 (2d Dep't 1992).

268. *Radford*, 190 A.D.2d at 99, 597 N.Y.S.2d at 972.

269. *See generally* Katherine C. Sheehan, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN'S L.J. 135 (1986).

270. *Radford*, 190 A.D.2d at 99, 597 N.Y.S.2d at 971-72; *Coniglio v. Coniglio*, 170 A.D.2d 477, 478, 565 N.Y.S.2d 834, 836 (2d Dep't 1991).

271. The different appellate divisions treat the presumption differently. The Third Department refers to a presumption that it is in the best interest of the child not to be moved away from the noncustodial parent if visitation would be impacted, but that this presumption may be rebutted by a showing of exceptional circumstances by the custodial parent. *See Raybin v. Raybin*, 205 A.D.2d 918, 919-20, 613 N.Y.S.2d 726, 727 (3d Dep't 1994) (summarizing the holdings in *Lake v. Lake*, 192 A.D.2d 751, 596 N.Y.S.2d 171 (3d Dep't 1993); *Atkin v. McDaniel*, 181 A.D.2d 188, 585 N.Y.S.2d 849 (3d Dep't 1992); and *Hathaway v. Hathaway*, 175 A.D.2d 336, 572 N.Y.S.2d 92 (3d Dep't 1991)). Yet, where a relocation will not disrupt visitation by the noncustodial parent, the Third Department as well finds the issue of exceptional circumstances to be irrelevant. *See Murphy v. Murphy*, 145 A.D.2d 857, 535 N.Y.S.2d 844 (3d Dep't 1988).

The First, Second, and Fourth Departments generally apply the exceptional circumstances test as requiring a threshold showing of a pressing need for the relocation before the issue of whether the move is in the child's best interests will be considered. *See Elkus v. Elkus*, 182 A.D.2d 45, 588 N.Y.S.2d 138 (1st Dep't 1992); *Radford v. Propper*, 190 A.D.2d 93, 597 N.Y.S.2d 967 (2d Dep't 1993), and cases cited therein; *Sanders v. Sanders*, 185 A.D.2d 716, 585 N.Y.S.2d 891 (4th Dep't

noncustodial parent is better for the child than permitting the relocation.

The static threshold requirement of exceptional circumstances results in at least two anomalies. First, there is seemingly a disproportionately high rate of reversals by the Appellate Divisions in relocation cases. Trial level courts, seeing and hearing the witnesses first-hand, are inclined to fashion equitable remedies to further the best interests of the children without yielding to the irrebuttable presumption favoring convenient access by the noncustodial parent, while appellate courts, reading sterile records, apply the exceptional circumstances test as a threshold to reverse orders permitting relocation, considering themselves constrained by precedent to disregard the impact upon the children (absent exceptional circumstances).²⁷² Indeed, we note few instances which illustrate a trial level court order denying relocation having been reversed to permit the move.²⁷³

1992); *Wiles v. Wiles*, 171 A.D.2d 398, 578 N.Y.S.2d 292 (4th Dep't 1991); *Cooper-Jones v. Williams*, 162 A.D.2d 1001, 557 N.Y.S.2d 214 (4th Dep't 1990); *Stec v. Levindofske*, 153 A.D.2d 310, 550 N.Y.S.2d 966 (4th Dep't 1990); *Richardson v. Howard*, 135 A.D.2d 1140, 523 N.Y.S.2d 272 (4th Dep't 1987); *Shed v. Sofia*, 134 A.D.2d 894, 521 N.Y.S.2d 1008 (4th Dep't 1987); *Kelly v. Kelly*, 132 A.D.2d 977, 518 N.Y.S.2d 508 (4th Dep't 1987); *Barie v. Faulkner*, 115 A.D.2d 1003, 497 N.Y.S.2d 565 (4th Dep't 1985).

272. A brief glance at the cases cited in this article alone reveal an astounding number of reversals at the appellate level. See, e.g., *Raybin v. Raybin*, 205 A.D.2d 918, 613 N.Y.S.2d 726 (3d Dep't 1994); *Clark v. Dunn*, 195 A.D.2d 811, 600 N.Y.S.2d 376 (3d Dep't 1993); *Elkus v. Elkus*, 182 A.D.2d 45, 588 N.Y.S.2d 138 (1st Dep't 1992); *Leslie v. Leslie*, 180 A.D.2d 620, 579 N.Y.S.2d 164 (2d Dep't 1992); *Wiles v. Wiles*, 171 A.D.2d 398, 578 N.Y.S.2d 292 (4th Dep't 1991); *Stec v. Levindofske*, 153 A.D.2d 310, 550 N.Y.S.2d 966 (4th Dep't 1990); *Richardson v. Howard*, 135 A.D.2d 1140, 523 N.Y.S.2d 272 (4th Dep't 1987); *Bonfiglio v. Bonfiglio*, 134 A.D.2d 426, 521 N.Y.S.2d 49 (2d Dep't 1987); *Kozak v. Kozak*, 111 A.D.2d 842, 490 N.Y.S.2d 583 (2d Dep't 1985).

