INTRASTATE RELOCATION IN NEW JERSEY

N.J.S.A. 9:2-2 prevents divorced or separated parents from permanently removing minor children from the State of New Jersey absent written consent of the other parent or Court Order. As a result, there are a number of cases guiding courts with respect to removal applications including the paramount case of Baures v. Lewis, 167 N.J. 91 (2001) and its progeny. However, there is no statute preventing a residential custodial parent from permanently moving with the minor children within the State of New Jersey and there is virtually no published case law and considerably less guidance when a parent wishes to relocate with a child within the state. This presents serious issues in cases where the non-custodial parent exercises substantial weeknight parenting time. Given the size of the State of New Jersey, a custodial parent's move from a town in northern New Jersey to a town in southern New Jersey would cause a substantial change of circumstance making overnight parenting time during the week virtually impossible. Despite this fact, the case law that does exist, is in favor of the residential custodian, irrespective of how much weeknight parenting time is exercised by the non-custodial parent.

In fact, there is only one published case on this issue, namely Schulze v. Morris, 361 N.J. Super. 419 (App. Div. 2003). In Schulze, the parties owned a condominium in Middlesex County during their marriage. Id. at 422. At the time of their divorce, it was agreed that defendant would maintain this home until December 31, 2001. Id. Plaintiff was not residing in New Jersey at the time the parties' final judgment of divorce was entered on February 23, 1998 and instead, had temporarily relocated to Maryland to complete a fellowship at the University of Maryland. Id. at 421-22. The parties' agreement provided that while plaintiff was in Maryland he would exercise parenting time two weekends each month—one in New Jersey and one weekend in Maryland. Id. at 422. When plaintiff returned to New Jersey, the issue of his parenting time would be renegotiated and either party could return to the Court if they were unable to resolve this matter amicably. Id.

When plaintiff returned to New Jersey, he took up residence in Middlesex County. Id. at 423. Defendant, however, was not able to secure the financing to purchase plaintiff's interest in the condominium and furthermore was not offered tenure in the Highland Park School District located in Middlesex County. Id. Defendant ultimately obtained another teaching position and elected to move with the child to Vernon, located in Sussex County. Id. Plaintiff responded by filing an Order to Show Cause to prohibit her relocation. Id.

The trial court initially allowed defendant to relocate, without prejudice, and scheduled this matter for a plenary hearing. Id. However, the court subsequently granted defendant's motion for summary judgment, finding:

> You have a custodial parent who wants to relocate. . . . Her relocation was not outside the state. There is a standard set [under Baures, supra] that courts must comply with when making a determination to allow a parent to relocate ... outside the state. I see no reason that that standard should be applied to the defendant in this case.

Id. at 424. Plaintiff subsequently appealed this decision.

Although the Appellate Division upheld the trial court's decision permitting relocation and determined that intrastate relocation does not constitute a removal action pursuant to N.J.S.A. 9:2-2, which requires approval for the relocation, the court did find that there are circumstances in which a request to relocate within the state that may warrant Court intervention. Id. at 426. Specifically, the Appellate Division found when the relocation would "have a significant impact upon the relationship between the child and the non-residential custodial parent that may constitute a substantial change of circumstances warranting modification of the custodial and parenting-time arrangement." Id. at 426. The Schulze Court explained that when the non-custodial parent opposes the relocation because the move will detrimentally affect his or her relationship with the child or otherwise, will not be in the child's best interest, a Court should consider the factors set forth in Baures, supra. Id. In dicta, the Appellate Division also noted that the parties' agreement did not restrict defendant's relocation within New Jersey. Id. at 427.

Following Schulze, the question became what types of intrastate relocation cases warranted an analysis under Baures. Specifically, would an agreement providing that intrastate relocation is automatically a change of circumstances requiring a review of custody and parenting time be sufficient to justify this analysis and possibly, prohibit the relocation? This issue was specifically address in the unpublished decision of Vetri v. Vetri, 2005 N.J. Super. Unpub. LEXIS 523 (Nov. 28, 2005) In this case, the parties resided in Montgomery Township located in Somerset County. While the parties' agreement recognized the Mother's intent to move closer to her family in Monmouth and Middlesex County, it also included a provision that her relocation outside the Montgomery Township school system would be considered a change of circumstances allowing the Father to file an application revisiting whether the current custody and parenting time arrangement[1] should continue. Id. at 2. When the Mother subsequently

[1] Under the parties' agreement, the Father was afforded regular parenting time every Tuesday and Thursday from 6:00 p.m. to 8:00 p.m., plus every other weekend between Friday at 6:00 p.m. and Sunday at 8:00 p.m. In addition, the Father was actively engaged with the children through their sports and extracurricular hobbies.

advised that she was planning to move to Manalapan in Middlesex County, the Father successfully obtained a restraining order prohibiting her from leaving and the Court scheduled a plenary hearing on the issue. Id. at 3.

Following a plenary hearing, which included both custodial and educational experts, the trial court applied the factors set forth in Baures, and concluded that the intrastate relocation would not be inimical to the children's best interests although the court did award the Father an extra weekend per month. Id. Notably, on appeal, the Appellate Division stated that the trial court went farther than it had to by analyzing the Mother's desire to relocate under the Baures factors. Id. at 8. They found that the relocation by a residential custodian did not constitute a "removal action pursuant to N.J.S.A. 9:2-2, requiring approval for the proposed relocation." Id. at 3. The Appellate Division also noted that the parties' agreement specifically identified the Mother's desire to move closer to her family in Monmouth County. Thus, while the language in the parties' agreement may have allowed for the initial restraints and the scheduling of a plenary hearing, it did not ultimately require a Baures analysis or prohibit the Mother from relocating with the parties' children.

