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CHILDREN'S RIGHTS v. PARENTS' RIGHTS: A PROPOSED SOLUTION TO THE CUSTODIAL RELOCATION CONUNDRUM

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INTRODUCTION

Being the pawn in a contested custody battle between two warring parents is traumatic for a child. The likelihood that the child will suffer some emotional injury increases when the child is forced to endure a second contested custody battle because one parent decides to relocate outside the jurisdiction of the court that granted the divorce. This paper suggests an approach that minimizes the adverse consequences of relocation. The approach still keeps the best interests of the children paramount by providing courts with discretion when it is needed to protect the child.

Custodial relocation is a topic that evokes strong emotional responses, especially in the parties directly involved. Nothing is more likely to disturb post-divorce stability between ex-spouses than the custodial parent's[1] decision to relocate. The news of the custodial parent's intention to relocate can be devastating to a noncustodial parent who has been very involved in parenting the couple's child. The noncustodial parent views the move as an infringement on his or her visitation rights and a threat to the parent-child relationship.

On the other hand, the custodial parent believes that he or she should not be "held hostage" by the noncustodial parent. Relocation cases often arise after there has been a remarriage, with children born of the remarriage, when the new spouse receives a job transfer to another city. The custodial parent argues that he or she should not be made to "choose" between the children of the two marriages.

This article reviews the different approaches currently applied by each of the various states. This article next discusses a myriad of factors, including social science research, that should be considered in making relocation decisions based on protecting the child's interests. In doing so, this article prioritizes the twin goals of avoiding litigation where possible and when litigation is necessary, resolving it pursuant to the child's best interests. Finally, this article proposes a model relocation statute, incorporating the recommendations discussed herein.

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1. This paper uses the traditional terms "custodial parent" to refer to the parent with whom the child primarily lives and "noncustodial parent" to refer to the other parent. Some courts and legislatures, however, have begun to use less adversarial terms such as "primary residential parent" and "non-primary residential parent." The use of such non-adversarial terms is encouraged in Part VII. G, *infra*; however, the more familiar terms are used in the text of this Article for the benefit of the reader.

I. BACKGROUND

At the time of the initial custody decree,[2] parties are free to structure their own custodial arrangements. The court will adopt the agreed upon arrangements in its decree, upon a finding that such arrangements are in the best interests of the child.[3] If the parties cannot agree on custody, courts generally have wide discretion to order a custodial arrangement, based on the best interests of the child[4] and often taking into account specific factors set out in the state's statutes or case law.[5]

Once the initial determination of custody has been made, either by agreement of the parties or by the court, it is afforded some deference based on recognition both of the child's need for stability in the custodial arrangement and of the harm inflicted on the child who is subjected to continued conflict between the parents.[6] The general rule is that custody cannot be changed, absent a showing of substantial and material change of circumstances, occurring after entry of the original custody decree, such that the welfare of the child requires a change in custody.[7]

Relocation, however, often precipitates a petition to change custody. There is very little agreement among the various states regarding proper resolution of the relocation issue.[8] In fact, there is disagreement on the preliminary issue of whether, and to what extent, a proposed relocation constitutes a sufficient, substantial and material change of circumstances to justify a petition to modify custody. In some states, relocation is *per se* evidence of a material change of circumstances.[9] In other

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2. The initial custody decree is usually rendered at the time of the divorce if the parents were married; the decree can also be rendered in conjunction with a legitimization proceeding when the parties are not married.

3. *See, e.g.*, McClain v. McClain, 716 P.2d 381, 385 (Alaska 1986) (holding that the parties' agreement is not binding on the court, and the court must independently determine what arrangement is in the best interests of the child); Keen v. Keen 629 N.E.2d 938, 941 (Ind. Ct. App. 1994) (stating that court should defer to the parents' agreement when they are capable of carrying it out without court intervention, unless the agreement is dangerous to the child, or not in child's best interests); In re Marriage of Fesolowitz, 852 P.2d 658, 662 (Mont. 1993) (noting that court is not bound by the stipulations of the parties, but may order a custody arrangement it believes to be in the best interests of the child).

4. *See, e.g.*, In the Interest of R.R., 474 S.E.2d 12 (Ga. App. 1996).

5. *See* cases and statutes cited *infra* note 13.

6. *See infra* notes 7-39 and accompanying text.