273. In *Blundell v. Blundell*, 150 A.D.2d 321, 540 N.Y.S.2d 850 (2d Dep't 1989), the Supreme Court, Nassau County, directed the mother to return to within a 30 mile radius of the former marital residence. *Id.* at 321, 540 N.Y.S.2d at 851. The Appellate Division, Second Department, reversed, permitting a relocation to New Hampshire, finding that the trip would not preclude visitation by the father. *Id.* at 324, 540 N.Y.S.2d at 852-53. See *Ladizhensky v. Ladizhensky*, 184 A.D.2d 756, 585 N.Y.S.2d 771 (2d Dep't 1992) (reversing an order denying relocation to Missouri). See also *Von Ohlen v. Von Ohlen*, 178 A.D.2d 592, 577 N.Y.S.2d 662 (2d Dep't 1991) (reversing an order denying relocation to Arkansas); *A.F. v. N.F.*, 156 A.D.2d 750, 549 N.Y.S.2d 511 (2d Dep't 1989) (reversing an unwarranted custody change and permitting relocation incident thereto).

The second, more significant anomaly is that cases which purport to be concerned with the best interests of the children involved may actually be decided in a manner inconsistent with the children's best interests.

The custodial parent's decision to move to a distant domicile is generally one not undertaken lightly. Such a move invariably entails significant expense, effort, and the adjustment of the entire moving family. Genuine economic concerns are frequent motivators, as are remarriages. Whatever precipitates the decision to move, it will have an impact upon the family as a whole.

When a custodial parent moves, only to be ordered to return by a court which has determined that the move was not necessary, the psychological impact of such an occurrence may be truly devastating for the child. As if the child is not burdened enough by his or her parents' divorce, now the child is responsible for the custodial parent's inability to move. Pioneer visions of a new life are shattered and a child may see him or herself as being the reason why everyone is made to suffer. Even the most caring and supportive custodial parent would react with resentment towards being told that the contemplated move is prohibited. While the frustrated parent may focus resentment upon an ex-spouse, or the court, the children may well absorb a different message. It's their fault.

Of course it is not "their fault," but they may nevertheless suffer. Furthermore, whether the move is made with court approval or without, an appellate court ordering a child's return can likewise cause that child to suffer personal turmoil resulting from the responsibility inappropriately assumed for the family's plight.²⁷⁴ The guilt which might plague such a child is only one aspect of the trauma of a forced move back to the area of the former marital domicile. The economic and educational advantages that would have benefitted the custodial parent and child may also be lost.

274. *But see* Frizzell v. Frizzell, 193 A.D.2d 861, 597 N.Y.S.2d 513 (3d Dep't 1993), wherein the Third Department, after two hearings and one prior appeal, held that a court-sanctioned 1991 move was "a fait accompli," and that this fact should have been considered by the supreme court. *Id.* at 862-63, 597 N.Y.S.2d at 514-15. Although there had been a prior appeal, *Frizzell* is technically another case in which the appellate division reversed a trial court order denying permission to relocate. *See supra* note 273.

The psychological impact upon a child "at fault" for the custodial parent's inability to relocate is probably greatest in cases where the custodial parent seeks to relocate as a consequence of a remarriage. The current state of the law is that remarriage is not an exceptional circumstance to justify a move if it will interfere with the noncustodial parent's rights of visitation.²⁷⁵ However, it is arguable that no situation, in which permission to relocate is denied, is more damaging to a child than being the reason that his or her custodial parent is unable to live with a new spouse, who may be unable to relocate near the residence of the noncustodial parent.²⁷⁶ Such rulings hold the family of the custodial parent hostage to the whims of the noncustodial parent, based upon a presumption that it is better for the child that the noncustodial parent to enjoy continued convenient access.²⁷⁷

The rationale underlying the exceptional circumstances rule has been simply stated, and is grounded in the noncustodial parent's "right to reasonable and meaningful access to the children [of] the marriage"²⁷⁸ "The term 'exceptional circumstances' or 'exceptional reasons' is invariably associated with a situation where either the exercise of such right is inimical to the welfare of the children or the parent has in some manner fortified his or her right to such access."²⁷⁹ The rule that has evolved is that unless visitation would be inimical to the child, or the noncustodial parent has forfeited his or her rights, that noncustodial parent possesses a natural right²⁸⁰ to visitation that is superior to, *inter alia*, the right of the custodial parent to relocate. In the absence of extraordinary circumstances, the noncustodial parent's right to reasonable visitation assumes primacy over the child's right to have his or her best interests fostered, furthered, and effectuated. Based upon the operation

275. *Elkus*, 182 A.D.2d at 48, 588 N.Y.S.2d at 140; *Richardson v. Howard*, 135 A.D.2d 1140, 523 N.Y.S.2d 272 (4th Dep't 1987); *LoBianco v. LoBianco*, 131 A.D.2d 642, 516 N.Y.S.2d 724 (2d Dep't 1987).

276. *Cf. Elkus*, 182 A.D.2d at 48, 588 N.Y.S.2d at 140.

277. *Cf. Hemphill v. Hemphill*, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991); *Cataldi v. Shaw*, 101 A.D.2d 823, 475 N.Y.S.2d 480 (2d Dep't 1984).

