

## **Relocation: Moving Forward, or Moving Backward?**

by  
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The right of one divorced parent to unilaterally change the domicile of his or her children has spawned a great amount of litigation in domestic relations courts in recent years.<sup>1</sup> What has become known as “relocation litigation” is an area replete with controversy, and one on which many people simply cannot find agreement or even much common ground. Most family law practitioners concede, however, that relocation litigation is one of the most important topics affecting the law of domestic relations in this decade. Not only does society continue to become increasingly mobile, but access between a parent and child ultimately may be more important than who has legal custody.

In addition to business and economic forces, including the increase of national business entities that readily relocate families from one geographic region to another, a whole host of other factors have merged to influence the prominence of relocation cases in domestic courts. The outcome of relocation cases is affected by the continued increase of joint or shared custody, recognition of individual and family rights, increased acknowledgment by the legal system of children’s rights, and conflict over what form of access between a parent and child minimizes the chances of untoward effects of divorce on the child’s development.

Relocation litigation is affected not only by legal standards and procedures, but also by social and forensic sciences. Two

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<sup>1</sup> In re Marriage of Littlefield, 940 P.2d 1362, 1366 (Wash. 1997).

competing propositions have emerged from social scientists involved in determining what makes some children survive divorce with little repercussion while others emerge as severely emotionally scarred adults. One theory holds that children need both of their parents and prosper socially and emotionally when both parents remain actively involved in their lives. This proposition is manifested in phraseology such as the importance of both parents' "daily involvement" or "frequent and continuing contact" with the child. The second proposition is that while children need contact with both parents, the quality of the relationship between the noncustodial parent and the child may be far more important than daily contact between them, and further, that the child's well-being is affected more by the stability of the new family unit—including the happiness and adjustment of the custodial parent.

Statutes and court opinions across the country clearly reveal the impact of both these propositions. What is less clear is whether the emphasis placed by courts and social scientists on the importance of the primary custodian is a concept left over from more conservative times, or is it a deliberate return to a former concept and a conscious rejection of the more liberal view that children necessarily need both parents. Simply put, is the theory privileging a stable primary relationship between a child and one custodial parent—and the impact of this notion on relocation litigation—a step forward or a step backward?

The first section of this article examines the headline cases *Tropea v. Tropea*<sup>2</sup> and *Burgess v. Burgess*<sup>3</sup> in depth and discusses the trend in these and other cases toward less restrictive relocation laws, statutes, and rulings. Section II of this article addresses the central issue of how to determine the "best interest" of a child involved in a relocation case, current theories regarding the post-divorce family, and the implications of relocation decisions for such related issues as custody modification. Section III of this article addresses the issue of how prior custody arrangements influence the outcome of relocation cases. Section IV briefly discusses the constitutional concerns that emerge in relocation litigation, and section V concludes the paper with an examination

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<sup>2</sup> 665 N.E.2d 145 (N.Y. 1996).

<sup>3</sup> 913 P.2d 473 (Cal. 1996).

of the Model Act for Relocation Litigation proposed in 1997 by the American Academy of Matrimonial Lawyers.

## **I. Relocation Favored or Disfavored Among the States?**

Courts that traditionally have taken a very restrictive view of relocation have recently retreated from their previously entrenched positions against allowing a primary custodian to move to another location with his or her children. In highly publicized cases from California and New York, the highest courts of both states enunciated new standards for determining the outcome of relocation cases. The fact patterns and the court's holdings and analyses are noteworthy because they signal some important changes in how relocation cases are being handled from coast to coast.

### *A. Headline Cases: New York And California*

1. "Exceptional circumstances" rule gives way to "best interest of the child": *Tropea v. Tropea*; *Browner v. Kenward*

In 1996, the New York Supreme Court issued a single opinion addressing two cases, both appealed on the issue of whether a divorced spouse with custody of the children should be granted permission to move away from the area where the noncustodial former spouse resides. New York had long been considered among the most restrictive jurisdictions against the relocation of custodial parents.<sup>4</sup> Yet, less than a month later, with its joint opinion in *Tropea v. Tropea*<sup>5</sup> and *Browner v. Kenward*,<sup>6</sup> New York radically revised its stance on relocation litigation and held that the outcome of relocation requests would be determined by consideration of all relevant facts, with predominant emphasis placed on what outcome is most likely to serve the best interests of the child.<sup>7</sup>

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<sup>4</sup> See Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 297 (1996).

<sup>5</sup> 665 N.E.2d 145 (N.Y. 1996).

<sup>6</sup> *Id.* at 150.

<sup>7</sup> *Id.* at 150.

Under pre-existing New York law, parents divorced in that state who wished to relocate were forced to meet very high burdens of justifying their requests as “exceptional circumstances.”<sup>8</sup> The lower appellate courts developed a three-step analysis to resolve relocation disputes and decided these matters based upon whether the proposed relocation would deprive the noncustodial parent of “regular and meaningful access to the child.”<sup>9</sup> Evidence of such disruption created a presumption that the move was not in the best interest of the child, and the custodial parent then was required to demonstrate “exceptional circumstances” to justify the move. After the relocating parent surmounted that evidentiary hurdle, the courts then looked to the best interest of the child.<sup>10</sup> In analyzing the existing status of New York law, the court of appeals acknowledged that the premise underlying the three-step formula was the belief that children “derive an abundance of benefits from ‘the mature guiding hand and love of a second parent,’ and consequently geographic changes that significantly impair the quantity and quality of parent-child contacts are to be disfavored.”<sup>11</sup>

The New York Court of Appeals did not denounce the underlying premise of the previous lower-court decisions from that state. Rather, the court observed that the legal formula that had evolved was problematic. The court described application problems with the previous form of analysis and, more importantly, found that it erected artificial barriers that prevented the trial courts from considering all of the relevant factors. Significantly, while acknowledging the need of the child and the right of the noncustodial parent to have regular and meaningful contact, the *Tropea* court expressed the belief that no single factor should be treated as dispositive or outcome determinative.<sup>12</sup>

Other factors the New York Court of Appeals suggested that lower courts consider include the feasibility of a parallel move by the noncustodial parent, the good faith of the parents opposing or requesting the move, a possible alternative visitation schedule that permits the noncustodial parent to maintain a

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<sup>8</sup> Bruch & Bowermaster, *supra* note 4, at 298.

<sup>9</sup> *Tropea*, 665 N.E.2d at 149 (citing cases).

<sup>10</sup> *Tropea*, 665 N.E.2d at 149.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 149-50.

meaningful relationship with the child, the degree to which the custodial parent's and the child's lives may be enhanced economically, emotionally, and educationally by the move, the effect of the move on extended family relationships, and the potential negative impact from continued hostility between the child's parents.<sup>13</sup>

While the effect of the move on the relationship between the child and the noncustodial parent is still a central concern, the reasons for the requested relocation and the benefits or detriments to the child that may result from either granting or denying the relocation request are also significant. Contrary to lower court precedent, the court of appeals observed that valid motives for a move may include not only economic necessity or specific health-related issues, but also demands of a second marriage or the custodial parent's opportunity to improve his or her economic situation.<sup>14</sup> Significant in the court's analysis is the recognition of the importance of stability and the quality of life in the child's custodial home. The court explained that to summarily reject the custodial parent's motives to relocate "overlooks the value for the children that strengthening and stabilizing the new, post-divorce family unit can have in a particular case."<sup>15</sup>

The recognition that the child's interests may not necessarily be best served by maximizing the noncustodial parent's access to the child is a radical shift for the New York court. This shift reflects an emerging trend of recognition by social scientists that the divorced family is a fundamentally different unit than the marital family and that a child's circumstances may actually be improved by a relocation when other positive factors are present.<sup>16</sup>

In *Tropea*, the parties divorced in 1992. The parties agreed that the mother, who had been the primary caregiver to the children (ages seven and four at the time), would have sole custody and that the father would have visitation on holidays and at least three days a week. Additionally, the parties agreed to restrict their domicile to Onondaga County and not to relocate without prior judicial approval. In June 1993, the mother requested

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<sup>13</sup> *Id.* at 151.

<sup>14</sup> *Id.* at 150-51.

<sup>15</sup> *Id.* at 151.

<sup>16</sup> See *infra* discussion in text at notes 94-126.

changes in the visitation arrangement and permission to relocate with the children. The anticipated move was still within the state of New York. The basis provided by the mother for her request to relocate concerned her plans to marry an architect with an established firm in another area. The mother and her fiancé had purchased a home in the area into which they wished to move and were expecting a child of their own. She testified that she supported a liberal visitation schedule between the children and their father that would still afford frequent and extended contact and also that she was prepared to make the two and one-half hour drive to and from the father's home. Mid-week visits would be impossible.

The father opposed the move on the basis that the request was the product of the mother's own lifestyle choice and that he should not be the parent "punished" with loss of proximity and weekday contact. The father requested custody of the children, if the mother should choose to relocate. Undoubtedly, Mr. Tropea was an active father. He coached the children's sports teams, participated in their religious classes, and had become involved with his older son's academic education during the 1992-1993 school year. Additional evidence, however, showed that he exhibited bitterness towards the children's mother and that he had disparaged her (calling her a "tramp" and a "low-life") in the children's presence. While he acknowledged that this behavior had a negative effect on the children, he also stated he saw nothing wrong with his conduct.

The trial court denied the mother's request for permission to move on the basis that whenever a proposed relocation "unduly disrupts or substantially impairs" the noncustodial parent's access rights, the party requesting the right to relocate bears the burden of demonstrating "exceptional circumstances" to justify the move.<sup>17</sup> The appellate division reversed, holding that the mother had shown the requested relocation would not deprive the father of regular and meaningful access, the visitation schedule proposed by the mother afforded the father the opportunity for frequent and extended contact with his children, and the move would be in the best interest of the children. The father

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<sup>17</sup> *Tropea*, 665 N.E.2d at 147.

was provided substantial weekend, summer, and vacation visitation.<sup>18</sup>

In upholding the decision of the appellate division allowing the mother's relocation, the court of appeals found that the appellate division had appropriately used "best interest" analysis to evaluate the requested relocation and that the lower appellate court had also determined the proposed visitation schedule would afford the father frequent and extended visitation with his children. The court further recognized that relocation decisions are not to be made as a means of castigating one party for what the other party deems "personal misconduct."<sup>19</sup>

In *Browner*, the parties had one child, a son, who was six or seven years old when they divorced in 1992. The mother had physical custody of the child, and the father had liberal visitation, including alternating weekends and midweek visitation. The parties had stipulated that the mother and child could not move more than 35 miles from the father's home without prior court approval. The father remained in the marital residence, and the mother and child moved in with the mother's parents.

The mother petitioned the court several months after the divorce to allow her to relocate with her child to Pittsfield, Massachusetts, approximately 130 miles away from the father's home. The basis for the relocation request was that the mother's parents, with whom she and the child resided, were moving to Pittsfield, the mother had lost her job in New York and had been unable to find work, and the prospects of her finding affordable housing in the area were slim. The mother had found a job in Pittsfield that would allow her to rent a home there for herself and her son, and she had located a suitable school and synagogue for her son. Her extended family, including her parents and others in Pittsfield, would provide additional emotional support and child care, and she had been somewhat dependent upon her family for financial and emotional support following the divorce. The child had become very close to his maternal grandparents and apparently garnered significant emotional support through his relationship with them. The father opposed the move on the grounds that it would eliminate the mid-week visits he had en-

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 152.

joyed as well as his opportunity to participate in the child's daily activities; hence, he argued, he would be deprived of meaningful access to his child.

The trial court allowed the move, although it was not convinced by the mother's position that she was unable to secure employment or housing in the area, and further mentioned that the father had been vigilant about visiting his son and was sincerely interested in guiding and nurturing the child. The father was granted liberal visitation rights. The trial court observed that the father would not be deprived of meaningful contact with his child and that the move would be in the best interest of the child, based upon the psychological evidence introduced at trial. The evidence indicated that the parents still exhibited hostility towards each other through bickering and that this was causing the child difficulties. The trial court further perceived that the emotional advantages the mother would realize from proximity to her parents would ultimately enhance the child's emotional well-being. The appellate court affirmed the trial court's decision, and the case was appealed to the New York Court of Appeals. After observing that the trial court had already concluded the relocation was in the best interests of the child, the court of appeals affirmed the lower courts' determination to permit the relocation.<sup>20</sup>

2. *Court presumes parents' right to relocate: Burgess v. Burgess*

Immediately after the New York Court of Appeals decision, the California Supreme Court issued its 1996 opinion in the relocation case of *Burgess v. Burgess*,<sup>21</sup> holding that a custodial parent seeking to relocate bears no burden of establishing that the move is necessary. Rather, except in the case of a move detrimental to the child or a move intended to deprive the noncustodial parent of contact, a custodial parent has the right to change the residence of the child.<sup>22</sup>

The parties were divorced in 1992 under a stipulation and order dissolving the marriage and providing for temporary custody and visitation pursuant to a mediation agreement, in which

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<sup>20</sup> *Id.*

<sup>21</sup> 913 P.2d 473 (Cal. 1996).

<sup>22</sup> *Id.* at 476.



the mother would have sole physical custody of their three and four-year-old children, and the parties would share joint legal custody of the children. At the time of the parties' separation, both parents were employed by the State Department of Corrections and lived nearby in a suburb. The parties' mediation agreement left open the resolution of the father's visitation schedule if the mother left the county. Otherwise, the father had weekly visitation with the children and an alternative schedule for biweekly visitation, depending on the father's work schedule.

At a custody hearing in 1993, the mother testified that she had accepted a job transfer to a town approximately 40 minutes travel time away and planned to relocate after her son graduated from preschool the following June. The move would advance her career, as well as permit greater access for the children to medical care, extracurricular activities, and private schools and day care facilities. The father argued he would not be able to maintain the current visitation schedule if the move took place and requested that he be the primary caretaker for the children if the mother moved as planned. In subsequent testimony, the father conceded, however, that he had made the commute to the place of the mother's intended relocation and that it was an easy commute.