7. *See, e.g.*, GA. CODE ANN. § 19-9-1(b) (1997) ((1) change in any material conditions or circumstances of a party or the child, or (2) without such showing once in each two-year period following the date of entry of the judgment); KAN. STAT. ANN. § 60-1610(a)(2)(A) (1994) (requiring a material change of circumstances); MISS. CODE ANN. § 93-5-24 (1972) (requiring a material change of circumstances); N.C. GEN. STAT. § 50-13.7 (1997) (requiring a change of circumstances); Cloutier v. Lear, 691 A.2d 660, 662 (Me. 1997) (requiring a change in circumstances sufficiently substantial in its effect upon the best interests of the child as to justify a modification); Gazo v. Gazo, 697 A.2d 342, 345 (Vt. 1997) (requiring a "real, substantial and unanticipated change of circumstances,"(citing VT. STAT. ANN. tit. 15, § 668 (1989 & Supp. 1998))).

8. *See* Gruber v. Gruber, 583 A.2d 434, 437 (Pa. Super. Ct. 1990) ("[O]ur research has failed to reveal a consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objection of the noncustodial parent. In fact, the opposite is true. Across the country, applicable standards remain distressingly disparate."). *See also* Carol Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996) (summarizing the jurisprudence of various states on the relocation issue as of 1996).

9. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(E) (West Supp. 1998) (allowing nonmoving parent the automatic right to oppose relocation if petition filed within 30 days, otherwise petitioner must show good cause); IOWA CODE ANN. § 598.21(8A) (West 1998) (stating that a relocation of 150 miles may be considered substantial change of circumstances); KAN. STAT. ANN. § 60-1620 (1994) (stating that relocation to another state or removal from this state for more than 90 days may be considered substantial change of circumstances); ME. REV. STAT. ANN. tit. 19-A § 1657 (West 1998) (stating that relocation to another state, beyond 60 miles of residence, or notice

states, relocation, alone, is not sufficient to reopen the custody issue.[10] Some statutes require parental consent or court approval in order to relocate.[11]

If the threshold requirements have been met to hear the petition to allow or prevent relocation, the court applies the appropriate standard. States differ on the standard to be used. For example, some states use a general "best interests of the child standard."[12] Others use a best interest standard defined by stated factors.[13]

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of such relocation constitutes a substantial change in circumstances that warrants a party to petition the court for modification); MO. REV. STAT. § 452.411 (1997) (stating that relocation to another state by either parent is a change of circumstances); TENN. CODE ANN. § 36-6-108 (Supp. 1998) (allowing custody modification if relocation is outside the state or more than 100 miles away). House v. House, 779 P.2d 1204, 1207-08 (Alaska 1989); Osteraas v. Osteraas, 859 P.2d 948, 951 (Idaho 1993) (holding that a relocation that prevents compliance with existing custody order constitutes a substantial change of circumstances); Evans v. Lungrin, 708 So. 2d 731, 738 (La. 1998) (stating that relocation outside of the state is considered a material change of circumstances making the original custody order unworkable); Rowland v. Kingman, 629 A.2d 613, 615 (Me. 1993); Domingues v. Johnson, 593 A.2d 1133, 1136 (Md. 1991) (noting that relocation constitutes changed circumstances if best interests of child require change of custody).