In the unpublished case of Orricco v. Orricco, 2006 N.J. Super. Unpub. LEXIS 295 (App. Div. Feb. 24, 2006), the parties agreement specifically eliminated a provision that would have prohibited the Mother from relocating within 20 miles of Allendale, NJ or outside of Bergen County. Id. at 2. The trial court denied an Order to Show Cause brought by the Father to prohibit the Mother from relocating with the child to Manahawkin, New Jersey, which was located more than 100 miles away. Id. at 6. In response to a subsequent Court Order implicitly allowing the Mother to move, the Father filed a formal application seeking an order requiring her return with the child to Bergen County. Id. The trial court denied the Father's request for oral argument and in support of the trial court's denial of his application, explained that the relocation was not inimical to the child's best interests because the current visitation schedule[2] could be followed. Id. at 7.

In the appeal that followed, the Father argued that the trial court should have granted his request for oral argument and should have conducted a plenary hearing to determine the impact that the Mother's relocation, more than 100 miles away, would have on his relationship with the child. Id. at 7-8. In support of her opposition, the Mother stated, in part, that the express deletion of the provision in the parties' agreement prohibiting her from relocating more than 20 miles away is conclusive proof of her ability to live anywhere in the state. Id. at 8. Nevertheless, the Appellate Division agreed that an analysis under Baures was necessary in this case and that the trial court should have granted the Father's request for oral argument. In

[2] It should be noted that the current visitation schedule allowed the Father to exercise parenting time "'every other week from Thursday at 4:30 p.m. to Sunday 7:00 p.m.' The schedule would change on the 'off weeks,' to permit defendant to be with the child 'from Monday 7:00 p.m. to Wednesday 10:00 a.m.' Id. at 2.

remanding the matter, it directed the trial court to "conduct a plenary hearing and apply the relevant factors outlined by the Supreme Court in *Baures, supra, 167 N.J. at 91*. At the conclusion of the hearing, the parties must be afforded the opportunity to present oral argument in support of their respective positions." Id. at 10.

As set forth above, the contradictory findings in Vetri and Orricco, provide little guidance to trial courts as to when a plenary hearing and full analysis under Baures would be required. Moreover, as Family Law attorneys, these findings do not provide much comfort that specific language in the parties' agreement would automatically warrant this analysis. Indeed, the parties in Vetri expressly included a provision stating that the Mother's relocation would be a change of circumstances while the Appellate Division found that her move (which was approximately 26 miles away) was permissible and did *not* trigger a Baures analysis. On the other hand, the parties in Orricco expressly removed a provision prohibiting the mother from moving more than 20 miles away, yet the Court found that a plenary hearing under Baures was necessary when she ultimately moved more than 100 miles away. Given that the Fathers in both cases both had significant weeknight parenting time with the minor children, perhaps it was the actual distance that triggered a plenary hearing and analysis under Baures. Of course, the Appellate Division does not actually elaborate on what type of schedule, time or distance will require the trial courts to conduct an analysis under Baures.

The most recent, unpublished Appellate Division decision of P.P. v. N.P., 2011 N.J. Super. Unpub. LEXIS 3087 (App. Div. Dec. 23, 2011) sheds little light on this issue. In this case, the Mother was designated the residential custodian or Parent of Primary Residence and the Father was afforded an interim reasonable and liberal parenting time schedule, although it was temporarily interrupted when the Father became involved with the criminal justice system. Id. at 2. When the Father subsequently filed an application to establish a permanent parenting time schedule, the Mother informed him that she planned to relocate with the parties' children from Monmouth County to Verona, located in Essex County. Id. at 2. The Father immediately filed an Order to Show Cause and on the return date, the trial judge prohibited the Mother from relocating. Id. at 3. In support of this finding, the court emphasized that the Mother did not have a valid reason to relocate to Verona, such as employment, family or a fiancé in that jurisdiction. Id. at 5. Moreover, while the Mother had testified that she would like to be closer to New York City in order to find a job, the court felt that she could easily commute from Monmouth County. Id.

On appeal, the Mother argued that the trial court erroneously applied the first factor under the Baures analysis, which requires the custodial parent to demonstrate a good faith reason for the move, as she was merely seeking to relocate within the state. Id. at 6. However, the Appellate Division pointed out that the trial court actually denied the Mother's application pursuant to the terms of the parties' Property Settlement Agreement (PSA). Id. at 8. Specifically, the PSA provided that the parties will not do anything to estrange their children

from the other party and the court found that the Mother's relocation was based on her desire for the Father to have difficulty exercising his parenting time with the children. Id. at 8-9. Accordingly, it was not necessary for the Court to apply the holding in Schulze or conduct an analysis under Baures. Id. at 9.

In light of the above, it seems that even if an agreement does not expressly trigger a review of custody and parenting time upon a residential custodian's relocation within the state, the Court may nevertheless deny this request due to other provisions of the agreement and without the necessity of a plenary hearing or Baures analysis, absent a "good faith" reason for the move. However, given that the cases on intrastate relocation are few and far between, this is little comfort for Family Law attorneys. Unfortunately, the trial courts appear to have wide discretion and little guidance from the higher courts as to what analysis, if any, should be used when deciding a request to relocate within the state. Although not a guarantee, when drafting agreements where the non-custodial parent has substantial weeknight parenting time, it is helpful to add as much language as possible regarding an automatic review of the custody and parenting time provisions should the residential custodial parent choose to move outside of the current town or school district.

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