The trial court granted the mother sole physical custody and altered the visitation schedule for the father to alternate weekends with at least one three-hour midweek visit. Subsequently, in 1993, the court ordered that the children be permitted to move to Lancaster with the mother and the father be afforded liberal visitation. The court further ordered the parties to work out a visitation schedule and, failing agreement, to mediate that issue. After the father's motions for reconsideration and change in custody were both overruled, the father appealed, and the California Court of Appeals reversed the trial court.<sup>23</sup>

The court of appeals developed a test for determining the outcome in relocation cases. The noncustodial, nonmoving parent was required to show that the move would significantly affect the existing pattern of care and adversely affect the nature and quality of the noncustodial parent's contact with the child. The burden then shifted to the relocating parent to prove that the

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<sup>23</sup> *Id.*

move was reasonably necessary, either because not moving would impose an unreasonable hardship on the custodial parent's career or other interests, or because moving would result in a discernible benefit such that it would be unreasonable for the parent to forego that opportunity. The trial court was then required to resolve whether the benefit to the child in moving with the relocating parent would outweigh the loss or diminution in contact with the nonmoving parent.<sup>24</sup>

In reversing the trial court, the court of appeals relied, in part, upon a section of the California Family Code that provides a "policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage. . . except where the contact would not be in the best interest of the child."<sup>25</sup> A similar provision may be found in several other state statutes.<sup>26</sup>

The California Supreme Court, however, concluded that the articulated policy in favor of frequent and continuous contact did not constrain the trial court's broad discretion to determine what custody arrangement serves the best interest of the children. The court further observed that the California Family Code provided no preference or presumption in favor of any form of custody, whether legal or physical, and allowed the court and family the widest discretion possible in choosing a parenting plan that would serve the best interests of the children.<sup>27</sup> Additionally, under the California Family Code, the custodial parent, as a general rule, has the presumptive right to change residence, unless the move is detrimental to the child. The Court of Appeals' formula would impermissibly abrogate that right by placing the burden of proof on the custodial parent seeking to relocate.<sup>28</sup>

The court then made several observations about the role of the custodial parent and the effects of divorce. Due to the ordinary needs of both parents to establish their separate lives after

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<sup>24</sup> *Id.* at 477-78.

<sup>25</sup> *Id.* at 479, *citing* CAL. FAM. CODE § 3020.

<sup>26</sup> ALA. CODE § 30-3-150 (Supp. 1997). COLO. REV. STAT. § 14-10-124 (Supp. 1998); FLA. STAT. § 61.13 (Supp. 1998); IOWA CODE § 598.41 (Supp. 1998); MO. ANN. STAT. § 452.375 (Vernon 1997); NEB. REV. STAT. § 43-2902 (1993); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998).

<sup>27</sup> Burgess, 913 P.2d at 480.

<sup>28</sup> *Id.*

divorce and the pressures on both of them related to education, employment, remarriage, family, and friends, the court found it unrealistic to assume they will permanently remain in the same location and improper to exert pressure upon them to do so.<sup>29</sup> Further, in determining what role a parent's preference to relocate plays after an initial custody order, the California Supreme Court acknowledged the "paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker."<sup>30</sup> In assessing the importance of relocation upon the determination of a custodial parent, the court remarked that the parent who has been the primary caretaker of the minor children is "ordinarily no less capable of maintaining the responsibilities and obligations of parenting, simply by virtue of a reasonable decision (not based on an intent to frustrate the noncustodial parent's contact with the child) to change geographical location."<sup>31</sup>

The California court further emphasized the interests of the minor child in the continuity and permanency of custodial placement with the primary caretaker, noting that such interests would most often prevail in the face of a relocation. The parent seeking to change custody bears the burden to establish that the changed circumstances make it expedient or essential to the welfare of the child that custody be changed.<sup>32</sup>

#### B. *Other 1997 And 1996 Relocation Decisions*

California and New York, while perhaps the most publicized, are not the only states whose high courts have recently issued key relocation cases. The following opinions have also contributed to the current trends in this rapidly changing area of family law.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 478-79.

<sup>31</sup> *Id.* at 481.

<sup>32</sup> *Id.* at 482.

1. *Child's best interest is bound up with custodial parent's happiness: Stout v. Stout*

In 1997, with *Stout v. Stout*,<sup>33</sup> North Dakota's highest court clarified that state's statute on relocation and delineated the factors to be applied by trial courts in relocation cases. North Dakota requires a custodial parent to obtain judicial permission to relocate the child to another state when the noncustodial parent does not consent to the move.<sup>34</sup> Based upon a historical analysis of the underlying statute, the North Dakota Supreme Court held that the purpose of the statute is "to safeguard the visitation rights of the noncustodial parent, and to thereby maintain the parent-child relationship."<sup>35</sup>

After first establishing that the custodial parent was required to prove that the move would be in "the best interest of the child," the court delineated the specific factors to be considered in determining what constitutes "the best interest of the child" in the context of a request to relocate the child to another state. These factors were, in substantial part, based upon decisions from the states of New Jersey, Massachusetts, and Missouri, all of which had statutes similar to that in North Dakota. The court also examined some of its own earlier decisions and found that the "best interest" standard needed more uniform governing criteria to provide guidance to the trial courts.<sup>36</sup>

Based upon its own earlier decisions and the research of psychologist Dr. Judith Wallerstein, the court concluded that the noncustodial parent's right to maintain and develop a relationship with the child can be achieved by modification of the visitation schedule to include less frequent, but longer, periods of time.<sup>37</sup>

In considering the prospective advantages of the move, the court added that factors less tangible than economic opportuni-

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<sup>33</sup> 560 N.W.2d 903 (N.D. 1997).

<sup>34</sup> N.D. CENT. CODE § 14-09-09 (1991).

<sup>35</sup> *Stout*, 560 N.W.2d at 907-08.

<sup>36</sup> *Id.* at 912.

<sup>37</sup> While leaving the burden of proof on the relocating custodial parent and making the best interest of the child the primary concern, the court added the following four factors to be applied in each case:

- (1) The prospective advantages of the move in improving the custodial parent's and child's quality of life;

ties should also be considered. Such opportunities include the desire to be close to supportive extended family, the ability to pursue educational opportunities, or prospects for an improved physical and emotional environment in which to raise the child.<sup>38</sup> The motivations of both parents were significant, as was an available alternative visitation schedule for the child and the noncustodial parent.

In reversing the trial court's decision to prevent the custodial mother from relocating to Arkansas, post-divorce, the North Dakota Supreme Court noted in *Stout* that neither parent had family in North Dakota, whereas the mother had extended family in Arkansas. The trial court had noted on the record the advantage of having family and a support system close. Additionally, the mother was unemployed at the time of the divorce and subsequently obtained but lost a job due to downsizing. While she had been unable to find another suitable job in North Dakota, she found alternative employment in Arkansas that would pay her more money than she had been earning, as well as benefits that were unavailable to her in North Dakota.

The *Stout* opinion contains a rather interesting and novel dichotomy of competing interests. The trial court had found that an additional hourly raise caused by the move to Arkansas was not sufficient advantage to justify the separation of the child and the noncustodial father, stating that during the divorce "that is precisely why the Court ordered the combination of child support and spousal support in order to allow [the custodial mother] to stay in this area, even if she were making a relatively low income."<sup>39</sup> The state's supreme court observed that while rehabili-

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- (2) The integrity of the custodial parent's motive for relocation, considering whether it is to defeat or deter visitation by the noncustodial parent;
  - (3) The integrity of the noncustodial parent's motives for opposing the move; and
  - (4) Whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation. *See id.* at 913.

<sup>38</sup> *Id.* at 914.

<sup>39</sup> *Id.* at 915.

tative support is meant to allow the disadvantaged spouse to meet financial needs while becoming self sufficient, the trial court had used rehabilitative support not to restore the economically disadvantaged spouse to independent status, but to keep her in the state for the period the court felt necessary to establish the relationship between the child and his noncustodial parent.<sup>40</sup>

The Supreme Court further stated that the child's best interests were considered "inextricably interwoven with the quality of life of the custodial parent, with whom the child lives and upon whom the child relies emotionally."<sup>41</sup> The custodial parent's health and happiness are important to the child's best interests. The court also recognized that it was not realistic to expect the relationship between the child and noncustodial parent to remain the same after divorce.<sup>42</sup> These findings, like many others in other states, clearly reflect the writings and research of Judith Wallerstein, whose theories this article will discuss more fully below.<sup>43</sup>

Finally, the North Dakota Supreme Court concluded that no evidence existed of any motivation by either parent that established ill will against the other's rights, that the father had exercised visitation and the mother had encouraged the relationship between the child and noncustodial father, and that alternate visitation, including an agreement under which the mother would share the expenses of transportation, was available.<sup>44</sup>

## 2. *Privileging the stability and continuity of the custodial family: Vachone v. Pugliese and Hayes v. Hayes*

Two recent cases from Alaska involve custody determinations made during the original custody proceedings, where relocation of a parent was at issue. In *Vachon v. Pugliese*,<sup>45</sup> the trial court transferred custody from the mother to the father after the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 916.

<sup>43</sup> See generally JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN PARENTS COPE WITH DIVORCE (1980); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not To Move—Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996).

<sup>44</sup> *Stout*, 560 N.W.2d at 916.

<sup>45</sup> 931 P.2d 371 (Alaska 1996).

mother took the child from Alaska, where the mother and father had been separately residing, and moved to Massachusetts, which was near her family and the father's family.

The child's mother relocated without initially notifying the father. She testified that she left in such a manner because the child's father had been stalking her and she had concerns for the safety of the child and herself. She contacted the father a week or two after leaving, and the father testified that he contacted her thereafter but that she would not discuss the situation with him. The trial court found that the mother was not credible in her testimony regarding domestic abuse and stalking and further found that the mother's actions constituted custodial interference under that state's case law. The trial court stated that the key factor in its decision to award custody to the father was the mother's 'failure to allow an open and frequent relationship with [the father] and the belief that she would not do so in the future.'<sup>46</sup> Such a factor, according to the trial court, "more than counterbalances the desirability of maintaining [the child's] stability with [the mother] in her new home, created only when she wrongfully fled with [the child]."<sup>47</sup>

The Alaska Supreme Court reversed the trial court's custody decision, holding that the trial court made erroneous factual findings about the mother's credibility and improperly weighed the statutory factors (which the Supreme Court stated were not prejudicial).<sup>48</sup> Under state law in Alaska, if a custodial parent moves out of state, the court must consider whether it is in the child's best interests to remain with that parent, given the move.<sup>49</sup>

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<sup>46</sup> *Vachon*, 931 P.2d at 377.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 375.

<sup>49</sup> The Alaska statute requires that the following factors be considered in determining the child's best interests:

- (1) the physical, emotional, mental, religious, and social needs of the child;
- (2) the capability and desire of each parent to meet these needs;
- (3) the child's preference if the child is of sufficient age and capacity to form a preference;
- (4) the love and affection existing between the child and each parent;
- (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

Also, because the record did not support a finding of custodial interference or kidnaping, the Alaska Supreme Court determined that the trial court committed error in finding that the mother would impede a healthy relationship between the father and the child in the future.<sup>50</sup> When the mother returned to Massachusetts, where she had previously resided, she had lived in Alaska for a relatively short period of time. She went to the state where both she and the child's father had extended family, she contacted the father's family, and the father's sister-in-law assisted in day care for the child. She contacted the father soon after arriving in Massachusetts, and the parties remained in communication. Additionally, the mother had previously facilitated the relationship between the child and her father. The evidence established that the mother wanted the child to spend time with her father, that the father had two lengthy visitation periods with the child after the resolution of jurisdictional disputes, and that after the initial separation, it was the mother who had encouraged and facilitated visitation between the father and the child.<sup>51</sup>

Finally, the court determined that even if the mother had previously interfered with the father's relationship with the child, given her record of recent compliance, the trial court was speculating that the mother would interfere with that relationship in the future. Because a change in custody conflicts with stability and continuity, a less intrusive order requiring compliance by the mother with existing custody and visitation orders was required before changing custody.<sup>52</sup> Two separate child custody investiga-

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- (6) the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent;
  - (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;
  - (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child; and
  - (9) other factors that the court considers pertinent.

ALASKA STAT. § 25.24.150(c).

<sup>50</sup> *Vachon*, 931 P.2d at 375.

<sup>51</sup> *Id.* at 378.

<sup>52</sup> *Id.* at 378-79.



tors testified that the child was well cared for and developing appropriately and that it was unwise to disrupt the child's life with a change in custody from the person who had been the child's primary caregiver.<sup>53</sup> The expert testimony was unrefuted. Because the trial court erred in discounting the factor of stability and continuity and in concluding that the mother would not foster an open and healthy relationship between the child and the father, the Alaska Supreme Court reversed the custody order and directed the trial court to award custody to the mother.<sup>54</sup>

In *Hayes v. Hayes*,<sup>55</sup> the Alaska Supreme Court upheld the trial court's decision in divorce proceedings to award custody to the mother. Under the temporary orders, the father and mother shared physical custody of her son from a former marriage and the nine-year-old daughter who was born during their own marriage. The mother had custody of the children during the week, and the father had custody on weekends. Because the mother testified that she had decided to relocate, the final order granted physical custody to the mother during the entire school year and to the father during summers and a portion of the Christmas holidays. The state supreme court held that the trial court did not fail to consider the significance of the mother's proposed move of the children and did consider the stability and continuity the children had in the town where they were both raised. Therefore, the trial court had not abused its discretion in determining that the importance of keeping the children in the town where they grew up was outweighed by other competing considerations.<sup>56</sup>

The other considerations included the emotional needs of the mother's oldest child, his dependence upon his mother, and his preference. The father, by having custody during the summer months, would continue to play an important and consistent role in the son's life. The trial court further concluded that the continuity and stability offered by the oldest child's relationship with the mother was more important than continuity of geographic location or school. The trial court also concluded, based on the testimony and opinions of the experts, the parents, and the *ad litem*, that the youngest child should not be separated from her

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<sup>53</sup> *Id.* at 379.

