

THE RELOCATION DILEMMA:
IN SEARCH OF “BEST INTERESTS”

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King Solomon had it made; one threat to dismember a child (which litigants in ancient times apparently took rather seriously) resolved competing parental interests.¹ No doubt today’s judges, presiding over relocation disputes, wish their jobs could be that easy.

By its very nature, relocation cannot be solved by threats or even negotiation. An unemployed custodial parent from New York who finally finds lucrative employment in California cannot be placated with a proposal to live in Chicago just because it is a “mid-way point.”

In a mobile society—with cross-country and even international relocations being prompted by changing economic circumstances, family needs, remarriage, or health concerns—relocation requests are inevitable. We expect our judges to display Solomon-like wisdom in dispensing justice but despite Herculean efforts to serve the “best interests of the child,” children inevitably bear the brunt of any forced separation from a loving parent. And psychological studies confirm that the younger the child, the more devastating the consequences.²

A study conducted on 1,619 children between the ages of four and six “entering [the] Rochester City School District kindergarten

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¹ 1 *Kings* 3:16–3:28.

² See Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIM. LAW. 237, 242–43 (2005).

classrooms” concluded that separating children “from one or both parents before beginning kindergarten can increase the [child’s] risk for learning difficulties.”³ The study, led by “Sandy Jee, M.D., M.P.H., assistant professor of Pediatrics at the University of Rochester Medical Center’s Golisano Children’s Hospital,” concluded that “divorce, illness, violence,” and other situations that cause “temporary or permanent separations from [even one parent are reliable] predictors of which children may require special education interventions.”⁴

Today, if the relocating parent can establish some lack of interest or involvement by the noncustodial parent, combined with a demonstration that the move is genuinely necessary and will enhance the child’s lifestyle in some manner, the courts tend to permit the relocation.⁵ For example, in *Englese v. Strauss*, the Second Department recently permitted a custodial father to relocate to North Carolina with his two children and post-divorce family to open a restaurant with his parents, even though the father made no documentary showing of compelling economic circumstances to support the move.⁶ Although the mother’s relationship with her older child was strained because he disliked his mother’s fiancé, the decision was curiously silent as to the impact of the relocation on the younger child.⁷

I. THE DEVELOPMENT OF PROTOCOL

New York’s current relocation decisions reflect guidelines that evolved during the fourteen year period between 1982 and 1996. Prior to 1996, a New York parent seeking to relocate with a child

³ Rick Nauert, *Separation from Parents Can Hinder Child’s Learning*, PSYCH CENT., <http://psychcentral.com/news/2008/05/16/separation-from-parents-can-hinder-childs-learning/2300.html> (last updated May 16, 2008).

⁴ *Id.*

⁵ *See, e.g.*, *Lynch v. Gillogly*, 82 A.D.3d 1529, 1531–32, 920 N.Y.S.2d 437, 441 (App. Div. 3d Dep’t 2011) (holding that where the father’s financial assistance decreased and the mother’s move would provide her with housing, employment, and a viable support network to care for the child, relocation was permitted); *Sniffen v. Weygant*, 81 A.D.3d 1054, 1056, 916 N.Y.S.2d 320, 322 (App. Div. 3d Dep’t 2011) The *Sniffen* court reasoned it would permit relocation where the child’s life would be economically, educationally, and emotionally enhanced by the move. *Id.* In the instant matter, the court found the father had “not participated in a meaningful way in addressing the [child’s] basic needs,” failed to attend school functions, was not involved in medical care, and was not always completely current in his child support payments. *Id.*

⁶ *Englese v. Strauss*, 83 A.D.3d 705, 706–07, 920 N.Y.S.2d 365, 367–68 (App. Div. 2d Dep’t 2011).

⁷ *Id.* at 707, 920 N.Y.S.2d at 368.

was obliged to demonstrate the existence of “exceptional circumstances” to justify the proposed move.⁸ The 1981 Court of Appeals’ decision in *Weiss v. Weiss*, declaring visitation the “joint right” of the noncustodial parent and the child, made clear that a parent would not be permitted to relocate “absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent . . . forfeited his or her right to such access.”⁹

In the years following *Weiss*, a relocating parent bore a heavy burden to prove exceptional circumstances. By and large, permission to relocate was limited to situations in which the custodial parent fled to escape domestic violence¹⁰ or situations in which the noncustodial parent (most often the father) consistently failed to exercise his visitation and/or substantially neglected his obligation to remain current in child support payments.¹¹ As a general rule, where both parents were caring and fit custodians involved in their children’s lives, a request to relocate to join a new spouse or pursue more lucrative employment was denied.¹² In *Lavelle v. Freeman*, the court denied a mother’s request to relocate to Missouri with her child in order to join her new husband when his employer transferred him to a different locale.¹³

In 1993, in *Radford v. Propper*, the Second Department enunciated the following three-step analysis to be applied in all

⁸ *Daghir v. Daghir*, 82 A.D.2d 191, 194, 196, 441 N.Y.S.2d 494, 496–97 (App. Div. 2d Dep’t 1981) (quoting *Strahl v. Strahl*, 66 A.D.2d 571, 574, 414 N.Y.S.2d 184, 186 (App. Div. 2d Dep’t 1979), *aff’d*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980)), *aff’d*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *see also* *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982) (citing *Nehra v. Uhlar*, 43 N.Y.2d 242, 251, 372 N.E.2d 4, 9, 401 N.Y.S.2d 168, 173 (1977)). The *Friederwitzer* court held that the exceptional circumstances standard does not require “a sudden or unusual event”, but rather focuses on the existence of any countervailing circumstances when considering the totality of the circumstances to determine the best interest of the child. *Id.* at 95, 432 N.E.2d at 768, 447 N.Y.S.2d at 896.

