Pace Law Review

Volume 15
Issue 3 *Spring 1995*

Article 1

April 1995

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

Merril Sobie
Pace University School of Law, MSobie@Law.Pace.edu

PACE LAW REVIEW

Volume 15 Spring 1995 Number 3

Articles

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

Merril Sobie*

In her article *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?*,[1] Justice Sondra Miller presents a sharply critical analysis of the "exceptional circumstances" standard,[2] applied by the New York courts in determining custody modification proceedings when the custodial parent relocates to a geographically distant locale.[3] Initially articulated by the Court of Appeals in *Weiss v. Weiss*,[4] the test requires that the custodial parent establish, first, the presence of exceptional circumstances which necessitate the relocation,

* Professor of Law, Pace University School of Law. B.A. Brooklyn College. J.D. New York University. Professor Sobie has written widely concerning juvenile justice and children's rights.

1. Sondra Miller, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases*, 15 PACE L. REV. 339 (1995).

2. *See* Miller, *supra*, note 1, at 341-42, 373-76, 382-84.

3. *See* Miller, *supra*, note 1, at 340-41.

4. 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

such as economic hardship or health considerations, and, second, that relocation is in "the best interests of the child."[5]

Concluding, after a thorough analysis, that the standard has resulted in confused, inconsistent, and frequently irreconcilable decisions which, in fact, serve the best interests of no one,[6] Justice Miller advocates its abolition.[7] To replace exceptional circumstances, she proposes a slightly modified "best interests of the child" standard.[8] Assuming prima facie evidence that "(1) the motivation underlying the [relocation] is one of good faith . . . ; (2) a rational basis exists for [finding] that the relocation will provide a better life for the family unit . . . ; (3) the child will enjoy a healthy, decent lifestyle . . . ; [and] (4) a proposed visitation program will provide the noncustodial parent with sufficient visitation," the court would determine whether relocation is in the child's best interests:[9]

> 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.[10]

For the reasons outlined in this response, I respectfully disagree. In my opinion, exceptional circumstances is a fair and equitable doctrine. As interpreted by the courts in the years since *Weiss*, the standard appropriately balances the needs, interests, and expectations of the custodial parent, the noncustodial parent, and the child. It is not perfect, but no standard designed to balance competing interests and applied by human institutions ever is. There have been some inconsistent results,[11] although several seemingly conflicting cases can be reconciled by examining the conduct of the custodial parent,

---

5. Atkinson v. Atkinson, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 955 (3d Dep't 1993); Radford v. Propper, 190 A.D.2d 93, 100, 597 N.Y.S.2d 967, 973 (2d Dep't 1993); Hollington v. Cocchiola, 180 A.D.2d 635, 636, 579 N.Y.S.2d 700, 702 (2d Dep't 1992).

6. Miller, *supra* note 1, at 341, 382-85.

7. *Id.* at 384-85.

8. *See id.* at 385-87.

9. *Id.* at 385.

10. *Id.* at 386.

11. *See generally infra* part IV.

specifically, whether the custodial parent sought court approval before the move or, instead, relocated in violation of a court order.[12] I agree that the rule places a difficult burden on the custodial parent, but believe that is where it should lie. Lastly, I believe that the *Weiss* standard leads to more predictable judicial determinations and guidance than the far more subjective and vague "best interests of the child" principle.

This response will first discuss the competing interests and expectations of the parties to a relocation dispute,[13] and briefly outline the national view or views.[14] In fact, there is no national standard, or anything approaching a consensus among the states.[15] The New York experience under the exceptional circumstances standard will then be analyzed and appraised.[16] My conclusion is that the standard should be maintained, although I believe that the Court of Appeals should revisit the issue to clarify the factors and criteria relevant to a determination.[17]

I. The Interests

Child custody and visitation proceedings involve three participants—the father, the mother, and the child or children. Each parent has an interest in maintaining a relationship with the child. Custody, sole or joint, is one means of securing that relationship. Absent custody, a continuing relationship and parenting role is provided through the mechanism we call, rather clumsily, visitation. Visitation may result in a less intense or deep parent-child relationship than custody (though that is not always the case), but is nevertheless a very important familial component. For this reason, caselaw requires that visitation be awarded regardless of the best interests of the child, absent a showing of "exceptional circumstances" or detriment to the child.[18]

---

12. *See infra* part IV.
13. *See infra* part I.
14. *See infra* part II.
15. *See infra* part II.
16. *See infra* parts III and IV.
17. *See infra* part V.
18. *See, e.g.*, Strahl v. Strahl, 66 A.D.2d 571, 574, 414 N.Y.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).

