NFLR
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COBRA

By Shawn Meador, Woodburn, Wedge & Jeppson

INTRODUCTION

On April 7, 1986, President Reagan signed into law the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly known as COBRA. Although it contains numerous other provisions, the health care continuation requirements of the act are now generally referred to as COBRA. Reference to COBRA herein generally will be to those requirements of the Act. The purpose of this article is to address the rights COBRA affords parties to a marital dissolution proceeding and the mechanics of exercising those rights.

The basic purpose of COBRA is to afford a person who was entitled to group health care benefits provided by an employer, the opportunity to continue receiving those benefits for up to three years following the occurrence of an event, including a divorce, that would otherwise terminate the person's right to receive the group benefits. Secondarily, COBRA prohibits the group health care plan provider from discriminating between regular beneficiaries and those who are beneficiaries by virtue of a COBRA election.

INTERNAL REVENUE CODE AND REGULATIONS

The health care continuation requirements of COBRA are codified in the Internal Revenue Code. Originally, they were codified at 26 USC §162(k). Following their most recent amendment as part of the Revenue Reconciliation Act of 1989, those requirements of COBRA have been relocated to 26 USC §4980B.

In 1987, the Internal Revenue Service released proposed regulations to implement the provisions of COBRA.[1] Those proposed regulations take the form of a series of questions and answers as well as examples illustrating the answers. While helpful, it is important to keep in mind that COBRA has been amended in several important respects since the regulations were proposed.

Since it is a tax law, COBRA is enforced by means of a tax penalty. As originally enacted, COBRA prohibited an employer who failed to comply with its provisions from deducting any contributions or other expenses incurred in connection with its group health plan.[2] Now, an employer that fails to comply is subject to a tax of $100 per day for any period it fails to comply; with a minimum tax of $2,500 and a maximum tax up to $2,000,000.[3] COBRA does not provide a specific remedy for a beneficiary who has been wrongfully denied continued health care benefits. Presumably, the substantial tax penalties are sufficient, in most cases, to

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CASE REVIEW

D'ONOFRIO GUIDELINES APPLIED IN RELOCATION CASES

In a case of first impression, the Nevada Supreme Court interpreted NRS 125A.350, Nevada's "Anti-Removal" statute. *Schwartz v. Schwartz*, Nev. Adv. Op. #21010, June 6, 1991. In s0 doing, the Court approved the guidelines set forth in *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Supr.Ct. Ch. Div. 1976), one of the leading cases on removal of children from the jurisdiction, which case has been the standard for removal issues applied by numerous district courts of this and other states. NRS 125A.350 became effective in 1987 and provides:

> If custody has been established and the custodial parent or a parent having joint custody intends to move his residence to a place outside of this state and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the other parent to move the child from the state. If the noncustodial parent or other parent having joint custody refuses to give that consent, the parent planning the move shall, before he leaves the state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor

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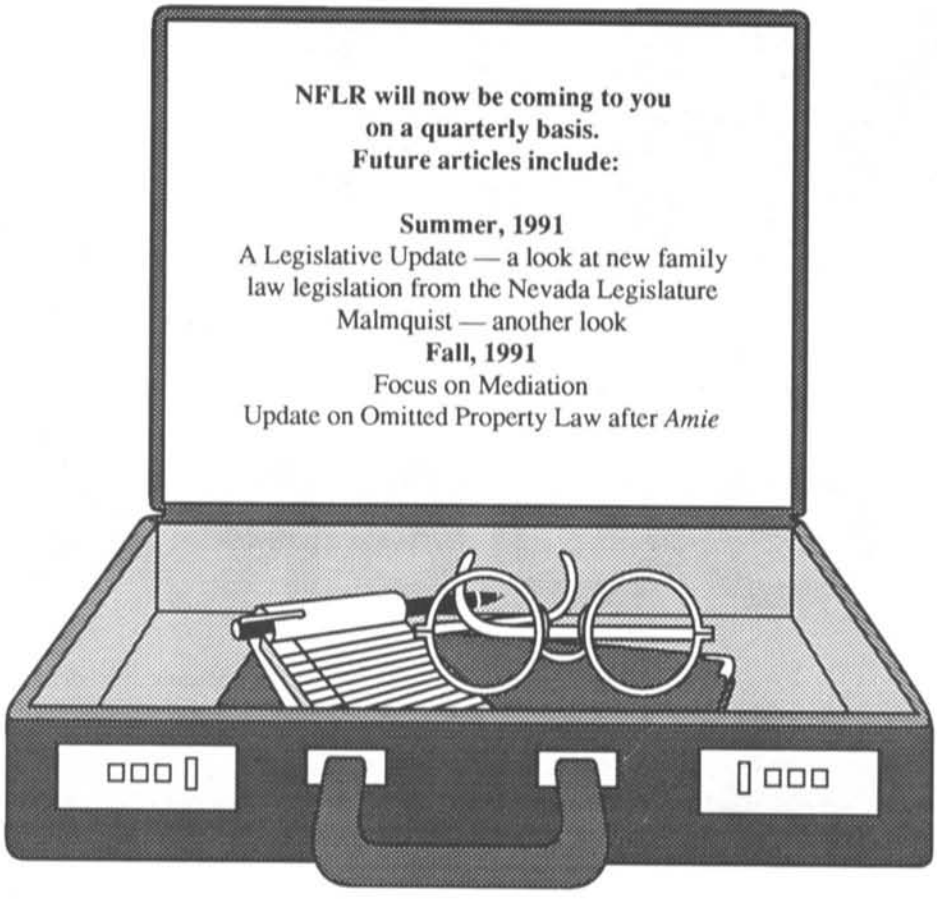