⁹ *Weiss v. Weiss*, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981) (citation omitted).

¹⁰ *Sheridan v. Sheridan*, 204 A.D.2d 771, 773, 611 N.Y.S.2d 688, 690 (App. Div. 3d Dep’t 1994); *Acevedo v. Acevedo*, 200 A.D.2d 567, 567–68, 606 N.Y.S.2d 307, 308 (App. Div. 2d Dep’t 1994).

¹¹ *See, for example, Temperini v. Berman*, 199 A.D.2d 399, 400, 605 N.Y.S.2d 363, 364 (App. Div. 2d Dep’t 1993), where a mother, unable to find work in New York, was permitted to relocate with her new husband to California, where both had been offered jobs, while the father’s visitation rights had been suspended and he was invariably in arrears regarding child support.

¹² *See, e.g., Radford v. Propper*, 190 A.D.2d 93, 99, 597 N.Y.S.2d 967, 972 (App. Div. 2d Dep’t 1993); *Lavelle v. Freeman*, 181 A.D.2d 976, 977–78, 581 N.Y.S.2d 875, 876–77 (App. Div. 3d Dep’t 1992).

¹³ *Lavelle*, 181 A.D.2d at 976–77, 581 N.Y.S.2d at 876.

relocation cases:¹⁴

1. Would “the proposed move . . . effectively deprive the non-custodial parent of . . . frequent and regular access” to the children?¹⁵ The Court stressed that beyond mere mileage, other factors included increased “travel time, the burdens and expense” of travel, “the number of visitation hours . . . lost, the frequency [and regularity of the] visitation,” and the noncustodial parent’s involvement in the children’s lives.¹⁶

2. If the proposed move deprived the noncustodial parent of regular access to the children, did the custodial parent demonstrate exceptional circumstances to justify the move?¹⁷

3. If the answer to question number 2 was yes, did the custodial parent establish the move to be in the best interest of the children?¹⁸

The analysis of *Radford* was applied by many appellate and trial courts,¹⁹ but even with the *Radford* guidelines, the prevailing indistinct definition of “exceptional circumstances” (as mandated by the Court of Appeals decision in *Weiss v. Weiss*)²⁰ led to wide irreconcilable disparity in the ensuing decisions.²¹ In *Amato v. Amato*, the Second Department had no difficulty permitting a mother to move from New York to Idaho to live with her family when she argued that her limited salary in New York precluded her from finding adequate housing.²² But in *Rybicki v. Rybicki*, the Second Department ruled that a mother’s proposed move from Northport, New York, to Fairfield County, Connecticut, which she justified as necessary to facilitate her new husband’s employment, was not an exceptional circumstance.²³

In *Wright v. Wright*, the Third Department granted a wife’s permission to relocate with her children to Mississippi to join her

¹⁴ *Radford*, 190 A.D.2d at 99, 597 N.Y.S.2d at 972.

¹⁵ *Id.* at 99, 597 N.Y.S.2d at 972.

¹⁶ *Id.* at 100, 597 N.Y.S.2d at 972.

¹⁷ *Id.*

¹⁸ *Id.* at 100, 597 N.Y.S.2d at 973.

¹⁹ *See, e.g.*, *Amato v. Amato*, 202 A.D.2d 458, 458–59, 609 N.Y.S.2d 51, 52 (App. Div. 2d Dep’t 1994); *Atkinson v. Atkinson*, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 954–55 (App. Div. 3d Dep’t 1993).

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 In contrasting the following decisions, the selected cases involved two caring parents, without the added factors of domestic violence, abuse, or neglect of financial obligations, which if present, invariably impact the court’s decision. *See infra* notes 22–30 and accompanying text.

²² *Amato*, 202 A.D.2d at 458–59, 609 N.Y.S.2d at 52.

²³ *Rybicki v. Rybicki*, 176 A.D.2d 867, 869–70, 575 N.Y.S.2d 341, 342–43 (App. Div. 2d Dep’t 1991).

new husband's household,²⁴ but a similar request was denied by the First Department in *Elkus v. Elkus*, where the wife, a celebrated opera singer, sought to relocate to California to join her new husband, whose employment precluded him from relocating to New York.²⁵

In *Temperini v. Berman*, the Second Department permitted a mother and her new husband to relocate to California when they were unable to find work in New York,²⁶ but the Third Department refused to allow the mother in *Bennett v. Bennett* to relocate, even temporarily, from upstate Broome County to New York City in order to further her unique educational goals in the field of criminal justice.²⁷

The court in *Atkinson v. Atkinson* succinctly observed an emerging trend which required a showing of "economic necessity," not "economic betterment or [financial] advantage,"²⁸ and, applying that test, refused to allow a mother to relocate to Florida with her paramour.²⁹ But as the precise definition of "economic necessity" remained elusive, the court in *Raybin v. Raybin* ruled that a custodial father's job termination and subsequent transfer to another state (Florida) was insufficient to justify his request to relocate with the children, even though refusal of the transfer would have necessarily resulted in his loss of employment with IBM.³⁰

A. "Exceptional Circumstances" Gives Way to "Best Interests"

In 1996, the Court of Appeals' decision in *Tropea v. Tropea* and *Browner v. Kenward*, decided together, set a new "best interests" standard directing that first and foremost the "emphasis [be] placed on [the] outcome . . . most likely to serve the best interests of the child."³¹ The "exceptional circumstances" test and strict three-step

²⁴ *Wright v. Wright*, 211 A.D.2d 341, 343, 345, 627 N.Y.S.2d 819, 820–22 (App. Div. 3d Dep't 1995).