The child's interests are of a similar nature. The child has the right to maintain a continuing and meaningful relationship with each parent.[19] Parents may divorce each other, but do not divorce their offspring. Visitation is therefore considered the joint right of the child and the noncustodial parent.[20] Except when there exists a risk of physical or emotional harm, the child should rightfully enjoy the company and input of both parents.[21]

In a custody or visitation dispute where both parents reside in the same community, or at least within commuting range, the rights and interests of all the participants can be protected by balancing custody with visitation. It may not be a facile exercise, and the disappointments in dissolving an integral family unit may be severe, but the court possesses the ability to order the continuation of a meaningful relationship between the child and each of the then-embattled parents.[22] However, that ability breaks down when the custodial parent decides, for whatever reason, to relocate to a distant locale.[23] Relocation is the only voluntary event which jeopardizes the continuation of a meaningful relationship with each parent. One of the bonds must be broken, or at least severely diminished.

The precipitating fact is the custodial parent's decision to move. Courts are powerless to prevent a parental move. By exercising his or her right to relocate, the custodial parent thereby unilaterally frustrates the noncustodial parent's visitation or, to phrase it more appropriately, the continuation of a meaningful

---

19. *See, e.g.*, Hemphill v. Hemphill, 169 A.D.2d 29, 32, 572 N.Y.S.2d 689, 691 (2d Dep't 1991) (stating that "the best interests of a child lie in his being nurtured and guided by both of his natural parents"); Daghir v. Daghir, 82 A.D.2d 191, 193, 441 N.Y.S.2d 494, 494 (2d Dep't 1981) (same).

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

21. *See generally* Katz v. Katz, 97 A.D.2d 398, 398, 467 N.Y.S.2d 223, 224 (2d Dep't 1983) (stating that "[i]n the absence of 'a pressing concern' and that proof that visitation is 'inimical to the welfare of the children,' the parent to whom custody is not awarded must be granted reasonable visitation privileges") (quoting Quinn v. Quinn, 87 A.D.2d 643, 643, 448 N.Y.S.2d 248, 249 (2d Dep't 1982)); Hotze v. Hotze, 57 A.D.2d 85, 87-88, 394 N.Y.S.2d 753, 756 (4th Dep't 1977) (stating that "when the exposure of a child to one of its parents presents a risk of physical [and emotional] harm, a court should deny visitation").

22. *See generally Weiss*, 52 N.Y.2d at 175, 418 N.E.2d at 380, 436 N.Y.S.2d at 865.

23. *See* Miller, *supra* note 1, at 373 n.273.

relationship.[24] Something has to give, and the court is faced with the perhaps Hobson's choice of changing custody or sanctioning an abridgement of the child-parent relationship unless, of course, the custodial parent seeks prior permission to relocate, is unsuccessful, and then elects to remain.

When analyzing the problem and weighing alternative solutions, one should consider the continuing interests of each participant. One should also consider the responsibilities and obligations of custodianship. It is true, as Justice Miller notes, that the noncustodial parent is "free to move whenever and wherever he wishes . . . ."[25] But it is also true that the custodial parent, unlike his or her noncustodial counterpart, has freely undertaken the burden of custodianship. As stated by Justice Bracken, dissenting in *Hemphill v. Hemphill*,[26] "I conclude that the case must be decided with reference to the [exceptional circumstances] rule which disfavors the relocating parent, since it is that parent who, even if for the best of reasons, must ultimately be considered responsible for the breakdown of what had been a fair and equitable custody arrangement."[27]

II. Other Jurisdictions

Different jurisdictions have taken, well, different views regarding relocation. There is no national consensus. Indeed, there is such a multiplicity of views that the rules cannot even be easily categorized.[28]

In Minnesota, for example, there is a presumption in favor of relocation.[29] To overcome the presumption the party opposing the relocation must "establish[ ] by a preponderance of the evidence that the move is not in the best interests of the child."[30]

---

24. *See infra* text accompanying note 27; *see also generally infra* part IV.

25. Miller, *supra* note 1, at 383.

26. 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991).

27. *Id.* at 41, 572 N.Y.S.2d at 697 (Bracken, J., dissenting).

28. *See generally* Mandy S. Cohen, Note, *A Toss of the Dice . . . The Gamble with Post-Divorce Relocation Laws*, 18 HOFSTRA L. REV. 127 (1989).

29. Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983); *see also* Ayers v. Ayers, 508 N.W.2d 515, 519 (Minn. 1993); Gordon v. Gordon, 339 N.W.2d 269, 270 (Minn. 1983); Cohen, *supra* note 28, at 147-48.

