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1. Is it in the best interests of the parties' children to relocate to California where their stepfather's employment has been transferred, and where they will have the benefit of a stay-at-home mother, an enhanced standard of living, and ample visitation with their father?

   The Family Court held that the Petitioner-Appellant failed to prove by a preponderance of the evidence that the proposed relocation to California would serve the children's best interests.

Petitioner-Appellant ("Petitioner") appeals the denial of her request for leave to relocate with the parties' two daughters to the State of California and for a revised visitation schedule for the Respondent-Respondent ("Respondent"). Due to her present husband's required change of employment to California, the Petitioner seeks to relocate with the children to California so that she can continue to care for the children on a full-time basis, to improve the children's standard of living, and to successfully continue her marriage. It is submitted that the Family Court erred in holding that the Petitioner failed to demonstrate by a preponderance of the evidence that the proposed relocation would serve the best interests of the children. Accordingly, the Petitioner respectfully requests that the Decision and Order of the Family Court, Hon. James P. McCormack, AJFC, be reversed, or in the alternative, that the case be remanded for further proceedings.

I. NATURE OF THE CASE

A. Factual History

The Petitioner, Amanda F. (née V.H.), and the Respondent, David R., are former husband and wife. There are two children of their marriage, M., born XXXXX XX, 1997, and C., born XXXXX XX, 1999. At the commencement of the hearing, the children were aged nine and six, respectively, and resided with their mother in Merrick, New York pursuant to the Stipulation of Settlement entered

into between the parties on October 30, 2003 (Petr.'s 2),[1] and the Judgment of Divorce granted by the Nassau County Supreme Court on February 17, 2004 and entered February 20, 2004 (Petr.'s 1).[2] The Respondent resides in East Meadow, New York. Pursuant to the October 30, 2003 Stipulation that survived the Judgment of Divorce, and the February 17, 2005 Order, Mrs. F. has physical and residential custody of the children, and the Respondent has visitation every other weekend, alternate holidays, two weeks in the summer, and one mid-week visit followed by two midweek visits on an alternating weekly basis. (Petr.'s 1; Petr.'s 2.)[3]

The Stipulation further provides that absent the Respondent's consent, Mrs. F. is required to seek leave of the Nassau County Supreme Court or Family Court prior to relocating with the children. Specifically, the Stipulation provides:

> In the event that the Wife desires to relocate beyond 25 miles, and the Husband refuses to give his written consent, then the Wife, if so advised, shall make an application to the Nassau County Supreme Court or Family Court for leave to relocate prior to actually relocating and, in such event, the parties acknowledge that the court will determine this issue in accordance with the best interests of the children. The Wife shall not relocate with the children prior to court determination.

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[1] References to evidence shall be cited hereinafter in the format "Petr.'s [exh. no.], [page no.]."
[2] A subsequent Final Order of Custody and Visitation granted by the Honorable Tammy S. Robbins, JFC on February 17, 2005 merely clarified that the Petitioner is entitled to two weeks of uninterrupted visitation with the children during the summer.
[3] In the Decision that is the subject of this appeal, the Family Court adjusted the parties' visitation schedule such that Mrs. F. has uninterrupted parenting time for one month of the children's summer vacation from school, the February winter break, and the long weekends of Columbus Day, Martin Luther King, Jr. Day and Memorial Day. (Decision 27.)

See Petr.'s 2, 14.

In or about March 2004, Mrs. F. and the children moved to the home in Merrick, New York, with her husband-to-be, Neil F. (Tr. June 21, 2006, 23-24; Aug. 2, 2006, 16.)[4] Mrs. F. and Mr. F. married on December 29, 2004. (Tr. June 21, 2006, 23 *ll*. 9-10.) Mr. F., Mrs. F., M., and C. have since developed a strong relationship, enjoying everyday family activities together. (*E.g.*, Tr. Aug. 2, 2006, 31-32; Ct. Exh. 1, 13.) The children love their stepfather, and he loves M. and C. (Tr. June 21, 2006, 52 & 62 *ll.* 15-24; July 24, 2006, 43 *ll.* 6-8.)

At the time the Petitioner and the children moved into the Merrick home, Mr. F. was employed with Mattel, Inc. as the President of Fisher-Price and Fisher-Price Brands. (Tr. June 21, 2006, 29.) His office was located in Manhattan. (Tr. June 21, 2006, 29.) In this position, Mr. F. was responsible for overseeing the entire Fisher-Price manufacturing line, and earned significant income. (Tr. June 21, 2006, 29-30.) He had purchased the home in Merrick, New York where he resided with Mrs. F. and her children. (Resp.'s D.) Further, Mr. F. paid all of the carrying charges on the home, as well as medical insurance and other living expenses for Mrs. F. and M. and C. (Tr. June 21, 2006, 54 *ll.* 5-24; Aug. 2, 2006, 13-14.) He also continued to support his former wife and three children of his previous marriage in accordance with his legal obligation and past practice. (Tr. June 21, 2006, 41 *ll.* 8-18.)

As a result of Mr. F.'s financial support, the Petitioner has been a full-time parent, and commits herself to C. and M. as her primary occupation. Each morning, Mrs. F. spends time with the children readying them for school, and each afternoon she is home to find out how their day has been and to be involved in their extracurricular activities. (Tr. Aug. 2, 2006, 10 *et seq.*) Mrs. F. also knows all of the other students at M. and C.'s school through supplemental art programs that she directs, other weekly volunteer work, and through a weekly enrichment program she conducts called Lunch Plus. (Tr. Aug. 2, 2006, 10-12.) The forensic report and testimony of the Court-appointed expert, Susan Silverstein, L.M.S.W., showed that Mrs. F. is an excellent mother, and that the children are both very well adjusted. (*E.g.*, Ct. Exh. 1; Tr. Oct. 5, 2006, 40 *ll.* 14-15.) Mrs. F.'s ability to dedicate herself to the children in this manner is largely dependent upon the emotional and financial support that she receives from Mr. F.

Without prior notice, in or about October 2005, Mr. F. was informed that Mattel, Inc. and the Fisher-Price division were restructuring, and that his position would be dissolved. (Tr. June 21, 2006, 31 *l.* 22 to 32 *l.* 6.) This primarily resulted from the success of the Fisher-Price line under Mr. F.'s leadership and the declining sales in the other divisions. The reorganization eliminated his former position as President of Fisher-Price, and promoted Mr. F. to President of Mattel, Inc. to oversee both Fisher-Price and Mattel brands. (Tr. July 25, 2006, 7-8.) The

[4] References to the transcript shall be cited as "Tr. [date], [page no.] *ll.* [line nos.]."

reorganization also centralized operations in California. (Tr. June 21, 2006, 31.) Against his own wishes and the wishes of Mrs. F., Mr. F.'s new position requires him to work in the State of California (Tr. July 24, 2006, 48 *ll.* 9-25),[5] where he began working in October 2005 (Tr. July 24, 2006, 25), and began residing in December 2005. (Tr. June 21, 2006, 44.)

At the hearing of this matter, Mrs. F., Mr. F., and Mr. Alan Kaye, Senior Vice President of Human Resources of Mattel, Inc.,[6] testified that Mr. F. was required to accept the transfer to California. (Tr. July 25, 2006, 20-22 & 61-63.) Mr. F. could not carry out his duties as President of Mattel, Inc. from New York. (Tr. July 25, 2006, 53-54 & 58 & 61-64; Decision 8.) Furthermore, there are no similar positions at any other company in the toy industry in the New York metropolitan area. (Tr. June 21, 2006, 33 *ll.* 13-22; July 25, 2006, 51.) Mr. F. has 34 years of experience solely in the toy industry. (Tr. June 21, 2006, 33 *ll.* 9-12.) Mattel, Inc. is the largest toy company in the world, having gross revenues in excess of five billion dollars. (Tr. June 21, 2006, 24 *ll.* 17-18.) The next largest toy company is Hasbro, Inc. which is a much smaller company than Mattel, Inc., is

[5] As further evidence that Mr. F. does not have the ability to continue employment in New York is the testimony that there was and is no reason that either the Petitioner or her husband would voluntarily relocate to California unless, in effect, forced to do so. Both the Petitioner and her husband have their extended family residing in the New York metropolitan area (Tr. Aug. 2, 2006, 19 *ll.* 7-13), and neither Mr. F. nor Mrs. F. had any desire or reason to relocate but for the unanticipated restructuring of Mattel, Inc. and the resultant change in Mr. F.'s employment. (Sep. 5, 2006, 24-25.)