²⁵ *Elkus v. Elkus*, 182 A.D.2d 45, 46–47, 49, 51, 588 N.Y.S.2d 138, 139–40, 142 (App. Div. 1st Dep't 1992).

²⁶ *Temperini v. Berman*, 199 A.D.2d 399, 400, 605 N.Y.S.2d 363, 364 (App. Div. 2d Dep't 1993).

²⁷ *Bennett v. Bennett*, 208 A.D.2d 1042, 1042, 1044, 617 N.Y.S.2d 931, 932–33 (App. Div. 3d Dep't 1994).

²⁸ *Atkinson v. Atkinson*, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 955 (App. Div. 3d Dep't 1993) (emphasis and citations omitted).

²⁹ *Id.* at 771, 773, 602 N.Y.S.2d at 954–55.

³⁰ *Raybin v. Raybin*, 205 A.D.2d 918, 920–22, 613 N.Y.S.2d 726, 728–29 (App. Div. 3d Dep't 1994).

³¹ *Tropea v. Tropea*, 87 N.Y.2d 727, 738–39, 665 N.E.2d 145, 150, 642 N.Y.S.2d 575, 580 (1996).

analysis of *Radford v. Propper*³² was rejected with instructions that each relocation issue “be considered [and determined] on its own merits.”³³ The *Tropea* analysis required consideration of the following factors in every relocation case:³⁴ (1) “the good faith of the parent[] in requesting or opposing the move”;³⁵ (2) “the child’s respective attachments to the custodial and noncustodial parent[s]”;³⁶ (3) “the possibility of devising a visitation schedule . . . [to continue] a meaningful parent-child relationship”;³⁷ (4) “the quality of the life-style [sic] that the child would have if the proposed move were permitted or denied”;³⁸ (5) “the negative impact, if any, from continued . . . hostilit[ies] between the . . . parents”;³⁹ (6) “the effect [of] the move . . . on . . . extended family relationships”;⁴⁰ and (7) “any other [factors] or circumstances that [may] have a bearing on the” issue of relocation.⁴¹

The impact of the court’s decision was immediately apparent in post-*Tropea* cases, which made clear that the prior “exceptional circumstances” test⁴² posed a far more difficult burden for the petitioning parent.

In contrast with the prior rigid standards, the court used the “best interests” yardstick in *Malandro v. Lido* to permit a custodial mother to relocate with her preschool-aged child to live with her parents in Florida, in order to benefit from free housing,⁴³ and in *Frayne v. Frayne*, to approve a mother’s relocation to a distance two-and-one-half hours away to accept a job offer, observing that economic necessity was no longer the governing test.⁴⁴

³² See *id.* at 736–38, 665 N.E.2d at 148–50, 642 N.Y.S.2d at 578–80, for a discussion of the “exceptional circumstances” test and the three-step *Radford v. Propper* analysis. See generally *Radford v. Propper*, 190 A.D.2d 93, 99–100, 598 N.Y.S.2d 967, 972–73 (App. Div. 2d Dep’t 1993) (establishing the “exceptional circumstances” test and the three-step analysis).

³³ *Tropea*, 87 N.Y.2d at 738–39, 665 N.E.2d at 150, 642 N.Y.S.2d at 580.

³⁴ See generally *id.* at 738–41, 665 N.E.2d at 150–52, 64 N.Y.S.2d at 580–82 (listing the relevant factors that should be considered in the analysis of relocation requests).

³⁵ *Id.* at 740, 665 N.E.2d at 151, 64 N.Y.S.2d at 581.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See generally *Radford v. Propper*, 190 A.D.2d 93, 99–100, 598 N.Y.S.2d 967, 972–73 (App. Div. 2d Dep’t 1993) (establishing the “exceptional circumstances” test and the three-step analysis).

⁴³ *Malandro v. Lido*, 229 A.D.2d 541, 541–42, 645 N.Y.S.2d 845, 845–46 (App. Div. 2d Dep’t 1996).

⁴⁴ *Frayne v. Frayne*, 234 A.D.2d 545, 546, 651 N.Y.S.2d 583, 583–84 (App. Div. 2d Dep’t 1996).

One of the most memorable cases impacted by the *Tropea* standard was the 1997 lower court decision in *Lazarevic v. Fogelquist*, which astoundingly permitted a mother to relocate to Saudi Arabia with her new husband and a six-and-one-half-year-old child from her first marriage.⁴⁵ In permitting the move, the Court succinctly summarized the impact of *Tropea*, emphasizing that the mother would never have been permitted to relocate with the child under the “exceptional circumstances” test.⁴⁶ Despite observing that the noncustodial father could have blocked the long distance relocation under pre-*Tropea* standards, the court nevertheless allowed the mother, a psychiatrist with the clear ability to secure gainful employment in New York, to move to Saudi Arabia with the parties’ child and two younger step-siblings in order to join her second husband who had already relocated to Dhahran “to pursue [a] financially rewarding employment” opportunity.⁴⁷ The mother made clear that if relocation of the child was denied, she intended to move to Saudi Arabia to join her husband nonetheless.⁴⁸ Her pronouncement left the court with a painful “Morton’s fork” dilemma;⁴⁹ no matter what the court’s decision, the parties’ six-and-one-half-year-old child would be deprived of regular contact with one of his parents.⁵⁰ While finding that the father was wholly “capable and would provide [the child] with an equal amount of love and emotional support,”⁵¹ the court inexplicably denied a change of custody and granted the mother’s request against the recommendations of the law guardian and the social worker, who stressed that a young child requires “frequent, regular visitation with the non-custodial parent in order to establish a healthy and lasting relationship with that parent.”⁵²

B. Impact of Psychological Studies

The immediate and dramatic impact of *Tropea* prompts speculation as to the factors which influenced the Court of Appeals

⁴⁵ *Lazarevic v. Fogelquist*, 175 Misc. 2d 343, 344, 354, 668 N.Y.S.2d 320, 321, 327–28 (Sup. Ct. N.Y. County 1997).