30. *Auge*, 334 N.W.2d at 399; *see also* Gordon, 339 N.W.2d at 270.

New York is, more or less, at the opposite end of the spectrum, and is not alone.[31] In South Carolina, for example, there is a clear presumption against relocation.[32] Removal is permitted, however, in situations where it will benefit the child.[33]

California was in the past quite permissive in permitting relocation. Indeed, the fact that the removal deprived the noncustodial parent of visitation rights was held to be " 'generally' insufficient to justify restraint on the [custodial parent's] free movement."[34] However, even the mobile state par excellence now recognizes the importance of the relationship between the child and the noncustodial parent.[35]

New Jersey and Illinois, the two states analyzed by Justice Miller,[36] are at neither pole of the jurisdictional array. New Jersey, which utilizes a slightly modified best interests test,[37] is

---

31. *See* Cohen, *supra* note 28, at 137 n.57.

32. McAlister v. Patterson, 299 S.E.2d 322, 323 (S.C. 1982); *see also* Eckstein v. Eckstein, 410 S.E.2d 578, 580 (S.C. Ct. App. 1991).

33. *McAlister*, 299 S.E.2d at 323; Marshall v. Marshall, 320 S.E.2d 44, 49-50 (S.C. Ct. App. 1984); *see also Eckstein*, 410 S.E.2d at 580.

34. *In re* Cignovich, 61 Cal. Rptr. 261, 263 (Cal. Ct. App. 1976) (citing Walker v. Superior Court, 55 Cal. Rptr. 114, 117 (Cal. Ct. App. 1966); Stack v. Stack, 11 Cal. Rptr. 177, 185 (Cal. Ct. App. 1961)); Dozier v. Dozier, 334 P.2d 957, 961 (Cal. Ct. App. 1959) (stating that the fact that the removal of the child from the state would deprive the noncustodial parent of his visitation rights "is generally not alone sufficient to justify restraint on the mother's free movement unless the [removal] is inconsistent with the welfare of the child").

35. *See* Cooper v. Roe, 23 Cal. Rptr. 2d 295, 299 (Cal. Ct. App. 1993) (stating that the custodial parent seeking to remove the child from the state had the burden of proving that "the move . . . was both necessary to [the custodial parent] and would have no detrimental effect on [the child] or his relationship with [the noncustodial parent] and that it was in [the child's] best interest"); *In re* McGinnis, 9 Cal. Rptr. 2d 182, 185 (Cal. Ct. App. 1992) (recognizing that the custodial parent's removal of the child from the jurisdiction would impact on the noncustodial parent's "ability to have frequent and continuing contact with his or her children"); *In re* Carlson, 280 Cal. Rptr. 840, 844 (Cal. Ct. App. 1991) (holding that the trial court did not err in considering "the effect that the [custodial] mother's contemplated move would have on the father's exercise of visitation . . ."). *See also* CAL. FAM. CODE § 3020 (declaring it the public policy of California "to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage . . .").

36. *See* Miller, *supra* note 1, at 376-82.

37. *See* Holder v. Polanski, 544 A.2d 852, 855 (N.J. 1988) (holding that "a custodial parent may move with the children of the marriage to another state as long as the move does not interfere with the best interests of the children or the visitation rights of the non-custodial parent"). *See also* N.J. STAT. ANN. § 9:2-2 (West 1993), which provides that:

liberal, though not as permissive as Minnesota.[38] Good cause, or at least a "sincere, good-faith reason" to relocate must be shown.[39] Once this burden is satisfied, the court then considers "whether the move [would] be inimical to the best interests of the children or [would] adversely affect the visitation rights of the noncustodial parent."[40] Illinois is more complex and, I gather, more stringent than New Jersey in sanctioning a proposed or already accomplished relocation. The burden is placed on the custodial parent to prove that the move would be in the best interests of the child,[41] and the impact of a removal on visitation between the child and the noncustodial parent is a relevant factor.[42]

Other states follow still other permutations and variations in grappling with the relocation dilemma.[43] The multiplicity of standards, presumptions, exceptions, and plain ambivalence are a testament, I suppose, to the difficult issues facing the court. In no other custody dispute are the interests of the parties, parent and child alike, more difficult to bridge. Given the lack of a national consensus, I believe it prudent that New York move slowly, if at all, in modifying relocation standards. No one seems to have found a better way, though many have found a different way.

---

if minor children of divorced parents "are natives of [New Jersey] or have resided five years within its limits, they shall not be removed out of [the] jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order.