[6] Mr. Kaye reports not to Mr. F., but to Mr. Robert Eckert, Chairman and Chief Executive Officer of Mattel. (Tr. July 25, 2006, 29.)

headquartered in Rhode Island, and has no position available for Mr. F. (Tr. June 21, 2006, 33 *ll.* 13-22.)[7]

During the pendency of the underlying proceedings, Mr. F. thus spent the bulk of his time in California in temporary housing provided for by Mattel, Inc. (Tr. June 21, 2006, 23 & 44-45.) He returned to New York as work permitted, approximately once every three weekends. (Tr. June 21, 2006, 60-62.) Although at the time of the hearing he continued to support the Petitioner and the children as before, the evidence demonstrated that his finances cannot provide the same level of support if he is to maintain both a home in New York and one in California. (*Infra* Part II.D.1.) The Petitioner also explained that even if Mr. F. could afford to maintain their current home in Merrick while living in California, she could not expect him to continue to support an expensive home in New York that he only infrequently visits. (Tr. Aug. 2, 2006, 28 *ll.* 9-18 & 62 *ll.* 16-18; Sep. 5, 2006, 10 *ll.* 24-25.) Accordingly, if relocation is not permitted, the Petitioner expects either to move with the children to a more modest home in New York to remain a full-time parent, or she will be required to return to the workforce to supplement the family's income. (Tr. Aug. 2, 2006, 27-29; Oct. 13, 2006, 45-47.) Furthermore, the Petitioner obviously misses her husband since he has moved to California, and she is without a partner to share home responsibilities and to assist with caring for the

[7] Additionally, were Mr. F. to work for a competitor of Mattel, Inc., he would forfeit his senior executive pension. (Tr. June 21, 2006, 33 *ll.* 20-22; July 25, 2006, 26 *l.* 19 to 27 *l.* 18.)

children. (Tr. Aug. 2, 2006, 32; Oct. 13, 2006, 45-47.) The children also miss Mr. F. now that he is in California. (Tr. July 24, 2006, 37 *ll.* 8-22 & 78-79.)

B. Procedural Posture

Mrs. F. brought a motion by Order to Show Cause dated December 6, 2005 in the Nassau County Family Court for leave to relocate with the children to the State of California and to set a visitation schedule for the Respondent at all reasonable and appropriate times pursuant to Article 6 of the Family Court Act, *N.Y. Fam. Ct. Act* §§ 611-671 (Consol. 2007). The Respondent served an affidavit in opposition dated January 16, 2006, and cross-moved for temporary relief, fees, and costs.[8] The Petitioner interposed an affidavit in opposition to the cross motion dated February 2, 2006, to which the Respondent replied on February 8, 2006. The Family Court appointed Conrad Singer, Esq.[9] as Law Guardian to represent the children.[10] By Order dated February 9, 2006, the Family Court appointed Susan Silverstein, L.M.S.W. as a forensic evaluator. Ms. Silverstein recommended that

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[8] Respondent also cross moved for a transfer of custody in the event the relocation is permitted, however, this issue is moot because the Petitioner testified that she will not relocate without the children, and the parties have so stipulated. (Tr. Sep. 27, 2006, 57 *ll.* 5-11.)

[9] Pursuant to this Court's April 5, 2007 Decision and Order on Motion, the former Law Guardian (now the Hon. Conrad D. Singer, JFC) has been relieved, and Gail Jacobs, Esq. has been appointed as Law Guardian in his stead.

[10] Although the Law Guardian submitted an Affirmation in Opposition to Petitioner's Order to Show Cause dated March 7, 2006 prior to the hearing, at the commencement of the hearing he clarified that his opposition was to the matter being determined without a hearing. *See* Tr. June 21, 2006, 21-22 ("I didn't oppose the relocation. What I opposed was the relocation being determined on an order to show cause."). Thus, contrary to the Family Court's recitation in its Decision (Decision 24), the Law Guardian did not proffer an ultimate recommendation.

the children remain in New York, yet later testified that this was not an easy decision to reach. (Tr. Oct. 5, 2006, 66-67.)[11]

The Petitioner served a Pre-Hearing Memorandum on June 21, 2006, and a hearing thereafter took place before the Honorable James P. McCormack, AJFC. Testimony was taken on June 21, July 24, July 25, August 2, September 5, September 20, September 27, October 5 and October 13, 2006. Following the hearing, the Petitioner served a Post-Hearing Memorandum of Law on November 6, 2006, and the Respondent served a Post Trial Memorandum of Law on November 30, 2006.[12]

The Family Court issued a Decision and Order captioned "Decision After Trial" dated and entered January 18, 2007 (hereinafter "Decision"). In the Decision, the Family Court denied the application for relocation in its entirety (Decision 26), and expanded the Petitioner's parenting time "for these children to be able to travel with their mother to California unencumbered a limited number of times per year." (Decision 27.)

Subsequently, the Petitioner served a Notice of Appeal on February 14, 2007, and filed the Notice of Appeal with Request for Appellate Division

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[11] As further discussed *infra* at Part II.B, the forensic report was at least in part premised upon the erroneous factual conclusion reached before the hearing that the proposed relocation to California was a voluntary choice. (Ct. Exh. 1; Tr. Sep. 20, 2006, 21 *ll.* 7-13.) The evidence has shown this factual assumption upon which Ms. Silverstein relied to be untrue. The import of this error is discussed *infra* at Part II.B.

[12] The parties also submitted additional papers regarding the issue of legal fees, which are the subject of a separate appeal, *V.H. v. R.*, Docket No. 2007-3036 (2d Dep't filed 2007).

Intervention in the Nassau County Family Court on February 15, 2007. The Petitioner takes this appeal as of right pursuant to *N.Y. C.P.L.R.* 5702 (Consol. 2007) and *N.Y. Fam. Ct. Act* §1112 (Consol. 2007).

II. ARGUMENT: THE PROPOSED MOVE WOULD SERVE THE BEST INTERESTS OF THE CHILDREN

The Family Court erred in denying Mrs. F.'s petition for relocation of the children. The proper framework for analysis of this case is set forth in *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996) (deciding appeals from both the Second and Fourth Departments), in which the Court of Appeals instructed that it is for the trial court to determine, "based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests." *Id.* at 741. The Court of Appeals identified several factors to instruct the "best interests" determination, namely: each parent's reasons for seeking or opposing the move; the quality of the relationships between the child and the custodial and noncustodial parents; the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent; the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move; the feasibility of preserving the relationship between the noncustodial parent and child

through suitable visitation arrangements; and other factors that may be relevant to the determination.[13] *Id.* at 740-41. These factors are guided by the principle that,

> [l]ike Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit. In some cases, the child's interests might be better served by fashioning visitation plans that maximize the noncustodial parent's opportunity to maintain a positive nurturing relationship while enabling the custodial parent, who has the primary child-rearing responsibility, to go forward with his or her life.

Id. at 740.

The court below failed to recognize that, as the Court of Appeals held in both cases before it in *Tropea*, it is in the best interests of M. and C. to permit relocation. As in *Tropea*, although the nature of visitation would differ, it cannot be said that the proposed relocation to California will deprive the Respondent of meaningful contact with his daughters. *Id.* at 738. Such is the appropriate result; otherwise a per se rule against relocations to distances too far for midweek visitations effectively would be created. Moreover, New York law instructs that is

[13] The *Tropea* factors purposefully exclude innocence or blame of the parties. The Respondent's prior efforts to invoke the history of the parties' prior marital difficulties in this proceeding are not credible, and are in any event immaterial to a determination of the children's best interests. *Tropea* at 741-42 (reproaching the respondent in *Tropea* for directing arguments to the mother's purported "unclean hands" in developing a relationship with a person she met before the marriage was dissolved and in choosing to marry that individual after her divorce from respondent.)

in error for a court to give priority to the effect of a proposed relocation on visitation while minimizing the clear benefits for the child. *Tropea* at 735. Specifically, application of the *Tropea* factors as refined by other case precedent to the facts in the record demonstrates that the Family Court should have granted the Petition because:

A. New York Courts allow relocation where, as here, the primary custodian seeks to relocate because her husband's employment has been transferred and he had no real choice but to accept the transfer;

B. Permission to relocate should be granted where the primary custodian enjoys a strong and positive relationship with her children, and especially where relocation will enable the custodian to be a full-time parent;

C. Relocation is routinely permitted where the quality and quantity of the children's future contact with the noncustodial parent will be preserved by extended visitation during holiday periods;

D. Relocation is favored where it will provide both the children and the custodial parent economic, emotional and educational enhancements;

E. Where it is feasible to preserve the relationship between the noncustodial parent and the children through visitation arrangements and frequent contact, relocation is permitted; and

F. Relocation should be granted where the distance will lessen the discord between the parties and minimize the risk of domestic violence.

The bulk of the 28-page Family Court Decision denying permission to relocate merely summarizes the evidence presented without weighing its credibility and without legal analysis. Critically, the only cases cited in the otherwise lengthy Decision are *Tropea*, *supra*, and *Strahl v. Strahl*, 66 A.D.2d 571, 414 N.Y.S.2d 184 (App. Div. 1979) (Decision 24), a woefully outdated case that was decided before

the *Tropea* Court changed New York law to remove presumptions against relocation. In effect, the Family Court ignored the law of the past ten years that was developed to guide its Decision. As such, it is unsurprising that the Family Court determined that "it is impossible for this, or any other court, to place a relative value on [the parents'] roles… on the development of these remarkable children into… adult women." (Decision 26.) Had the Family Court properly applied the factors enumerated in *Tropea* and its progeny, it would have recognized that the Petitioner has shown by a preponderance of the evidence that the relocation to California should be permitted.

This Court's authority in custody matters is as broad as that of the trial court. *Miller v. Pipia*, 297 A.D.2d 362, 364, 746 N.Y.S.2d 729 (2d Dep't 2002) (internal citations and quotations omitted) (reversing Supreme Court determination of custody and allowing relocation to Florida). Pursuant to *N.Y. C.P.L.R.* 5501(c) (Consol. 2007) and *N.Y. Fam. Ct. Act* §1112 (Consol. 2007), the Appellate Division "shall review questions of law and questions of fact." Accordingly, the Petitioner respectfully requests this Court to reverse the Decision and Order of the Family Court, or in the alternative, remand for further proceedings.