⁴⁶ *Id.* at 345–47, 668 N.Y.S.2d at 321–22.

⁴⁷ *Id.* at 344–46, 668 N.Y.S.2d at 321–22.

⁴⁸ *Id.* at 345, 668 N.Y.S.2d at 321.

⁴⁹ “A Morton’s Fork is a practical dilemma in which both choices offered are equally unattractive” Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 WM. & MARY L. REV. 923, 962 n.119 (2010).

⁵⁰ *Lazarevic*, 175 Misc. 2d at 344–45, 668 N.Y.S.2d at 321.

⁵¹ *Id.* at 349, 668 N.Y.S.2d at 324.

⁵² *Id.* at 353, 668 N.Y.S.2d at 326.

to reject the more restrictive “exceptional circumstances” and three-step analysis.⁵³ While *Tropea* is silent, an amicus curiae brief filed in another case, literally on the other side of the country, might hold an answer.

At roughly the same time that *Tropea* was winding its way through the New York State court system, another relocation case was forging its own path in California. By the time *In re Marriage of Burgess* reached the Supreme Court of California, it had garnered enough attention to prompt the filing of at least three amici curiae briefs.⁵⁴ One such brief was filed by Judith Wallerstein,⁵⁵ “a famous psychologist who [had] studied the effects of divorce on children.”⁵⁶ Wallerstein’s brief urged the Court to adopt her opinion on child relocation, reasoning that a “well-functioning custodial parent-child relationship [operated to protect a child] from psychological problems during the post-divorce years” and concluded “it was in the children’s best interest to allow custodial parents, mostly mothers, to relocate with their children away from [a] noncustodial father[].”⁵⁷ At the time, Wallerstein was certainly a compelling force, having “conducted a twenty-five year longitudinal study on 131 post-divorce[] children from sixty families” and having “summarized [the] results of [her] research . . . in three books.”⁵⁸ Although she made generalized claims derived from the interview data collected in her studies, Wallerstein had very little information about the impact of relocation on children.⁵⁹

Nevertheless, Wallerstein’s authoritative voice prompted the California court to hold that in relocation cases, the custodial parent was not required to demonstrate the proposed relocation was “necessary.”⁶⁰ Placing paramount importance on the “need for continuity and stability in custody arrangements,” the *Burgess* court essentially shifted the burden, requiring the noncustodial parent to prove that a change in circumstances warranted a change in the custody arrangement, thereby handing a custodial parent the

⁵³ *Tropea v. Tropea*, 87 N.Y.2d 727, 738–39, 665 N.E.2d 145, 150, 642 N.Y.S.2d 575, 580 (1996).

⁵⁴ *In re Marriage of Burgess*, 913 P.2d 473, 476 (Cal. 1996) (listing the names of those who had filed amici curiae briefs in this matter).

⁵⁵ Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 305 (1996).

⁵⁶ Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 321, 322 (2005).

⁵⁷ *Id.* at 322–23.

⁵⁸ *Id.* at 322.

⁵⁹ *Id.*

⁶⁰ *In re Marriage of Burgess*, 913 P.2d 473, 481 (Cal. 1996).

presumptive right to relocate with the children.⁶¹

To be sure, the *Tropea* court did not blindly adopt the California approach, but relocation requests that would have been prohibited under the “exceptional circumstances” test⁶² were, more often than not, approved under the new *Tropea* standards.⁶³ One is prompted to speculate if New York’s “relaxation” of the prior, more stringent standard was not somehow influenced by the Wallerstein study. Indeed, there is no question that the *Burgess* decision had far reaching effects. In 2001, citing the Wallerstein study, the New Jersey Supreme Court in *Baures v. Lewis*⁶⁴ was prompted to give the primary residential custodial parent the presumptive right to relocate, observing that “social science research has uniformly confirmed the simple principle that, in general, what is good for the custodial parent[s] is good for the child.”⁶⁵ And if *Burgess* influenced decisions in New Jersey, it is certainly reasonable to believe that the Wallerstein brief had some impact on New York’s highest court. At least one article reviewing relocation decisions from various jurisdictions believed that Wallerstein’s views are “credited with influencing” the court decisions in both *Burgess* and *Tropea* and “reversing the national trend in relocation cases.”⁶⁶

II. ONGOING EXPLORATIONS OF “BEST INTERESTS”

More than fifteen years have elapsed since *Tropea* was decided.⁶⁷ In that time, other psychologists have come forward with new studies and criticisms of the Wallerstein conclusions.

Richard Warshak, a clinical and research psychologist,⁶⁸ disagreed with Wallerstein’s position, observing that Wallerstein

⁶¹ *Id.* at 478, 480.

⁶² *See, e.g.*, *Roush v. Roush*, 204 A.D.2d 195, 197–98, 612 N.Y.S.2d 394, 396 (App. Div. 1st Dep’t 1994) (holding that lifestyle considerations such as the desire to live in a more suburban environment do not constitute “exceptional circumstances.”).