Id.

38. *See generally* Cohen, *supra* note 28, at 137 n.57, 147-48.

39. *Holder*, 544 A.2d at 856 (interpreting N.J. STAT. ANN. § 9-2:2 to require that the custodial parent show a "sincere, good-faith reason" for relocating with the child outside the jurisdiction); *see also* Winer v. Winer, 575 A.2d 518, 522 (N.J. Super. Ct. App. Div. 1990).

40. *Holder*, 544 A.2d at 856.

41. ILL. COMP. STAT. ANN., ch. 750, 5/609 (Michie 1993); *In re* Eckert, 518 N.E.2d 1041, 1044 (Ill. 1988); *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).

42. *See, e.g.*, *Eckert*, 518 N.E.2d at 1045 (stating that the impact of the proposed move on the visitation rights of the noncustodial parents "should be carefully considered"); *In re* Bednar, 496 N.E.2d 1149, 1153 (Ill. App. Ct. 1986).

43. *See* Cohen, *supra* note 28, at 130 nn.20, 21.

III. Application of the Exceptional Circumstances Standard

Before considering the impact of the New York exceptional circumstances standard, it may be helpful to outline those situations in which it does not apply. First, exceptional circumstances need be shown only for relocation to a distant locale.[44] There exists a plethora of decisions allowing a relocation over a "reasonable" distance, coupled, when appropriate, with modified visitation provisions.[45] The custodial parent is quite free to move with the child to the next town, the next county, or even from Westchester County to Suffolk County, i.e., from one end of the New York City suburbs to the other.[46] In determining the issue of "distance" the numeric mileage as well as the travel time, and burden and expense of travel are all relevant.[47]

Second, the standard is not relevant when the noncustodial parent has failed to establish or continue a meaningful relationship with the child.[48] After all, the rule's purpose is the preservation of a meaningful relationship, unless exceptional circumstances exist which outweigh that consideration.[49] Not

---

44. *See* Bennett v. Bennett, 208 A.D.2d 1042, 1043, 617 N.Y.S.2d 931, 932 (3d Dep't 1994) (stating that the exceptional circumstances standard "does not apply when the relocation 'is not so distant as to deprive the noncustodial parent of regular and meaningful access to the child' ") (quoting Lake v. Lake, 192 A.D.2d 751, 752-53, 596 N.Y.S.2d 171, 172 (3d Dep't 1993)).

45. *See, e.g.*, Lake v. Lake, 192 A.D.2d 751, 596 N.Y.S.2d 171 (3d Dep't 1993); Jacoby v. Carter, 167 A.D.2d 786, 563 N.Y.S.2d 344 (3d Dep't 1990); Partridge v. Myerson, 162 A.D.2d 507, 556 N.Y.S.2d 707 (2d Dep't 1990); Lenenthal v. Webster, N.Y. L.J., Aug. 27, 1990, at 23 (Sup. Ct. N.Y. County).

46. *See Partridge*, 162 A.D.2d at 509, 556 N.Y.S.2d at 709. The custodial parent, however, may be constrained by a "radius" provision in a separation agreement whereby the parent agrees to a relocation restriction.

47. Radford v. Propper, 190 A.D.2d 93, 100, 597 N.Y.S.2d 967, 972 (2d Dep't 1993); Blundell v. Blundell, 150 A.D.2d 321, 324, 540 N.Y.S.2d 850, 853 (2d Dep't 1989).

48. *See Radford*, 190 A.D.2d at 99, 597 N.Y.S.2d at 972 (stating that in order to reach the question of exceptional circumstances, it must first be demonstrated that the relocation would deprive the noncustodial parent of "frequent and regular access to his or her children").

49. *See Bennett*, 208 A.D.2d at 1043, 617 N.Y.S.2d at 932 (3d Dep't 1994) (stating that "the benchmark against which the applicability of the relocation rule is measured is 'meaningful access', i.e., the ability of a noncustodial parent to continue to maintain a close and meaningful relationship with his or her children . . ."); *Radford*, 190 A.D.2d at 99, 597 N.Y.S.2d at 972 (stating that " '[t]he overriding concern is with the best interests of the children, which are clearly nurtured by a continued relationship with a noncustodial parent who has maintained reasonable visitation . . .' ") (quoting Ferguson v. Ressico, 125 A.D.2d 915, 916, 510

surprisingly, the cases rejecting a relocation bid are replete with statements concerning the consistency of visitation and other indicia of close bonds between the child and the noncustodial parent.[50] Of course, parents who contest a relocation are likely to have fully exercised visitation—an uncaring father or mother will probably not object to a relocation, or at least will not be willing to devote the time and expense necessary to litigate the matter.