A. New York Courts allow relocation where, as here, the primary custodian seeks to relocate because her husband's employment has been transferred and he had no real choice but to accept the transfer

While the Family Court correctly concluded that Mr. F. had no real choice but to relocate to California for his employment (Decision 4-5 & 27),[14] the Family Court failed to correctly apply the law on this point. New York Courts allow relocation where, as here, the primary custodian seeks to relocate because her husband's employment has been transferred. *See, e.g.*, *Schreurs v. Johnson*, 27 A.D.3d 654, 811 N.Y.S.2d 437 (2d Dep't 2006) (discussed *infra*). Cases denying permission to relocate frequently do so on the basis that the move is sought by the custodial parent to defeat the non-custodial parent's visitation, or other bad-faith motives, or where a party has only vague plans for the relocation. *See, e.g.*, *Holden v. Cardozo*, 8 A.D.3d 567, 778 N.Y.S.2d 885 (2d Dep't 2004); *Dunaway v. Espinoza*, 23 A.D.3d 928, 805 N.Y.S.2d 680 (3d Dep't 2005). In sharp contrast to those cases, the Petitioner here has a good faith motive to seek relocation in that her husband, who is the primary financial support for M. and C., is working and living in California. Additionally, the Petitioner has presented a distinct plan as to relocation and visitation. *See, e.g.*, Petr.'s 10 (proposed visitation schedule).

[14] Although unstated, the finding that Mr. F. and certainly Mrs. F. had no choice as to relocation is inherent in the Family Court's Decision providing increased uninterrupted visitation with the children so as to allow them to travel to California together. *See* Decision 27 ("[a]though the court has denied the petitioner's application for relocation, the court is aware of a significant change in circumstances in that the petitioner's husband has been relocated to California….").

In *Schreurs v. Johnson*, 27 A.D.3d 654, 811 N.Y.S.2d 437 (2d Dep't 2006), this Court recently affirmed the granting of permission to relocate where the custodial parent's job had been discontinued, and his employer offered similar employment to him in the State of Florida. The father testified that although the company, a hotel organization, operated 43 hotels, none were in the New York metropolitan area. That is directly analogous to Mr. F.'s change of employment, which eliminated his prior position, and transferred his employment to another state.

The instant matter is also strikingly similar to *Gillard v. Gillard*, 241 A.D.2d 966, 661 N.Y.S.2d 378 (4th Dep't 1997), in which the Fourth Department reversed the Family Court to permit relocation to the western coast of Canada. Specifically, that petitioner sought relocation as a result of her engagement to a resident of Vancouver, British Columbia, with "significant business interests" there. Asserting that she planned to remarry and move to Vancouver, the petitioner requested modification of a visitation order to reflect the distance and the cost of visitation. In reversing, the Fourth Department held that it would be in the child's best interests to permit the move, despite the child's father having exercised visitation and having been involved in the child's extracurricular activities. There, like here, the father's involvement was outweighed by the benefits of relocation, which included improved financial condition of the petitioner and of the child, the ability of the petitioner to spend more time with the child without a stressful work

schedule, and a loving family unit with equal if not greater educational and cultural opportunities.

The situation here is also akin to that presented in *Thompson v. Smith*, 277 A.D.2d 520, 715 N.Y.S.2d 505 (3d Dep't 2000). In *Thompson*, the plaintiff's husband had obtained a tenure-track position at Bowdoin College in Maine as an assistant professor. Recognizing that "positions in Thompson's chosen field are scarce and despite a diligent search, he was unable to find such a position closer to defendant's residence than Maine," the Appellate Division affirmed the Supreme Court to permit the relocation. *Id.* at 522. Just as in *Thompson*, so too are positions in Mr. F.'s field scarce. The evidence demonstrated that there is no comparable employment available to Mr. F. in the New York metropolitan area. (Tr. June 21, 2006, 33 *ll.* 13-22; July 25, 2006, 51.)

Even mere improvement of employment position has served as a factor favoring relocation, such as in *Smith v. Hoover*, 24 A.D.3d 1096, 805 N.Y.S.2d 715 (3d Dep't 2005), where the Third Department reversed the Family Court to permit relocation to North Carolina. While the Family Court had questioned the petitioner's husband's ability to find work in New York, the Appellate Division found good reason to conclude that his employment in North Carolina would be permanent with a substantially higher salary and opportunity for advancement. *See also Winn v. Cutting*, 39 A.D.3d 1000, __ N.Y.S.2d __ (3d Dep't 2007) (relocation permitted to Pennsylvania where mother and fiancé could not find as well paying

work in New York); *Lazarevic v. Fogelquist*, 175 Misc. 2d 343, 347, 668 N.Y.S.2d 320 (Sup. Ct. N.Y. County 1997) (relocation to Saudi Arabia permitted where "clear that Respondent's request to relocate to Saudi Arabia is brought in good faith, to promote continued stability for [the children], to maintain or strengthen Respondent's financial position without sacrificing her legitimate and established desire to care full time for [the children], and to otherwise improve the family's quality of life.").

The Petitioner here seeks to relocate with the children because her husband, Mr. F., previously was employed with Fisher-Price Brands and then promoted to a unique position created for him within Mattel, Inc. As was shown through the testimony of Mr. F. and Mr. Alan Kaye, the Senior Vice President of Human Resources at Mattel, Inc., Mr. F.'s acceptance of this position was not a matter of his discretion. Mr. F.'s previous position was eliminated, and his new position as President of Mattel, Inc. requires that he live in California. (Tr. July 24, 2006, 48 *ll.* 9-25; July 25, 2006, 20-22.) Operations of Mattel, Inc. have been centralized in that state. After the reorganization, approximately three thousand Mattel, Inc. employees were located in California, and only two hundred twenty remained in New York. (Tr. June 21, 2006, 31.) Moreover, Mattel, Inc. is the largest toy company in the world, and there are only two positions in the industry more senior than his. (Tr. July 25, 2006, 61 *ll.* 9-19.) It would be unrealistic to expect Mr. F. to decline this prestigious promotion that exists nowhere else in his industry, and the

governing case law recognizes this reality. *See Thompson*, *supra*; *Schreurs*, *supra*; *Smith*, *supra*; *Gillard, supra*. Nevertheless, even if Mr. F. had had a choice in the matter of the transfer, Mrs. F. assuredly did not.

The Family Court thus erred because it failed to recognize that the credible evidence presented falls within the parameters set by the case law authorizing relocation. Here, where the relocation sought is premised upon a good-faith motive; *i.e.*, the Petitioner's husband's transfer of employment, and because the children will benefit from the relocation as discussed *infra*, *Tropea* and its progeny favor the proposed relocation.

B. Permission to relocate should be granted where the primary custodian enjoys a strong and positive relationship with her children, and especially where relocation will enable the custodian to be a full-time parent

The Family Court erred for the further reasons that it did not give due consideration to the strong and positive relationship between the Petitioner and her children, or to her value as a full-time parent. The New York Courts routinely tip the scale in favor of allowing a child the benefit of a full-time custodial parent in weighing whether to permit relocation. The Family Court failed to properly weigh these considerations.

In reversing the Family Court in *Wisloh-Silverman v. Dono*, 39 A.D.3d 555, __ N.Y.S. __ (2d Dep't 2007), this Court permitted relocation where the parent

seeking to relocate had been the child's primary caretaker for nearly all of the child's life, and the proposed move would enable her to be a full-time parent. Similarly in *Fegadel v. Anderson*, No. 2006-00982, 2007 N.Y. App. Div. LEXIS 6615, at *2 (2d Dep't May 29, 2007), this Court recently permitted relocation to Florida largely because, although both parties were loving parents, "the mother has been [the child's] primary caretaker since the parties' divorce and has established a primary emotional attachment to the child."

In a parallel context, this Court also permitted relocation in *Ladizhensky v. Ladizhensky*, 184 A.D.2d 756, 758, 585 N.Y.S.2d 771 (2d Dep't 1992), opining that "where it is uncontroverted that [the child] has flourished under his mother's custody, it is unnecessary to remit for a further hearing on custody modification."[15] *See also Smith v. Hoover*, 24 A.D.3d 1096, 1097, 805 N.Y.S.2d 715 (3d Dep't 2005) (reversing the Family Court and permitting relocation to North Carolina to "substantially increase [the petitioner and her husband's] income so as to permit petitioner to stop working and stay at home with the child"); *Boyer v. Boyer*, 281 A.D.2d 953, 953, 722 N.Y.S.2d 322 (4th Dep't 2001) (permitting relocation where "[t]he relocation will enhance the financial situation of petitioner and the child, and it will allow petitioner to spend more time with her"); *cf. John A. v. Bridget M.*, 16 A.D.3d 324, 335, 791 N.Y.S.2d 421 (1st Dep't 2005) (F., J., concurring) ("While

[paid caregivers] may be able to provide adequate care, the children are entitled to be raised by a parent.").