<sup>54</sup> *Id.* at 380.

<sup>55</sup> 922 P.2d 896 (Alaska 1996).

<sup>56</sup> *Hayes*, 922 P.2d at 899.

older brother and so should be placed with the mother during the school year.<sup>57</sup>

Finally, the Alaska Supreme Court refused to accept the father's proposition that the parent seeking to move the children from their previous home should be required to show, by clear and convincing evidence, that such a move is in the children's best interests. Rather, when the existing custodial parent chooses to move out of state, the trial court must consider the best interests of the child, according to the statutory criteria, and must consider whether a legitimate reason exists for the move.<sup>58</sup>

3. *Only vindictive moves and moves that pose a "specific serious threat" are restrained: Aaby v. Strange*

In *Aaby v. Strange*,<sup>59</sup> the Tennessee Supreme Court held that a custodial parent may remove a child from the jurisdiction unless a noncustodial parent can prove by a preponderance of the evidence that the custodial parent's motives for moving are vindictive—that is, intended to defeat or curtail the visitation rights of the noncustodial parent.

The Tennessee court emphasized that, while not entirely identical, the best interests of the child and the interests of the custodial parent are interrelated. The noncustodial parent can prevent removal only by showing that removal could pose a specific, serious threat of harm to the child. In such instances, the noncustodial parent would file a petition alleging that "the proposed move evidences such bad judgment and is so potentially harmful to the child that custody should be changed."<sup>60</sup> Examples of "specific, serious threat" include and are not limited to that of a parent who wishes to take a child with a serious medical problem to an area where no adequate treatment is readily available, a parent who wishes to take a child with special educational needs to a location with no acceptable education facilities, or a parent who intends to take up residence with a person with a confirmed history of child abuse.<sup>61</sup> The court found that expert testimony from a mental health professional that removal would

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<sup>57</sup> *Id.*

<sup>58</sup> 922 P.2d 896 (Alaska 1996).

<sup>59</sup> *Aaby*, 924 S.W.2d at 629.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 629 n.2.

be generally detrimental to the child would usually not suffice to establish an injury that is specific and serious enough to justify a change of custody.<sup>62</sup>

4. *Brief decision focuses on best interest, modified visitation: Russenberger v. Russenberger*

In a rather brief opinion, *Russenberger v. Russenberger*,<sup>63</sup> the Florida Supreme Court held that relocation ordinarily should be approved so long as the custodial parent has a well-intentioned reason to move and a founded belief that relocation is best for the well-being of that parent and the children, rather than a vindictive desire to interfere with the visitation rights of the other parent.<sup>64</sup> The court stated that its “intent was to adopt a policy allowing a good faith relocation by a custodial parent,” while “stopping short of adopting a per se rule.”<sup>65</sup> The court recognized that circumstances may exist that would justify departure from this general rule. In considering a request to relocate, and any opposition to such request, the trial court should consider primarily the best interest of the child (and by extension, that of the custodial parent) and also should consider the feasibility of arrangements likely to foster a meaningful relationship with the noncustodial parent.<sup>66</sup>

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<sup>62</sup> *Id.* at 630.

<sup>63</sup> 669 So. 2d 1044 (Fla. 1996).

<sup>64</sup> *Russenberger*, 669 So. 2d at 1046.

<sup>65</sup> *Id.*

<sup>66</sup> The factors the trial court is to consider are as follows:

- (1) Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children;
- (2) Whether the motive for seeking the move is for the express purpose of defeating visitation;
- (3) Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements;
- (4) Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the noncustodial parent;
- (5) Whether the cost of transportation is financially affordable by one or both parents; and

5. *The “endangerment standard”*: In re Marriage of Francis

In *In re Marriage of Francis*,<sup>67</sup> the Colorado Supreme Court also recognized the importance of the stability of the custodial relationship to the child’s well-being and held that a presumption exists in favor of a custodial parent’s choice to move with the children.<sup>68</sup> The various burdens of proof and standards by which the removal should be evaluated, however, are somewhat confusing in application and may serve to undermine the primary holding of this case.

The parties were divorced, and the mother was awarded sole custody by agreement. The agreement included a provision documenting the parties’ belief that it was in the children’s best interests to have continued interaction with both parents in the Fort Collins area. However, the agreement also acknowledged that the mother of the children intended to attend school outside the Fort Collins area. The mother applied to several physician assistant programs but was accepted only to a two-year program on Long Island, New York. The father filed a motion to modify custody to joint custody, or to sole custody vested in him. He also filed a motion to request that the mother be prohibited from removing the children from the state.

The trial court restrained the mother from removing the children and further ruled that if the mother chose to attend school outside the state, custody would be modified from sole to joint, with the father having the right to establish residential custody. The court of appeals affirmed, and the Colorado Supreme Court granted writ to hear the case.

The supreme court held that where the parent with sole residential custody wishes to move with a child, that parent must present a prima facie case showing a sensible reason for the move but is not required to establish that the move is in the child’s best interests.<sup>69</sup> After the custodial parent has established a prima facie case, the presumption in favor of relocation arises and the

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(6) Whether the move is in the best interests of the child (noting that this last requirement is believed to be a generalized summary of the previous five).

*Id.*

<sup>67</sup> 919 P.2d 776 (Colo. 1996).

<sup>68</sup> *Id.* at 784.

<sup>69</sup> *Id.* at 784 n.8.

burden shifts to the noncustodial parent to show that the move “is not in the best interests” of the child.<sup>70</sup> The court held that the noncustodial parent can overcome the presumption by showing that the custodial parent has consented to modification of custody in the noncustodial parent, the child has been integrated into the noncustodial parent’s family with the custodial parent’s consent, or the child would be endangered by the move.<sup>71</sup> The court further held that the question of endangerment encompasses issues regarding threats to the child’s physical health and emotional development, while noting that endangerment to a particular child is a highly individualized determination.<sup>72</sup>

The court then applied this same “endangerment standard,” rather than the “best interest” standard argued for by the father, to removal cases.<sup>73</sup> The court specifically determined the endangerment standard to be appropriate “in order to honor the legislative determination favoring the residential custodian of the children.”<sup>74</sup> The court found that the child’s best interests are served by preserving the custodial relationship, avoiding relitigation, and recognizing the close link between the best interests of the custodial parent and the best interests of the child.<sup>75</sup>

Diluting the endangerment standard, however, the Colorado Supreme Court then held that if no credible evidence of endangerment exists, the noncustodial parent still could overcome the presumption by establishing by a preponderance of the evidence that the negative impact of the move cumulatively outweighs the advantages of remaining with the primary caregiver.<sup>76</sup> This alternative manner of defeating the presumption renders the test one of best interests rather than endangerment.<sup>77</sup>

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<sup>70</sup> *Id.* at 784-85.

<sup>71</sup> *Id.* at 785.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 783.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 784.

<sup>76</sup> *Id.*

<sup>77</sup> In considering whether the disadvantages of moving are great enough to outweigh the advantages of staying with the same parent, the trial court may consider the following factors:

- (1) whether there is a reasonable likelihood the proposed move will enhance the quality of life for the child and the custodial parent,

The court noted that the realities of life after divorce undermine parents' abilities to maintain close emotional and geographic ties to their children. It indicated that the trial court should defer to decisions made by the custodial parent after an award of custody has been entered, rather than substituting the court's own judgment for that of the parent, absent some reason to do so.<sup>78</sup>

6. *Custody change in response to relocation held an abuse of discretion: Fossum v. Fossum*

In 1996, in *Fossum v. Fossum*,<sup>79</sup> the South Dakota Supreme Court reversed a trial court's decision to transfer custody to the father during the school year when the custodial mother sought to move 70 miles away for a better job. Under the prior order, the mother had custody of the parties' two daughters, ages ten and seven, during the school year, and the father had custody during the summer. After the mother provided notice to the father that she had accepted a better job and was relocating, the father requested a show cause order from the court as to why custody of the children should not be transferred to him. He claimed that the move was a material and significant change in circumstances since the children had strong emotional, school, and family ties to their current place of residence. The mother explained that she was concerned about the father's financial stability; his net income was a little over \$1,000 per month, and he had extensive debts. The trial court found the relocation to be a substantial and material change of circumstances in that the chil-

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including the short and long term effects of the move on the custodial parent's ability to support the child;

- (2) whether the court is able to fashion a reasonable visitation schedule for the non-custodial parent after the move and the extent of the non-custodial parent's involvement with the children at the old location;
- (3) whether there is a support system of family or friends, either at the new or old location; and
- (4) educational opportunities for the children at the new and old locations.

*Id.*

<sup>78</sup> *Id.* at 786.

<sup>79</sup> 545 N.W.2d 828 (S.D. 1996).

dren had their home and school changed, they had been uprooted from daily contact with friends and family in the old location, they changed from regular church and Sunday school attendance to sporadic or non-attendance, numerous strange men who maintained social relationships with the mother had been in the home, and the children had lost daily contact with their father, as well as other changes resulting from a move from a close-knit rural community to a city. Thus, the court switched the positions of the parents, so that the father had custody during the school year, the mother had custody during the summer, and the father's decision would control if the parents were unable to agree on major decisions affecting the children.

In reversing the trial court, the South Dakota Supreme Court reiterated the "general rule" that minor geographical changes generally will not be regarded as a substantial change in circumstances. The court further held that all of the factors determined by the trial court as a change in circumstances would be a natural consequence of any move and that the short distance involved minimized the impact of such factors.<sup>80</sup> Further, there was no evidence of any change, since the time of divorce, in those factors that had been determinative of the trial court's original decision to award the mother physical custody during the school year (those factors being that she provided an excellent home and played a major role in matters of the daughters' health, education, and religious training).<sup>81</sup> On this basis, the state supreme court held that the trial court abused its discretion in changing custody.

*7. Noncustodial parent has burden of showing relocation to be against child's best interest: Silbaugh v. Silbaugh*

In *Silbaugh v. Silbaugh*,<sup>82</sup> the Minnesota Supreme Court clarified that state's standard for removal of children to another state when the noncustodial parent opposes the move. The parties divorced in 1991 and had joint legal custody of their two children, with the mother having primary physical custody. The father had liberal visitation, which he had exercised consistently. Neither parent could move the children from Minnesota without

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<sup>80</sup> *Id.* at 832.

<sup>81</sup> *Id.* at 833.

<sup>82</sup> 543 N.W.2d 639 (Minn. 1996).

consent of the other parent. After the divorce, the father remarried, and the mother became engaged. The mother had a career opportunity in Arizona, and she and her fiancé purchased a home in Arizona, as well as a lake cabin in Minnesota. She proposed an alternative visitation schedule that included her return to Minnesota during the summer months so that the children could have extended visitation with their father.

The father requested an evidentiary hearing on his opposition to the children's removal, and in the alternative sought to be appointed the primary custodian if the mother left the state. The Minnesota Supreme Court held that Minnesota recognizes an implicit presumption in favor of allowing relocation, even in cases of joint legal custody.<sup>83</sup> To defeat the presumption, the party opposing the removal must establish that the removal is not in the best interests of the child and would endanger the child's health and well-being, or that the removal is intended to interfere with visitation. Without this *prima facie* showing against removal, the removal may be granted without an evidentiary hearing.<sup>84</sup>

The court observed that affidavits submitted by the father established that he and his wife were people of good character who loved, supported, and nurtured the children and that the father had an equally loving extended family, who would experience loss if the children moved elsewhere. While mindful of the loss and worry of noncustodial parents who face the prospect of their children moving to another state, the court found that the concern must be for the children and their need for stability in their custodial arrangements.<sup>85</sup> The Minnesota statute of that state, creating the implicit presumption that removal will be allowed, articulated a legislative preference for permanence and closure on custody matters, except under the most extraordinary circumstances—when the children's physical or emotional health would be endangered. Thus, the Minnesota Supreme Court affirmed the trial court's ruling that denied the father an evidentiary hearing.<sup>86</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 642.

<sup>86</sup> *Id.*



8. *Custodial parent has burden of showing relocation is in child's best interest: In re Marriage of Smith*

*In re Marriage of Smith*<sup>87</sup> indicates that Illinois continues to take a restrictive approach in removal cases. The outcome of this case, however, may be attributed to the facts before the court and the strong deference given to the judgment of the trial court. By statute, a custodial parent who wishes to remove a child from Illinois is required to seek leave of court and bears the burden of proving that the move is in the children's best interests.<sup>88</sup> The court continues to follow the standards enunciated in the 1988 case *In re Marriage of Eckert*.<sup>89</sup> Because a determination of the best interests of the children cannot be reduced to a simple bright-line test, the decision must be made on a case-by-case basis, and the court should hear all relevant evidence in making this determination.<sup>90</sup>

The facts presented in *Smith* were somewhat unusual, in that the parents had a joint physical custody arrangement in which each parent had almost equal time with their two girls. Both parents had remarried, and the relationship between the parents was acrimonious. The mother's husband lived in New Jersey, and that couple commuted between homes in Illinois and New Jersey. She had quit her job and devoted her time to her children and husband. When the children were with their father, their mother was in New Jersey with her husband. The mother sought sole physical custody and permission to remove the children to New Jersey. The father counter-petitioned for sole custody.

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<sup>87</sup> 665 N.E.2d 1209 (Ill. 1996).

<sup>88</sup> *Id.* at 1213.

<sup>89</sup> 518 N.E.2d 1041 (Ill. 1988).