Where the two "threshold" facts have been satisfied, i.e., the move is to a distant locale and the noncustodial parent has maintained a meaningful relationship, the exceptional circumstances test becomes relevant and the custodial parent seeking relocation, or who has already relocated, has the burden of proof.[51] The factors which are encompassed by this standard are comprehensibly explained in Justice Miller's article.[52] Suffice it to say that the standard is not readily fulfilled. There must be an economic necessity, a specific job opportunity not available near home, a health necessity, or other compelling reason.[53] In my opinion, that is appropriate.

Only one contingency, remarriage, has resulted in several apparently unfair decisions.[54] The issue is whether the custodial parent's remarriage to a spouse who resides and is employed in a distant geographic area constitutes an exceptional circumstance, particularly when the new spouse cannot easily

---

N.Y.S.2d 275, 276 (3d Dep't 1986)). *See generally* Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981).

50. *See, e.g.*, *Bennett*, 208 A.D.2d at 1043, 617 N.Y.S.2d at 933; Raybin v. Raybin, 205 A.D. 2d 918, 920, 613 N.Y.S.2d 726, 728 (3d Dep't 1994); *Radford*, 190 A.D.2d at 99, 597 N.Y.S.2d at 972; Leslie v. Leslie, 180 A.D.2d 620, 622, 579 N.Y.S.2d 164, 165 (2d Dep't 1992); Rybicki v. Rybicki, 176 A.D.2d 867, 871, 575 N.Y.S.2d 341, 344 (2d Dep't 1991); Wiles v. Wiles, 171 A.D.2d 398, 400, 578 N.Y.S.2d 292, 293 (4th Dep't 1991).

51. *See* Lake v. Lake, 192 A.D.2d 751, 752, 596 N.Y.S.2d 171, 173 (3d Dep't 1993); *Radford*, 190 A.D.2d at 99-100, 597 N.Y.S.2d at 972-73; *see also Bennett*, 208 A.D.2d at 1043-44, 617 N.Y.S.2d at 933; Atkinson v. Atkinson, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 955 (3d Dep't 1993); *Wiles*, 171 A.D.2d at 400, 578 N.Y.S.2d at 293.

52. *See* Miller, *supra* note 1, at part III.A.

53. *Bennett*, 208 A.D.2d at 1044, 617 N.Y.S.2d at 933; *Atkinson*, 197 A.D.2d at 772, 602 N.Y.S.2d at 955; *see also* Richardson v. Howard, 135 A.D.2d 1140, 1140, 523 N.Y.S.2d 272, 273 (4th Dep't 1987).

54. *See, e.g.*, Elkus v. Elkus, 182 A.D.2d 45, 588 N.Y.S.2d 138 (1st Dep't 1992); 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).

move to the child's locale. In *Weiss*, the Court of Appeals foresaw the possibility and, in dicta, differentiated remarriage: "[A]s we know, this is not a case where the obligations undertaken by a divorced parent who marries anew require a dramatic change of locale."[55]

In recent years the Appellate Division, Second Department, has treated remarriage as an exceptional circumstance. That was the situation in *Hemphill v. Hemphill*,[56] where the new husband's "business or livelihood depended upon his living and working in England."[57] However, the First and Fourth Departments have not followed suit. In *Elkus v. Elkus*,[58] for example, the First Department held that the fact that the custodial parent's new spouse resided in California and could not relocate did not constitute exceptional circumstances.[59]

Remarriage is one issue which warrants clarification by the Court of Appeals. Placing the custodial parent in the untenable position of sacrificing child custody or a spouse serves no one. In effect, the new spouse should stand in the shoes of the custodial parent. If failure to relocate will result in economic hardship, exceptional circumstances should be satisfied and the court should turn to the best interests of the child.

Best interests is the final prong of a relocation determination. That standard always constitutes the overarching consideration in a custody case.[60] Even when exceptional circumstances are shown, the court should and will determine whether relocation is in the child's best interest. Conversely, custody should not be changed to the noncustodial parent with-

55. Weiss v. Weiss, 52 N.Y.2d 170, 177, 418 N.E.2d 377, 381, 436 N.Y.S.2d 862, 866 (1981).

56. 169 A.D.2d 29, 571 N.Y.S.2d 689 (2d Dep't 1991).

57. *Id.* at 32, 572 N.Y.S.2d at 691. *But see* LoBianco v. LoBianco, 131 A.D.2d 642, 516 N.Y.S.2d 724 (2d Dep't 1987) (precluding the child's move to Canada after conducting a complete "best interests" analysis).