Here, the Family Court failed to adequately consider the undisputed evidence that Mrs. F. is an excellent full-time mother to M. and C., and that her ability to be a full-time parent will be in question if relocation is not permitted. (See discussion *infra* Part II.D.) As the primary caretaker of the children, Mrs. F. and the children have established a strong bond. Mrs. F. directly cares for the children each day so that there is no need for child care or babysitters. She volunteers at M. and C.'s school, and among other volunteer projects, directs the ongoing Lunch Plus weekly enrichment program that she developed. She is also involved in the children's extracurricular activities, such as girl scouts and dance classes, and in the evening she helps the children with their homework. (Tr. Aug. 2, 2006, 9 & 11.) As a result, M. and C. earn excellent grades at school, and are mature and well-adjusted little girls. (Tr. Oct. 5, 2006, 42; Decision 26.)

The uncontroverted evidence has further shown that it is in the best interests of M. and C. that their mother remain a full-time parent. Because the Petitioner worked outside the home when the children were born until approximately four years before the hearing, there is specific evidence to demonstrate the difference in the children resulting from Mrs. F.'s retirement. For example, now that she no

[15] Because *Ladizhensky* predates *Tropea* and permitted relocation to Kansas City, it is particularly persuasive; the then-applicable authority required that a higher burden of

longer works outside the home, Mrs. F. is able to participate fully in the children's daily lives and in their school. (Tr. July 24, 2006, 73-74.) The children's mornings are no longer rushed, and no longer in competition with Mrs. F.'s own preparations to leave for work. (Tr. Aug. 2, 2006, 13.) Mrs. F. is also able to care for the children when they are sick, and need not rely on carpools and other caregivers because she is a full-time parent. (Tr. Aug. 2, 2006, 13.) As a result, M. and C. talk more and are happier and more secure (Tr. Aug. 2, 2006, 13), and are comforted by having Mrs. F. at home. (Tr. Aug. 2, 2006, 28-29.) The testimony of the children's maternal grandmother confirmed the increased happiness and sense of security the girls enjoyed after their mother retired. (Tr. July 24, 2006, 74 *ll.* 1-16; Oct. 13, 2006, 48-49.) The Family Court, however, failed to give proper weight to the uncontroverted improvement to, *inter alia*, the children's emotional and social well being and academic achievement as a result of Mrs. F. being a stay-at-home mother.

The Family Court's recitation of the evidence also skews the report and testimony of the Court-appointed forensic evaluator, Susan Silverstein, L.M.S.W. in this regard. (Decision 15-17.) For example, the Decision quotes positive aspects of the relationship observed between the children and the Respondent, yet the Decision discounts the evaluator's praises of the relationship between the children

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"exceptional circumstances" be established to permit relocation. *Id.*

and the Petitioner. In actuality, Ms. Silverstein testified that Mrs. F. has a close and loving relationship with the children. (Tr. Oct. 5, 2006, 46.) Further, Ms. Silverstein reported that Mrs. F. "portrays the relationship which she shares with M. and C. as a close and loving relationship," and "is assessed to be a capable and dedicated parent, [with] a solid fund of knowledge as to effective parenting skills…." (Ct. Exh. 1, 9.) Ms. Silverstein further found that the Petitioner is a "great mom" (Tr. Oct. 5, 2006, 40 *ll.* 14-15 & 46 *ll.* 21-23), and in contrast, that the Respondent is "capable" of caring for the children. (Tr. Oct. 5, 2006, 64-66.)[16]

The Family Court, however, failed to take cognizance of the forensic evaluator's generally positive assessment of the Petitioner's parental dedication and skill. Instead, the Court focused on Ms. Silverstein's criticism of Mrs. F., which was actually limited to issues pertaining to the relocation itself. For example, the Court concentrated on the forensic evaluator's opinion that Mrs. F. had minimized the impact of the requested relocation upon the children, and that she presented a "fantasized" portrait of life in California. (Ct. Exh. 1, 9; Tr. Sep.

[16] The Decision also overlooked Ms. Silverstein's criticisms of Mr. R. Ms. Silverstein found that, *inter alia*, Mr. R.'s "continuing to harbor significant emotions of rejection and abandonment towards Mrs. F. does, at time, impact his perceptions and behaviors." (Ct. Exh. 1, 5.) Even this assessment is an underestimation of the effect that Mr. R.'s emotions and rigidity in perception have on his behaviors relating to the children. For example, Ms. Silverstein testified that she did not believe Mr. R. would require Mrs. F. to obtain a court order before allowing her to take the children to California for two weeks in the summer, yet exactly this did occur. (Tr. Sep. 27, 2006, 69-72; *supra* n.2.) The Family Court disregarded this shortcoming in Ms. Silverstein's assessment, as well as her criticisms of Mr. R., and generally failed to equitably consider both parents' relationships with the children.

20, 2006, 19 & 25 & 26, *ll.* 13-15). This misconception, however, resulted from court restraint not to discuss the legal proceedings with the children (Tr. Oct. 5, 2006, 55-56; Oct. 13, 2006, 24), and there is ample evidence that the Petitioner is acutely aware of the difficulties that may be associated with the relocation. (*E.g.*, Tr. Sep. 5, 2006, 24-25.) Moreover, Ms. Silverstein's criticism of the Petitioner for supposedly minimizing the effect of relocation on the children was predicated upon a misguided and incorrect assumption that Mrs. F. had made a voluntary choice to relocate.[17] In any event, when questioned by the Law Guardian, the forensic evaluator indicated that the children would adjust if the relocation were permitted,

[17] As this Court is certainly aware, this is an issue of fact and thus within the province of the Court in its role as factfinder. It is not within the ambit of the forensic evaluator's role as expert witness to make factual determinations, and as such, in relying upon the recommendation of Ms. Silverstein (Decision 15 *et seq.*), the Family Court erred. The admissibility and bounds of the expert testimony remains in the sound discretion of the trial judge and the credibility and the weight to be afforded such testimony remains with the trier of fact. *Olivier A. v. Christina A.*, 9 Misc. 3d 1104A, 806 N.Y.S.2d 446 (Sup. Ct. Suffolk County 2005) (citing *People v. Cronin*, 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983); *People v. Ciaccio*, 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979)).

In fact, there is an ongoing debate in both the legal community and the mental health profession as to the implications of expert psychological opinions in custody litigation, especially where, as in the case at bar, the opinion results in a conclusion as to the ultimate determination as to where to award custody so as to serve the child's best interest. *See, e.g.*, Timothy M. Tippins, *Matrimonial Practice, Custody Evaluations - Part IX: Babies, Bathwater and "Daubert,"* N.Y. L.J., Nov. 5, 2004, at 3; *W. v. J.*, 8 Misc. 3d 1012A, 801 N.Y.S.2d 782 (Fam. Ct. N.Y. County 2005). Moreover, the American Psychological Association Guidelines for Child Custody Evaluations expressly note that the mental health profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts. *John A. v. Bridget M.*, 16 A.D.3d 324, 332 n.1, 791 N.Y.S.2d 421 (1st Dep't 2005) (Sullivan, J. concurring) (internal quotations omitted).

and that she would recommend only short term counseling to assist in that adjustment. (Tr. Oct. 5, 2006, 12 *l.* 14 to 30 *l.* 7.)[18]

While Ms. Silverstein testified to her belief that the children would be "just fine" if Mrs. F. returned to work (Tr. Oct. 5, 2006, 41 *l.*12 *et seq.*), New York authority instructs that relocation is favored where it enables full-time parenting and the children enjoy a strong relationship with the custodial parent. It is respectfully submitted that here, where Mrs. F. has been the primary custodian of the parties' two daughters for all of their lives, where the children are flourishing under her care, and where the move will permit her to remain a full-time parent, it would be in the best interests of M. and C. to permit relocation.

C. Relocation is routinely permitted where the quality and quantity of the children's future contact with the noncustodial parent will be preserved by extended visitation during holiday periods

The Family Court further erred because it failed to recognize that the children's future contact with the Respondent could be preserved by extended visitation during holiday periods and summer recesses. Under New York law, a court should not give priority to the effect of a proposed relocation on visitation while minimizing the clear benefits for the child. *Tropea* at 735; *see also Smith v.*

[18] The issue of counseling raises a secondary question of credibility as to Ms. Silverstein's assessment, in that her recommendations were inconsistent during the proceedings. For example, her report recommends therapy for the children (Ct. Exh. 1, 11-12), whereas at the hearing she testified that the children were not in need of therapy and instead it would likely be detrimental to them. (Tr. Oct. 5, 2006, 12 *l.* 14 to 30 *l.* 7.)