<sup>90</sup> In *Eckert*, the court set forth four factors to be considered, noting that they were not exclusive and the weight to be given each factor would vary according to the facts of each case. Those factors are:

- (1) the likelihood that the proposed move will enhance the general quality of life for both the custodial parent and the children;
- (2) the motives of the custodial parent in seeking the move;
- (3) the motives of the noncustodial parent in contesting the move; and
- (4) the visitation rights of the noncustodial parent.

*Smith*, 665 N.E.2d at 1213.

The father and stepmother engaged in a pattern of behavior that denigrated the mother, as evidenced by the mother's testimony and other corroborating evidence. He admitted to discussing several adult issues with the older child, including the fact that he could not afford to buy a house due to his child support payments. The evidence showed, however, that he was actively involved in the children's lives and participated in their activities.

Two mental health experts testified, including one retained by the mother and another appointed by the trial court. Both experts found that the older daughter was a troubled eleven-year-old child who was given too much adult information by her father and who was unable to cope with adult issues. The experts diverged, however, with respect to the resolution of the problem. As might be expected, the mother's expert testified that the proposed move to New Jersey would benefit the children by reducing their exposure to parental conflict and acrimony. The court-appointed expert recommended that all stress, pressure, and conflict be minimized in the older girl's life, and he found it possible that the joint parenting arrangement, which involved constant moves between households, might be causing her emotional stress and strain. In contrast to the mother's expert, however, the court-appointed psychologist expressed the opinion that the mother's plans to relocate to New Jersey would prove to be too much of an adjustment for the eleven-year-old daughter and would adversely affect her.

The trial court granted the mother's request for sole custody but restrained her from removing the children from Illinois to New Jersey. The father was granted liberal visitation. The trial judge also directed the parties to stop making derogatory remarks about each other in the presence of the children. The mother appealed, and the appellate court affirmed. The Illinois Supreme Court applied the *Eckert* factors and held that the trial court's refusal to allow the mother to relocate with the children to New Jersey was not against the manifest weight of the evidence.<sup>91</sup>

It is in the supreme court's application of the *Eckert* factors, however, that its conservative approach to relocation disputes is revealed. Regardless of the factor under analysis, the court re-

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<sup>91</sup> *Smith*, 665 N.E.2d at 1214-15.

peatedly referenced the harm to the older daughter that the court appointed psychologist indicated would result if the relocation were allowed.<sup>92</sup> The trial court held that the mother showed how her life would be improved by moving to New Jersey but failed to show that the children's lives would be enhanced. The mother argued that the trial judge failed to consider the indirect benefits would result to the children from the enhancement of the mother's life. However, the Illinois Supreme Court approved the trial court's finding, with no discussion of the benefits to the children if their mother was allowed to live with her husband or if the children were distanced from the acrimony between their parents. The court simply stated that it was not persuaded that the trial judge failed to consider these indirect benefits.<sup>93</sup> Other courts have discussed at great length the theory that the children's lives can be enhanced by improving the life of the primary caretaker. Again, the outcome of this case may derive in part from the fact that the parents had joint physical custody—that the custodial relationship factor did not, in this case, pertain.

The court also recognized that the girls were very involved in school and community activities in Illinois. While the mother had already located comparable schools, church, and other activities, a move to New Jersey would require the children to leave their familiar surroundings and establish new relationships with friends and community members. Unlike many other courts, the Illinois Supreme Court does not distinguish these "everyday" changes that occur for children any time an intact family relocates.

## II. What is in the "Child's Best Interest?"

### A. *The Effects Of Divorce On Children*

Dr. P. Caren Phelan, a noted child and forensic psychologist in Austin, Texas, and one of this article's authors, provides the following perspective, and the substantiating social research, regarding the effects of divorce on children. Dr. Phelan has counseled countless children who have been affected by divorce and has testified in numerous custody and relocation cases on the

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<sup>92</sup> *Id.* at 1214.

<sup>93</sup> *Id.*

subject of how children adjust and cope with divorce and relocation.

Most people know that the American child has been greatly affected by the revolutionary changes that have occurred in the patterns of marriage, divorce, and remarriage over the past 25 to 30 years. Each year since the mid-1970's, more than one million children have experienced a family divorce.<sup>94</sup> Furthermore, it is projected that nearly half of all the babies born today will spend some time in a one-parent family as a result of single parenthood or divorce.<sup>95</sup> Because of this dramatic increase in the U.S. divorce rate, the United States Bureau of the Census projected that 40 percent of all children growing up in America will experience a parental divorce in the 1990's. Even though it appears that the divorce rate is leveling off somewhat, millions of American children still are, and will be affected by the dissolution of their families of origin.

Some theorists, such as author Neil Kalter, see the ending of the marriage contract as a kind of social surgery,<sup>96</sup> and just as physical surgery has potential benefits and risks, so too does social surgery of the marital dissolution. Children of divorce are more vulnerable to a wide variety of social, behavioral, emotional, and academic problems.<sup>97</sup> The risk that in a divorce situation the healthy child may develop angry and aggressive behavior, sadness, low self-esteem, or depression, or have trouble with intimate relationships in later life has been emphasized repeatedly by experts.<sup>98</sup>

Fortunately, for many children these difficulties are short-lived, and within a year or two of the parent's divorce, the children are able to put many of the problems behind them. A substantial number of children, however, perhaps as many as 30 to

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<sup>94</sup> See JAMES P. LICHTENBERGER, *DIVORCE: A SOCIAL INTERPRETATION* (1931); WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1973).

<sup>95</sup> See LICHTENBERGER, *supra* note 94; O'NEIL, *supra* note 94.

<sup>96</sup> See NEIL KALTER, *GROWING UP WITH DIVORCE* (1990).

<sup>97</sup> See KALTER, *supra* note 96; WALLERSTEIN & KELLY, *supra* note 43; Paul R. Amato & Gay Ochiltree, *Child and Adolescent Competence in Intact, One-parent, and Stepfamilies*, 10 *J. Divorce* 75 (1987); Lenore J. Weitzman, *The Divorce Revolution* (1985).

<sup>98</sup> See WALLERSTEIN & KELLY, *supra* note 43; Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-being of Children: A Meta Analysis*, 100 *PSYCHOL. BULL.* 26 (1991).

50 percent, will continue to bear the painful and disruptive legacy of their parents' divorce for years.<sup>99</sup> As disturbing as these figures are, Neil Kalter indicates that it is important to keep things in perspective. He recognizes that if 30 to 50 percent of children of divorce experience lasting divorce-related difficulties, it follows that 50 to 70 percent do not.<sup>100</sup> Thus, even though nearly all children wrestle with conflicts and upset feelings for a year or two after the parents separate, the majority of children do not appear to have long-lasting problems that can be attributed to their parents' divorce. In fact, some children may even show improvements following divorce.<sup>101</sup> Mental health professionals and child development experts are just beginning their struggle to make the consequences of divorce for children as positive as possible. The question that must be answered is, "What conditions make divorce harmful to children?"

To understand how divorce affects children, social scientists predominately rely on two research designs: cross-sectional and longitudinal. The cross-sectional and longitudinal designs are used widely because they are suited for studies involving one or more nonmanipulable independent variables.<sup>102</sup> The longitudinal and cross-sectional studies have, for the most part, looked at variables such as gender, ethnicity, and age.<sup>103</sup> Significant research exists on such topics as (1) how divorce affects the child's overall sense of well-being and how parental absence affects the child,<sup>104</sup> (2) the custodial parent's psychological adjustment and

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<sup>99</sup> See John Guidubaldi & Joseph D. Perry, *Divorce, Socioeconomic: Children's Cognitive-Social Competence at School Entry*, 54 J. ORTHOPSYCHIATRY 459-68 (1984); WALLERSTEIN & KELLY, *supra* note 43.

<sup>100</sup> See KALTER, *supra* note 96.

<sup>101</sup> See Paul R. Amato, *Children's Adjustment to Divorce*, 55 J. MARRIAGE & FAM. 23-38 (1993).

<sup>102</sup> See SCOTT A. MILLER, *DEVELOPMENTAL RESEARCH* (1987).

<sup>103</sup> Several influential studies have looked at these variables. See generally WALLERSTEIN & KELLY, *supra* note 43 at 6-9; Elisa Slater, J.J. Steward & M.W. Linn, *The Effects of Family Disruption on Adolescents*, 18 J. ADOLESCENCE 931 (1983); Paul R. Amato & Gay Ochiltrie, *Child and Adolescent Competence in Intact, One-Parent, and Stepfamilies*, 10 J. DIVORCE 75 (1987); Michael Rutter, *Sex Differences in Children's Responses to Family Stress*, 1 THE CHILD IN HIS FAMILY 165-96 (Elwyn J. Anthony and Cyrille Koupetnik, eds., 1970).

<sup>104</sup> See Frank F. Fursteinberg, Jr. & Christine W. Nord, *Parenting Apart: Patterns of Child-rearing After Marital Disruption*, 47 J. MARRIAGE & FAM.

its effect on the parenting skills of the custodial parent,<sup>105</sup> (3) economic hardship and its effect on the adjustment of children,<sup>106</sup> and (4) parental conflict (the high-conflict divorce) and its effect on the child's adjustment to the divorce.<sup>107</sup>

In general, books and papers on the subject echo the beliefs that if: (1) the noncustodial parent sees the child on a regular basis; (2) the custodial parent continues to be supported and exercises appropriate discipline; (3) the parents are able to cooperate without conflict; (4) the child's standard of living changes little; and (5) the transition is accompanied by no other major disruptions in the child's life, the child is likely to make a satisfactory adjustment to the divorce.<sup>108</sup> However, little research has been conducted on the effect of relocation on the child, particularly in the high-conflict divorce.

#### B. *The Reality Of A Mobile Society*

Dr. Judith Wallerstein comments in her amicus brief filed in the *Burgess* case that it is unrealistic to expect that any family in today's society, whether intact or divorced, will remain in one geographic location for an extended period of time.<sup>109</sup> The high

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893-904 (1985); Judith Seltzer, *Legal Adjustment Arrangements and Children's Emotional Welfare*, 96 AM. J. SOC. 895 (1991).

<sup>105</sup> See E. MAVIS HETHERINGTON, MARTHA COX & ROGER COX, EFFECTS OF DIVORCE ON PARENTS AND CHILDREN, NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (Michael E. Lamb, ed., 1982).

<sup>106</sup> See Sara S. McLanahan, *Family Structure and the Reproduction of Poverty*, 90 AM. J. SOC. 873-90 (1985); Jane D. McLeod & Michael J. Shanahan, *Poverty, Parenting and Children's Mental Health*, 58 AM. SOC. REV. 351 (1993).

<sup>107</sup> See WALLERSTEIN & KELLY, *supra* note 43; Charlene E. Depner et al., *Interparental Conflict and Child Adjustment: A Decade Review and Meta-analysis*, 30 FAM. & CONCILIATION CTS. REV., 323 (1992); Charlene E. Depner et al., *Building a Uniform Statistical Reporting System: A Snapshot of California Family Court Services*, 30 FAM. & CONCILIATION CTS. REV. 195 (1992); Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982); Janet R. Johnston, *High-conflict and Violent Parents in Family Court: Findings on Children's Adjustment and Proposed Guidelines for the Resolution of Custody and Visitation Disputes*, Final Report to the Judicial Council to the State of California (Statewide Office of Family Court Services, 1992) [hereinafter Johnston *Findings*].

<sup>108</sup> See Amato, *supra* note 101, at 23-38.

<sup>109</sup> Amicus Curiae Brief of Dr. Judith Wallerstein, Ph.D., at 11, *Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996)(No. SO46116)[hereinafter Wallerstein Brief].

incidence of divorce, remarriage, second divorce, unpredictability of the employment market, and competing economic factors are all forces that affect the lives of many families and render the possibility of relocation a condition to be faced by most.<sup>110</sup> Children of divorced families will face more changes within their family unit, as parents remarry and stepparents, step-siblings, and extended step-families are created.<sup>111</sup> If handled inappropriately, these subsequent disruptions to children in divorced families have the serious potential for creating not only more suffering in the children, but also lasting psychological damage to those children who are already traumatized by divorce.<sup>112</sup>

*C. Active Involvement By Two Parents Or One Happy Parent?*

While social scientists agree that children suffer residual effects from divorce, they disagree over what conditions will best ameliorate the trauma and associated symptoms children suffer as a result of the disruption of their families of origin. The fundamental difference between the varied positions courts assume in relocation cases seems to center on assumptions as to what actually constitutes the “best interest” of the children. Two conflicting schools of thought seem to have emerged, and the impact of their beliefs about what circumstances are optimal for children in divorced families is readily apparent in *Tropea*, *Burgess*, and other recent opinions reported above.

*1. Active involvement by two parents*

The core belief underlying joint custody arrangements, as well as relocation restrictions, is that children need continuing and frequent contact with two parents, and that such contact is necessary to mitigate the damage suffered by children in divorced families. Underscoring this belief is the maxim that the parents divorced each other and that neither parent divorced the children. Therefore, it is important that both continue to parent their children, and it is paramount to the children for the divorce to cause as little disruption as possible.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 12.

<sup>112</sup> *Id.* at 17.

In a debate held at the 1996 Advanced Family Law Course sponsored by the State Bar of Texas, legal scholar and AAML member Stewart Gagnon of Houston presented a paper asserting that the statutory presumption in favor of joint managing conservatorship in Texas implied a restriction of the children's domicile. In advocating for the restriction of the right of a parent to relocate with the children, Gagnon said that "a child's best interest is not served where the child will suffer a serious deprivation in contact with the noncustodial parent, a parent whom, up until the request for removal, has enjoyed frequent if not constant interaction with the child in all aspects of his or her life."<sup>113</sup> Gagnon further indicated that the likely result of a change in the children's domicile is decreased communication and contact between the visiting parent and the children and that without frequent communication and contact, it is likely that a parent who "once had a positive influence on the children will ultimately lose the ability to influence the children to the same extent."<sup>114</sup>

## 2. *Stability of primary custodial relationship*

Others, however, assert that the primary focus of "frequent and continuing contact" between a child and both parents after divorce ignores the reality of the divorced home. A divorce creates significant changes in a child's family and in the child's perception of reality. "Frequent and continuing contact" does not alter the reality that the family unit has changed dramatically, and other factors are frequently more important in helping the child adapt to the changes wrought in his or her life by the divorcing parents.