58. 182 A.D.2d 45, 588 N.Y.S.2d 138 (1st Dep't 1992).

59. *Id.* at 49, 588 N.Y.S.2d at 140; *see also* Richardson v. Howard, 135 A.D.2d 1140, 1140, 523 N.Y.S. 272, 273 (4th Dep't 1987) (holding that the custodial mother's desire to remarry and move to her new husband's locale was an insufficient justification for removal of the children).

60. Miller, *supra* note 1, at 366 & n.244 (citing Lavane v. Lavane, 201 A.D.2d 623, 623, 608 N.Y.S.2d 475, 476 (2d Dep't 1994); Radford v. Propper, 190 A.D.2d 93, 100, 597 N.Y.S.2d 967, 973 (2d Dep't 1993); Klein v. Klein, 93 A.D.2d 807, 808, 460 N.Y.S.2d 607, 608 (2d Dep't 1983); Daghir v. Daghir, 82 A.D.2d 191, 193, 441 N.Y.S.2d 494, 496 (2d Dep't 1981)).

out an exploration of best interests. Thus, as noted by Justice Miller, in *LoBianco v. LoBianco*[61] the court assessed all relevant considerations before transferring custody.[62] No reasonable person would advocate transferring custody to an unfit parent, or urge a modification which conflicts directly with the interests of the child. The difficulty lies in the large number of cases where both parents are fit, capable, and concerned, and where the child has developed a meaningful relationship with both. There, and only there, should a relocation be precluded unless outweighed by necessity or hardship. The fact that the exceptional circumstances standard has been appropriately applied in many cases simply means that in the majority of litigated relocation matters each parent is fit and caring.

IV. The Exceptional Circumstances Standard Appraised

In my opinion, the exceptional circumstances standard has served the state better than would any alternative. There always are and always will be some inconsistencies when the courts adjudicate emotional human needs and desires. As noted by Justice Miller, there also have been an unusual number of appellate reversals.[63] That phenomenon may indicate the need for appropriate guidance, perhaps by the Court of Appeals, but is not, in itself, a reason to change the standard.

Several seemingly inconsistent decisions can be reconciled by looking at the conduct of the custodial parent. A relocation case may be filed either before or after the move to a distant locale. When the custodial parent petitions for court approval prior to the move, he or she is probably asking in good faith, or at least has not intentionally undermined the other party's interest. However, when the parent relocates without permission, visitation rights are unilaterally frustrated, or, worse, terminated. Further, the relocating parent has violated an existing court order or agreement, and is probably in contempt of court. While violation of a court order is not in itself disposi-

61. 131 A.D.2d 642, 516 N.Y.S.2d 724 (2d Dep't 1987).

62. *See* Miller, *supra* note 1, at 362 (citing *LoBianco*, 131 A.D.2d at 643, 516 N.Y.S.2d at 725).

63. *See* Miller, *supra* note 1, at 373 n.272 and cases cited therein.

tive,[64] courts appear to be very reluctant to find exceptional circumstances in those situations.[65]

Indeed, a "fait accompli" relocation is usually disallowed. Of eight appellate cases in the past decade, six denied a post-relocation attempt to seek judicial approval.[66] The message is clear. Parents who relocate in violation of a court order do so at their peril, in my opinion rightly so.

There are apparent inconsistencies between departments when a parent seeks prior judicial approval or the noncustodial parent seeks to enjoin a move. The Third Department appears to apply the exceptional circumstances test strictly,[67] while the Second and Fourth Departments are more flexible.[68] Somewhat

64. *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)); Wodka v. Wodka, 168 A.D.2d 1000, 1001, 565 N.Y.S.2d 353, 354 (4th Dep't 1990) (stating 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 interests").

65. *See, e.g.*, Schultz v. Schultz, 199 A.D.2d 1065, 606 N.Y.S.2d 480 (4th Dep't 1993); Ellor v. Ellor, 145 A.D.2d 773, 535 N.Y.S.2d 643 (3d Dep't 1988); Morgano v. Morgano, 119 A.D.2d 734, 511 N.Y.S.2d 146 (2d Dep't 1986).

66. The six cases are: Schultz v. Schultz, 199 A.D.2d 1065, 606 N.Y.S.2d 480 (4th Dep't 1993); Atkinson v. Atkinson, 197 A.D.2d 771, 602 N.Y.S.2d 953 (3d Dep't 1993); Sanders v. Sanders, 185 A.D.2d 716, 585 N.Y.S.2d 891 (4th Dep't 1992); Ellor v. Ellor, 145 A.D.2d 773, 535 N.Y.S.2d 643 (3d Dep't 1988); Morgano v. Morgano, 119 A.D.2d 734, 511 N.Y.S.2d 146 (2d Dep't 1986); Barie v. Faulkner, 115 A.D.2d 1003, 497 N.Y.S.2d 565 (4th Dep't 1985).