Hoover, 24 A.D.3d 1096, 1098, 805 N.Y.S.2d 715, 718 (3d Dep't 2005) (same). Although the frequency of the Respondent's access to M. and C. would lessen upon relocation, the total amount of visitation proposed by the Petitioner is equivalent to the amount of visitation that he now enjoys.[19] Longer stays, such as those proposed here, enable a noncustodial parent to replicate the parenting rhythms of an intact family. *See* Lucy S. McGough, *Starting Over: The Heuristics Of Family Relocation Decision Making*, 77 St. John's L. Rev. 291, 334 (2003). Some authorities have thus cited a consensus among social scientists that "it is the quality of the noncustodial parent-child interaction, rather than the quantity of days of companionship, that is important in their bonding." *Id.* at 335; *see also* Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave Of Communication Between Children And Non-Custodial Parents In Relocation Cases*, 9 Cardozo Women's L.J. 567, 578 (2003) (citing findings of Dr. Judith Wallerstein, relied upon by the Supreme Court of California among other courts, that the cumulative body of social science research on custody does not support the presumption that frequent

[19] The evidence has shown that under the current visitation schedule, M. and C. spend the equivalent of approximately 80 twenty-four hour days with their father each year, and 285 twenty-four hour days with their mother. (Petr.'s 9.) By rearranging the parenting schedule, and allowing Mr. R. to be with the children for most of the summer, during school vacation periods and long weekends, he still would enjoy the same amount of time with the children, and the children still would enjoy the benefit of a stay-at-home mother and the financial support of Mr. F. *See* Petr.'s 10 (proposed visitation schedule). As further adduced at the hearing, the number of waking hours and sleeping hours the children would spend with their father under the proposed visitation schedule would remain the same: the Respondent previously had 78 days of visitation with a sleepover per year, and under the proposed schedule, he would enjoy 81 days with sleepover time. (Tr. Oct. 13, 2006, 27 *ll.* 4-9 & 82-83.)

and continuing access to both parents is at the core of the child's best interests…. [V]isitation quality, not the quantity, is the critical element in the child's development."); Marguerite C. Walter, Note, *Toward The Recognition And Enforcement Of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U.L. Rev. 2381, 2393 & n.53 (Dec. 2004) (citing observation that some studies suggest the most important element in well-being of child is stability of relationship to primary caregiver, while increased contact with nonresidential parent has not been shown to increase child's well-being).

This issue was squarely addressed by the Court of Appeals in *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996). In *Tropea*, the respondent in the companion case argued that the proposed move would eliminate his midweek visitation opportunity, reduce his ability to participate in his son's religious worship, and diminish the quality of the weekend visits he has with his son. While the Court was sympathetic, it reversed the Appellate Division, finding such arguments did not necessitate the prevention of relocation, because:

> [w]hile these losses are undoubtedly real and are certainly far from trivial, it cannot be said that they operated to deprive respondent of a meaningful opportunity to maintain a close relationship with his son.

Id. at 742; *see also Tropea* at 735 (permitting relocation in principle case despite respondent's contentions that he was a committed and involved noncustodial parent and that the proposed move would deprive him of meaningful contact with his son).

Accordingly, the appellate courts repeatedly have endorsed visitation schedules with even less visitation time for the non-custodial parent than the Petitioner has proposed here. For example, this Court in *Pardee v. Pardee*, 246 A.D.2d 522, 666 N.Y.S.2d 926 (2d Dep't 1998), permitted a mother to relocate with the parties' child to the State of Washington. Concurrently, the Court maximized visitation with the father so as not to interfere with the child's schooling and home life, consisting of seven consecutive weeks in the summer, nine days every other spring term, nine days every other Christmas, and nine days every other Easter recess. This result is much akin to, and less than, the amount of visitation that Mrs. F. has proposed for the Respondent here. In *Smith v. Hoover*, 24 A.D.3d 1096, 805 N.Y.S.2d 715 (3d Dep't 2005), the Third Department held that while it was proper for Family Court to give weight to the impact of the relocation on visitation, "its concerns were adequately met by petitioner's offer to make the child available for visitation whenever respondent could come to North Carolina, bring the child to New York at Christmas and during summers, and work with respondent to share transportation responsibilities." *Id.* at 1098. Again, the quality and the quantity of the visitation approved by the Appellate Division was less than that which the Respondent here would receive. In *Thompson v. Smith*, 277 A.D.2d 520, 715 N.Y.S.2d 505 (3d Dep't 2000), the Third Department permitted relocation to Maine, and the approved visitation schedule required the plaintiff to pay air travel costs for the child to be with the defendant on numerous

extended weekend visits throughout the year, extended summer and holiday visits, and provided for additional visitation at the father's option for one weekend per month in Maine.

Accordingly, the courts have stated that while relocation may effectively eliminate a noncustodial parent's midweek visitation and diminish the frequency of his weekend visits, such visitation schedules do not deprive the noncustodial parent of the opportunity to maintain a close relationship with the child. For example, this Court in *Miller v. Pipia*, 297 A.D.2d 362, 365, 746 N.Y.S.2d 729 (2d Dep't 2002), held that an award of custody to a parent relocating to the State of Florida "would not have a significant adverse effect on the child's relationship with the defendant." *See also Wisloh-Silverman v. Dono*, 39 A.D.3d 555, __ N.Y.S. __ (2d Dep't 2007) ("While the loss of weekday contact [upon relocating to Pennsylvania] is not insignificant, a visitation schedule could be devised that would allow for the continuation of the meaningful relationship between the father and son."). All departments of the Appellate Division concur.[20]

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[20] *See, e.g.*, *Heisler v. Heisler*, 30 A.D.3d 321, 321, 818 N.Y.S.2d 60 (1st Dep't 2006) (reversing denial of permission to relocate to Maryland in part because loss of midweek visitation "does not necessary deny the non-custodial parent meaningful access to the child"); *See also Winn v. Cutting*, 39 A.D.3d 1000, __ N.Y.S.2d __ (3d Dep't 2007) (permitting relocation to Pennsylvania despite frequent visitation with father and presence of extended family in New York); *Smith v. Hoover*, 24 A.D.3d 1096, 1098, 805 N.Y.S.2d 715 (3d Dep't 2005) (move to North Carolina permitted because Family Court's concerns regarding impact of the relocation on visitation "were adequately met by petitioner's offer to make the child available for visitation whenever respondent could come to North Carolina, bring the child to New York at Christmas and during summers, and work with respondent to share transportation responsibilities") (see *supra* text); *Thompson v. Smith*, 277 A.D.2d 520, 715 N.Y.S.2d 505 (3d Dep't 2000) (relocation to Maine permitted although it would effectively eliminate the defendant's midweek visitation and

In the underlying proceeding, Mrs. F. specifically requested that the Family Court fix a liberal visitation schedule with the Respondent at all reasonable and appropriate times. Pursuant to her request, the Respondent would continue to have approximately the same amount of time with the children, albeit with his parenting time in larger blocks of weeks or days, during February, Spring, and December recesses from school, as well as during summer vacation. (Petr.'s 10.) *Tropea* and its progeny hold that this type of visitation schedule, even with the prospect that midweek visitation will be jeopardized, does not necessarily deny the non-custodial parent meaningful access to the child. *Tropea* at 742. Thus, as in *Tropea*, both the quality and the quantity of the child's future contact with the Respondent could be preserved in the event of Mrs. F.'s relocation with the children.

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diminish the frequency of his weekend visits because it "[could]not say that Supreme Court's visitation schedule deprives defendant of the opportunity to maintain a close relationship with the child") (see *supra* text); *Gillard v. Gillard*, 241 A.D.2d 966, 967, 661 N.Y.S.2d 378 (4th Dep't 1997) (where respondent was actively involved in visitation and extracurricular activities, and child had close relationship with extended family members in New York, relocation to Vancouver, Canada permitted largely based upon mother's fiancé's significant business interests in Vancouver which would permit the petitioner to stop working and spend more time with the child).

D. Relocation is favored where it will provide both the children and the custodial parent economic, emotional and educational enhancements

In its Decision, the Family Court assumed without evidentiary basis that the children's current living arrangements will continue even if permission to relocate is denied. The Family Court repeatedly compared the proposed relocation in California to the children's situation in Merrick, New York as it existed at the time of the hearing. (Decision 13, 21, 25, 26.) In actuality, the children's lives will change significantly even within New York if relocation is not permitted. The evidence presented as to that change shows the proposed relocation would enhance both the children's lives and the Petitioner's life economically and emotionally.

1. The proposed relocation would provide the children with significant economic, emotional and educational enhancements

The proposed relocation would provide the children with significant economic, emotional and educational enhancements that the Family Court failed to consider. A proper analysis would compare relocation to California to what the children's and the Petitioner's lives will be like in the future in New York. The Family Court, however, inaptly compared the children's lives in California to their present circumstances in New York, which will not continue if relocation is denied. *See infra*. It was without any evidentiary basis that the Family Court assumed the Petitioner and the children would continue to live in their present circumstances in Merrick, New York at the conclusion of this litigation.

With regard to economic enhancement, the appellate courts have repeatedly recognized that finances present a particularly persuasive ground for permitting a proposed move. *See, e.g.*, *Thompson v. Smith*, 277 A.D.2d 520, 522, 715 N.Y.S.2d 505 (3d Dep't 2000) (permitting relocation to Maine, and observing that the move would "substantially improve plaintiff's economic situation by avoiding duplication of household expenses and enabling her, through Thompson's support, to pursue a [degree] so that she may become certified to teach."); *Stone v. Wyant*, 8 A.D.3d 1046, 1046, 778 N.Y.S.2d 816 (4th Dep't 2004) ("economic necessity… may present a particularly persuasive ground for permitting the proposed move"); *Cynthia L.C. v. James L.S.*, 30 A.D.3d 1085, 1085-86, 816 N.Y.S.2d 659 (4th Dep't 2006) (same).