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GROUP HEALTH PLANS

COBRA applies to group health plans maintained by employers who provide medical care to employees, former employees or their families. The definition of a group health plan is very broad and covers plans that provide such benefits through insurance, reimbursement, HMO's, cafeteria plans and other flexible arrangements. [4] Similarly, medical care is broadly covered, including diagnosis, cure, treatment and prevention of disease.[5] COBRA applies to health care plans as of the first day of the plan year that begins after January 1, 1987, or, in the case of a plan under a collective bargaining agreement, the date on which the agreement relating to the plan terminates.[6] Therefore, it is possible that there are some union plans that are not yet covered.

Three categories of group health care plans are not covered by COBRA: small-employer plans; government plans; and church plans.[7] A small-employer plan is a plan maintained by one or more employers each of whom normally employed fewer than 20 employees on a typical day during the preceding year. When a plan is maintained by more than one employer and any employer in the group has more than 20 employees, the entire plan is covered by COBRA.[8]

Governmental and church plans are defined in section 414 of the Internal Revenue Code. [9] Generally, a governmental plan is one established by a federal, state or local governmental authority, or agency thereof. However, notwithstanding the fact that section 10001 of COBRA which is codified in the Internal Revenue Code specifically excludes all governmental plans; section 10003 of COBRA which was enacted as part of the Public Health Service Act, contains provisions which are virtually identical to the COBRA provisions discussed herein and applies to any group health plan maintained by a state or political subdivision or agency of a state which receives funding under the Public Health Service Act. [10]

QUALIFIED BENEFICIARIES

The health care continuation benefits of COBRA are available to any "qualified beneficiary."[11] A qualified beneficiary is any person who, on the day before the event giving rise to the COBRA rights, was the spouse or dependent of a "covered employee."[12] A covered employee is an individual who was provided coverage under a group health plan by virtue of the performance of services for the party maintaining the plan.[13] The definition of covered employee, therefore, is broad enough to include agents, independent contractors and directors as well as common law employees, so long as they are included and participate in the plan.[14] Persons who are beneficiaries of a plan solely by virtue of another person's COBRA election are not qualified beneficiaries entitled to make their own COBRA election.[15]

It is the actual decree of divorce or legal separation that is the qualifying event, not the parties' physical separation. It is not clear whether an annulment would constitute a qualifying event under the language of the statute.

QUALIFYING EVENTS

COBRA affords qualified beneficiaries the right to elect to continue their group health care coverage upon the happening of certain events, which would otherwise result in the termination of the qualified beneficiaries' rights to receive the group benefits. These events are known as "qualifying events." [16] There are six such events, including: death of a covered employee; termination or reduction of a covered employee's hours (except for gross misconduct); divorce or legal separation; a covered employee's entitlement to medicare; dependent children reaching the age where they are no longer dependents under the terms of the plan; and, the employer's bankruptcy.[17]

It is the actual decree of divorce or legal separation that is the qualifying event, not the parties' physical separation. It is not clear whether an annulment would constitute a qualifying event under the language of the statute.