Dr. Wallerstein's research indicates that the post-divorce symptoms suffered by children are not prevented by a child's access to both parents. She further finds that the central factor associated with a "good outcome" for children in divorced families is that the child have a close, sensitive relationship with a psychologically intact, conscientious custodial parent. The key factors for courts to consider are (1) the parents' ability to give primary

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<sup>113</sup> Stewart Gagnon, *Resolved: The Statutory Presumption of Joint Managing Conservatorship Implies of Geographical Restrictions of the Child's Primary Residence*, 1996 ADV. FAM. L. COURSE (State Bar of Texas 1996) (copy of paper on file with authors).

<sup>114</sup> *Id.*



care and guidance to a child as demonstrated by their day-to-day interactions and behaviors, and (2) the child's need for stability and continuity in established patterns of care and emotional bonds.<sup>115</sup>

In her amicus curiae brief to the California Supreme Court in *Burgess*, Dr. Wallerstein apprised the court of her research results. Perhaps the most controversial position asserted by Wallerstein concerns her findings that social science does not support the presumptions that a child's "frequent and continuing" access to both parents lies at the core of the child's best interests. The amount of time spent and the frequency of visitation with the noncustodial parent are not necessarily related to a good outcome in a child of divorce, according to Wallerstein's ten- and fifteen-year longitudinal studies of children in divorced households.<sup>116</sup> Wallerstein is not alone in this determination. Her findings have been supported by others, who also discover that "parental conflict and the custodial parent's ability to function have more impact on children's adjustment than custody and visitation arrangements."<sup>117</sup>

In relocation the role of noncustodial parents (whom Wallerstein refers to as "fathers") is not necessarily diminished. Wallerstein found that while no connection exists between the frequency of visits and the amount of time spent in the father's home and the development of a nurturing father-child relationship, the substance and nature of that relationship is critical to the child's development.

The child's perception of the father, within the family and the child's relationship, are according to a study by Michael E. Lamb that Wallerstein cites, of "lasting importance in the creation of a child's self image, capacity to relate to others, and conscience formation."<sup>118</sup>

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<sup>115</sup> Wallerstein Brief, *supra* note 109, at 16.

<sup>116</sup> *Id.* at 17.

<sup>117</sup> Bruch & Bowermaster, *supra* note 4, at 248, n.3, citing Frank F. Furstenberg, Jr. & Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part* 75 (1991), see also *id.* at 264 citing Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dimensions of Custody* 271, 268-69 (1992); and Valarie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. FAM. ISSUES 78 (1994).

<sup>118</sup> Wallerstein Brief, *supra* note 109, at 18.

Notably, Wallerstein also finds that while the psychological adjustment of the custodial parent has consistently been found to be related to the child's adjustment following the breakup of the family, the adjustment of the noncustodial parent has not.<sup>119</sup> This finding underlies many of the court opinions that emphasize that a child benefits when the custodial parent is able to improve life for the child and for that parent, whether economically, educationally, or socially.

*D. The Role Of Parental Disharmony, Conflict, And Violence*

Dr. Caren Phelan believes that interparental hostility and aggression is the single most destructive force in the lives of children whose families are going through a divorce. Consistent interparental hostility and aggression do more to undermine the child's concept of safety than any other factor. Undermining the child's sense of safety is extremely dangerous to the healthy development of that child. After all, the sense of safety is central to maintaining a positive attitude toward future life experiences and preventing crippling anxiety and phobic avoidance. Children who possess a concept of safety in the home appear to develop better coping skills and tend to be more resilient than children who do not possess this concept. Simple common sense, therefore, dictates that courts and parents do whatever is necessary to help maintain a child's sense of safety. This help may take the form of separating the warring parents and allowing one of them to relocate.

In her practice, as well as from her review of relevant research, Phelan has seen the detrimental effects on children of interparental hostility and aggression. According to research, the effects of hostility and aggression can be mitigated by the quality of the parent-child relationship, with the child's relationship to the mother being more predictive of child adjustment than is the relationship with the father.<sup>120</sup> This finding implies that at least one good parent-child relationship can buffer children from the interparental conflict. In addition, researchers have noted that

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<sup>119</sup> *Id.* at 17.

<sup>120</sup> See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMA* (1992); J.M. Tshann et al., *The Family Process and Children's Functioning During Divorce*, 51 *J. MARRIAGE & FAM.* 431 (1989).

characteristics of the individual child are more reliable indicators.<sup>121</sup> Children with more adaptable temperament, higher intelligence, and better coping skills tend to be more resilient than children who do not possess these traits.

Dr. Janet Johnston has argued that family laws, as well as court policies, are often justified by research findings from the broad population, but she argues that these findings are insufficiently backed by studies of the special subgroup of the divorcing population to which they are most frequently applied. In general, mental health professionals who conduct custody evaluations for the courts have, over the past ten years, assumed that relocation damages a child's relationship with the noncustodial parent and therefore damages the child. A further point made by Johnston is that children tend to deteriorate dramatically when frequent visitation transfers occur in high-conflict divorce situations.<sup>122</sup> Little research has addressed this subject in relation to the long-term effects of the interparental hostility and aggression on the future development of the child. In her own practice, Phelan finds that relocation, especially in the cases of high-conflict divorce, offers the child a welcome chance to escape parental conflict. While some sacrifice is made in "frequent and continuing contact" with the noncustodial parent, that sacrifice also means that frequent and continuing conflict is no longer present. The custodial parent who becomes more relaxed, less engaged in conflict and consequently less hostile is a better parent to the child. Additionally, relocation often greatly reduces the child's level of stress and anxiety over issues of loyalty to one parent or the other.

Thus, in situations involving continued interparental hostility and aggression, one parent's relocation may actually help the child bring closure to a painful situation. However, insufficient longitudinal research exists on the subject to say this with certainty. Extensive research does exist in child development on the long-term effects of violence on children. Phelan maintains that interparental hostility and aggression constitutes a form of violence inflicted upon children and can produce many of the same detrimental effects over time.

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<sup>121</sup> Johnston, *Findings*, *supra* note 107.

<sup>122</sup> Janet R. Johnston, *High Conflict Divorce*, 4 *FUTURE OF CHILDREN* 165, 174 (1994).

Phelan does add a note of caution, however. Courts may err if they approach the subject of relocation on a generalized basis. Each case needs to be decided on its own merits. What is best for one child in one case is not good for another child in another case. In this respect, Phelan takes some exception with Wallerstein's contention that the court should strive to protect the stability and integrity of the new post-divorce family unit.<sup>123</sup> Phelan believes that the clinician evaluating each of these cases must be open minded about what is truly in the best interest of the particular child(ren) before the court.

*E. Is it The Child's Current Environment?*

Undoubtedly, a move adds additional stress to the life of any child. Dr. Wallerstein finds significant distinctions, however, between the perceptions of a child in an intact family, and a child from a divorced family, when it comes to relocation. Children with their families intact have the support and stability of the whole family, and the child has a reasonable sense that he or she will be protected by both parents. For a child of divorce, relocation can represent another episode of the original disruption that occurred at the time of divorce.<sup>124</sup>

Bruch and Bowermaster distinguish between stability created by the child's geographic location and that created by the equanimity within the household. This can be an important distinction to make when attorneys and judges make "stability" a central theme of a relocation case. Bruch and Bowermaster also note that an intact family would not be threatened by a custody challenge from extended family members "who might find a proposed relocation unwise and would wish to retain the children in local schools, youth groups or therapy sessions."<sup>125</sup> They further assert that it is equally important to protect the new family unit following divorce and that this unit deserves the same protection after the initial custody decision has already been made.<sup>126</sup>

In an Indiana opinion, the dissent criticized the majority's reference to school, church, and community relationships as the children's "crucial relationships," noting that the truly "crucial

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<sup>123</sup> Wallerstein & Tanke, *supra* note 43, at 323.

<sup>124</sup> Wallerstein Brief, *supra* note 109, at 11.

<sup>125</sup> Bruch & Bowermaster, *supra* note 4, at 264.

<sup>126</sup> *Id.* at 265.

relationship” was the one between the children and their custodial parent.<sup>127</sup> Other courts also have downplayed the importance of environmental factors, noting that these factors affect every relocating family.<sup>128</sup> Some jurisdictions, however, believe that environmental factors contribute significantly to the stability of the custodial family unit and should be considered.<sup>129</sup> In *Domingues v. Johnson*,<sup>130</sup> the Maryland Supreme Court perceived that keeping children in the area where they have always lived and where they can continue their association with friends and extended family also provides a form of stability. In recent years, the Maine Supreme Court upheld a trial court that considered the environmental stability of the children to be more important than the custodial community, the trial court ordered the children to remain in the current location, with custody granted to the mother if she also remained there, and custody granted to the father if he relocated there and the mother moved elsewhere. The dissent in that case accurately recognized that *neither* parent wished to reside in the location to which the children’s domicile was restricted.<sup>131</sup>

#### F. *Other Considerations*

Wallerstein also considers court intervention designed to maintain the geographical proximity of divorced parents to be at odds with the decision of the parents to divorce and rebuild their lives separately. The child of parents who are unable to build new, stable, separate lives may continue to be threatened with

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<sup>127</sup> *Smith v. Mobley*, 561 N.E.2d 504 (Ind. Ct. App. 1990).

<sup>128</sup> *See Fossum v. Fossum*, 545 N.W.2d 828 (S.D. 1996) (deciding, where noncustodial parent sought change of custody, to emphasize the parenting attributes that caused mother to be awarded custody initially and to discount the relevance of natural consequences of any move such as changes to a new home, new school, new friends); *Aaby v. Strange*, 924 S.W.2d 623, 630 (Tenn. 1996) (explaining that “a move in any child’s life, whether he or she is raised in the context of a one or two parent home, carries with it the potential of disruption; such common phenomena — both the fact of moving and the accompanying distress—cannot constitute a basis for the drastic measure of changing custody”).

<sup>129</sup> *See In re Marriage of Smith*, 665 N.E.2d 1209 (Ill. 1996).

<sup>130</sup> 593 A.2d 1133 (Md. 1991).

<sup>131</sup> *See Rowland v. Lingman*, 629 A.2d 613 (Me. 1993).

continued instability throughout his or her childhood.<sup>132</sup> Additionally, if the development of the child is in any manner contingent upon the adjustment of the custodial parent following divorce, as Wallerstein and others have suggested, prohibiting a move by that parent may force the parent to choose between custody of the child and opportunities that may benefit the new family unit, including the child. Such opportunities include a new marriage for the custodial parent that may help make the custodial parent happy, as well as improve the family economically; an important job opportunity; or return to supportive extended family. When the custodial parent is forced to choose between custody of a child and a new opportunity that benefits that parent and the family, either option may grieve the parent and ultimately cause the child to feel responsible for the parent's choice.<sup>133</sup> The Supreme Court of Vermont, responding to concerns such as these, adopted a standard for determining relocation disputes that does not assume the custodial parent should stay in the state and be prohibited from improving his or her own life; instead, the court considers factors such as changes the child will face in moving to the noncustodial parent's home and in losing daily contact with the custodial parent.<sup>134</sup>

Bruch and Bowermaster observe that a "net detriment to the child's best interest" may be established "only if at least two conditions are met: (1) advantages to the child stemming from the move, however great, are insufficient to offset the decreased influence of the noncustodial parent, and (2) prohibiting the proposed relocation will not cause comparable or greater detriment to the child" (such as the relocation of the primary caretaker without the child, whereby the child still "moves"—to the noncustodial parent's residence). "Despite a statute directing frequent and continuing contact with *both* parents, courts often do not consider the likely impact of the move (the custody transfer, which separates the child from its primary caretaker) when they deny permission to a custodial parent to change the child's residence."<sup>135</sup>

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<sup>132</sup> See Wallerstein Brief, *supra* note 109, at 21.

<sup>133</sup> *Id.* at 22.

<sup>134</sup> See Lane v. Schenck, 614 A.2d 186 (Vt. 1992).

<sup>135</sup> Bruch & Bowermaster, *supra* note 4, at 260.

In Wallerstein's view, "if the child is reasonably content and developmentally on course, the stability and integrity of the post-divorce family unit in which the key relationship is the one between the child and the primary custodial parent, should be protected." Thus, when the child is in the primary physical custody of a parent, that parent should be able to relocate with the child, except under unusual circumstances.<sup>136</sup> Like many courts making these decisions, Wallerstein also believes that other factors are important for the court to consider, including that the relocation has been undertaken in good faith, that the child will not be required to travel continually and extensively or under adverse circumstances, and that summer and vacation periods will allow the continuation and development of the child's vitally important relationship with the noncustodial parent.<sup>137</sup> In short, Wallerstein believes that the relationships of the child should predominate over geographic considerations.<sup>138</sup>

G. *What If Precluding The Child's Move Results In The Modification Of Custody—Is This In The "Best Interest" Of The Child?*

If the custodial parent has no choice but to move, such a move results in a de facto change in custody when the child is restricted from relocating with the custodial parent. In the case of *McDonough v. Murphy*,<sup>139</sup> the North Dakota Supreme Court held that a motion to change custody and a counter motion to relocate a child cannot be considered separately; if one is granted, the other is necessarily denied.