278. *Strahl v. Strahl*, 66 A.D.2d 571, 574, 414 N.Y.S.2d 184, 186, (2d Dep't 1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980).

279. *Strahl*, 66 A.D.2d at 573, 414 N.Y.S.2d at 186 (citing *Denberg v. Denberg*, 34 Misc. 2d 980, 986, 229 N.Y.S.2d 831, 837 (Sup. Ct. Queens County 1962)).

280. *Id.*

of a presumption that the child's best interests will be served by continued local visitation with the noncustodial parent, his or her actual best interests may be thwarted and custody may be changed.²⁸¹

Clearly, the rights of a noncustodial parent are significant, and a child will normally derive very genuine benefits from regular visitation with the noncustodial parent. However, each case turns on its own facts and what is needed is flexibility rather than strict applications of unyielding thresholds.

V. A Better Approach

The approach followed in New York represents just one point of view in the analytical spectrum. Whereas New York imposes tougher requirements upon a custodial parent seeking to relocate, other states, such as Minnesota, take the opposite approach to facilitate relocation.²⁸² Yet other states take a more middle ground. Two states whose relocation policies are worthy of discussion are New Jersey and Illinois.

A. New Jersey

The New Jersey standards for removal are based upon statute and case law. The New Jersey statute dealing with custodial relocation is New Jersey Statutes section 9:2-2.²⁸³ The purpose of this statutory provision is "to preserve the rights of the noncustodial parent and the child to maintain and develop their familial relationship."²⁸⁴ Under the statute, removal is permitted only upon "cause shown."²⁸⁵ The "cause shown" has been interpreted to encompass the "interest in continuing, by

281. In its simplest form, a relocation case is a custody case, since an unauthorized relocation can lead to a change in custody. See generally Radford v. Prop- per, 190 A.D.2d 93, 597 N.Y.S.2d 967 (2d Dep't 1993). Cf. Wodka v. Wodka, 168 A.D.2d 1000, 565 N.Y.S.2d 353 (4th Dep't 1990) (holding an automatic change of custody to be improper).

282. For a concise comparative discussion of the relocation laws of several key states, see Mandy S. Cohen, Note, *A Toss of the Dice . . . The Gamble With Post-Divorce Relocation Laws*, 18 HOFSTRA L. REV. 127 (1989).

283. N.J. STAT. ANN. § 9:2-2 (West 1993).

284. Holder v. Polanski, 544 A.2d 852, 855 (N.J. 1988) (quoting Cooper v. Cooper, 491 A.2d 606, 610 (N.J. 1984)); see also Comas v. Comas, 608 A.2d 1005, 1007 (N.J. Super. Ct. Ch. Div. 1992).

285. N.J. STAT. ANN. § 9:2-2.

appropriate visitation, as reasonable, healthy and affectionate a relationship as possible with the parent with whom he does not reside."²⁸⁶ Under case law, "the standard for allowing removal is now primarily what is in the best interest of the children."²⁸⁷

New Jersey begins its analysis with the realistic acknowledgement that divorce necessarily alters the former family unit and that accommodations are necessary. The courts of New Jersey look at what is in the best interest of the child in terms of the new family unit. The new family unit consists of the custodial parent and the children. The courts have recognized that "[t]he family unity which is lost as a consequence of the divorce is lost irrevocably, and there is no point in judicial insistence on maintaining a wholly unrealistic simulation of unity."²⁸⁸

Indeed, the New Jersey approach reflects a pragmatic acknowledgement absent in New York, that new familial relations and dynamics must necessarily alter the family structure. Parents may have new partners, employment opportunities may require relocation to new states, and the archetypal "Ozzie and Harriet" family structure simply must give way to a new reality. In this new reality, the rights of the noncustodial parent are not to be disregarded; and depending upon the nature of the relationship between the noncustodial parent and child, it may well be in the child's best interest to disallow a relocation. The New Jersey approach possesses a greater flexibility than does the New York exceptional circumstances threshold standard. As such, the New Jersey approach is better suited to reach an appropriate disposition in each case.

In *Cooper v. Cooper*,²⁸⁹ the court held that the custodial parent had to show that there would be a "real advantage" to himself or herself and the children by the relocation.²⁹⁰ The court in *Holder v. Polanski*²⁹¹ held that "the focus of the 'cause' requirement should not be on the benefits that will accrue to the custo-

286. *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 29 (N.J. Super. Ct. Ch. Div.), *aff'd*, 365 A.2d 716 (N.J. Super. Ct. App. Div. 1976).

287. *Winer v. Winer*, 575 A.2d 518, 522 (N.J. Super. Ct. App. Div. 1990) (citing *Holder*, 544 A.2d at 855).

288. *Cooper*, 491 A.2d at 612 (quoting *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984)).

289. 491 A.2d 606 (N.J. 1984).

290. *Id.* at 613.