TERMINATION OF CONTINUED BENEFITS

Following most qualifying events, including a divorce, COBRA allows the qualified beneficiary to obtain group coverage for up to 36 months.[18] If the qualifying event is the covered employee's termination or reduction of hours, COBRA affords group coverage for up to 18 months. [19]

It is possible to have multiple qualifying events that may extend the benefits, but for no longer than 36 months. For example, a husband is a covered employee and his wife is a qualified beneficiary. Husband loses his job entitling the parties to 18 months of continued group benefits. During the 18 month period, the parties divorce. Wife, as the qualified beneficiary, but not husband, may continue to receive the group benefits for up to 36 months from the date of the husband's termination, which originally gave rise to the parties' COBRA rights.[20]

The COBRA requirements of 18 and 36 months' continued coverage are minimum requirements.[21] Therefore, it is theoretically possible that a collective bargaining or other group plan could provide for benefits that are greater than those mandated by COBRA.

There are four events which will result in the termination of the continued benefits before the expiration of the 18 or 36 month period. The first is when the employer, who maintains the plan, no longer provides the group health care benefits to its regular employees.[22] As noted above, COBRA prohibits discrimination against those who are beneficiaries solely by virtue of a COBRA election. On the other hand, the COBRA beneficiaries are not entitled to greater rights than regular beneficiaries.

The extended benefits provided by COBRA may also be terminated if the qualified beneficiary obtains health care coverage under another group plan.[23] As originally enacted, that provision worked a hardship when the qualified beneficiary had a pre-existing condition which was covered by the original group plan but which was excluded under the replacement plan. Recent amendments have resolved that problem by providing that the replacement plan will not terminate rights under the first plan if the

In this day and age of ever increasing health care costs and insurance premiums, COBRA affords qualified beneficiaries significant rights which cannot be ignored in a divorce proceeding. Often the group benefits will be more comprehensive and less expensive than private insurance. The continued benefits are particularly important if the qualified beneficiary has a pre-existing condition which would preclude coverage under a new policy.

new plan excludes pre-existing conditions.[24]

COBRA extended benefits may be terminated upon the qualified beneficiaries becoming entitled to receive medicare benefits.[25]

Finally, the COBRA extended benefits may be terminated if the qualified beneficiary fails to pay the premium on a timely basis.[26]

PREMIUMS

While the employer who maintains the group health plan must make the benefits available to qualified beneficiaries, the employer is not required to pay the premiums for the beneficiary. The qualified beneficiary may be required to pay a premium not to exceed 102% of the premium the employer actually pays for the group coverage.[27] While group coverage generally may be less expensive than obtaining new coverage, that is not always the case. There may also be occasions when the qualified beneficiary can make do with less comprehensive benefits. Therefore, it is important to determine as soon as possible what benefits the group plan provides, and how much the premium will be, so that your client can shop around and determine whether to elect the COBRA coverage.

The qualified beneficiary has the right to elect to make monthly premium payments rather than an annual lump sum or other periodic premium payment.[28] A payment generally is considered timely if it is made within 30 days after the date it is due or within such longer period allowed under the plan.[29] The employer cannot require the qualified beneficiary to make a premium payment until 45 days after the COBRA election has been made. [30]

COVERAGE AVAILABLE

In accord with the Act's anti-discrimination purpose, the coverage offered to a qualified beneficiary must be identical to the coverage offered beneficiaries generally.[31] If the group plan offers a variety of coverage options, each qualified beneficiary is entitled to chose which option to receive.[32]

If, during the period of continued coverage the group plan coverage is modified, the modification must apply to those beneficiaries who have made a COBRA election.[33] If the group plan offers beneficiaries the right to convert to an individual plan, that conversion option must also be extended to beneficiaries whose continued coverage under COBRA has expired.[34]

The employer cannot condition continuation coverage on evidence of the qualified beneficiaries' insurability on the date of the qualifying event just as it could not terminate a regular beneficiary's health care coverage due to a loss of insurability.