The post-relocation cases permitting relocation of the child are: Schouten v. Schouten, 155 A.D.2d 461, 547 N.Y.S.2d 126 (2d Dep't 1989); Pecorello v. Snodgrass, 142 A.D.2d 920, 530 N.Y.S.2d 350 (4th Dep't 1988).

67. *See* Bennett v. Bennett, 208 A.D.2d 1042, 617 N.Y.S.2d 931 (3d Dep't 1994) (finding that the custodial mother's desire to move 180 miles to attend college did not constitute exceptional circumstances, since her desire to relocate was prompted by "betterment rather than necessity," and since the move would "disrupt [the noncustodial father's] ability to continue a close and meaningful relationship with his children"); Murphy v. Murphy, 195 A.D.2d 794, 600 N.Y.S.2d 373 (3d Dep't 1993) (holding that the custodial mother's need for contact with and emotional support from her close friends in the Rochester area did not constitute exceptional circumstances and that the move would deny the father, in Saugerties, meaningful contact with his children).

68. *See* Hemphill v. Hemphill, 169 A.D.2d 29, 572 N.Y.S.2d 689 (2d Dep't 1991) (holding that the custodial mother's remarriage to an English citizen constituted exceptional circumstances and that it was "in the best interests of the children to continue to reside with their mother"); Pecorello v. Snodgrass, 142 A.D.2d

different approaches between departments are not uncommon, and custody cases are notoriously case specific, involving different facts and circumstances.

One additional observation: Relocation, unlike almost any other custody proceeding, does not invariably result in the prevailing party achieving actual custody. The issue is whether to permit relocation of the child, or deny such permission. If a relocation request is granted, custody is obviously not changed. But even if a relocation request is denied, custody may not be modified. In that event the custodial parent has a choice of relocating and surrendering custody, or not relocating and maintaining custody. No wonder a straight best interests standard is not utilized.

If the custodial parent does not relocate, the result may well be in the child's best interest—both parties remain available and the child can maintain a meaningful relationship with each. We do not know how many custodial parents who fail to prevail in obtaining judicial approval subsequently elect to remain. Given the emotional ties and the overwhelming importance of custody to most parents, many surely remain and continue the pre-existing custody and visitation scheme. For all we know, even Rosalyn Weiss, the infamous respondent in the Court of Appeals landmark exceptional circumstances case,[69] decided to forego her intended "new life" in Las Vegas for the mundane life of raising her child in New York.

V. Justice Miller's Proposed Solution

As has been noted, Justice Miller advocates that the exceptional circumstances test be replaced by a "best interests of the child" standard.[70] Although tempered somewhat by requiring, as threshold facts, that the motivation for the move be one of good faith, that relocation will provide a better lifestyle, and that sufficient visitation will be provided,[71] the thrust is pure best interests. Thus, "[t]he basic change proposed is not a mat-

920, 530 N.Y.S.2d 350 (4th Dep't 1988) (holding that the custodial mother's remarriage constituted exceptional circumstances, where her new husband's employment was "involuntarily transferred" to another state due to a merger).

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

70. *See* Miller, *supra* note 1, at 385-87.

71. *See id.* at 385.

ter 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."[72]

There are several problems in applying a straight best interest of the child approach, or even a slightly modified version. First, the focus would be, as intended, only upon the child. Yet visitation or a continuing meaningful relationship is a joint right between the child and the noncustodial parent.[73] As has been noted, relocation is the only voluntary event which jeopardizes that relationship. Vacation visitation from a distant locale, while possible, is in no way the equivalent. A father or mother who sees his or her child on several occasions during the week, attends the child's school, athletic, and social functions, entertains the child's friends, and communicates constantly should not be readily forced to accept vacation visitation. Every facet of the parent-child relationship merits preservation, or at least should be maintained unless clearly outweighed by exceptional circumstances.

Second, the best interest standard is a highly subjective doctrine.[74] Just why it would result in greater predictability than the exceptional circumstances test[75] is unfathomable to this writer. Economic or health necessity, each a component of the present exceptional circumstances standard,[76] are relatively objective criteria. On the other hand, whether the child is better off at a new location with the custodial parent, new friends and a fresh environment, as opposed to residing in the old tried-and-true location with existing friends and a continuation of the noncustodial relationship, is far more subjective and, therefore, unpredictable. Reasonable people will differ.