In some instances, courts will "conditionally" change custody to the noncustodial parent if the custodial parent should choose to relocate. Such a result is seldom "in the best interest" of the children. The father in *Burgess* argued that most custodial parents seeking to relocate are "bluffing" and that they will not move if the relocation will result in the loss of custody. The California Supreme Court, however, refused to accept his argument, noting that the "Family Code provides no ground for permitting the trial court to test parental attachments or to risk

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<sup>136</sup> Wallerstein Brief, *supra* note 109, at 26.

<sup>137</sup> *Id.* at 28.

<sup>138</sup> *Id.* at 30.

<sup>139</sup> 539 N.W.2d 313, 318-19 (N.D. 1995).

detriment to the 'best interest' of the minor children on that basis. Nor should either parent be confronted with Solomonic choices over custody of minor children."<sup>140</sup> Bruch and Bowermaster refer to such practices as "unseemly judicial blackmail" and assert that such courts "expect the custodial parent to forego the relocation in order to retain custody."<sup>141</sup>

Courts are not sufficiently taking into account the harm that will result to the child if the custodial parent relocates without the child, or "the harm to the custodial parent, and derivatively, to the child, of a parent's decision to abandon the move."<sup>142</sup> Some courts, though, do consider these factors. For example, the Mississippi Supreme Court has acknowledged that a long-distance relocation away from either parent adversely affects children, and that the adverse effects warranting a custody change must be more than those created by the divorce or by geographic separation from one parent.<sup>143</sup> In Alabama, once custody is reopened in a relocation case, the person seeking the custody change has the burden of demonstrating that the benefits to the child of changing custody outweigh the inherently disruptive effects of uprooting the child from an established custodial relationship.<sup>144</sup>

Parents who wish to relocate may face a burden of proof with the trial court that is imposed upon them neither by statute nor by case precedent. Dr. Wallerstein observes that parents seeking to relocate suffer discrimination and are "blamed for disrupting parenting arrangements and violating the rights of the other parent."<sup>145</sup> Bruch and Bowermaster recognize that "even if the noncustodial parent who challenges the move is unqualified for or uninterested in obtaining custody, the custodial parent faces costly litigation. If commitments are made and kept in a timely fashion, whether to an employer, a prospective spouse, a

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<sup>140</sup> 913 P.2d at 481.

<sup>141</sup> Bruch & Bowermaster, *supra* note 4, at 261.

<sup>142</sup> *Id.* at 260-61.

<sup>143</sup> *Spain v. Holland*, 483 So. 2d 318, 321 (Miss. 1986) (deeming legally irrelevant to the matter of permanent custody the fact that taking the children to a distant state or outside the United States effectively curtails the noncustodial parent's visitation rights).

<sup>144</sup> *Ex Parte Murphy*, 670 So. 2d 51 (Ala. 1995).

<sup>145</sup> Wallerstein Brief, *supra* note 109, at 29.



landlord or an educational institution, a loss of custody may result.”<sup>146</sup>

In order to “punish” a parent who seeks to move, courts often change conservatorship. As Bruch and Bowermaster observe, this results in two “moves” for the child. First, the child changes residences from the custodial parent to the noncustodial parent. Second, the child loses the stability experienced in the relationship with the custodial parent.<sup>147</sup> In their haste to find a solution to a difficult problem and contentious situation, where many competing interests are at issue, courts often overlook the disadvantages of disrupting the child’s life in these ways.

#### H. *Wasn’t “Best Interest” Already Determined At Divorce?*

When parents dissolve their marriage and a custody determination is made, whether by agreement or judicial resolution, presumably the court issues an order reflecting the custody arrangement that is in the best interest of the children. Too often the noncustodial parent opposing the relocation will attempt to “retry” the divorce, and many of the factors considered in the original custody determination are simply not relevant to the determination of the relocation issue. As Bruch and Bowermaster suggest, courts must assume that the original custody determination was in the child’s best interest and so consider only matters that truly constitute changed circumstances.<sup>148</sup> By way of example, Bruch and Bowermaster observe that the question of a custodial parent’s mental health is only relevant if it has altered sufficiently since the time of the original custody determination, and “this question must stand on its own merits, not on the fact that a relocation is at hand.”<sup>149</sup>

The Colorado Supreme Court observed that instability in custodial arrangements adversely affects children. In suggesting that courts not substitute their judgment for that of the custodial parent after custody has been determined, the court stated “neither the child nor the parents benefit from repeat appearances before the court or from the uncertainty caused thereby. Instead uncertainty only threatens the child’s stability and under-

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<sup>146</sup> Bruch & Bowermaster, *supra* note 4, at 248.

<sup>147</sup> *Id.* at 262.

<sup>148</sup> *Id.* at 265 n.71.

<sup>149</sup> *Id.*

mines the parties' acceptance of the original award of custody."<sup>150</sup>

The Wyoming Supreme Court held that because the "best interest of the child" standard was applied at the time of the initial custody decision, review of that decision looks at balancing the continued rights of the parties with the best interests of the child as established at time of divorce. Wyoming considers it "incongruous," once a custody order is rendered based upon the best interest of the child, not to support the custodial parent's efforts to improve the household's standard of living, whether or not in another jurisdiction.<sup>151</sup> Similarly, Tennessee has held that the "best interests determination in the removal context is not equivalent to the original custody decision."<sup>152</sup> Alaska, however, does not distinguish between a "best interests" determination made at the time of divorce and one made upon the motion of a party to modify custody.<sup>153</sup>

#### *I. Is Anyone Truly Interested In The Child's Best Interest?*

The determination of a relocation case involves many competing interests. The interest of the parent wanting to relocate and the interest of the non-relocating parent are clearly in conflict. What is less clear is whether the position assumed by either parent truly represents the best interest of the child.

The impact of gender on competing interests inherent in relocation litigation cannot be ignored. For many years, at the time of divorce mothers were expected to continue as primary caretakers. With the passage of time, the number of divorced families in this country increased dramatically. With the increase in the divorce rate, the outcry for and subsequent movement toward gender equality in other aspects of society, and consciousness-raising from the 1960's onward, both women and men came to realize that gender-based assumptions about their roles as breadwinners and caretakers after divorce were often unworkable.

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<sup>150</sup> *In re Marriage of Francis*, 919 P.2d 776, 786 (Colo. 1996).

<sup>151</sup> *Love v. Love*, 851 P.2d 11283 (Wyo. 1993).

<sup>152</sup> *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996) (*citing Taylor v. Taylor*, 849 S.W.2d 319, 328 (Tenn. 1993)).

<sup>153</sup> *McQuade v. McQuade*, 901 P.2d 421, 423 n.6 (Alaska 1995).

Many divorced men were deprived of their families and were essentially divorced from their children as well as their spouses. Many women were unable to continue to raise small children and engage in careers that would provide ample economic support for their new families. Women were dissatisfied with the economic hardships suffered at time of divorce, and men were dissatisfied with being cast out of their children's lives and relegated to the role of weekend fathers. "Fathers' Rights" groups sprung up across the country to support legislation that would help secure men's roles in the lives of their children. These groups have achieved much for fathers, and for their children as well.

Undoubtedly some gender bias remains in the legal system with respect to courts appointing conservators and allocating time periods for possession and access. On another level, however, the policy arguments that favor the stability of the custodial relationship, and thereby favor children's relationships with mothers, may merely represent social reality. Current research reveals that the majority of the primary caretakers of children from divorced families are still women. In only 10 percent of post-divorce households do children live with their fathers. In the one out of six families in which residential arrangements were more evenly balanced, the division of child rearing arrangements typically was not evenly distributed; two-thirds of these children spent more overnights with their mothers than their fathers, and mothers typically handled "matters such as doctors' appointments and the purchase of everyday clothing."<sup>154</sup>

Courts that protect the custodial parent's right to relocate still do so when the custodial parent is a father, and they emphasize the importance of the custodial relationship, regardless of whether that relationship is with a father or mother. For example, in Nevada a custodial father was allowed to move because strong family support existed in the new location, a new job would allow him to afford a college education for his children, his motives were honorable, he had always accommodated the

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<sup>154</sup> Bruch & Bowermaster, *supra* note 4, at 247, n.2 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DIMENSIONS OF CUSTODY* 271 (1992)).

mother's visitation, and he agreed to a reduction in child support to offset the mother's transportation expenses.<sup>155</sup>

While "Fathers' Rights" groups have helped equalize the involvement of fathers in their children's lives, these groups may be advancing fathers' interests above those of the children, if Dr. Wallerstein's research results showing the importance of the stability of the child's custodial relationship to a child's development are accurate. By way of example, the father in *Tropea* seemed far more concerned about whether *he* should be "punished" by losing proximity and weekday contact with his children than he was with the effect a change in custody would have on his children.<sup>156</sup> Undoubtedly he was a very involved father, but the lack of respect he held for the relationship between the children and their mother was apparent in his open disparagement of her in the children's presence.

In addition to the desire of one former spouse to "punish" the other, resistance to relocation may be a form of control by one spouse over the other, subsequent to divorce. In *Burgess*, for example, the mother testified that the father objected to her move, at least in part, because he wanted to retain control of her and the children and that he did not want to change his work schedule, because the existing situation kept her and the children in the former geographic location.<sup>157</sup>

The question of how one imparts to a legal system the understanding that children are the only parties who truly have no choices presented to them and that they alone are the true victims of a broken family remains a mystery. In the meantime, however, when one talks about "best interest" of the children, the reference may be a mischaracterization of ulterior motives involved.

### **III. What Difference Does Joint Custody Make?**

Whether joint custody either should or actually does make a difference in the resolution of relocation disputes likely depends on the form of joint custody at issue. A survey on joint custody reveals that most jurisdictions have enacted some legislation af-

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<sup>155</sup> *Gandee v. Gandee*, 895 P.2d 1285 (Nev. 1995).

<sup>156</sup> *Tropea*, 665 N.E.2d at 146.

<sup>157</sup> *Burgess*, 913 P.2d at 477.

fecting joint custody. Only eight jurisdictions do not have joint custody statutes: Alaska, Arkansas, North Dakota, Rhode Island, South Carolina, Washington, West Virginia, and Wyoming.<sup>158</sup> Alabama has only recently enacted a joint custody statute.<sup>159</sup>

*A. Legal Joint Custody Versus Shared Physical Possession*

Whether the joint custody arrangement is one of legal joint custody or of shared physical possession may be crucial to the outcome of a relocation case and the consideration of the issues involved. Legal joint custody may involve the joint rights, powers, and duties to make significant decisions affecting the life of the child, but not necessarily an equal sharing of possession.<sup>160</sup> A party may have legal joint custody in California, as in most other states that recognize joint custody, without being granted physical joint custody.<sup>161</sup> In other words, the result of a legal joint custody arrangement may be that there is still one “custodial” parent and one “noncustodial” parent.

*1. Effect of legal joint custody*

Generally, only physical joint custody affects the relocation determination. In at least one state, however, legal joint custody affects the result in a relocation case. While Minnesota presumes that an established custodian should not be replaced absent proof of endangerment to the child in relocation cases, it does not do so in cases where primary caretakers share joint legal and physical custody with the other parent, even if the primary caretaker has far greater parental responsibilities, including the right to establish the primary residence of the children. In such cases, courts use the “best interest” standard.<sup>162</sup>

The distance of the relocation may make some difference in the outcome of the case. The Supreme Court of Indiana observed that a move far away will significantly affect the relation-

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<sup>158</sup> See Gale Research Inc., *Child Custody*, NATIONAL SURVEY STATE LAWS, Table 21 at 232-33 (Richard A. Leiter ed. 1993).

<sup>159</sup> ALA. CODE §§ 30-3-150 (Supp. 1997) (effective January 1, 1997).

<sup>160</sup> California distinguishes between “legal joint custody” and “physical joint custody.” *Burgess v. Burgess*, 913 P.2d 473, 476 n.2 (Cal. 1996).

<sup>161</sup> CAL. FAM. CODE § 3085 (1994).

<sup>162</sup> MINN. STAT. ANN. § 518.17 (West Supp. 1998); *Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993).

ship between the child and the noncustodial parent and will severely hamper active participation of that parent in the child's upbringing.<sup>163</sup> The court further stated that this was particularly significant when joint custody is involved because the court's order of joint custody reflects a finding that participation by the noncustodial parent in major decisions regarding the child's welfare is in the child's best interest.<sup>164</sup>

## 2. *Effect of physical joint custody*

Other situations may entail physical joint custody, or a de facto joint custody, such that the child spends an equal amount of time with both parents, and the relationship with both parents is important to the continued stability of the post divorce situation. In such cases, courts are particularly reluctant to allow one parent to relocate with the children.

The *Burgess* court indicated that a situation involving joint physical custody may require an altogether different analysis when one parent seeks to relocate with the children. In such cases, courts may modify or terminate the custody order if it is shown that the best interest of the children requires modification or termination.<sup>165</sup> The trial court then must consider *de novo* what arrangement for primary custody is in the best interest of the children. The Colorado Supreme Court, in *In re Marriage of Francis*,<sup>166</sup> also held that a presumption favoring relocation with the children is necessarily weakened if the parents share both residential and legal custody; the court, however, declined to decide the issue of how removal should be evaluated in such circumstances.

In her amicus curiae brief to the California Supreme Court in *Burgess*, Dr. Wallerstein acknowledged that parents and children operating under a joint physical custody arrangement face a different situation than those where one parent has primary physical custody. When both parents share physical custody of a child and the child has a true dual residency, both parents are considered primary to the child's development, and the important factors of stability and continuity favor protecting the child's

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<sup>163</sup> *Lamb v. Wenning*, 660 N.E.2d 96 (Ind. 1992).

<sup>164</sup> *Id.* at 99.

<sup>165</sup> *Burgess v. Burgess*, 913 P.2d 473, 483 n.12 (Cal. 1996).