⁶³ *See, e.g.*, *Lynch v. Gillogly*, 82 A.D.3d 1529, 1529, 1531, 920 N.Y.S.2d 437, 439–440 (App. Div. 3d Dep’t 2011) (allowing a mother to move a distance of two-and-one-half hours for economic betterment over objections of devoted and involved father); *Clarke v. Boertlein*, 82 A.D.3d 976, 976, 919 N.Y.S.2d 51, 52 (App. Div. 2d Dep’t 2011) (allowing a mother to relocate from New York to Pennsylvania with three children).

⁶⁴ *Baures v. Lewis*, 770 A.2d 214, 222 (N.J. 2001) (citing Wallerstein & Tanke, *supra* note 55, at 311–12).

⁶⁵ *Id.* at 223.

⁶⁶ Janet Leach Richards, *Children’s Rights v. Parents’ Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 260 (1999) (footnote omitted).

⁶⁷ *See Tropea v. Tropea*, 87 N.Y.2d 727, 727, 665 N.E.2d 145, 145, 642 N.Y.S.2d 575, 575 (1996).

⁶⁸ Richard A. Warshak, *Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 83 n.* (discussing the author’s credentials).

cited only ten references to support her amicus curiae brief in *Burgess*.⁶⁹ Warshak compellingly argued that Wallerstein's unique interpretations were skewed and "minimized the importance of the father to [the] post-divorce child" simply because her studies began in the 1970s, when noncustodial parents (usually the fathers) had limited relationships with their children following divorce.⁷⁰

Warshak could well be correct. Newer studies have found that there may be greater interactions between divorced fathers and their children than previously suggested by empirical literature.⁷¹ And, at least one study by Sanford L. Braver found "a preponderance of negative effects associated with parental moves by mother or father, with or without the child [in comparison to] divorced families [where] neither parent" relocated.⁷² While the study could not establish "with certainty" that parental relocations cause harm to the children, the study also observed there was "no empirical basis on which to justify a legal presumption that a move by a custodial parent to a destination she plausibly believes will improve her life will necessarily confer benefits on the children she takes with her."⁷³ In other words, while Wallerstein's study and amicus curiae brief in *Burgess* opined that improving the life of the custodial parent necessarily improved the life of the child,⁷⁴ Braver's study found no empirical data to support such a conclusion.⁷⁵ Quite to the contrary, Braver observed that a custodial parent's belief that her life will be improved by a move does not automatically improve the life of the child who accompanies her.⁷⁶ Unfortunately, Braver's observations which challenged Wallerstein's views came two years too late for the New Jersey litigants in *Baures v. Lewis*.⁷⁷

The studies noted above trigger more questions than were previously believed answered and suggest the need for a newer and

⁶⁹ *Id.* at 83–84.

⁷⁰ *See id.* at 86; Pasahow, *supra* note 56, at 324.

⁷¹ Pasahow, *supra* note 56, at 324; *see, e.g.*, Sanford L. Braver et al., *A Longitudinal Study of Noncustodial Parents: Parents Without Children*, 7 J. FAM. PSYCHOL. 9, 9–10 (1993) [hereinafter Braver, *Longitudinal Study*] (explaining that the results of their studies showed that the noncustodial parent, typically the father, interacts with their children substantially through child support payments and visitation, contrary to the results of previous studies that were plagued with methodological problems).

⁷² Sanford L. Braver et al., *Relocation of Children After Divorce and Children's Best Interest: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206, 214 (2003) [hereinafter Braver, *Relocation of Children*].

⁷³ *Id.* at 215.

⁷⁴ *See* Pasahow, *supra* note 56, 322–23.

⁷⁵ Braver, *Relocation of Children*, *supra* note 72, at 215.

⁷⁶ *Id.*

⁷⁷ *See* *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001).

more in-depth examination of the impact of relocation on children, particularly those of pre-kindergarten age who enjoy positive relationships with both parents. But until then, should we not be erring on the side of caution to protect the children? Leslie Ellen Shear, discussing *Browner v. Kenward* which authorized a mother's relocation approximately 130 miles away so she could continue to live with her parents,⁷⁸ questioned the Court of Appeals' decision to place a mother's need for emotional support from her parents ahead of the child's need for emotional support from his father.⁷⁹

Other states appear reluctant to permit relocation except under the most compelling circumstances, recognizing the magnitude of the impact on the child's relationship with the noncustodial parent. The Nebraska case of *Brown v. Brown*⁸⁰ is one such example. In *Brown*, upon graduation from nursing school, the mother (Cynthia) was offered employment at New York University Medical Center in New York City; she was given the opportunity for professional advancement within a teaching hospital as well as financial security, medical benefits, and free college education for her children at New York University.⁸¹ Cynthia had a support network in place, with a cousin prepared to provide child care for her two children, ages six and four at the time of trial.⁸² Dwight, a devoted and involved father, had financial difficulty exercising visitation in New York, but Cynthia offered to pay for Dwight's travel costs so he could exercise expanded "visitation during summers, holidays, and spring breaks."⁸³ Both parents were unquestionably fit, loving, and devoted to their children, and despite Cynthia's firm offer of employment which would unquestionably enhance her career, the Court declined to permit the relocation.⁸⁴ The Court concluded that despite evidence of an improved quality of life for the children, such improvement was outweighed by the diminished relationship with their father.⁸⁵

The 2008 Idaho case *Bartosz v. Jones* refused to allow a custodial

⁷⁸ Tropea v. Tropea, 87 N.Y.2d 727, 734, 665 N.E.2d 145, 147–48, 642 N.Y.S.2d 575, 577–78 (1996) (including the consolidated action *Browner v. Kenward*); Leslie Ellen Shear, *Life Stories, Doctrines, and Decision-Making: Three High Courts Confront the Move-Away Dilemma*, 34 FAM. & CONCILIATION CTS. REV. 439, 443 (1996).