291. 544 A.2d 852 (N.J. 1988).

dial parent but on the best interests of the children and on the preservation of their relationship with the noncustodial parent.”²⁹² The court in *Holder* then stated that “from that perspective, the ‘cause’ requirement of [section 9:2-2] implicates the best interests of the child as manifested through visitation with the noncustodial parent.”²⁹³ The *Holder* court then stated that “[s]hort of an adverse effect on the noncustodial parent’s visitation rights or other aspects of a child’s best interests, the custodial parent should enjoy the same freedom of movement as the noncustodial parent.”²⁹⁴

In readdressing the issue of removal in *Holder*, the court modified the “cause” requirement of a “real advantage” from *Cooper*, and held instead that “any sincere, good-faith reason will suffice.”²⁹⁵ Upon a satisfactory showing to the court that there is a good faith reason for the move, the court then considers whether the move will be “inimical to the best interests of the children or adversely affect the visitation rights of the noncustodial parent.”²⁹⁶ If the move requires substantial changes in the visitation schedule, the court then considers several factors.

The first factor the court considers is the advantages the move may provide, including whether the move will improve the quality of life for the child and the custodial parent.²⁹⁷ The second factor is the motive of the custodial parent in deciding to move and the motive of the noncustodial parent in opposing the move.²⁹⁸ If the motive of the custodial parent was to frustrate or defeat the visitation rights of the noncustodial parent, then removal will not be permitted.²⁹⁹ The third factor that the

292. *Id.* at 856.

293. *Holder*, 544 A.2d at 856 (citing *Cooper*, 491 A.2d at 610).

294. *Id.*

295. *Id.* The court noted that if the custodial parent’s motive was to “thwart” the noncustodial parent’s visitation, the test would not be met. However, since the custodial parent in *Holder* was motivated to move to be closer to relatives and to make a “fresh start in life,” this was sufficient to justify a move to Connecticut. *Id.* See also *McMahon v. McMahon*, 607 A.2d 696, 698 (N.J. Super. Ct. Ch. Div. 1991); *Winer*, 575 A.2d at 522; *Harris v. Harris*, 563 A.2d 64, 71-72 (N.J. Super. Ct. Ch. Div. 1989).

296. *Holder*, 544 A.2d at 856; *Harris*, 563 A.2d at 72.

297. *Cooper*, 491 A.2d at 613.

298. *Id.*

299. *Id.*

courts consider is whether there will be a realistic opportunity for visitation which will maintain and foster the relationship between the child and the noncustodial parent if removal is allowed.³⁰⁰ The court also looks to whether the custodial parent is likely to comply with visitation orders when he or she is no longer within the jurisdiction.³⁰¹

The emphasis in looking at these factors is no longer on "whether the children or the custodial parent will benefit from the move, but on whether the child will suffer from it."³⁰² The *Holder* court further stated that "[m]otives are relevant, but if the custodial parent is acting in good faith and not to frustrate the noncustodial parent's visitation rights, that should suffice."³⁰³ The *Holder* court stated that a critical concern remains that the noncustodial parent maintain a reasonable visitation schedule, "but in our mobile society, it may be possible to honor that schedule and still recognize the right of [the] custodial parent to move."³⁰⁴ Although the courts are mindful of the custodial parent's right to move as well as the noncustodial parent's right of visitation, the "beacon" concern remains the best interests of the child.³⁰⁵ The New Jersey courts hold that the advantage of the proposed removal and the possibility for a better lifestyle should not be sacrificed in order to preserve weekly visitation by the noncustodial parent where there is a reasonable alternative to visitation, "and where the advantages of the move are substantial."³⁰⁶ Thus, once the initial burden of cause is shown by the custodial parent, the burden is on the noncus-

300. *Holder*, 544 A.2d at 857; *Cooper*, 491 A.2d at 613; *McMahon*, 607 A.2d at 698.

301. *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Super. Ct. Ch. Div. 1976), *aff'd*, 365 A.2d 716 (N.J. Super. Ct. App. Div. 1976).

302. *Holder*, 544 A.2d at 857.

303. *Id.*

304. *Id.*; *Winer*, 575 A.2d at 524.

305. *Holder*, 544 A.2d at 857; *McMahon*, 607 A.2d at 698-99.

306. *Cooper*, 491 A.2d at 614; *Harris v. Harris*, 563 A.2d 65, 70 (N.J. Super. Ct. Ch. Div. 1989); *D'Onofrio*, 365 A.2d at 30. In *Harris*, Mrs. Harris wanted to move to Florida with the children, remarry, and begin a new life. *Harris*, 563 A.2d at 70. The cost of living in New Jersey had become "exorbitant," and finances became increasingly difficult. *Id.* The housing was cheaper in Florida, the state had several schools which her gifted child could attend, and the climate would be beneficial in controlling their other child's asthma. *Id.* at 70-71. The court here determined that there were several advantages in the move to Florida and the children should not be deprived of an improved lifestyle, which would be in the children's

todial parent to show that the proposed alternative visitation schedule would not work and therefore would unreasonably burden his or her relationship with the child.³⁰⁷

