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Courts Cracking Down on Bad Faith Negotiation of Non-Relocation Clause

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Physical custody of the children is often one of the most contentious issues that must be resolved during a divorce. The desire to be named the primary custodial parent is sometimes so great, unscrupulous litigants may negotiate the Marital Settlement Agreement ("MSA") in bad faith and make false representations to the other parent in order to convince them to concede primary custody of the children. Along these same lines, a parent may only be willing to concede primary custody of the children under the condition that the other parent not relocate the children to a distant geographical location that makes regular visitation impracticable. Accordingly, a non-relocation clause will be included in the MSA.

Even if a non-relocation clause is included in the MSA, our courts realize that "life happens," and the primary custodial parent may very well need to relocate with the children despite the agreement (i.e. they need to move to a different state for a new job). When an application to relocate by the primary custodian is made to the court, the court will generally permit the move to occur upon a showing by the primary custodial parent that: (1) there is a good faith reason for the move, and (2) the move will not be inimical to the child's interest. Baures v. Lewis, 167 N.J. 116-17 (2001). However, if there is no good faith reason for the move, or if the non-relocation clause was not negotiated in good faith, the application must survive greater scrutiny, and the court must determine whether permitting the move would actually be in the child's best interest (as opposed to simply not being inimical to the child's interest). The former is a much easier showing for the primary custodial parent to make, and therefore there is a tremendous incentive to do whatever is necessary to be awarded primary custody of the children, and then just ask the court to permit the move later on, even if the parent secretly knew the relocation would be necessary and likely to occur all along during the negotiation of the MSA. This is exactly what happened in the recent unpublished case of Bisbing v. Bisbing.

In Bisbing, the Father agreed to let the Mother have primary custody of the children under the conditions that he have a great deal of regular visitation time with the children, and also that a non-relocation clause be included in the MSA – the Mother agreed to these conditions, and was granted primary custody of the children pursuant to the parties' agreement. Just nine months after the Final Judgment of Divorce was issued, the Mother filed, and the court granted, a motion seeking to relocate the children to a far-away state so she could live with a man who would eventually become her new husband. Notwithstanding some very suspicious circumstances which would cause many to think the Mother planned on relocating all along, the trial court did not hold a plenary hearing[1] to determine whether the Mother negotiated the MSA in bad faith, and simply opted to apply the lenient analysis set forth in Baures.

On appeal, the Appellate Division reversed and remanded the matter for a plenary hearing, so a determination could be made as to whether the Mother had negotiated the MSA in bad faith, and set forth the analysis courts should use when an accusation of bad faith MSA negotiation is made. The Bisbing Court explained that the lower court must first determine whether the primary custodial parent negotiated the non-relocation clause of the MSA in bad faith. If so, a "best interests of the child" analysis must be conducted. Second, if bad faith is not demonstrated, the trial court must then consider whether the parent proved a substantial unanticipated change in circumstances warranting avoidance of the agreed-upon non-relocation provision and simultaneously necessitating a Baures analysis. If the MSA was negotiated in good faith, yet the parent fails to satisfy her burden of proving a substantial unanticipated change in circumstances, the court must apply the same "best interests" analysis as required in the first step. Only if the noncustodial parent is unable to demonstrate that the custodial parent negotiated the MSA in bad faith, and the custodial parent is able to prove a substantial unanticipated change in circumstances occurred, should the custodial parent be accorded the benefit of the Baures analysis.

The Appellate Division's holding is significant, as it provides valuable instruction on how trial courts should address colorable accusations of bad faith negotiations of MSAs, particularly non-relocation clauses. It is also demonstrative that this issue is now something our courts are on the lookout for, and will not tolerate. While it may be tempting to do so, divorce litigants should not attempt to game the system and trick their ex-spouse into giving up primary custody of their children based on bogus promises not to move out of the state.

[1] A plenary hearing is necessary when one party makes a motion and the court needs additional facts and information beyond what the parties have provided in their pleadings to make an informed decision.