⁷⁹ Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIM. LAW. 119, 146 (1998); Shear, *supra* note 78, at 444.

⁸⁰ *Brown v. Brown*, 621 N.W.2d 70 (Neb. 2000).

⁸¹ *Id.* at 75.

⁸² *Id.* at 76.

⁸³ *Id.* at 76–77.

⁸⁴ *Id.* at 81, 85–86.

⁸⁵ *Id.* at 85.

mother to relocate to Hawaii with her ten-year-old daughter in order to join her new husband, who was already living and working in Hawaii.⁸⁶

Eight years after its decision in *Burgess*, the California high court appeared to retreat from the broader non-restrictive position. *In re Marriage of LaMusga* involved a contentious custody battle that ultimately awarded the mother primary physical custody.⁸⁷ The trial court, denying the mother's request to relocate to Ohio several years later, held that the move would hinder "frequent and continuing contact [between] the father" and the children and awarded physical custody to the father if the mother chose to relocate.⁸⁸ The trial court's decision was reversed by the California Court of Appeal, which found that all relocations result in a significant detriment to the child's relationship with the noncustodial parent, and that relocation alone should not mandate a change in the custody arrangement.⁸⁹ The supreme court accepted the concerns of the appellate court and made it clear that the custodial parent's relocation would not mandate a change in custody but granted the trial court discretion to order such a change in custody if it served the child's best interests.⁹⁰

While the *Burgess* decision effectively established a presumption in favor of maintaining the custodial arrangement irrespective of the impact of relocation,⁹¹ *LaMusga* modified that position, holding that the stability of custodial arrangements was only one factor to be considered.⁹² The court noted other factors, including the detrimental effect of the proposed relocation on the child's relationship with the noncustodial parent.⁹³ In urging careful consideration of a multitude of factors, the court effectively proposed a case-by-case analysis, not unlike the methodology established by *Tropea*.⁹⁴

There is, however, a critical difference between New York and California. In New York, a proposed relocation is generally viewed as a substantial "change [in] circumstances" sufficient to warrant a

⁸⁶ *Bartosz v. Jones*, 197 P.3d 310, 314, 319 (Idaho 2008).

⁸⁷ *In re Marriage of LaMusga*, 88 P.3d 81, 85–86 (Cal. 2004).

⁸⁸ *Id.* at 89.

⁸⁹ *Id.* at 89, 96.

⁹⁰ *Id.* at 99–100.

⁹¹ *In re Marriage of Burgess*, 913 P.2d 473, 482 (Cal. 1996).

⁹² *LaMusga*, 88 P.3d at 100.

⁹³ *See id.*

⁹⁴ *Tropea v. Tropea*, 87 N.Y.2d 727, 740, 665 N.E.2d 145, 151, 642 N.Y.S.2d 575, 581 (1996).

new evidentiary hearing,⁹⁵ as the party desirous of relocating has the burden to prove “the relocation [will serve] the child’s best interests.”⁹⁶ In California, however, the right to an evidentiary hearing is not a given. Rather, before a hearing will be directed, the noncustodial parent seeking to block relocation must make a prima facie showing that the relocation will have a detrimental impact on the child’s rights or well-being, or will operate to alienate the parent-child relationship.⁹⁷

Fifteen years after *Tropea*, a review of all relevant⁹⁸ 2011 New York case decisions evinces a marked shift towards permitting relocation by the custodial parent without specific regard for the ages of the children involved. Of the sixteen “pure” relocation cases examined⁹⁹—those not involving an initial custody determination or an application for a change in custody—only three declined to allow the relocation.¹⁰⁰ Thirteen permitted the custodial parent to relocate,¹⁰¹ often to a great distance, and of those, only four made any reference to abuse or lack of involvement by the noncustodial

⁹⁵ *Chambers v. Renaud*, 72 A.D.3d 1433, 1433, 899 N.Y.S.2d 470, 472 (App. Div. 3d Dep’t 2010).

⁹⁶ *Solomon v. Long*, 68 A.D.3d 1467, 1469, 891 N.Y.S.2d 528, 530 (App. Div. 3d Dep’t 2009) (citations omitted).

⁹⁷ *Brown v. Yana*, 127 P.3d 28, 37 (Cal. 2006).

⁹⁸ Relevant cases are defined as those pertaining exclusively to relocation requests following an initial custody determination.