In the case of a divorce, if the plan permits dependents to be covered, the qualified beneficiary spouse must determine whether to elect to cover the dependents on the COBRA continuation coverage or the covered employee's plan. The choice, of course, will effect the monthly premium.[36] The choice will also affect the rights of dependent children and potential dependent beneficiaries. If the dependent children receive coverage under the COBRA continuation, their coverage will expire 36 months after the divorce, regardless of their age. They will not be entitled to make their own COBRA election, upon reaching the age where they are no longer dependent under the terms of the plan. On the other hand, if they remain dependents under the covered employee's group benefits, they will be entitled to make their own COBRA election when they become no longer dependent, so long as the covered employee remains employed throughout that period. However, if the qualified beneficiary spouse elects family coverage, new family members, such as new spouses or after-born children, may obtain coverage under the group policy. These add-on beneficiaries would not be entitled to coverage if the qualified beneficiary spouse does not elect family coverage.[37]

NOTICE AND ELECTION

COBRA contains a comprehensive scheme for providing notice to affected parties and for making a COBRA election.[38] At the original commencement of the group health care coverage, the administrator of the plan is required to notify the covered employee and his or her spouse of their rights under COBRA.[39] The covered employee, or qualified beneficiary spouse, must notify the administrator of the divorce or legal separation within 60 days after the decree is entered.[40] The qualified beneficiary who is interested in receiving COBRA benefits, should not rely on the ex-spouse to notify the Administrator of the qualifying event, particularly if the divorce has been acrimonious. It is probably safest for the qualified beneficiary's counsel to contact the administrator during the course of the divorce proceedings to advise the administrator of the proceeding, to obtain information regarding the plan benefits and the premium amount, and to request that all notices be sent to counsel.

Within 14 days after the Administrator receives notice of the divorce, or other qualifying event, it must notify the qualified beneficiary of his or her rights under COBRA.[41] The notice should enclose a form for making the election. The qualified beneficiary must make a COBRA election, if at all, within the "election period." The election period begins on the date on which coverage would terminate by reason of the qualifying event. It ends 60 days after the date on which coverage would otherwise expire, or 60 days

after the qualified beneficiary receives the Administrator's notice of rights, whichever is later.[42]

The combination of the notice and election periods and the qualified beneficiaries right to delay payment for 45 days after the election is made, provide a substantial planning opportunity which, in effect, may allow the qualified beneficiary to obtain insurance retroactively. For example, the qualified beneficiary may be able to purchase or otherwise obtain new insurance at a lower cost. However, the new policy has a waiting period or pre-existing condition exclusion. The qualified beneficiary may buy time under the original group plan by timing the notices, election and payment properly. The qualified beneficiary would wait the entire 60 days to give notice of the divorce, make the election on the last day possible and then pay the premium 45 days thereafter. If no pre-existing condition or other problem arises that would make the new policy ineffective, the qualified beneficiary simply cancels the COBRA election and fails to make the premium payment. However, if a medical problem has arisen, the qualified beneficiary goes forward with the COBRA election and coverage by making the premium payments. The same would be true if the qualified beneficiary decides to go without insurance but a problem arises during the notice and election period. By giving notice, making the election, and if necessary paying the premium, the qualified beneficiary may obtain insurance after the illness or injury has occurred.[43]

SUMMARY

In this day and age of ever increasing health care costs and insurance premiums, COBRA affords qualified beneficiaries significant rights which cannot be ignored in a divorce proceeding. Often the group benefits will be more comprehensive and less expensive than private insurance. The continued benefits are particularly important if the qualified beneficiary has a pre-existing condition which would preclude coverage under a new policy.

COBRA also provides planning opportunities such as whether the dependents will remain on the covered employee's coverage or the on the qualified beneficiary's continued coverage; the type and extent of coverage; and the ability to obtain insurance retroactively under certain circumstances.

It is important to determine as soon as possible whether your client is entitled to benefits under COBRA. If so, information regarding benefits and options provided by the plan, as well as the cost of the premium, should be obtained so that the client can make an intelligent and appropriate decision regarding COBRA rights.

FOOTNOTES

[1] Treasury Regulation 1.162-26; 26 CFR 1. 162-26; 52 Federal Register 22,721 (1971) (hereafter "T.R. at Q and A").

[2] 26 USC §162 (i) (2) (repealed); T.R. at Q-3, A-3.

[3] 26 USC § 4980B (a) - (c).