In evaluating the effect of removal, the New Jersey courts look at the reality that the noncustodial parent is free to remove him or herself in order to seek an improved and better life, even though the child remains behind.³⁰⁸ In this situation, the custodial parent could not prevent the noncustodial parent from relocating by claiming the child is being deprived of his or her right to visit with the noncustodial parent.³⁰⁹ Therefore, New Jersey law provides that the custodial parent should be entitled to seek out the same opportunities through removal that are available to the noncustodial parent, providing parental interest can still be accommodated, even though the visitation schedule may be different.³¹⁰ The New Jersey courts also consider the preference of the children, if they are of suitable age,³¹¹ whether there will be extended family in the new location,³¹² remarriage,³¹³ education,³¹⁴ and employment.³¹⁵

B. *Illinois*

Illinois also sets forth its relocation standards by statute and case law. The courts hold that the custodial parent's desire, per se, to move to another state is not sufficient without a further showing that the move would be in the child's best interest.³¹⁶ The burden of proving that the move is in the child's best

best interests. *Id.* at 71-72. The court placed the benefits of the children above the visits with the noncustodial parent. *Id.* at 72.

307. *Cooper*, 491 A.2d at 614; *Winer*, 575 A.2d at 522; *Harris*, 563 A.2d at 72.

308. *Holder*, 544 A.2d at 857; *Cooper*, 491 A.2d at 613; *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984); *D'Onofrio*, 365 A.2d at 30.

309. *Holder*, 544 A.2d at 857; *Cooper*, 491 A.2d at 613; *Helentjaris*, 476 A.2d at 832; *D'Onofrio*, 365 A.2d at 30.

310. *Holder*, 544 A.2d at 857; *Cooper*, 491 A.2d at 613; *Helentjaris*, 476 A.2d at 832; *D'Onofrio*, 365 A.2d at 30.

311. N.J. STAT. ANN. § 9:2-2 (West 1993).

312. *Holder*, 544 A.2d at 854.

313. *Harris*, 563 A.2d at 71.

314. *Holder*, 544 A.2d at 854.

315. *Id.*

316. See, e.g., *In re Eckert*, 518 N.E.2d 1041, 1044 (Ill. 1988); *In re Gibbs*, 645 N.E.2d 507, 512 (Ill. App. Ct. 1994); *In re Stone*, 559 N.E.2d 92, 95 (Ill. App. Ct. 1990); *In re Kutinac*, 538 N.E.2d 862, 865 (Ill. App. Ct. 1989).

interest is placed on the parent seeking removal.³¹⁷ In determining the best interests of the child, the Illinois courts look to the impact that removal will have on the visitation rights of the noncustodial parent.³¹⁸ The courts also look to the policy of the Illinois Marriage and Dissolution of Marriage Act,³¹⁹ which states that "[t]he court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of their child is in the best interest of the child."³²⁰ The burden thus is on the parent seeking removal to show that the move will still promote the policy of maximum parental involvement.³²¹

In determining what is in the best interests of the child, the courts look at five factors. The first is whether the move is likely to "[e]nhance the general quality of life for both the custodial parent and the child."³²² The second factor requires an examination of the motives of the custodial parent who wishes to move, in order to determine whether the motive behind the move is to defeat or "frustrate" visitation.³²³ The third factor the court considers is the noncustodial parent's motives for opposing removal.³²⁴ The fourth factor the court considers is the noncustodial parent's visitation rights since it is in the best in-

317. ILL. COMP. STAT. ANN., ch. 750, 5/609 (Michie 1993); *Eckert*, 518 N.E.2d at 1044; *In re Taylor*, 621 N.E.2d 273, 275 (Ill. App. Ct. 1993); *In re Herkert*, 615 N.E.2d 833, 837 (Ill. App. Ct. 1993); *In re Pribble*, 607 N.E.2d 349, 353 (Ill. App. Ct. 1993); *In re Ballegeer*, 602 N.E.2d 852, 854 (Ill. App. Ct. 1992); *In re Davis*, 594 N.E.2d 734, 739 (Ill. App. Ct. 1992).

318. *In re Bednar*, 496 N.E.2d 1149, 1153 (Ill. App. Ct. 1986).

319. ILL. COMP. STAT. ANN., ch. 750, 5/101-5/802 (Michie 1993 & Supp. 1994).

320. ILL. REV. STAT. ch. 40 paras. 102(7), 602(c) (recodified as ILL. COMP. STAT. ANN., ch. 750, 5/102, 5/602 (Michie 1993 & Supp. 1994)), cited in *Bednar*, 496 N.E.2d at 1154.

321. *In re Shalashnow*, 512 N.E.2d 1076, 1079 (Ill. App. Ct. 1987); *Bednar*, 496 N.E.2d at 1154; *In re Brady*, 450 N.E.2d 985, 986-87 (Ill. App. Ct. 1983); ILL. REV. STAT. ch. 40, para. 609 (recodified as ILL. COMP. STAT. ANN., ch. 750, 5/609 (Michie 1993)).

322. *Eckert*, 518 N.E.2d at 1045; *Taylor*, 621 N.E.2d at 275; *Herkert*, 615 N.E.2d at 837; *Pribble*, 607 N.E.2d at 353; *In re Pfeiffer*, 604 N.E.2d 1069, 1071 (Ill. App. Ct. 1992); *Ballegeer*, 602 N.E.2d at 855; *Davis*, 594 N.E.2d at 739; *In re Zamarripa-Gesundheit*, 529 N.E.2d 780, 782 (Ill. App. Ct. 1988).