⁹⁹ *Cadet v. Lamour*, 86 A.D.3d 538, 928 N.Y.S.2d 301 (App. Div. 2d Dep’t 2011); *Baker v. Spurgeon*, 85 A.D.3d 1494, 927 N.Y.S.2d 399 (App. Div. 3d Dep’t 2011); *Butler v. Hess*, 85 A.D.3d 1689, 926 N.Y.S.2d 240 (App. Div. 4th Dep’t 2011); *Jennings v. Yillah-Chow*, 84 A.D.3d 1376, 924 N.Y.S.2d 519 (App. Div. 2d Dep’t 2011); *Alaire K.G. v. Anthony P.G.*, 86 A.D.3d 216, 925 N.Y.S.2d 417 (App. Div. 1st Dep’t 2011); *Francois v. Grimm*, 84 A.D.3d 1082, 924 N.Y.S.2d 275 (App. Div. 2d Dep’t 2011); *Harding v. Harding*, 84 A.D.3d 1086, 923 N.Y.S.2d 851 (App. Div. 2d Dep’t 2011); *Munson v. Fanning*, 84 A.D.3d 1483, 922 N.Y.S.2d 613 (App. Div. 3d Dep’t 2011); *Canady v. Binette*, 83 A.D.3d 1551, 922 N.Y.S.2d 676 (App. Div. 4th Dep’t 2011); *Englese v. Strauss*, 83 A.D.3d 705, 920 N.Y.S.2d 365 (App. Div. 2d Dep’t 2011); *Lynch v. Gillogly*, 82 A.D.3d 1529, 920 N.Y.S.2d 437 (App. Div. 3d Dep’t 2011); *Clarke v. Boertlein*, 82 A.D.3d 976, 919 N.Y.S.2d 51 (App. Div. 2d Dep’t 2011); *DeLorenzo v. DeLorenzo*, 81 A.D.3d 1110, 916 N.Y.S.2d 360 (App. Div. 3d Dep’t 2011); *Sniffen v. Weygant*, 81 A.D.3d 1054, 916 N.Y.S.2d 320 (App. Div. 3d Dep’t 2011); *Steadman v. Roumer*, 81 A.D.3d 653, 916 N.Y.S.2d 796 (App. Div. 2d Dep’t 2011); *Hissam v. Mancini*, 80 A.D.3d 802, 916 N.Y.S.2d 248 (App. Div. 3d Dep’t 2011).

¹⁰⁰ *Cadet*, 86 A.D.3d at 539, 928 N.Y.S.2d at 303; *Munson*, 84 A.D.3d at 1485, 922 N.Y.S.2d at 616; *Steadman*, 81 A.D.3d at 654, 916 N.Y.S.2d at 796.

¹⁰¹ *Baker*, 85 A.D.3d at 1497, 927 N.Y.S.2d at 402; *Butler*, 85 A.D.3d at 1690, 926 N.Y.S.2d at 241; *Jennings*, 84 A.D.3d at 1377, 924 N.Y.S.2d at 520; *Alaire K.G.*, 86 A.D.3d at 222, 925 N.Y.S.2d at 421; *Francois*, 84 A.D.3d at 1083, 924 N.Y.S.2d at 276; *Harding*, 84 A.D.3d at 1087, 923 N.Y.S.2d at 851–52; *Canady*, 83 A.D.3d at 1551–52, 922 N.Y.S.2d at 676; *Englese*, 83 A.D.3d at 707, 920 N.Y.S.2d at 368; *Lynch*, 82 A.D.3d at 1530–31, 920 N.Y.S.2d at 439; *Clarke*, 82 A.D.3d at 978, 919 N.Y.S.2d at 54; *DeLorenzo*, 81 A.D.3d at 1111, 916 N.Y.S.2d at 362; *Sniffen*, 81 A.D.3d at 1056–57, 916 N.Y.S.2d at 322–23; *Hissam*, 80 A.D.3d at 805, 916 N.Y.S.2d at 252.

parent.¹⁰²

The remaining nine cases permitted relocation predominantly for legitimate economic or emotional reasons, such as to pursue more lucrative employment,¹⁰³ because the custodial mother, due to unusual circumstances, required the emotional support of her parents,¹⁰⁴ or to allow the custodial parent to form a household with a new spouse.¹⁰⁵ The latter category is of exceptional significance, in that prior to *Tropea*, New York invariably denied relocation requests to join a new spouse in a different state.¹⁰⁶

Two contrasting Second Department cases compellingly illustrate the trend. In the pre-*Tropea* case of *Gruenspecht v. Gruenspecht*, the court refused to allow a custodial mother to move to Cleveland to join her new husband who, unable to find suitable employment in New York, opted to work for a family-owned graphics business in

¹⁰² *Clarke*, 82 A.D.3d at 977, 919 N.Y.S.2d at 53; *Sniffen*, 81 A.D.3d at 1056, 916 N.Y.S.2d at 322; *Baker*, 85 A.D.3d at 1497, 927 N.Y.S.2d at 402; *Jennings*, 84 A.D.3d at 1377, 924 N.Y.S.2d at 520.

¹⁰³ *See Canady*, 83 A.D.3d at 1551–52, 922 N.Y.S.2d at 676–77 (permitting the mother to relocate to Louisiana to pursue permanent employment, as opposed to limited temporary employment in New York); *Englese*, 83 A.D.3d at 705, 920 N.Y.S.2d at 367 (allowing the father to relocate with children to North Carolina to operate restaurant with his parents); *Lynch*, 82 A.D.3d at 1529, 1531, 920 N.Y.S.2d at 439, 441 (permitting the mother to move two-and-one-half hours away for economic improvement after she lost her house and filed bankruptcy when father cut back on support).

¹⁰⁴ *See Delorenzo*, 81 A.D.3d at 1111–12, 916 N.Y.S.2d at 361–62 (permitting the mother to relocate over six hours away with her young child in order to continue living with her parents after their employer transferred them because the young mother suffered posttraumatic stress disorder following a serious sexual assault and she required the emotional support of her family).

¹⁰⁵ *See Butler*, 85 A.D.3d at 1689–90, 926 N.Y.S.2d at 240–41 (permitting mother and new husband to relocate to Pennsylvania for employment because neither could sustain jobs in western New York); *Alaire K.G.*, 86 A.D.3d at 217–20, 925 N.Y.S.2d at 418, 420 (allowing the mother to move from Harlem to California to unite with her new husband, whom she met on Match.com when husband, an employee of Northrop Grumman, was sent to work in California, and the father was unemployed); *Sniffen*, 81 A.D.3d at 1057, 916 N.Y.S.2d at 322 (permitting the mother to move to St. Lawrence County to pursue a new relationship because she currently lived in her mother's home in cramped quarters and the children's father had limited involvement with the children).