---

72. *Id.* at 387.

73. *See Weiss*, 52 N.Y.2d at 175, 418 N.E.2d at 380, 436 N.Y.S.2d at 865.

74. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975) (stating that "determination of what is 'best' or 'least detrimental' for a particular child is usually indeterminative and speculative).

75. *See* Miller, *supra* note 1, at 341-42.

76. *See supra* text accompanying note 53; *see also* Bennett v. Bennett, 208 A.D.2d 1042, 1044, 617 N.Y.S.2d 931, 933 (3d Dep't 1994); Atkinson v. Atkinson, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 955 (3d Dep't 1993); Richardson v. Howard, 135 A.D.2d 1140, 1140, 523 N.Y.S.2d 272, 273 (4th Dep't 1987).

Best interests of the child presently constitutes an essential part of the two-pronged *Weiss* standard and should continue as an important component. However, it should not constitute the sole basis upon which to predicate a relocation determination.

Third, a straight best interest test confuses the narrow issue of relocation with a broad issue of custody generally. Custody is always modifiable based on the best interests of the child.[77] The noncustodial parent may accordingly petition at any time for custody and, if successful, the child thereafter resides with that parent. Relocation cases are different. As mentioned, the object is to prevent relocation and not necessarily change custody. If the noncustodial parent prevails, the custodial parent has a choice—relocate without the child or remain with the child.

If the noncustodial parent has sufficient grounds to modify custody based on the best interests of the child, other than the relocation, he or she should bring the action on that basis. The result, if successful, is custody—no ands, ifs, or buts. Why prove best interests in the context of a relocation case only to have the losing parent say, "sorry, I've had second thoughts and will stay and of course will stay with Johnnie"? In sum, we should not confuse a straight best interests modification action, which always places custody on the line, with a relocation case, which does not place custody directly on the line.

Last, substitution of a best interest of the child standard would defeat the prophylactic value of the exceptional circumstances doctrine. Many custodial parents would prefer to relocate for many different reasons, good or bad. With the knowledge that they must prove exceptional circumstances, many undoubtedly decide against relocation. The cases which are litigated tend to be those in which the parent believes he or she has a good chance of prevailing under the standard. If a best interests test were substituted, court approval would be easier to obtain, or at least would appear easier to the parent. Pleadings and proof would revolve about that highly broad indeterminate standard. Should we encourage litigation, particu-

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

larly custody litigation with its baggage of emotionalism, tension, and unpredictability?

VI. Conclusion

The exceptional circumstances rule is a sound principle. Intended to balance the interests and expectations of each parent and the child, the rule preserves the parent-child relationship, when meaningful, between the noncustodial parent and the child unless "exceptional circumstances" outweigh the benefit of such preservation. Further, the rule does not in itself result in a change of custody. Custodial parents may choose, post-litigation, to refrain from relocating, thereby maintaining the status quo (unless the parent has already rashly relocated in defiance of a court order or agreement). In the absence of a compelling reason or a necessity to move, recognized under the rule, that is probably the most equitable result.

Best interests of the child should continue as a significant factor in relocation cases. However, it should not be elevated to the status of the sole or even primary consideration. Substitution of a straight best interest standard would render the important policy of continuing a meaningful relationship with each parent a virtual nullity. Further, application would encourage litigation, decrease predictability, and might result in even greater inconsistencies than at present.

The Court of Appeals should nevertheless revisit the issue to clarify the standard and resolve some of the ambiguities and uncertainty. In my opinion, the Court should state clearly and explicitly that the existence of a full meaningful relationship between the noncustodial parent and the child constitutes an essential precondition to applying the exceptional circumstances test. Further, every indicia of the relationship should be examined, perhaps assisted by appropriate forensic evaluations. One must have developed a relationship worthy of protection before expecting the court to order its preservation.

Second, the Court of Appeals should hold that remarriage to a spouse who resides and is employed in a distant locale may constitute an exceptional circumstance. In essence, the new spouse should stand in the shoes of the custodial parent. If remaining at the distant locale constitutes an economic necessity or other exceptional circumstance for the new spouse, the relo-

cation of the child should be permitted unless a best interest analysis concludes otherwise.

The exceptional circumstances standard first articulated in *Weiss* has served the state well for the past fourteen years. In an increasingly mobile and an increasingly insecure society, a doctrine which encourages a meaningful parent-child relationship with each parent warrants judicial continuation and reaffirmation.