323. *Eckert*, 518 N.E.2d at 1045; *Taylor*, 621 N.E.2d at 275; *Zamarripa-Gesundheit*, 529 N.E.2d at 782; *Winebright v. Winebright*, 508 N.E.2d 774, 776 (Ill. App. Ct. 1987).

324. *Eckert*, 518 N.E.2d at 1045 (citing *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Super. Ct. Ch. Div. 1976)); *Davis*, 594 N.E.2d at 739; *Zamarripa-Gesundheit*, 529 N.E.2d at 782.

terests of the child to have a "healthy and close relationship with both parents, as well as other family members."³²⁵ The fifth factor is "whether a realistic and reasonable visitation schedule can be reached if the move is allowed."³²⁶

In Illinois, if the custodial parent can "establish[] a good, sincere reason for wanting to move to another jurisdiction, the trial court should consider all the relevant factors in determining the best interest of the child."³²⁷ The appellate courts have stated that there is a presumption favoring the trial court's decision. That presumption is that "[a] trial court's determination of what is in the best interests of the child should not be reversed unless it is clearly against the manifest weight of the evidence and it appears that a manifest injustice has occurred."³²⁸

VI. The Proposed Test

When a marriage ends, it is because of the inability of the husband and wife to resolve their differences. Regardless of whether one party is more at fault, it is the children of the marriage who invariably suffer as a result of their parents' failure. By creating bright-line rules, such as the "exceptional circumstances" test, affecting where, with whom, and how the children shall live in order to give effect to the *parents'* rights is to treat the children as chattel. This is not to say that parental rights are unimportant. But a court must delicately balance the rights of the noncustodial parent, the custodial parent, and the child in resolving relocation disputes. In this triangle, it is the child who is least able to protect his interests in maintaining a loving, nurturing relationship with both parents, stability of a home environment, and continuity of parental care.³²⁹

325. *Eckert*, 518 N.E.2d at 1045; *Ballegeer*, 602 N.E.2d at 854; *Zamarripa-Gesundheit*, 529 N.E.2d at 782; *Brady*, 450 N.E.2d at 987.

326. *Eckert*, 518 N.E.2d at 1045-46; *Zamarripa-Gesundheit*, 529 N.E.2d at 782.

327. *Eckert*, 518 N.E.2d at 1046 (citing *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1158 (Mass. 1985)).

328. *Pribble*, 607 N.E.2d at 353 (citing *Eckert*, 518 N.E.2d at 1046); *Pfeiffer*, 604 N.E.2d at 1071.

329. This is why it is so important that Law Guardians be appointed to protect the rights of the children involved. See *Ladizhensky v. Ladizhensky*, 184 A.D.2d 756, 758, 585 N.Y.S.2d 771, 773 (2d Dep't 1992).

The restrictive view adopted by the courts of New York ignores the fact that the noncustodial parent (usually the father) is free to move whenever and wherever he wishes, regardless of the impact it will have on his child.³³⁰ Moreover, the relationship is a "joint right" of parent and child,³³¹ and one case has stressed the need for inquiry into whether the noncustodial parent could relocate to the proposed new domicile of the custodial parent.³³² Therefore a more careful inquiry should be made into the nature and strength of the relationship, including the bond that existed prior to the divorce, before restricting the right of the custodial parent to relocate when the move is motivated by a sincere desire to improve the lifestyle for herself and her child.

Furthermore, while studies suggest that frequent contact with the noncustodial parent is beneficial to the child, there are "two major qualifiers . . ."³³³ The first is that heightened levels of conflict between the divorced parents are detrimental to the child.³³⁴ Secondly, from a common sense perspective, "persis-

330. Very few New York cases have even acknowledged this paradox. *But see In re Michael G.*, N.Y. L.J., Mar. 26, 1991, at 24 (Family Ct. N.Y. County 1991) (noting that "[n]o cases exist in which a father, custodial parent or not, was denied the right to move wherever and whenever he pleased. It is the woman who was asked to submit to the scheduling needs of the child's father."). However, the issue has been squarely addressed by the New Jersey Superior Court in *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30-32 (N.J. Super. Ct. Ch. Div. 1976). As one commentator has noted, in *D'Onofrio*, the court's "real advantage" test was based on the reasoning that the "noncustodial parent's freedom to move . . . to seek a better life should be matched by a comparable freedom of a custodial parent to seek a better life, both personally and for the child, provided that substitute visitation is available." Peter Ted Surace, *A Proposed "Best Interests" Test for Removing a Child from the Jurisdiction of the Noncustodial Parent*, 51 *FORDHAM L. REV.* 489, 507-08 (1982). Theoretically, a noncustodial parent's right to relocate should also be recognized only upon a showing of exceptional circumstances.

331. *Weiss v. Weiss*, 52 N.Y.2d 170, 175, 418 N.E.2d at 377, 380, 436 N.Y.S.2d at 862, 865 (1981).

332. *See Rampolla v. Rampolla*, 635 A.2d 539 (N.J. Super. Ct. App. Div. 1993).