10. *See, e.g.*, Burgess v. Burgess, 913 P.2d 473, 482 (Cal. 1996) (requiring noncustodial parent to show that relocation must cause the child to suffer detriment, rendering it essential or expedient that custody be changed); In the Interest of R.R., 474 S.E.2d 12, 17 (Ga. App. 1996); Lamb v. Wenning, 600 N.E.2d 96, 98 (Ind. 1992) (stating that relocation is not *per se* a substantial change of circumstances); Mennemeyer v. Mennemeyer, 887 S.W.2d 555, 558 (Ky. Ct. App. 1994) (requiring a showing of inability or bad faith refusal of the other party to cooperate in the child's upbringing); Hensgens v. Hensgens, 653 So. 2d 48, 53 (La. Ct. App. 1995); Costantini v. Costantini, 521 N.W.2d 1,1 (Mich. 1994) (Riley, J., concurring) (stating that change of domicile does not warrant a review of the best interests factors); Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996) (stating that custody statute, MINN. STAT. ANN. § 518.18(d) (West 1990 & Supp. 1999), contains an implied presumption that removal will be permitted); Bell v. Bell, 572 So. 2d 841, 846 (Miss. 1990) (stating that relocation is not *per se* evidence of material change of circumstance); Dobos v. Dobos, 431 S.E.2d 861, 863 (N.C. Ct. App. 1993) (noting that relocation alone is not a substantial change of circumstance), *overruled by* Pulliam v. Smith, 501 S.E.2d 898, 899 (N.C. 1998) (to the extent that *Dobos* required a showing of adversity resulting from the change of circumstances); *In re* Marriage of Teel-King, 944 P.2d 323, 326 (Or. Ct. App. 1997) (holding that relocation, alone, was not a substantial change of circumstance); Fossum v. Fossum, 545 N.W.2d 828, 833 (S.D. 1996) (holding that 70-mile move was not a substantial and material change); Taylor v. Taylor, 849 S.W.2d 319, 332 (Tenn. 1993); Gazo v. Gazo, 697 A.2d 342, 345 (Vt. 1997) (stating that relocation alone is not sufficient). *But see* Pitt v. Olds, 511 S.E.2d 60, 62 (S.C. 1999) (holding that primary residential parent's desire to relocate in order to live with her new husband was not a sufficient change of circumstances to modify the existing consent decree that enjoined either parent from relocating the child without court approval).

11. *See, e.g.*, MINN. STAT. ANN. § 518.175(3) (West 1990 & Supp. 1999) (custodial parent cannot relocate the child to another state without court order or consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree); N.J. STAT. ANN. § 9:2-2 (West 1993) (requiring consent of mature child or consent of both parents, or court approval for immature child, in order to remove children native to state or those residing in state for five years or more); N.D. CENT. CODE § 14-09-07 (1997) (requiring consent of noncustodial parent or court order, unless the noncustodial parent has failed to exercise visitation for one year or has moved out of state and more than fifty miles from the custodial parent); Dehring v. Dehring, 559 N.W.2d 59, 60 (Mich. Ct. App. 1996) (noting that state statute requires court approval or parental consent for interstate relocations, but not for intrastate relocations).

12. *See, e.g.*, HAW. REV. STAT. § 571-46(1) (1997); MD. CODE ANN., FAM. LAW § 8-103 (1991); Maeda v. Maeda, 794 P.2d 268, 270 (Haw. Ct. App. 1990) (mother required to prove that relocation would be in best interests of child); Evans v. Lungrin, 708 So. 2d 731, 738 (La. 1998) (party seeking modification of a stipulated judgment must prove a material change of circumstances since the original judgment and that the modification is in the best interest of the child); Harder v. Harder, 524 N.W.2d 325, 328 (Neb. 1994) (requiring relocating parent to show legitimate reason for the move and that the move is in the child's best interests); Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299, 309 (1991) (holding that the court may adopt a plan that promotes the child's best interests); *In re* Marriage of Duckett, 905 P.2d 1170, 1171 (Or. Ct. App. 1995) (giving primary consideration to the child's best interest); Parish v. Spaulding, 496 S.E.2d 91 (Va. Ct. App. 1998) (applying best interest test retroactively to custodial parent's relocation without court approval).

13. *See, e.g.*, Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996) citing ALASKA STAT. § 25.24.150(c) (1998) which states:

Some states employ a heightened best interest standard.[14] And, some states use an endangerment standard.[15]

In determining the best interests of the child the court shall consider
(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;
(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;
(9) other factors that the court considers pertinent.