<sup>166</sup> 919 P.2d 776, 785 (Colo. 1996).

relationships with both parents.<sup>167</sup> Absent an agreement between the parents regarding the relocation decision, Dr. Wallerstein supports the position requiring the parent requesting the move to prove that such a move is in the best interest of the child instead of just that of the relocating parent.<sup>168</sup> However, if the joint custody arrangement is legal rather than physical, then Dr. Wallerstein believes parents can continue to share major decisions even if physical custody is changed.<sup>169</sup>

Several state appellate courts have held that when one party files a removal motion in a joint physical custody situation, neither party bears the burden of proving that relocation of the child is either favorable or detrimental to the child's best interests. Rather, each party carries an equal burden to prove that the new custody arrangement proposed by that party should be adopted by the court. If either party fails to meet that burden, the court remains free to adopt the arrangement that it determines promotes the child's best interest.<sup>170</sup>

In some states, the court will modify custody so that the non-relocating parent becomes the custodial parent. The Tennessee Supreme Court, for instance, upheld a court's change of custody from the mother to the father, where the mother's move from the state would frustrate the extensive visitation which the father had previously enjoyed with the children (characterized as close to a de facto joint custody agreement), and the children would be deprived of close, personal ties with their step-mother and step-siblings.<sup>171</sup>

Still other states continue to apply a "best interests" test regardless of whether the parties have operated under a joint custody arrangement. Alaska has refused to apply a more rigid

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<sup>167</sup> Wallerstein Brief, *supra* note 109, at 28.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 30-31.

<sup>170</sup> *In re Chester*, 907 P.2d 726 (Colo. Ct. App. 1995) (holding in joint custody situation, burden of proof for resolving a request by a parent to remove his or her children from the state is shared equally by both parents; court must consider relevant information submitted and decide what new arrangement will best serve the children's interests); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991).

<sup>171</sup> *Nichols v. Nichols*, 792 S.W.2d 713 (Tenn. 1990).

standard where the parties have enjoyed joint custody of a child.<sup>172</sup>

3. *What place of domicile fixed at time of divorce?*

Sometimes, even when one parent has the sole right to determine the child's primary residence or legal domicile, that parent may have agreed to be enjoined from changing the domicile without further permission from the court. Such was the case in *Tropea*.<sup>173</sup> In other cases, the trial court may predetermine the domicile of the child. Under the latter scenario, neither parent has the right to determine the child's domicile. The domicile has been "fixed" by prior agreement of the parties, or by court order at the time of divorce. If the domicile was restricted to a certain geographical locality, either by agreement or by court order, has a determination not already been made as to the "best interest" of the child in remaining in that domicile?

#### **IV. Constitutional Concerns**

The topic of constitutional issues in relocation cases has been the subject of at least two noteworthy articles.<sup>174</sup> While it is not the intent of this paper to thoroughly explore all of the constitutional concerns that arise in relocation or removal litigation, court opinions repeatedly make reference to these matters. Most courts do not determine the outcome of relocation cases based on the constitutional issues, but many make comments pertaining to their concerns over constitutional matters, or disparate treatment of custodial, versus noncustodial parents who wish to relocate with their children. A review of court opinions reveals several common constitutional themes. Courts generally discuss constitutional matters either in terms of the state impinging upon

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<sup>172</sup> See *McQuade v. McQuade*, 901 P.2d 421, 424 (Alaska 1995) (Alaska essentially applies standard that if parents have joint physical custody and one parent seeks to move the child, the appropriate standard would be similar to a de novo review that would be made at initial custody hearing; custody determined by best interests).

<sup>173</sup> 665 N.E.2d 149 (N.Y. 1996).

<sup>174</sup> See Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1 (1995-96); Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and the Courts*, 1985 ARIZ. L.J. 1.



individual rights, such as the right to parent, to travel, to remarry, and to have possession of or access to one's child, or the courts apply an "equal protection" analysis.

A. *Individual Constitutional Rights*

While domicile restrictions are not decided on a constitutional basis, some courts do recognize the potential for violation of parents' rights to certain individual freedoms, including the right to travel and choose where one will live. Such factors may be viewed as tempering the right of the trial court to restrict the custodial parent from relocating the child.<sup>175</sup>

Courts have disagreed over whether restrictions placed on a parent's right to relocate with children infringe on personal constitutional rights. For example, the New Mexico Supreme Court observed that requiring a moving parent operating under a joint physical custody arrangement to show a move to be in the child's best interest violates that parent's right to travel; and, furthermore, that requiring the non-moving party to show a proposed move to be contrary to the child's interests violates the liberty interest of that parent.<sup>176</sup>

Courts that find no constitutional violations generally distinguish between a restriction placed on the parent's right to relocate and the parent's right to remove the child when it is not in the child's best interest to do so. In *Carter v. Schieb*,<sup>177</sup> for example, the Missouri appellate court held that the denial of the mother's right to take the children with her out of the state was not a denial of her constitutional right to travel or of the right of freedom of personal choice in matters such as remarriage and family life.

B. *Equal Protection Clause*

Additional constitutional concerns arise over requiring the custodial parent to obtain consent of the court to relocate, when the noncustodial parent is not required to obtain anyone's "permission" to move. The noncustodial parent is free to relocate and thereby break the "continuing and frequent contact" with

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<sup>175</sup> See *In re Sheley*, 895 P.2d 850 (Wash. Ct. App. 1995).

<sup>176</sup> See *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991).

<sup>177</sup> 877 S.W.2d 665 (Mo. Ct. App. 1994).

the child with no interference from the courts. The *Burgess* court held that no statutory basis existed for imposing a specific additional burden of persuasion on *either* parent to justify a choice of residence as a condition of custody, and observed that both parents have needs following divorce to secure or retain employment, pursue career or educational opportunities, or reside in the same location as a new spouse or other family or friends.<sup>178</sup>

It has been critically noted that the divorced family is subject to restrictions not equally applied to intact families. The South Dakota Supreme Court held that custodial parents are entitled to the same options that noncustodial parents, or intact families, have to seek a better life for themselves and their children.<sup>179</sup>

## V. A Model Act for Relocation Litigation

The Board of Governors of the American Academy of Matrimonial lawyers (“AAML”) adopted a proposed Model Relocation Act (“Model Act”) at the 1997 spring meeting of the AAML.<sup>180</sup> The Special Concerns of Children Committee (“the Committee”) prepared the original draft of the Model Act. The Committee was composed of twelve members of the AAML, who hail from California, New York, Illinois, Texas, Florida, Georgia, Wisconsin, Pennsylvania, Oklahoma, and Connecticut. The majority of these states have either existing statutes or recent court opinions regarding relocation.

### A. *Is A Model Act Appropriate?*

Given the vast disparity between the states as to the circumstances under which a parent can relocate with children and what party bears the burden of proof, it is amazing that the Committee and the AAML Board have managed to reach consensus on any section of the Model Act. Significantly, in the Introductory Comment to the version of the Act adopted by the Board, the Committee stated that the suggested statute was *not* intended to be a “uniform” act, and several significant issues are presented in

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<sup>178</sup> *Burgess v. Burgess*, 913 P.2d 473, 479-80 (Cal. 1996).

<sup>179</sup> *Fortin v. Fortin*, 500 N.W.2d 229, 231 (S.D. 1993).

<sup>180</sup> AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (AAML), PROPOSED MODEL RELOCATION ACT (1997), 15 J. AMER. ACAD. OF MAT. LAW, (1998).

the alternative “in order to facilitate independent consideration of controversial issues by state legislators.”<sup>181</sup> Presumably, these are the areas where consensus among the members proved unattainable. Further, those jurisdictions that have enacted relocation statutes have yet to achieve uniformity in their application. Relocation litigation is, perhaps, the most fact-intensive area of domestic relations law, and uniformity is not a realistic goal.

### B. *The Model Act*

The Model Act will apply to any relocation; there is no specified distance, nor is the relocation required to be “across state lines.” The Model Act tracks current trends away from requiring custodial parents to seek “permission” from courts or noncustodial parents to move. Unless a court order or agreement between the parties that is enforceable by court order provides otherwise, a person who has the right to establish the principal residence of the child may seek to relocate the child and is required to provide notice to every other person entitled to visitation with the child of the proposed relocation of the child’s residence.<sup>182</sup>

After the noncustodial parent receives notice from the custodial parent of an intent to relocate with the child, the burden shifts to the noncustodial parent to take necessary legal action to prevent the relocation.<sup>183</sup> Inherent in this shifting of the burden and in the language of the statute is the premise that the custodial parent has the right to establish and to relocate the child’s principal residence. One should recognize from the outset, though, that the burden, at this juncture, is only one of instituting court action, not “a burden of proof.”<sup>184</sup>

#### 1. *Notice of intent to relocate*

The Model Act provides that a person who has the right to establish the principal residence of the child shall notify every other person who is entitled to visitation with the child of a proposed relocation of the child’s principal residence.<sup>185</sup> The notice

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<sup>181</sup> *Id.*, Introductory comment, at 3.

<sup>182</sup> *Id.* §§ 102(a)(2)(b), 201, 301.

<sup>183</sup> *Id.* § 301.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* § 201.

is required to be mailed no later than either the sixtieth day before the date of the intended move, or, if the custodial parent did not know and could not have known the information in sufficient time to provide sixty days' notice, then the information must be communicated no later than the tenth day after the date the relocating person knows the information.<sup>186</sup> The duty to provide information as it becomes known is continuing.

The failure to provide the requisite notice may be considered by the court as a factor in making its determination of the relocation of the child, a factor in determining whether custody and/or visitation should be modified as a basis for ordering the child returned to the previous location, and as sufficient cause to have the person relocating with the child pay the objecting party's reasonable attorney's fees and expenses.<sup>187</sup> If the order contains the language pertaining to notice as specified by the Model Act, then contempt may also be an available enforcement remedy.<sup>188</sup>

In addition to the usual information pertaining to the child's new residence address, mailing address, home telephone number, and date of the move, the custodial parent is also required to provide a brief statement of the specific reasons for the proposed relocation, a proposal for a revised schedule of visitation with the child, and a warning to the non-relocating parent that an objection to the relocation must be made within thirty days or the relocation will be permitted.<sup>189</sup>

In an interesting deviation from most relocation statutes, the noncustodial parent, as well as any other adult entitled to visitation with a child, is also required to notify every person entitled to visitation with a child of an intended change in the *adult's* primary residence.<sup>190</sup> The "comment" provided by the Committee following this provision acknowledges that the primary legal focus has been on the relocation of the child, with scant attention paid to the impact of a change of residence of a person with visitation rights. The Committee further comments that legal action to interfere with an adult's constitutional right to travel is not

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<sup>186</sup> *Id.* § 203(2)(A)(B).

<sup>187</sup> *Id.* § 206.

<sup>188</sup> *Id.* § 207.

<sup>189</sup> *Id.* § 203(b).

<sup>190</sup> *Id.* § 202.

possible but asserts that the information about the change of residence of a noncustodial party should enhance the relationships between the child and adults involved, as well as provide necessary information for the enforcement of child support orders.

## 2. *Objecting to relocation*

If no one entitled to notice objects to the relocation of the child within 30 days after receiving notice, then the person entitled to custody may relocate with the child.<sup>191</sup> A person objecting to the child's relocation is required to seek a temporary or permanent order to prevent the relocation. The "comment" provided indicates that the Committee rejects the procedure required by some state statutes in which the custodial parent is always and presumptively prevented from relocating the child "until further order of the court." The Committee rejects that particular procedure on the following grounds: (1) a future relocation issue should not be automatically prejudged without relevant and current evidence; (2) at the time of divorce, the parties' new living circumstances may prevent crucial evidence regarding relocation and the relationships between the child and the parties from being available; and (3) such a requirement forces parties to return to court unnecessarily.

The persons entitled to object to the relocation include any parent entitled to visitation with the child. A non-parent entitled to visitation with a child may file a proceeding to obtain a revised schedule of visitation, but may not object to the proposed relocation or seek an order to prevent the relocation.<sup>192</sup> The previous draft of this section of the proposed model act provided that *any person* entitled to visitation could object to the relocation. The "comment" to section 302, however, indicates that this section was the subject of considerable debate among the Committee, and the members ultimately decided to distinguish between rights of parents and non-parents and the remedies available to each.

The request for an order preventing the relocation must be accompanied by an affidavit "setting forth the specific factual basis supporting a prohibition of the relocation."<sup>193</sup> The party seek-

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<sup>191</sup> *Id.* § 301.

<sup>192</sup> *Id.* § 302.

<sup>193</sup> *Id.* § 303.

ing to relocate with the child may also file a responsive affidavit.<sup>194</sup> The Committee comments that in some jurisdictions, the dispute may be determined by a process less than a full evidentiary hearing. The state of Minnesota currently allows relocation without an evidentiary hearing unless the parent resisting the move makes a prima facie case against removal.<sup>195</sup>

### 3. *Resolution of the dispute*

#### a. *Temporary orders*

The proposed statute provides for temporary orders, after a hearing, either restraining or allowing the relocation of a child. The outcome of the temporary orders should depend on whether notice was given, whether the parties agree on a revised schedule for temporary custody and visitation, and whether the evidence presented at the temporary orders hearing leads the court to believe the relocation will be approved or not approved on final hearing.<sup>196</sup>

#### b. *Factors to be considered*

The Model Act designates eight factors for the courts to consider when deciding whether to restrain the relocation.<sup>197</sup> In proposing these factors, the Committee was quick to comment that the list may do little to solve the dilemma, which is often incapable of a satisfactory solution. If the parties are competent, caring parents who have a healthy post-divorce relationship with the child, the competing interests may be “compelling and irreconcilable.” The Committee observes that the child has a compelling interest in stability, in remaining with the custodial parent, and in maintaining frequent contact with the noncustodial parent.

The Model Act includes the following factors to be considered:

- (1) the nature, quality, extent of involvement, and duration of the child’s relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child’s life;

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<sup>194</sup> *Id.* § 303.