333. Robert D. Felner and Lisa Terre, *Child Custody Dispositions and Children's Adaptation Following Divorce*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS* 106, 117 (Lois A. Weithorn ed., 1987).

334. *Id.* at 118. *See generally* Edythe S. Ellison, *Issues Concerning Parental Harmony and Children's Psychosocial Adjustment*, 53 *AM. J. ORTHOPSYCHIATRY*, 73 (Jan. 1983); Judith S. Wallerstein and Joan Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 *J. AM. ACAD. CHILD PSYCHIATRY* 600 (1975), *cited in* Ellison, *supra*, at 73.

tent discord" will most likely have the effect of decreasing visitation over time.³³⁵

Naturally, a court cannot be affected by the emotional discord that often follows its decision. However, we cannot ignore the potentially damaging effect on the child of increased parental conflict that must inevitably arise when a custodial parent is denied permission to move because she cannot meet the technical burden of proving "exceptional circumstances." It is to be expected that such a legally imposed restriction on the custodial parent's freedom will intensify parental hostilities that may already exist or perhaps even create discord where none existed. The child may be made to feel responsible for their parents' anger and frustration.

This is especially true when the custodial parent has relied on a lower court's order allowing such a move. Often, in those cases, the custodial parent and child have set up a new life where they may be thriving. But on appeal the permission to move is revoked and the court mandates that both the parent and child return to an area within a particular radius of the noncustodial parent's residence.³³⁶ Especially in these cases, to adhere to the absolute presumption that relocation is *not* in the child's best interests and disrupt the child's life once again is contrary to psychological research and is an inflexible way to approach the difficult questions surrounding custody issues.

For the reasons stated, New York law on relocation should be changed either by statute, or, more expeditiously, by the Court of Appeals to reflect the law's expressed primary concern for the child and to establish guidelines to promote procedural and substantive consistency. I propose that the exceptional circumstances test be abandoned since it fails to balance the multitude of factors that *should* be considered prior to determining

335. See Felner and Terre, *supra* note 333, at 118.

336. See, e.g., Raybin v. Raybin, 205 A.D.2d 918, 919-20, 613 N.Y.S.2d 726, 727-28 (3d Dept. 1994); Clark v. Dunn, 195 A.D.2d 811, 811-12, 600 N.Y.S.2d 376, 377 (3d Dept. 1993); Leslie v. Leslie, 180 A.D.2d 620, 621, 579 N.Y.S.2d 164, 164 (2d Dep't 1992); Stec v. Levindofske, 153 A.D.2d 310, 313, 550 N.Y.S.2d 966, 968 (4th Dep't 1990). But see Frizzell v. Frizzell, 193 A.D.2d 861, 863, 597 N.Y.S.2d 513, 514 (3d Dept. 1993) (holding that forcing mother and child to return to New York from California, where the child had "blossomed," and to undergo financial expense and emotional upheaval, would not be in the child's best interests).

whether or not a parent should be permitted to relocate or whether there should be a change of custody to the theretofore noncustodial parent.

I propose that the test for determining whether a custodial parent may relocate with the child to a distant domicile be determined in accordance with the following principles:

There shall be no presumptions for or against the proposed move. The custodial parent desiring to relocate shall bear the initial burden of coming forward with *prima facie* evidence that:

(1) the motivation underlying the move is one of good faith and is not sparked by a desire to interfere maliciously with the relationship or visitation schedule of the child and noncustodial parent;

(2) a rational basis exists for believing that the relocation will provide a better life for the family unit, the parent, or the child (e.g., a realistic opportunity for a fresh start, a remarriage, better economic circumstances, career opportunity, educational advantages, the emotional or practical support of family, etc.);

(3) the child will enjoy a healthy, decent lifestyle in the new community (i.e., adequate schooling, housing, financial support);

(4) a proposed visitation program will provide the noncustodial parent with sufficient visitation to permit and encourage the development of a meaningful relationship between the noncustodial parent and child.

In seeking to oppose the relocation, the noncustodial parent shall have the burden of disproving by a preponderance of the evidence, the plaintiff's *prima facie* case on any of the four factors above, or that the move will be detrimental to the child. Thus, the proposed relocation may be defeated by proving that the purported benefits of the move are not rationally supportable, or that the deprivation of contact with the noncustodial parent would be so traumatic to the child as to outweigh other advantages. If no genuine issues of fact are raised by the party opposing relocation, the court shall permit the relocation to proceed without a hearing.³³⁷ If such issues of fact are raised and

337. *David W. v. Julia W.*, 158 A.D.2d 1, 8, 557 N.Y.S.2d 314, 319 (1st Dep't 1990).

after a hearing the noncustodial parent fails to sustain the burden on any of those issues, the relocation may proceed. In the event the noncustodial parent sustains the required burden, then, the court should continue the best interest hearing to determine whether or not, considering all of the circumstances, the child should be permitted to move with the custodial parent, or whether custody should be changed to the noncustodial parent.

This change in the law will eliminate the rigidity that has produced inconsistent and inequitable determinations. By removing the exceptional circumstances test and providing more discretion in the *nisi prius* courts, the litigation of relocation cases should diminish and the detrimental effects of forced returns to the former matrimonial domicile following reversal of trial court determinations should be ameliorated.