[4] 26 USC 4980B (g) (2): *See also*, T.R. at Q-7, A-7.

[5] *Id.*

[6] T.R. at Q-11, A-11 and Q-14, A-14. The date of the collective bargaining agreement's termination must be determined without regard to any extensions agreed upon after April 7, 1986.

[7] 26 USC §4980B (d).

[8] *Id.*; T.R. at Q-9, A-9.

[9] 26USC §4980B (d). *See also*, 26 USC §414 (d) and (e). However, a plan maintained by a church in connection with an unrelated trade or business is subject to COBRA. 26 USC 414 (e) (2) (a).

[10] *See*, 42 USC §300bb-1 - §300bb-8. Individuals injured by a covered state plan's failure to abide by the statute are allowed to bring an action for "appropriate equitable relief." 42 USC §300bb-7.

[11] 26 USC §4980B (f) (1).

[12] 26 USC §4980B (g) (1). (A) The covered employee may also be a qualified beneficiary in certain events. *Id.* §4980B (g) (1) (B).

[13] 26 USC §4980B (f) (7).

[14] T.R.: Q-16, A-16.

[15] T.R. Q-15, A-15.

[16] 26 USC §4980B (f) (3).

[17] *Id.*

[18] 26 USC §4980B (f) (2) (B) (i) (IV).

[19] 26 USC §4980B (f) (2) (B) (i) (I). If the covered employee is determined to be disabled under title II or XVI of the Social Security Act at the time of the qualifiying event, the group benefits may be extended to 29 months. *See* 26 USC §4980B (f) (2) (B) (i) (V).

[20] 26 USC §4980B (f) (2) (B) (i) (II); T.R. Q-40, A-40.

[21] 26 USC §4980B (f) (2) (B).

[22] 26 USC §4980B (f) (2) (B) (ii).

[23] 26 USC §4980B (f) (2) (B) (iv) (I).

[24] *Id.*

[25] 26 USC §4980B (f) (2) (B) (iv) (II).

[26] 26 USC §4980B (f) (2) (B) (iii).

[27] 26 USC §4980B (f) (2) (C) (i). When a covered employee is entitled to COBRA due to a termination of employment but is entitled to 29 months of coverage rather than 18 due to a disability, the employer can charge the employee 150% of the premium for months 19 through 29. 26 USC §4980B (f) (2) (C).

[28] 26 USC §4980B (f) (2) (C) (ii).

[29] 26 USC §4980B (f) (2) (B) (iii).

[30] 26 USC §4980B (f) (2) (C) (ii).

[31] 26 USC §4980B (f) (2) (A).

[32] *Id. See also*, T.R. Q-24, A-24, Q-25, A-25.

[33] T.R. Q-23, A-23.

[34] 26 USC §4980B (f) (2) (E).

[35] 26 USC §4980B (f) (2) (D).

[36] *See*, T.R. Q-31,A-31.

[37] *See, Id*; and T.R. Q-17, A-17.

[38] 26 USC §4980B (f) (5) and (6).

[39] 26 USC §4980B (f) (6) (A).

[40] 26 USC §4980B (f) (6) (C). The employer is required to notify the Administrator of the death or termination of the covered employee, the employee's entitlement to medical and the employer's bankruptcy. 26 USC §4980B (f) (6) (B). The covered employee or qualified beneficiary must notify the Administrator of a dependent child no longer being dependent. 26 USC §4980B (f) (6) (C).

[41] 26 USC §4980B (f) (6) (D).

[42] 26 USC §4980B (f) (5) (A).

[43] *See*, T.R. Q-32, A-32; Q-34, A-34; Q-35, A-35.

if a change of custody is requested by the noncustodial parent or other parent having joint custody. (1987, ch. 601, Sec. 1, P. 1444).

The Court stated that the overall purpose of the statute is to "preserve the rights and familial relationship of the noncusodial parent with respect to his or her child."[1] It confirmed that it is in the best interests of a child to have a close relationship with both parents, as well as other family members. This requires a balancing between "the custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the state's interest in protecting the best interests of the child, and the competing interests of the noncustodial parent."[2] The court acknowledged that when considering the "best interests of the child," there is no "bright-line" test; therefore, removal issues necessarily involve a determination of all relevant factors.

