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FAMILY LAW

When Familial Relationships Break the Mold

Will societal changes impact the law applied to removal matters?

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In a previous article, I suggested that many career-minded people are opting to postpone marriage until later in life. "Sorting Out Premarital Assets," Aug. 15, 2005 [181 N.J.L.J. 608]. Now, as more and more professionals merge their respective investments, property and retirement plans after marriage, equitable distribution has become more fact sensitive, leaving potential gaps in the law. Societal changes have impacted other areas of the law as well, including removal applications.

When a parent wishes to relocate with a child, the first question that must be addressed is whether this is a removal case or a change of custody, as each case requires a different standard. *O'Conner v. O'Conner*, 349 N.J. Super. 381, 397 (App. Div. 2002). When both parents truly share both legal and physical custody of the child, the analysis must be based upon a change of custody and the parent seeking to relocate must show that it is in the child's best interest for residential custody to be primarily with the relocating parent. *O'Conner,* 349 N.J. Super at 398, citing *Chen v. Heller*, 334 N.J. Super. 361, 380 (App. Div. 2000) and *Voit v. Voit*, 317 N.J. Super. 103, 112 (Ch. Div. 1998). On the other hand, when the relocating parent is the primary caretaker, the removal is analyzed in accordance with *Baures v. Lewis*, 167 N.J. 91 (2001), and rests on whether the move is made in good faith and whether the move will be inimical to the child's interests.

However, what analysis is applied when the parties do not share physical custody and neither party truly stands out as the primary caretaker? Families often depend on more than one full-time breadwinner. As moms and dads continue to work longer hours — five or six days a week — the needs of their children must be met by third-party caregivers. This familiar scenario does not fit either of the custodial circumstances outlined above and found in current case law.

Consider the following hypothetical: A new client has advised you that she wants to move from New Jersey to Colorado. A large software company has recruited your client and offered to double her $250,000 annual salary. She wants to take her six and eight year olds with her but their father will not consent. When the parties divorced six years ago, they decided that the children would live with their mother and that she would be the primary caretaker. They also decided that dad — who lives just fifteen minutes away from the children — would have parenting time with the children from Sunday through Wednesday morning every week. At this point, the analysis is relatively straight forward. We would apply the 12 factors as articulated in *Baures v. Lewis*, 167 N.J. 91 (2001), to demonstrate that mom has a good faith reason for moving and that the move will not be inimical to the children's interest:

> (1) the reasons given for the move; (2) the reasons given for the opposition; (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here; (5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodi-

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> al parent if the move is allowed; (8) the effect of the move on extended family relationships here and in the new location; (9) if the child is of age, his or her preference; (10) whether the child is entering his or her senior year in high school, at which point he or she should generally not be moved until graduation without his or her consent; (11) whether the noncustodial parent has the ability to relocate; (12) any other factor bearing on the child's interest.

Subsequent discussions with your client reveal that she is a high-powered executive for a multinational corporation based in Philadelphia. Mom typically leaves the house at 7:30 a.m. and arrives home at 7:30 p.m. She travels for business approximately ten days each month. Mom advises you that she has spent the past six years relying heavily on a nanny, attended only a handful of parent-teacher conferences and, while she knows the names of the children's physicians, acknowledges that the nanny has taken the children to more doctors' appointments than she has. The nanny also assists the children with their homework, chauffeurs them to and from activities and prepares their dinner. Consistent with your client's busy schedule, the nanny arrives at 8:00 a.m. to care for the children and leaves around 7:00 p.m. As for dad, he is also a professional and his schedule mirrors the children's mother's schedule. He too depends on a third party to care for the children; his mother prepares their meals, drives them to activities and helps with homework and school projects.

Initially you believed the case would be decided pursuant to a *Baures* analysis. However, on learning that the children were cared for by their nanny and grandmother, you realize that a different standard must be applied.

First, you review the analysis of shared custody in *O'Conner* where the court not only focused on the time that the child (Ryan) spent with each parent, but also focused on the involvement of each parent in the child's daily life:

> The evidence established that the parties shared the custodial responsibilities and duties in meeting Ryan's needs; both parties purchased clothing for Ryan; plaintiff primarily attended to Ryan's religious instruction and his medical appointments and care, although defendant participated; defendant took Ryan to sign-up for his various sporting activities such as baseball, basketball and soccer, and attended almost all of Ryan's practices and games; plaintiff attended all of Ryan's baseball games unless she was traveling; defendant attended all Ryan's events at school, such as concerts or plays. The parties also shared the responsibility for attending parent-teacher conferences, and defendant attended all of the back-to-school nights. Defendant went on a school field trip with Ryan to the Museum of Natural History. Defendant also signed most of Ryan's report cards.

After applying the analysis to your case, you determine that the children's nanny and paternal grandmother have shared more of these duties than your client or her ex-husband. Next, you attempt to analyze whether your client, or the children's father, is the primary caretaker:

> Although both [primary caretaker and secondary caretaker] roles create responsibility over children of divorce, the primary caretaker has the greater physical and emotional role. Because the role of 'primary caretaker' can be filled by men or women, the concept has gained widespread acceptance in custody determinations. Indeed, many state courts often determine custody based on the concept of "primary caretaker."
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> In one of the earliest cases using the concept of 'primary caretaker,' the Supreme Court of Appeals of West Virginia articulated the many tasks that make one parent the primary, rather than secondary, caretaker: preparing and planning of meals; bathing, grooming, and dressing; purchasing, cleaning and caring for clothes; medical care, including nursing and general trips to physicians; arranging for social interaction among peers; arranging alternative care, i.e., babysitting or daycare; putting child to bed at night, attending to child in the middle of the night, and waking child in the morning; disciplining; and educating the child in a religious or cultural manner. As do many other jurisdictions, we find that that State's highest court's definition articulates many of the duties of a primary caretaker. O'Conner, 349 N.J. Super. at 399 (quoting *Pascale v. Pascale*, 140 N.J.583, 598-99 (1995) (other citations omitted)).

When applying these factors, you would be hard pressed to show that either your client or the children's father is truly the primary caretaker. The division of duties lies primarily with the children's nanny and paternal grandmother. As such, your case does not fit either an *O'Conner* or *Baures* analysis. Do you then rely on the "best interests" analysis that guides our courts in issues concerning children?

Practitioners must find even more creative ways to apply the facts of such removal matters to existing law, particularly as parents continue to adapt to increasing economic demands and as familial relationships continue to evolve. Our trial courts are guided by existing case law when rendering decisions in these very difficult and fact-sensitive matters. But what standard do you present to the court when the parties do not share custody and neither parent is the primary caretaker? As in cases involving the welfare of the child, perhaps the "best interests" standard would apply. ■