The proposed formula requires the courts to consider all relevant factors and bestows upon the courts the greatest discretion and flexibility to equitably deal with cases where there is genuine opposition to the move. A move will be allowed, or not, because it has been demonstrated that it is, or it is not, in the child's best interests. Exceptional circumstances will not pose a threshold, nor will there be a presumption against relocation. If the child's best interests will be served by a relocation, a move will be allowed. If not, the move will be enjoined.

This approach takes into consideration the needs of the modern-day custodial parent. Gone are the days of permanent alimony, and lifetime maintenance is also less frequently awarded—since today, the focus is on making the dependent spouse self-sufficient.³³⁸ The fact is that custodial parents must support themselves, and at the same time, bear a greater burden in raising the children. The custodial parent pays a pro rata share of the child's support³³⁹ and is primarily responsible for the resident children's emotional, psychological and physical

338. See N.Y. DOM. REL. LAW § 236(B)(6) (McKinney Supp. 1995). See also *Harmon v. Harmon*, 173 A.D.2d 98, 108, 578 N.Y.S.2d 897, 902-03 (1st Dep't 1992); *Sperling v. Sperling*, 165 A.D.2d 338, 340, 567 N.Y.S.2d 538, 539-40 (2d Dep't 1991).

339. See Child Support Standards Act, N.Y. DOM. REL. LAW § 240(1)(b)(f) (McKinney Supp. 1995); N.Y. FAM. CT. ACT § 413(1)(f) (McKinney Supp. 1995).

needs. Given the comparatively greater burden borne by the custodial parent, and the potential impact upon the children, it is in the best interest of the child and also, only fair, to permit and encourage custodial parents to obtain the best possible lifestyle for both themselves and their children.

The proposed change in the law does not disparage the potential significance of the role of the father (more typically the noncustodial parent) in the child's emotional or cultural development. Indeed, notable among the most dramatic changes in our social fabric is the fact that as mothers have joined the workforce, bearing responsibility for their own support and that of their children, fathers have become far more actively and intimately involved in daily parenting duties, starting at the very beginning, by their presence in Lamaze classes and in birthing and delivery rooms. The flexibility implicit in the recommended approach to relocation cases permits the courts to weigh the relative importance to the child of such close relationships with the noncustodial parent against all other factors in determining whether to permit the move, alter visitation or even change custody. The basic change proposed is not a matter of preference between fathers and mothers, but rather one of focus on the child considering all factors impacting upon that child's best interest unimpeded by rigid preconditions.

VII. Conclusion

Just as "[t]he only absolute in the law governing custody of children is that there are no absolutes,"³⁴⁰ there is no formula or criteria that will ensure an equitable balancing of the interests of parents and children in relocation cases or ensure that the best interests of the children are protected. The best that the law can do is recognize the reality of the tensions that inherently exist, and to provide such guidance and flexibility as will enable the trial courts to render determinations to protect the most vulnerable, innocent parties—the children.

In the final analysis, however, neither geographic proximity of child to parent, nor any visitation program, will ensure or

340. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).

even encourage a positive relationship between the child and parent, or the healthy development of the child, absent a decent level of communication and good faith between the parties. The principles underlying the proposed approach to relocation cases are intended to focus on the child's interests and thereby encourage a cooperative attitude between the parents. While the courts cannot mandate cooperation or good faith, they, as well as the bar, can encourage the development of those attitudes in the course of litigation by emphasizing the effect of the parents' behavior upon the child and by participating in court-related educational programs offered to parents embroiled in custody disputes which encourage and facilitate the greater understanding and cooperation that ultimately benefits the children, the parties, and the system.³⁴¹

A custody or relocation decision is a critical step in the child-of-divorce's tentative, even perilous journey toward maturity. That child will be required to divide his or her life between parents without benefit of the comfort and security of an intact family. The child should not be required to serve as a bridge between them, or be tossed into the tumultuous sea of resentment, anger, and discontent that flows too frequently from their divorce. Following that critical court order are inevitable and unforeseeable changes in the needs and circumstances of all concerned, that no court can be expected to anticipate. The court may be "parens patriae" of the child, but it is obviously no substitute for the parents who must ulti-

341. In New York, Parent Education and Custody Effectiveness (P.E.A.C.E.) has conducted pilot parent educational programs in a number of communities, including Westchester, Erie, Orange, Nassau, Brooklyn, and Albany. In addition, the Dutchess County Family Court has organized a similar parent education program. Preliminary results from these pilot programs find that they encourage divorcing and separating parents to control their hostility towards each other and focus on the welfare of their children by providing information, encouraging sensitivity to the child's perspective, and offering referrals to helpful community resources. This feedback suggests that divorcing and separating parents welcome information and support to help structure their post-divorce relationships for the benefit of their children. Indeed, some states have mandated that parents attend similar educational programs as part of the divorce process. See Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REF. 131 (1993).

mately provide the continuum of care and flexibility required to accommodate growth and change. It is clear, therefore, that the children of New York are not likely to cease being victimized by the disruption and relocation of their parents' lives, until both the law of relocation and their parents truly focus on the children's best interests above all other concerns.