In establishing guidelines for removal pursuant to NRS 125A.350, the court approved those guidelines established in *D'Onofrio*. Therefore, in determining the issue of removal, the court must first find whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence, and that weekly visitation by the noncustodial parent is virtually precluded.

If the custodial parent satisfies this threshold requirement, then the court must weigh the following additional factors and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated. They are: (l) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) if permission to remove is granted, whether the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.

Finally, as stated in *D'Onofrio*, the court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style for the custodial parent and the children be forfeited, solely to maintain weekly visitation by the noncustodial parent, where reasonable alternative visitation is available, and where the advantages of the move are substantial.

The opinion noted that various defined subfactors, by no means exhaustive, must be considered as well, such as: (1) whether positive family care and support, including that of the extended family, will be enhanced; (2) whether housing and environmental living conditions will be improved; (3) whether educational advantages for the children will result; (4) whether the custodial parent's employment and income will improve; (5) whether special needs of a child, medical or otherwise, will be better served; and (6) whether, in the child's opinion, circumstances and relationships will be improved.

Finally, as stated in *D'Onofrio*, the court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style for the custodial parent and the children be forfeited, solely to maintain weekly visitation by the noncustodial parent, where reasonable alternative visitation is available, and where the advantages of the move are substantial.[3]

In *Schwartz*, the parties were married seven years before the husband filed for divorce in Las Vegas, Nevada. The parties had two minor children, apparently both of tender years, as issue of the marriage. The husband had previously been awarded primary custody of the children. At trial, the court considered husband's motion to remove the children to Pennsylvania, where the children's paternal grandmother and an extended family resided. Husband's motion for removal was granted, and Wife appealed, contending that the trial court abused its discretion in allowing the removal. The appellate court affirmed the trial court's decision.

To the credit of the trial judge, John F. Mendoza, D.J., the guidelines of *D'Onofrio* were carefully applied. The facts found in support of removal were determined by the Appellate Court to be sufficient to support his decision. In summary, those facts are: (l) Husband was a casino floorman, and his Wife a cocktail waitress; (2) Before separation, the Wife had been hospitalized for depression and attempted suicide by an overdose of antidepressants. Husband was awarded temporary custody of the minor children; (3) On three occasions Wife accused Husband, or the husband of a babysitter, of sexual abuse of their son. After investigation by the appropriate authorities, and Wife's polygraph which indicated "deception,"[4] Wife's visitation with the minor children was limited by supervision; (4) The trial court did not find that the motion for removal was motivated to defeat or frustrate visitation; and (5) In support of Husband's motion to remove the children to Pennsylvania, the court found that Husband would reside with his aged mother in her four-bedroom house, rent free, which would accommodate the children; that the grandmother had an established relationship with the children; that there were great aunts and uncles nearby in case of emergency; that Husband was the only child, expected to inherit his mother's home; and that substantial child care expenses of Husband would be eliminated by reason of relocation, which could be used to directly benefit the children.

Although the trial court was concerned about the impact the removal would have upon the mother's visitation with the children,

it found, with the appellate court's approval, that extensive summer visitation was an effective substitute for weekend visitation.[5] The appellate court found that allowing the removal was not an abuse of discretion.

CONCLUSION

It is clear that the trial court's conclusion that relocation would enhance the children's lifestyle, ameliorate the family's financial condition, and provide needed emotional stability for the children was aided by the Wife's mental instability and untruthful allegations of child sexual abuse. One must wonder whether the outcome would have been the same if the mother had been emotionally stable and had not made those untruthful allegations of child abuse.

ED. RJL

Footnotes

[1] In re marriage of *Kutinac*. 538 N.E.2d 862, 865 (Ill. App. Ct.1989) [citing In re marriage of *Eckert*, 518 N.E.2d 1041, 1045,(Ill. 1988~].

[2] *Schwartz* at P. 3; *Holder v. Polanski*, 544 A.2d 852, 855 (N.J.1988).

[3] *Schwartz* at 6. *D'Onofrio*, 365 A.2d at 30.

[4] The parties stipulated that the results of the parties' polygraphs could be used in court.

[5] See *Cooper v. Cooper*, 491 A.2d 606, 614 (N.J. 1984) wherein the court held that "reasonable and realistic visitation has been defined as 'one that will provide an adequate basis for preserving and fostering a child's relationship with the noncustodial parent if the removal is allowed.'"

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