Here, there is no basis in the record to support the Family Court's assumption that M. and C. could continue the "somewhat of a charmed life" (Decision 25) that they enjoyed in Merrick. First, it is unrealistic to expect Mr. F. to continue to support the Petitioner and her children in the Merrick home while he resides in California. The Petitioner testified that she could not expect Mr. F. to continue to support an expensive home in New York that he only infrequently visits. (Tr. Aug. 2, 2006, 28 *ll.* 9-18 & 62 *ll.* 16-18; Sep. 5, 2006, 10 *ll.* 24-25.)

Second, Mr. F. cannot sustain the children's present standard of living if relocation is not permitted, unless Mrs. F. returns to work, or moves with the children to a more modest house in order to continue as a full-time parent. (Tr.

Aug. 2, 2006, 27-29; Oct. 13, 2006, 45-47.) The Family Court acknowledged but failed to recognize the import of the evidence that the children are financially dependent upon Mr. F. to maintain their existing standard of living and the benefit of Mrs. F. as a full-time parent. Mr. R. provides only $12,000 per year in monetary child support. At the time of the hearing, he appeared poised to reduce this amount. He now claims to earn, and reports, only $25,000 per year after forming his own corporation.[21] (Petr.'s 11; Tr. Aug. 2, 2006, 14 & 65; Oct. 13, 2006, 8-9.) This reduced amount cannot maintain the children's present lifestyle under which they have thrived.

Mr. F.'s income, while indeed significant, is not without limitation. His finances cannot sustain the same level of support he provides for M. and C., (which includes their home in Merrick, and medical insurance, *inter alia*), while at the same time supporting his wife and children from his first marriage, and paying the new expenses of his own home and employment-related obligations in California which will be significant. Mr. F. earns one million dollars per year plus management incentive bonuses. In 2005, both his salary and bonuses totaled approximately $1.4 million gross income. (Resp.'s A; Tr. July 24, 2006, 11 *ll*. 20-

[21] Mr. R. testified that he is self-employed, has formed his own corporation, and had reduced income of $25,000 per year. The Family Court further erred in not permitting cross-examination of the Respondent as to his employment. (Tr. Sep. 27, 2006, 86-90; Oct. 13, 2006, 4-6.) The testimony elicited would have shed further light on the issue of support to the children, and as to the Respondent's credibility.

23; June 21, 2006, 24 *l.* 23 to 25 *l.* 3.)[22] While initially a considerable sum, after the payment of taxes, a further forty percent of his net income is paid to his former wife, Eileen F., pursuant to a written stipulation of settlement and judgment of divorce, as "permanent alimony." (Petr.'s 5, 10; Tr. June 21, 2006, 41-43.)

With his net income, Mr. F. also supports the three children from his prior marriage who are, to some extent, financially dependent upon him. He is still obligated to pay college and graduate school tuition and all living expenses for his youngest child. (Tr. June 21, 2006, 41.) His oldest son was unemployed at the time of the hearing and also is substantially supported by Mr. F. (Tr. June 21, 2006, 41.) Additionally, Mr. F. continues to pay for his first wife's and youngest son's medical, dental, and vision insurance (Petr.'s 5, 11-12; Tr. June 21, 2006, 25 *ll.* 5-6), and maintains life insurance in the amount of twice his salary for his first wife's benefit in accordance with the provisions of their divorce. (Petr.'s 5, 18.)

It is with the remaining income that Mr. F. voluntarily provides the Petitioner, M. and C. with significant monetary support, including medical benefits and the maintenance of the home in Merrick. (Tr. June 21, 2006, 54; July 24, 2006, 59 *ll.* 1-9.) Though they live in a "beautiful house on the water" in Merrick as described by the Family Court (Decision 25), the Family Court failed to acknowledge that it was purchased for $1.5 million in 2003 with a mortgage loan

[22] Mr. F. also accrued certain stock options, worth approximately $3 million to him before taxes and after being divided in half with his first wife. (Tr. July 24, 2006, 16-17 & 58.) Subsequent

of $1,050,000 (Resp.'s D), having monthly mortgage and real estate tax payments of $7,000 to $8,000, or approximately $90,000 per year. (Tr. July 24, 2006, 59 *ll.* 3-12.) Further, at the time of the hearing, Mr. F.'s California housing was paid for by a company relocation expense package, which temporarily enabled him to continue supporting the Petitioner and M. and C. at the same level. (Tr. June 21, 2006, 45 *ll.* 15-24; July 24, 2006, 61.) Upon the termination of the relocation package, Mr. F. is required to purchase a home of his own, in keeping with the expectations of his employment. The price range for comparable homes in California is three to four times the amount of the residence in Merrick. (Tr. July 24, 2006, 62.) There is thus no foundation for the Family Court's finding that the children's present standard of living can be sustained in New York while Mr. F. resides in California, unless Mrs. F. returns to work, or moves with the children to a more modest house to continue as a full-time parent. Accordingly, the children's lives would be significantly economically enhanced by permitting relocation.

Equally and perhaps more important are the emotional benefits that relocation would provide for the children. While the Family Court acknowledged that its Decision would place stress on the new family unit (Decision 7), it did not appropriately analyze this factor. The Court of Appeals in *Tropea* identified the significant value for children resultant from strengthening and stabilizing a new,

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testimony indicated that the options were at least partially exercised during the course of the litigation to be used toward Mr. F.'s purchase of a home in California. (Tr. Sep. 5, 2006, 6.)

postdivorce family unit. *Id.* at 739. Thus, for example, the Third Department approved a relocation to Maine in *Thompson v. Smith*, 277 A.D.2d 520, 715 N.Y.S.2d 505 (3d Dep't 2000), where the court observed that the plaintiff, her new husband, and the child had "developed a loving and mutually supportive relationship," because "the move will benefit the child insofar as it will strengthen and stabilize the new postdivorce family unit." *Id.* at 522 (citing *Tropea*).

To deny permission for M. and C. to relocate would further fragment their "home" to three locations, (*i.e.*, with their father, mother, and stepfather), rather than just two (*i.e.*, one home with both their mother and stepfather in California, and one home with their father in New York.) (Tr. Aug. 2, 2006, 29 *ll.* 5-10.) Further, as in *Tropea* and *Thompson*, M., C., Mrs. F. and Mr. F. have formed a loving and mutually supportive relationship since they began residing together in March 2004.

Also as in *Tropea* and *Thompson*, relocation would strengthen and stabilize the new postdivorce family unit. In the two years before Mr. F.'s employment required him to move to California, he enjoyed ordinary family activities with Mrs. F. and the children. They ate meals together and watched movies together. (Tr. Aug. 2, 2006, 31-32.) Mr. F. knew the children's friends (Tr. July 24, 2006, 79 *ll.* 6-9), and he did homework with M. and C. (Tr. Aug. 2, 2006, 31 & 9 *ll.* 18-21.) He occasionally brought the children to the school bus stop. If one child attended an event with Mrs. F., the other child was able to remain at home with Mr. F. (Tr.

Aug. 2, 2006, 31-32.) The Petitioner's mother, herself a daycare center director and owner, has observed how well he interacts with the children. For example, the children look forward to him coming home, and they show him what they are working on in school or on the computer. (Tr. July 24, 2006, 78-79.) The forensic evaluator also agreed that Mr. F. has "an appropriate understanding of the role of a step parent, as well as a sincere desire and achieved success in enjoying a positive relationship with M. and C." (Ct. Exh. 1, 14.)

In short, Mr. F. loves M. and C., and in return is a beloved stepfather. (Tr. June 21, 2006, 52 & 62 *ll.* 15-24; July 24, 2006, 43 *ll.* 6-8.) The children miss him now that he is in California, and call him to report good news, such as the grades on their school report cards. (Tr. July 24, 2006, 37 *ll.* 8-22 & 78-79.) As such, the Family Court erred in failing to weigh the emotional enhancement to M. and C. that would result from being part of an intact family unit with both their mother and her husband.

The educational benefits that relocation to California would provide are also substantial. Mrs. F. seeks to settle with the children in the Palos Verdes Peninsula area. Many Mattel, Inc. executives choose to live in this location because of the school system. (Tr. Aug. 2, 2006, 26 *ll.* 15-17.) The Petitioner and the children have visited the area, and Mrs. F. has researched the public school district, which she found to be excellent and highly rated. (Tr. Aug. 2, 2006, 26 *ll.* 12-24.) This evidence was not controverted by the Respondent. *Henion v. Henion*, 267 A.D.2d

805, 806, 699 N.Y.S.2d 815 (3d Dep't 1999) (affirming the granting of permission to relocate to the State of Virginia noting that the petitioner's evidence with respect to the school system in Charlottesville was uncontested).

In contrast, to remain a stay-at-home parent, the Petitioner would have to remove herself and the children to her parents' home within the Baldwin Schools district,[23] or to another more affordable home. (Tr. July, 24, 2006, 80 *l.* 19 to 81 *l.* 3; Oct. 13, 2006, 45-47.) Neither of these options is as beneficial to the children as relocation to the Palos Verdes Peninsula school district.