See also ARIZ. REV. STAT. ANN. § 25-408(J) (West Supp. 1998) (listing seven nonexclusive factors); DEL. CODE ANN. tit. 13, §§ 722, 729 (1993 & Supp. 1998) (listing seven factors that apply when the petition is brought at least two years after the prior custody decree; otherwise an "endangerment or impairment" standard applies); FLA. STAT. ch. 61.13(2)(d) (Supp. 1997) (listing five "relocation" factors plus thirteen "best interests" factors); IDAHO CODE § 32-717 (Michie 1996) (listing seven factors); IND. CODE ANN. §§ 31-17-2-8, -21, -23 (Michie 1997) (court will consider seven "best interests" factors as well as the distance involved in the move and the hardship and expense involved in maintaining visitation); KAN. STAT. ANN. § 60-1610(a)(3)(B) (Supp. 1998) (listing seven factors); KY. REV. STAT. ANN. § 403.270 (Banks-Baldwin Supp. 1998) (listing eight factors applicable to cases of joint custody); ME. REV. STAT. ANN. tit. 19-A § 1653(3) (West 1998) (stating fifteen factors); MONT. CODE ANN. § 40-4-212 (1997) (stating thirteen factors); WIS. STAT. ANN. §§ 767.24, 767.327 (West Supp. 1998) (listing eleven and three factors respectively); Staab v. Hurst, 868 S.W.2d 517, 520 (Ark. App. 1984) (stating five factors); *In re* Smith, 665 N.E.2d 1209, 1213 (Ill. 1996) (stating five factors); Dehring v. Dehring, 559 N.W.2d 59, 61 (Mich. Ct. App. 1996) (stating four factors); Shaw v. Shaw, 951 S.W.2d 746, 748 (Mo. Ct. App. 1997) (stating four factors); Tropea v. Tropea, 665 N.E.2d 145, 151-52, 152 n.2 (N.Y. 1996) (stating six factors); Paulson v. Bauske, 574 N.W.2d 801, 803 (N.D. 1998) (stating four factors); Zalenko v. White, 701 A.2d 227. 228 (Pa. Super. Ct. 1997) (stating three factors); Love v. Love, 851 P.2d 1283, 1290 (Wyo. 1993) (stating four factors).

14. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04(E)(1)(a) (Anderson 1996) (best interests and harm "caused by a change in environment is outweighed by the advantages of the change of environment"); *Ex parte* Murphy, 670 So. 2d 51, 53 (Ala. 1995) (citing *Ex parte* McLendon, 455 So. 2d 863 (Ala. 1984) (material changed circumstances since the last decree that would result in positive good for the child's welfare from a change of custody and the benefit from the change must exceed the negative effect of disrupting the child's current custodial placement)); *In re* Mayfield, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998) (nonrelocating parent seeking modification must show the ability to offer superior care); Williams v. Pitney, 567 N.E.2d 894, 897 (Mass. 1991) (real advantage standard); Garrison v. Mulcahy, 636 A.2d 732, 733 (R.I. 1993) (best interests and compelling reason for the relocation); Wood v. O'Donnell, 894 S.W.2d 555, 557 (Tex. Ct. App. 1995) (in joint conservatorship, the movant must show that modification would be a positive improvement for and in the best interest of the child); Anderson v. Newman, 439 S.E.2d 442, 444 (W. Va. 1993) (child's welfare must be materially promoted by the change in custody).

15. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-131.5 (West 1997); DEL. CODE ANN. tit. 13, § 729 (1993 & Supp. 1998) (applying an endangerment or impairment standard if the petition is brought within two years of the prior decree; otherwise, a best interest test based on seven factors applies); KY. REV. STAT. ANN. § 403.340 (Banks-Baldwin Supp. 1998); *In re* Marriage of Francis, 919 P.2d 776 (Colo. 1996) (en banc) (requiring an endangerment standard for sole custody cases); Jones v. Lang, 591 A.2d. 185, 187 (Del. 1991); Evans v. Lungrin, 708 So. 2d 731, 738 (La. 1998) (requiring non-domiciliary parent to prove that the continuation of the present custody arrangement is so deleterious to the child as to justify a modification or prove that the harm of the change of environment is substantially outweighed by its advantages to the child); Silbaugh v. Silbaugh, 543 N.W.2d 639, 642 (Minn. 1996) (requiring changed circumstances that endanger the child's physical or emotional health, citing MINN. STAT. ANN. § 518.18(d) (West 1995)); Stevison v. Woods, 560 So. 2d 176, 179 (Miss. 1990) (requiring "[p]eculiar or unusual circumstances adversely affecting the children over and above the effect attendant upon the mere increase in miles between the children and the non-custodial parent"); *In re* Littlefield, 940 P.2d 1362, 1370 (en banc) (Wash. 1997) (interpreting WASH. REV. CODE ANN. § 26.09.191(3) (West 1997) to require a showing of "more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships" to support a finding that relocation would harm the child).