¹⁰⁶ *See Skeval v. Skeval*, 210 A.D.2d 751, 752, 620 N.Y.S.2d 546–47 (App. Div. 3d Dep't 1994) (disallowing the wife, a nurse who could find work in New York, to move to Norfolk to join her husband, a United States Navy officer, who was stationed there); *Chiappardi v. Chiappardi*, 204 A.D.2d 379, 381, 611 N.Y.S.2d 897, 898 (App. Div. 2d Dep't 1994) (denying the wife permission to move to join her new husband, a member of the United States Air Force, stationed in Florida); *Elkus v. Elkus*, 182 A.D.2d 45, 49, 588 N.Y.S.2d 138, 140 (App. Div. 1st Dep't 1992) (denying the wife permission to relocate to California to join her new husband who could not work from any other locale); *Lavelle v. Freeman*, 181 A.D.2d 976, 977–78, 581 N.Y.S.2d 875, 876–77 (App. Div. 3d Dep't 1992) (denying the wife permission to move to Missouri to join her new husband, whose promotion at work required that he relocate to that state).

Cleveland.¹⁰⁷ But eighteen years later, in *Englese v. Strauss*, a custodial father was allowed to relocate with the children to North Carolina in order to open and operate a restaurant with his parents.¹⁰⁸

The foregoing trend which gives greater weight to economic concerns, such as the custodial parent's need to pursue or preserve financial security, could well be rooted in today's tenuous economic climate. It may be that in 2011, with awareness of the pervasive financial insecurities that plague so many families, courts are more likely to approve solutions which safeguard the family's economic survival, placing less weight on frequency of contact with the noncustodial parent.

Cases involving international relocations reflect yet another significant post-*Tropea* modification. In 1997, just one year after *Tropea*, the Fourth Department in *Gillard v. Gillard* granted a mother's request to relocate to Vancouver, Canada, to reside with her fiancé, despite the father's close relationship with his five-year-old son, reasoning that the financial advantages of the mother's remarriage to a wealthy businessman outweighed the diminished frequency of contact between the child and his father.¹⁰⁹ In 2003, the Fourth Department allowed the custodial mother to relocate with the child to China for two years.¹¹⁰ In *Rory H v. Mary M*, the Second Department awarded custody of a young child to the mother, recognizing that the mother had already relocated with the child to Ireland, her home country.¹¹¹ The custodial mother in *Etienne v. Sylvain* was permitted to return to live in her home country of France, taking the children with her,¹¹² and in *Hissam v. Mancini*, the Third Department allowed the custodial father to relocate with his ten-year-old son to Thailand, where the father's spouse was offered a transfer within her employer's company "with lucrative pay and benefits."¹¹³

¹⁰⁷ *Gruenspecht v. Gruenspecht*, 191 A.D.2d 612, 613, 595 N.Y.S.2d 246, 247 (App. Div. 2d Dep't 1993).

¹⁰⁸ *Englese*, 83 A.D.3d at 706, 920 N.Y.S.2d at 368.

¹⁰⁹ *Gillard v. Gillard*, 241 A.D.2d 966, 966-68, 661 N.Y.S.2d 378, 379-80 (App. Div. 4th Dep't 1997).

¹¹⁰ *Carncross v. O'Connell*, 302 A.D.2d 931, 932, 753 N.Y.S.2d 916, 916-17 (App. Div. 4th Dep't 2003).

¹¹¹ *Rory H. v. Mary M.*, 13 A.D.3d 373, 373-74, 786 N.Y.S.2d 195, 195-96 (App. Div. 2d Dep't 2004).

¹¹² *Etienne v. Sylvain*, 47 A.D.3d 930, 931, 851 N.Y.S.2d 605, 607 (App. Div. 2d Dep't 2008).

¹¹³ *Hissam v. Mancini*, 80 A.D.3d 802, 804-05, 916 N.Y.S.2d 248, 251-52 (App. Div. 3d Dep't 2011).

III. CONCLUSION

Regardless of the cause, the trend is apparent: in the absence of unusual circumstances or a showing that the move is motivated by malice or a desire to interfere in the noncustodial parent's relationship with the child, New York courts are willing to find that a proposed relocation, if undertaken for economic or emotional reasons (such as the desire to form a new family, return to a supportive environment, or to pursue an otherwise unavailable employment opportunity) serves the best interests of the children. Unfortunately, available studies provide no empirical data to support that belief.

Whether or not New York's trend truly serves the best interests of our children, particularly young children who require continuity and frequency in parental relationships to achieve successful bonding, is yet to be determined. But assuredly, analysis of the cases confirm the emergence of one common thread: relocation cases are scrutinized on a case-by-case basis as mandated by *Tropea*,¹¹⁴ as a sincere effort is made to balance the equities of each case in the light of current economic realities.

It is a given that in relocation cases, the needs of all parties cannot be satisfied. Prohibiting relocation deprives the custodial parent of the opportunity to pursue emotional happiness or financial security, but to permit the relocation assuredly wrenches the child from one of her parents. Relocation remains the most complex area of family law. If New York courts are able to avoid presumptions in favor of or against relocations by a custodial parent, with sensitivity to the needs of all children and especially those of tender age, judges will endeavor to approach each case with the painful knowledge that irrespective of the resolution, children remain the unintended victims of parental discord.

¹¹⁴ See *Tropea v. Tropea*, 87 N.Y.2d 727, 740–41, 665 N.E.2d 145, 151, 642 N.Y.S.2d 575, 581 (1996).