The forensic expert in making her recommendation admittedly did not consider the possibility that the Petitioner and her children are likely to move out of their home in Merrick if relocation is not permitted. (Tr. Oct. 5, 2006, 37 *ll.* 18-21.) When presented with this scenario at the hearing, however, she agreed that it would not be in the best interests of the children to remain in New York if it would involve a move to a lesser school district. (Tr. Oct. 5, 2006, 40 *ll.* 8-13.) The Family Court, nevertheless, appears to have relied upon Ms. Silverstein's opinion as to the children's comfort and contentment in the current routine (Decision 16); which the evidence demonstrated would not continue.

Accordingly, it would be in the children's best interests to permit relocation because their lives would be economically, educationally, and emotionally

[23] Mrs. F. and the children lived in her parents' home previously, after the parties herein were divorced, and before her marriage to Mr. F. (Tr. Oct. 13, 2006, 47.)

enhanced in California. In comparison, were permission to relocate denied, the children would remain in New York with diminished economical and emotional support from Mr. F., a further fragmented home, and lesser educational opportunity.

2. The proposed relocation would provide the Petitioner with significant economic and emotional enhancements

The Family Court recognized that its decision "could be devastating to the petitioner-mother and her current marriage," and that its Decision "is clearly not in the petitioner's 'best interests.'" (Decision 26.) The Family Court's denial of leave to relocate despite such recognition manifestly disregarded the body of law that considers the Petitioner's best interests to be in the best interests of the children. The evidence demonstrated that the Petitioner's life would be significantly enhanced economically and emotionally by the relocation, which New York law considers to be a component of the children's own best interests.

In *Tropea*, the Court of Appeals instructed that the demands of a second marriage may be valid motives for relocation that should not be summarily rejected. *Id.* at 739. Thus, "[i]n some cases, the child's interests might be better served by fashioning visitation plans that maximize the noncustodial parent's opportunity to maintain a positive nurturing relationship while enabling the

custodial parent, who has the primary child-rearing responsibility, to go forward with his or her life." *Id.* at 740.

Consequently, the courts often permit relocation so as to allow a primary caretaker to reside with his or her spouse. In *Vega v. Pollack*, 21 A.D.3d 495, 497, 800 N.Y.S.2d 442 (2d Dep't 2005), this Court permitted relocation to Virginia, where the petitioner's husband resided. In *Gillard v. Gillard*, 241 A.D.2d 966, 661 N.Y.S.2d 378 (4th Dep't 1997), the Fourth Department permitted the petitioner to relocate with the parties' child to Vancouver, Canada, to enable her to live with her fiancé. Citing *Tropea*, the *Gillard* Court held that the child's interests would be better served by allowing the custodial parent to go forward with her life. *Id.* at 968-69. The Third Department held likewise in *Thompson v. Smith*, 277 A.D.2d 520, 522, 715 N.Y.S.2d 505 (3d Dep't 2000). There, the court held that relocation to Maine, where the petitioner's fiancé had obtained employment, would strengthen and stabilize the new postdivorce family unit. Such decisions reflect the overall trend in the United States to permit relocation, in keeping with social science research suggesting the most important element in the well-being of a child is stability of the relationship to the primary caregiver. *See* Marguerite C. Walter, Note, *Toward The Recognition And Enforcement Of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U.L. Rev. 2381, 2393 (Dec. 2004).

Similarly, M. and C.'s best interests would be better served by relocation because relocation would allow Mrs. F. to go forward with her life. If permission

to relocate is denied, it assuredly will be detrimental to her marriage. At the time of the hearing, her husband already resided in an apartment in California, and only returned to New York as work permitted. (Tr. June 21, 2006, 60 *ll.* 5-8.) This ranged from one to three weekends per month (Tr. June 21, 2006, 60-62), as the company was affording him leniency because of the underlying proceedings. (*E.g.*, Tr. July 25, 2006, 59-60.) While Mr. F. is in California, the Petitioner is without a partner to share home responsibilities and to assist with caring for the children. (Tr. Aug. 2, 2006, 32; Oct. 13, 2006, 45-47.) The Petitioner's emotional enhancements upon relocation cannot reasonably be disputed. The Family Court, however, failed to consider the impact of this result on the children as directed by *Tropea*.[24] Accordingly, the Family Court did not appropriately weigh the factors comprising the best interests of the children.

[24] In this regard, the Family Court further erred in that it did not permit questioning of the expert as to her opinion on the impact if as a result of the denial of relocation, the Petitioner's marriage fails. (Tr. Oct. 5, 2006, 40 *ll.* 18 *et seq.*).

E. Where it is feasible to preserve the relationship between the noncustodial parent and the children through visitation arrangements and frequent contact, relocation is permitted

The Family Court misapprehended Mrs. F.'s ability to preserve the relationship between the children and the Respondent, and unduly relied on the forensic expert's erroneous factual conclusions in this regard. The evidence shows that as she has done in the past, Mrs. F. will continue to foster the Respondent's visitation with the children and provide the Respondent with liberal access to them.

This Court in *Vega v. Pollack*, 21 A.D.3d 495, 800 N.Y.S.2d 442 (2d Dep't 2005), permitted relocation to the State of Virginia on analogous facts. There, the Court acknowledged that the child had a loving relationship with the father and extended family in New York, and that visitation with the father would suffer from the long commute to Virginia. *Id.*, 21 A.D.3d at 497. Concomitantly, however, the mother had remarried and the mother's husband stated that he would actively support the father's efforts to maintain his relationship with the child. *Id.* Further, the husband was able to provide a comfortable home and standard of living for the child, and the child expressed great affection for her stepfather and her stepsiblings. As such, this Court reversed the Queens County Family Court to allow the relocation. In *Wisloh-Silverman v. Dono*, 39 A.D.3d 555, __ N.Y.S. __ (2d Dep't 2007) this Court again reversed the Family Court to permit a relocation, this time to Pennsylvania, because notwithstanding some difficulties in the past, the record demonstrated that the mother consistently adhered to the visitation

schedule with the father. Similarly in *Henion v. Henion*, 267 A.D.2d 805, 806-07, 699 N.Y.S.2d 815 (3d Dep't 1999), also affirming a permitted relocation to Virginia, the Third Department determined that the mother's "flexible attitude" toward extended periods of visitation, and her willingness to bear the expenses associated with the transportation of the children, would encourage the continuation of the meaningful relationship developed between respondent and his children.

The evidence has shown that as in *Vega, Wisloh-Silverman* and *Henion*, Mrs. F. also maintains this "flexible attitude" toward extended periods of visitation (Tr. Oct. 5, 2006, 20-21), and also has demonstrated her willingness to encourage a meaningful relationship between the Respondent and M. and C.[25] Of paramount significance, Mrs. F. has consistently facilitated visitation between the children and the Respondent, and the record is devoid of any indication that Mrs. F. ever interfered with the Respondent's visitation. Even when Mrs. F. had justifiable reason to deny visitation after an incident of Respondent's violence against her husband and threat of violence against herself, and when two orders of protection

[25] In contrast, the Respondent has historically denied the Petitioner's requests for periods of extended visitation. *See* Tr. Sep. 5, 2006, 67-69; Sep. 27, 2006, 69-72 (requiring Petitioner to obtain court order before she could vacation with the children to California in August 2006 and 2004); *see also* Tr. July 24, 2006, 75; Sep. 5, 2006, 63-64 (requiring police involvement before Respondent would return the children to Petitioner at the end of his scheduled visitation). The Court-appointed forensic expert also agreed that the Respondent would have difficulty relinquishing visitation rights so as to allow the Petitioner to visit her husband with the children. (Tr. Oct. 5, 2006, 20.) This too will be to the detriment of the children and their mother if relocation is not permitted.

were in force against the Respondent (*infra* Part II.F), Mrs. F. encouraged and fostered continued contact between the children and their father, and continued to enable visitation. (Tr. Sep. 27, 2006, 39-40.)

Further, both Mr. F. and the Petitioner have testified that they will pay for first class air transportation for the children, and that the Petitioner will accompany the children on all travel to facilitate visitation.[26] The *Wisloh-Silverman* Court specifically stated that a petitioner's willingness to bear the burden of travel demonstrates a desire to encourage a relationship between a child and a noncustodial parent. *Id.*

Mrs. F. will also continue to provide liberal telephone access to the Respondent if she is permitted to relocate. (Tr. Aug. 2, 2006, 37.) Such means of enhancing a long-distance father-child relationship resulting from relocation previously have been recognized. *See, e.g.*, *Lazarevic v. Fogelquist*, 175 Misc. 2d 343, 668 N.Y.S.2d 320 (Sup. Ct. N.Y. County 1997) (permitting relocation to Saudi Arabia notwithstanding the child's good relationship with his father and ordering systems for communication by telephone, Internet and fax and dedicated

[26] If relocation is permitted, the Petitioner will accompany the children in their travels to New York as she would not let them travel alone, and would wish to visit with her own family in New York. (Tr. Aug. 2, 2006, 25-26.) Further, they would travel in first class, which would allow the children to board and deplane ahead of crowds, and afford them in-flight comforts and entertainment. (Tr. Aug. 2, 2006, 25-26.) The Second Department and other courts have recognized the ability of children to travel by air for visitation. *See, e.g.*, *Thompson v. Smith*, 277 A.D.2d 520, 715 N.Y.S.2d 505 (3d Dep't 2000); *Henderson v. Henderson*, 20 A.D.3d 421, 798 N.Y.S.2d 128 (2d Dep't 2005). Furthermore, the Petitioner also testified to her hope that the

phone lines installed); *see also* Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave Of Communication Between Children And Non-Custodial Parents In Relocation Cases*, 9 Cardozo Women's L.J. 567, 584-88 (2003) (reviewing cases).