Certain states recognize a presumption, in favor of relocation,[16] while others recognize a presumption against relocation or focus on the interruption of the noncustodial parent's visitation.[17] Other states do not recognize a presumption either way.[18] Still other states, while not imposing a presumption, nevertheless, give great deference to the importance of stability and continuity of care.[19]

The burden of proof also varies among states and has essentially the same effect as a presumption, even though it is not designated as such. Some states place the burden of proof on the relocating parent to show that the move serves the child's

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16. *See, e.g.*, CAL. FAM. CODE § 7501 (West 1994) (stating that custodial parent has a right to relocate absent a court finding that the move would be detrimental to the child); COLO. REV. STAT. ANN. (West 1997) § 14-10-131; OKLA. STAT. ANN. tit. 10, § 19 (West 1998) (stating that custodial parent has a right to relocate, subject to the court's power to restrain a relocation prejudicial to the child's rights or welfare); S.D. CODIFIED LAWS § 25-5-13 (Michie 1992) (noting a right to relocate subject to court's power to restrain move prejudicial to child); TENN. CODE ANN. § 36-6-108 (Supp. 1998) (stating presumption in favor of relocation for primary residential parent, subject to exceptions); UTAH CODE ANN. § 30-3-10.3 (1998) (stating that court may designate custodian who has sole legal right to determine residence of child); WIS. STAT. ANN. § 767.327 (West 1993 & Supp. 1997) (stating rebuttable presumption that continuing the child's physical placement with the primary residential parent is in the child's best interests); Burgess v. Burgess, 913 P.2d 473, 479 (Cal. 1996) (noting that 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—weigh heavily in favor of maintaining ongoing custody arrangements); *In re* Marriage of Francis, 919 P.2d 776, 785 (Colo. 1996) (noting that presumption can be overcome by proof of one of three statutory factors or by showing that the negative impact of relocation outweighs the benefits of remaining with the custodial parent, taking into account four common-law factors); Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996); Jaramillo v. Jaramillo, 113 N.M. 57, 59 823 P.2d 299, 301 (1991) (recognizing a presumption in favor of the relocating parent having sole custody); Wood v. O'Donnell, 894 S.W.2d 555, 557 (1995) (requiring the movant, in joint conservatorship, to show that modification would be a positive improvement for, and in the best interests of the child); Bower v. Reich, 964 P.2d 359, 364 (Wash. Ct. App. 1997) (holding that relocation is a "minor modification" under the provisions of WASH. REV. CODE ANN. § 26.09.260 (West 1997) requiring the custodial parent to show only a substantial change in her own circumstances); Love v. Love, 851 P.2d 1283, 1288-89 (Wyo. 1993) (noting that removal should be granted as long as the court is satisfied with the relocating parent's motives and reasonable visitation is possible).

17. *See, e.g.*, UTAH CODE ANN. § 30-3-10.3 (1998) (court may designate county of residence of child); *In re* Marriage of Elser, 895 P.2d 619, 622-23 (Mont. 1995), *overruled on other grounds by* Porter v. Galarneau, 911 P.2d 1143 (Mont. 1996) (focusing exclusively on the disruption of the father's visitation that would result if the custodial mother were allowed to remove the couple's children from the state so that she could further her education); Levine v. Bacon, 705 A.2d 1204 (N.J. 1998) (denying custodial father permission to relocate because move would adversely affect mother's visitation and would not be in child's best interest); Holder v. Polanski, 544 A.2d 852, 854-55 (N.J. 1988) (finding that the New Jersey removal statute was aimed at preserving the rights of the noncustodial parent and the child to maintain and develop their familial relationship); McAlister v. Patterson, 299 S.E.2d 322, 323 (S.C. 1982) (recognizing a presumption against removal); *See also* Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985-86) (arguing that relocation should seldom be granted because the benefit of the move rarely outweighs the psychological detriment to the children and the remaining parent).

18. *See, e.g.*, FLA. STAT. ch. 61.13(2)(b) (1998); TENN. CODE ANN. § 36-6-108 (Supp. 1998) (noting no presumption in cases of actual, substantially equal residential parenting); *In re* Marriage of Whipp, 962 P.2d 1058 (Kan. 1998) (stating that best interests of the child controls when the custody issue is between parents); Jaramillo v. Jaramillo, 113 N.M. 57, 59, 65, 823 P.2d 299, 301, 307 (1991) (declining to recognize a presumption in favor of the relocating parent or the resisting parent in cases involving joint legal custody, even when one parent is the primary residential parent, but recognizing a presumption in favor of the existing joint custody arrangement).