<sup>195</sup> Bruch & Bowermaster, *supra* note 4, at 287 (citing *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641-42 (Minn. 1996)).

<sup>196</sup> AAML, *supra* note 180, § 401.

<sup>197</sup> *Id.* § 406.

- (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (3) the feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
- (4) the child's preference, taking into consideration the age and maturity of the child;
- (5) whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;
- (6) whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
- (7) the reasons of each person for seeking or opposing the relocation; and
- (8) any other factor affecting the best interest of the child.<sup>198</sup>

Several important points can be observed from the foregoing list of factors. While the factors are not designated as being listed in order of significance, it is interesting that the respective motives of both parties fall at the end of the list. As Bruch and Bowermaster recognize, "when viewed strictly from the child's vantage point, the parent's motives for moving are generally irrelevant."<sup>199</sup> However, in many jurisdictions the motive of the relocating parent is one of the most important considerations.<sup>200</sup>

The fifth consideration is whether the person seeking to relocate has demonstrated a pattern of either thwarting or promoting the relationship of the child and the non-relocating person. Such a consideration has a direct bearing on the motive of the relocating parent, but it also predicts whether that parent will

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<sup>198</sup> *Id.* § 405.

<sup>199</sup> Bruch & Bowermaster, *supra* note 4, at 268.

<sup>200</sup> *See, e.g.*, Pollock v. Pollock, 880 P.2d 633 (Ariz. Ct. App. 1995); In re Marriage of Francis, 919 P.2d 776 (Colo. 1996); In re Marriage of Murphy, 834 P.2d 1287 (Colo. Ct. App. 1992); Williams v. Pitney, 567 N.E.2d 894 (Mass. 1991); Harder v. Harder, 524 N.W.2d 325, 328 (Neb. 1994); Trent v. Trent, 890 P.2d 1309 (Nev. 1990); Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996); Love v. Love, 851 P.2d 1283 (Wyo. 1993).

take the necessary steps to encourage the relationship in the future and to find the manner and means to promote the relationship in other ways that are significant to the noncustodial parents relationship with the child, following relocation.

Additionally, the Model Act considers the child's relationship with step-parents, step-siblings, and other non-relocating persons, rather than simply the child's relationship with the noncustodial parent, a concern expressed by the court in *Domingues v. Johnson*<sup>201</sup> and many lower appellate courts. The court is also required to consider the age, developmental state, and needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development. At some point these considerations may become too broad. As other courts have pointed out, in families that remain intact, the stability of relationships with friends, schools, and other relatives do not dictate the right of the family to relocate. Relocation causes a disruption to children in families that are not broken by divorce.

Further, the Model Act indicates that the child should be heard—that the child's preferences should be considered, taking into account the maturity and the age of the child.<sup>202</sup> Dr. Wallerstein likewise encourages all concerned, including the courts, to hear the child's voice. She reminds us that children have their own independent thoughts and feelings and that they are not simply programmed to repeat information fed to them by the adults in conflict. While Wallerstein does not assert that children should dictate the outcome of the relocation decision, she does contend that at the age of seven or older, a child's thoughts, feelings, experiences, and reactions to the proposed changes should be carefully considered. The child is able to express feelings of comfort or discomfort within each home, the child's relationship with step-parents and siblings, and the nature of the child's relationship with each parent.<sup>203</sup>

Many would argue that numerous problems exist in Wallerstein's proposal and hence with this section of the Model Act, and that the results may harm more than benefit the child. The consideration of the children's desires assumes that the parents

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<sup>201</sup> 593 A.2d 1133 (Md. 1991).

<sup>202</sup> AAML, *supra* note 180, § 405(4).

<sup>203</sup> Wallerstein Brief, *supra* note 109, at 33.



are unaware of the information revealed to the court by the children, or in the alternative that all parents are mature and selfless enough not to pressure children to express the parents' wishes rather than the children's own feelings and perceptions. Children may have their own desires and feelings, but they are frequently pawns in parental conflict.

Wallerstein clarifies that adolescents fall within a different category than small children, since adolescents have developed more ties to the community, school and friends than small children; such ties may contribute significantly to their sense of stability.<sup>204</sup> Interestingly, the Model Act does not designate the age at which the desires of the children should be considered.

*c. Factors not to be considered*

Perhaps more significant than the factors that the court shall consider are those that the court *may not* consider. Under the Model Act, the court may not consider whether the person seeking relocation of the child has declared that he or she will not relocate if relocation of the child is denied.<sup>205</sup> This provision ends, or at least significantly curtails the "Solomonic choices" referred to by the California Supreme Court in *Burgess*,<sup>206</sup> which others refer to as "Sophie's Choice."<sup>207</sup>

Second, the court cannot give undue weight to a temporary order authorizing the party to relocate the child during the pendency of the suit.<sup>208</sup> The comment provided by the Committee indicates that the purpose of this provision is to recognize that the status quo resulting from the temporary order is often treated as having a determinative effect on the final hearing. While the Committee's "comment" notes that either permitting or denying relocation of the child on a temporary basis involves prejudging the final resolution of the issue, the Model Act does not prevent the court from considering a temporary order that *prevented* the party from relocating with the child as a factor in reaching its final decision.<sup>209</sup> Not only does this one-sided provision seem

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<sup>204</sup> *Id.* at 34.

<sup>205</sup> AAML, *supra* note 180, § 406(b).

<sup>206</sup> 913 P.2d 481 (Cal. 1996).

<sup>207</sup> Bruch & Bowermaster, *supra* note 4, at 297.

<sup>208</sup> AAML, *supra* note 180, § 406(a).

<sup>209</sup> *Id.*, Comment to § 406.

slanted against relocation, but it also conflicts with the provisions of the act allowing for the relocation of the child under temporary orders “when the court finds from the evidence presented at the temporary hearing that on the final hearing the court is likely to approve the relocation of the primary residence of the child on final hearing.”<sup>210</sup>

#### 4. *Burden of proof*

The issue as to which party, the relocating custodial parent or the non-relocating parent, bears the burden of proof is a key area on which the Committee members were unable to achieve consensus. Unfortunately, it is also the issue that has created both the greatest controversy in relocation cases and the largest disparities among varying jurisdictions. The Committee has proposed three alternatives, which are as follows:

- (1) The relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interest of the child;
- (2) The non-relocating person has the burden of proof that the objection to the proposed relocation is made in good faith and that the relocation is not in the best interest of the child; or
- (3) The relocating person has the burden of proof that the proposed relocation is made in good faith. If that burden of proof is met, the burden shifts to the non-relocating person to show that the proposed relocation is not in the best interest of the child.<sup>211</sup>

The Committee stated that the alternative of leaving this section out altogether was rejected, because the moving party would then automatically have the burden of proof, and the Committee found it inappropriate to place the burden on the petitioner rather than determine the issue based upon the status of either the person proposing or objecting to the relocation. Thus, the Committee determined to admit the disagreement over the issue and leave this topic for each state’s legislature to resolve.

#### 5. *Effect on custody litigation*

The Committee also was unable to resolve the issue whether a proposed relocation of a child either “may” or “may not” or

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<sup>210</sup> *Id.* § 401.

<sup>211</sup> *Id.* § 407.

“shall” be a factor in considering a change of custody.<sup>212</sup> Because some jurisdictions allow a proposed relocation to be a factor in a decision to modify a pre-existing custody order, while others do not, the Committee’s resolution of the issue was to merely provide those alternatives that already exist and leave the matter to be determined on a jurisdictional basis.

#### 6. *Applicability*

The language of the Model Act is broad enough to include virtually every possible contingency and applies, to some extent, to every person who has either court-ordered custody or visitation rights, including non-parents such as grandparents. The statute will apply to existing orders that do not conflict with the terms of the statute; in the event of a conflict, the existing order will prevail.<sup>213</sup>

Additionally, the statute has an “exceptional circumstances” provision that prevents the release of residential information in those cases where either the child or the adult would be put at risk.<sup>214</sup> The statute contains other provisions not discussed here in detail, including provisions for the relocating parent to post security to guarantee compliance with court-ordered visitation and sanctions for either a frivolous proposal to relocate the child or a frivolous objection to a proposed relocation.<sup>215</sup>

#### C. *Louisiana Is First To Adopt Model Act*

Louisiana was the first state to pass a statute based on the AAML’s Model Act.<sup>216</sup> Adopting the most conservative option provided by the Model Act, Louisiana requires the relocating custodial parent to prove that the change is proposed in good faith and in the best interests of the children.<sup>217</sup>

The Louisiana statute requires that notice be provided if (1) a parent with primary custody intends to relocate the child’s principal residence or if (2) the parents have equal physical custody and one of the parents intends to relocate the child’s principal

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<sup>212</sup> *Id.* § 404.

<sup>213</sup> *Id.* § 102.

<sup>214</sup> *Id.* § 205.

<sup>215</sup> *Id.* § 408, 409.

<sup>216</sup> LA. REV. STAT. ANN. §§ 9:355.1-9:355.17 (West Supp. 1998).

<sup>217</sup> *Id.* at § 9:355.13.

residence.<sup>218</sup> The statute applies to a relocation either outside the state or more than 150 miles away.<sup>219</sup>

The statute also provides that giving “notice of a proposed relocation shall not constitute a change of circumstances warranting a change of custody.”<sup>220</sup> Louisiana diverged from the Model Act, however, in adding a jurisdictional provision. The Louisiana statute provides that if the court allows the relocation, the court may “retain continuing exclusive jurisdiction of the case after relocation of the child as long as the non-relocating parent remains in the state.”<sup>221</sup> It will be interesting to see how that jurisdictional provision is interpreted when other states attempt to exercise jurisdiction under the Uniform Child Custody Jurisdiction Act.

#### D. *Will It Work?*

The concept of a Model Act that seeks even a modicum of uniformity in such a controversial area of domestic law as relocation is in and of itself controversial. One would expect that several jurisdictions will be exceptionally resistant to adopting the Model Act, even with the choices presented in the controversial areas where the Committee members were unable to resolve conflict.

Some states favor relocation statutes, others clearly do not. The Wyoming Supreme Court, for one, acknowledges that we live in a transient society and that restricting where custodial parents may live with their children is not realistic.<sup>222</sup> Jurisdictions fundamentally do not agree on the underlying premises that shape litigation in relocation disputes, and it is difficult to see how a model act can alter the fundamental disagreement. Further, it bears noting that the trend currently reflected in court opinions is one that favors, rather than restricts, relocation.

Several jurisdictions, such as Nevada, have specified that relocation cases are not subject to a “bright line” test, but are fact specific. For example, in Nevada, the determination of the best interest of a child in a removal context necessarily involves a fact-

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<sup>218</sup> *Id.* at § 9:355.3(A)(B) and (C).

<sup>219</sup> *Id.* at § 9:355.1(4)(a) and (b).

<sup>220</sup> *Id.* at § 9:355.11.

<sup>221</sup> *Id.* at § 9:355.17.

<sup>222</sup> *Love v. Love*, 851 P.2d 1283 (Wyo. 1993).

specific inquiry and cannot be reduced to a rigid “bright line” test.<sup>223</sup>

Additionally, as recognized by the Committee in its drafting of the Model Act, a disparity of viewpoints exists as to the presumptions that should be applied in a relocation dispute. While the March 1997 version of the Model Act that was ultimately adopted by the AAML Board of Governors states that the suggested statute is not meant to be a uniform act,<sup>224</sup> an earlier version of the model statute indicated that the act was developed to address the difficult problem of relocation litigation, given the disparate views that statutory formulations and court decisions have both taken on the subject.<sup>225</sup> The problem created by the decision to leave the various issues unresolved is that uniformity is precluded, and the laws of various jurisdictions continue to be applied disparately from one state to another.

The Committee indicated that the burden of proof may be only a hypothetical problem and that the relocation issue may first be based on the “best interest” of the child, with the trial court then finding that the burden has been met (regardless of which party bore the burden), and that relocation is “subject to result oriented analysis.”<sup>226</sup> However, the “best interest” of the child may also be result oriented, and the result is determined by the jurisdiction’s prevailing view on relocation cases in the first place. When it comes to the “best interest” of the child, one has to look no further than the debate over research results and the positions taken by social scientists such as Dr. Judith Wallerstein and Dr. Margaret Lee to ascertain that no uniform viewpoint exists as to what is in the “best interest” of a child when one parent wants to relocate to another geographical region with that child.

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<sup>223</sup> *Schwartz v. Schwartz*, 812 P.2d 1286 (Nev. 1991); *see also* in re Marriage of Smith, 665 N.E.2d 1209 (Ill. 1996); In re Marriage of Creedon, 615 N.E.2d 19 (Ill. App. Ct. 1993) (suggesting that complaints about unpredictability of decisions in relocation cases, and lack of black-letter rules, to some extent reflect a refusal to accept that the resolution of these cases requires a balancing process); *Love v. Love*, 851 P.2d 1283 (Wyo. 1993) (remarking that cases involving relocation are fact sensitive; court would be remiss to attempt to define a bright line test for their determination).

<sup>224</sup> AAML, *supra* note 180, Introductory Comment.

<sup>225</sup> AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, MODEL RELOCATION ACT (TENTATIVE DRAFT) (1996) (unpublished file with author).

<sup>226</sup> AAML, *supra* note 180, Comment to § 407.

Regardless of whether a statute based on the Model Act is enacted or not, and whether the statute in one state is textually comparable to that in another, the standards applied by the courts likely will continue to vary. In other words, it may be the very nature of relocation cases that makes the Model Act exceptionally difficult to enact. Relocation cases *are* particularly fact-sensitive and result-oriented, as evidenced by the opinions from the highest courts in those states that already have relocation statutes. The breadth that is required for such a statute to gain acceptance may also be what limits the statute's effectiveness.