Finally, Mrs. F.'s willingness to foster the children's relationship with the Respondent is also evidenced by her proposal to confer jurisdiction upon the courts of the State of New York under the Uniform Child Custody Jurisdiction And Enforcement Act, *N.Y. Dom. Rel. Law* §§ 75 to 78-a (Consol. 2007), if relocation were to be permitted. (Tr. Oct. 13, 2006, 27-28.)[27]

The forensic expert's speculations as to Mrs. F.'s ability to enable future visitation, however, were inconsistent and improperly relied upon by the Family Court. (Decision 17.) While Ms. Silverstein stated that in their teenage years the children would likely want to engage in their own social activities, and may not wish to visit with their father (Ct. Exh. 1, 9; Tr. Sep. 20, 2006, 28-29; Sep. 27, 2006, 18-19), this analysis is without foundation other than the generalized concept that teenagers often rebel against parental authority, and is not supported by the record. To the contrary, Ms. Silverstein also testified that Mrs. F. would likely abide by visitation ordered by the Court (Tr. Oct. 5, 2006, 58; Sep. 5, 2006, 45),

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Respondent would visit the children in California if the relocation were permitted. (Tr. Aug. 2, 2006, 25 *ll.* 4-6.)

[27] For Mr. F.'s part, having been divorced with children of his own, he is sympathetic to the Respondent's situation and would assist in facilitating visitation. (Tr. June 21, 2006, 36 *ll.* 10-16 & 67-68; Ct. Exh. 1, 13.)

and confirmed that there was not one indication reflected in her report that Mrs. F. ever stood in the way of Mr. R.'s relationship with the children. (Tr. Oct. 5, 2006, 29-30.) Additionally, the weakness of Ms. Silverstein's suppositions is exemplified by her testimony that she would have considered recommending relocation if it were only as far as Virginia. (Tr. Sep. 27, 2006, 13 *ll.* 11-21.) Because Mrs. F. has the ability to fund travel and accompany the children from California, the proposed relocation to California for these parties does not significantly differ from the *Vega* or *Henion* relocations, or from the hypothetical relocation to Virginia that Ms. Silverstein may have been inclined to recommend.

In light of the Petitioner's success in fostering visitation and a positive relationship between her children and their father thus far, combined with her willingness to bear the cost of future visitation and to confer jurisdiction upon the courts of the state of New York, this Court should recognize that it will be quite feasible to preserve the children's relationship with the Respondent through visitation and real-time contact from California.

F. Relocation should be granted where the distance will lessen the discord between the parties and minimize the risk of domestic violence

While the Family Court did not find the Respondent's past act of violence to be a consideration under *Tropea* (Decision 18-19), this Court has held that in considering the best interests of the children, the trial court is obligated to consider domestic violence. *Finkbeiner v. Finkbeiner*, 270 A.D.2d 417, 705 N.Y.S.2d 268 (2d Dep't 2000). Additionally, the Court of Appeals in *Tropea* also encouraged weighing the benefit to children of reduced quarreling between parents afforded by relocation of one party. *Id.* 87 at 735.[28] Both are significant inquiries here. The Family Court erred because it did not afford due credence to the incident of domestic violence and the discord between the parties due to the Respondent's continuing anger. Relocation would minimize concerns in this regard.

In *Tabernuro v. Jones*, 23 A.D.3d 667, 807 N.Y.S.2d 606 (2d Dep't 2005), this Court affirmed an order permitting relocation to Florida where second degree harassment and orders of protection were involved. *See also Sheridan v. Sheridan*, 204 A.D.2d 771, 611 N.Y.S.2d 688 (3d Dep't 1994) (where court permitted mother's relocation with infant issue to Puerto Rico in part because the record included circumstances of domestic violence); *Smith v. Hoover*, 24 A.D.3d 1096, 805 N.Y.S.2d 715 (3d Dep't 2005) (involving a proposed move to North Carolina, the parties' relationship was tumultuous, and also like the parties' relationship

here, involved orders of protection and an inability on the respondent's part to control his anger). Analogous concerns are present here.

In August 2004, without any provocation (Tr. Sep. 27, 2006, 75-76), the Respondent punched Mr. F. in the face, causing injury requiring medical attention. (Tr. June 21, 2006, 36; Aug. 2, 2006, 16 *ll.* 14-19; Sep. 5, 2006, 62 *ll.* 6-13; Sep. 27, 2006, 77 *ll.* 13-14 (Respondent stating, "I got him pretty good.")) Worse, the incident was either in the presence of, or in close proximity to M. and C. (Tr. June 21, 2006, 34-35; Aug. 2, 2006, 16; Sep. 27, 2006, 34 *ll.* 8-13 & 37-38.) The Respondent also has threatened Mrs. F., telling her, "You have no idea what's going to happen to you now," (Tr. Sep. 5, 2006, 63 *ll.* 19-21), and after striking her husband, telling her "You're next." (Petr.'s 8; Tr. Aug. 2, 2006, 16 *ll.* 7-9.) As a result of the Respondent's unprovoked violence, Mr. F. received an Order of Protection from the District Court (Tr. June 21, 2006, 35 *ll.* 3-18; Aug. 2, 2006, 17 *ll.* 11-12), and Mrs. F. received an Order of Protection from the Family Court upon the Respondent's default.[29] (Petr.'s 8; Tr. Sep. 27, 2006, 36.)

Since the incident, the Respondent has expressed no remorse for the act (Tr. Sep. 27, 2006, 78 *l.* 9 *et seq.*; Oct. 5, 2006, 26 *ll.* 6-7), and the Family Court's basis

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[28] Furthermore, the incident is relevant under *Tropea's* catch-all provision pursuant to which the Court may consider other factors that may be relevant to the determination. *Id.* at 740-41.

[29] The Respondent's default was the result of his failure to appear for the hearing. There can be no doubt that Mr. R. knew of the Family Court proceedings because he retained counsel and brought a motion to dismiss the Petition. (Tr. Aug. 2, 2006, 17 *ll.* 18-22; Petr.'s 8.)

for finding the Respondent contrite are the Respondent's own self-serving statements that he was sorry. (Decision 18.) The forensic examiner reported that the Respondent is still angry (Tr. Oct. 5, 2006, 22 *ll.* 1-7 & 36), and that although the Respondent knew the act was wrong, "he really wasn't sorry about it." (Tr. Oct. 5, 2006, 26 *ll.* 6-7.) That the Respondent harbors anger against the Petitioner (Tr. Oct. 5, 2006, 22 *ll.* 1-7), and has exhibited his anger in the presence of the children bears consideration in reviewing the best interests of the children. (Tr. Sep. 5, 2006, 12; Petr.'s 8.)

Moreover, the Court in *Tropea* approved of the benefit to children of reduced quarreling between parents afforded by relocation of one party, not an insignificant factor in the instant case. *Id.* at 735 (citing lower court finding that "[w]ith respect to the best-interests question, the court stated that the parents' separation from each other would reduce the bickering that was causing the child difficulty and would enable the child to have the healthy peer relationships that he needed."). Each time the Respondent was in the presence of the Petitioner or spoke to her by telephone in the three years prior to the commencement of these proceedings, he threatened her. (Tr. Sep. 5, 2006, 63-65.)

Ms. Silverstein indicated that in her professional opinion, parallel parenting is possible where there is no acrimony and minimal contact so long as basic information is communicated; and is common where one person is married or both people have remarried, and they frankly do not want to communicate. In other

words, Ms. Silverstein explained that simple emails, and minimum communication make parallel parenting possible. (Tr. Sep. 27, 2006, 20-21.) Oddly, however, though the parties have a demonstrated ability to parallel parent through electronic communication in New York, Ms. Silverstein dismissed the notion that it would be possible from California. At the time of the hearing, the parties communicated via text messaging. (Tr. Sep. 5, 2006, 64.) In this manner, Mrs. F. has kept the Respondent apprised of the children's activities, and the parties have been able to coordinate visitation. Additionally, the girls themselves can communicate directly with the Respondent. M. and C. speak to the Respondent each night on the telephone, a routine the Respondent instituted when the underlying proceeding commenced. (Tr. Aug. 2, 2006, 8 *ll.* 14-18.) Moreover, Mrs. F. has spoken to Mr. R. by telephone to discuss the proposed move, before they reached an impasse and the instant litigation was commenced. (Tr. Aug. 2, 2006, 35-36.) If permitted to relocate with the children to California, Mrs. F. will continue to foster visitation by electronic and telephonic contact, and with less acrimony and fewer opportunities for animosity to be displayed in the presence of the children. The Family Court underestimated this legally significant benefit to the proposed relocation.

III. CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court find the Family Court erred in denying her petition for relocation of the children, grant permission for the Petitioner to relocate with the children to California, and/or remand the case to the Family Court for further proceedings.

Dated: June 21, 2007
Baldwin, New York

Respectfully submitted,

Attorney Signature Pursuant to
Sec. 130-1.1-a of the Rules of
The Chief Admin. (22 NYCRR)

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