19. *See, e.g.*, Vachon v. Pugliese, 931 P.2d 371, 380 (Alaska 1996) (finding the statutory factors of stability and continuity controlling the results of the case); *In re* Marriage of Francis, 919 P.2d 776, 784 (Colo. 1996) (en banc) (noting that the presumption in favor of relocation is based on legislative preference for stability); Goldmeier v. Lepselter, 598 A.2d 482 (Md. Ct. Spec. App. 1991) (noting that stability of maintaining the current physical custody is a substantial factor to consider); Paulson v. Bauske, 574 N.W.2d 801, 803 (N.D. 1998) (emphasizing the importance of "maintaining 'the continuity and stability of the integrated family unit'") (citation omitted); *In re* Marriage of Duckett, 905 P.2d 1170, 1171 (Or. Ct. App. 1995) (concluding that "maintaining the stability of the primary parental relationship is the overriding consideration").

best interest.[20] Other states place the burden of proof on the nonrelocating parent to show that the move is detrimental,[21] or that the modification of custody is in the child's best interests.[22] Still others impose no burden of proof, allowing the court to make a best interest determination, as in an original custody determination.[23]

Some states require that the custodial parent show a legitimate reason for the move, usually defined as one that is not based primarily on a desire to interfere with

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20. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408 (West Supp. 1997); 750 ILL. COMP. STAT. ANN. 5/609 (West 1993) (stating that burden is on relocating parent to prove that removal is in the child's best interests); Vachon v. Pugliese, 931 P.2d 371, 376 (Alaska 1996); House v. House, 779 P.2d 1204, 1208 (Alaska 1989) (custodial parent must show that, *given the move*, it is in the child's best interest to remain in that parent's custody); Staab v. Hurst, 868 S.W.2d 517, 520 (Ark. App. 1994) (burden of demonstrating some real advantage to the custodial family unit resulting from the move); Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998) (burden to prove that the relocation is for a legitimate purpose and to a reasonable location); Katherine A.C. v. Dennis C., 1998 WL 420755 (Del. Fam. Ct. 1998) (burden to prove that the move will enhance the overall quality of the child's life, citing the American Academy of Matrimonial Lawyer's Model Relocation Act); Maeda v. Maeda, 794 P.2d 268, 270 (Haw. Ct. App. 1990) (mother required to prove that relocation would be in best interests of child); Harder v. Harder, 524 N.W.2d 325, 326 (Neb. 1994) (requiring relocating parent to show legitimate reason for the move and that the move is in the child's best interests); Cook v. Cook, 898 P.2d 702, 705 (Nev. 1995) (requiring custodial parent to show that move will result in actual advantage to parent and child, then shifting burden to noncustodial parent to show that the move would be adverse to the child's interests); Jaramillo v. Jaramillo, 113 N.M. 57, 65, 823 P.2d 299, 307 (1991) (placing a burden on the relocating parent, in cases involving joint legal custody, to produce evidence that the arrangement is no longer workable and needs to be changed); Burnham v. Basta, 659 N.Y.S.2d 945, 947 (1997) (concluding that custodial parent seeking relocation had "not met her burden of demonstrating . . . that the relocation" would serve child's best interests); Paulson v. Bauske, 574 N.W.2d 801, 802 (N.D. 1998) (requiring custodial parent to prove that the move is in the best interests of child); Rozborski v. Rozborski, 686 N.E.2d 546, 547 (Ohio Ct. App. 1996) (placing burden on the moving party to show that relocation is in best interest of child); Garrison v. Mulcahy, 636 A.2d 732, 733 (R.I. 1993) (stating that custodial parent has burden to show compelling reason for move and that move is in the best interests of the child).

21. *See, e.g.*, Burgess v. Burgess, 913 P.2d 473, 482-83 (Cal. 1996) (placing burden on noncustodial parent to show that relocation would not be in best interests of the child); Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998) (placing burden on relocating parent to prove that relocation is not in the child's best interests after the relocating parent proves that the relocation is for a legitimate purpose and to a reasonable location); Evans v. Lungrin, 708 So. 2d 731, 738 (La. 1998) (stating that nondomiciliary parent bears burden of proving major decisions are not in best interests of child); Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996) (party opposing relocation must show that move is not in the child's best interests and would endanger the child's health and well-being); Stevison v. Woods, 560 So. 2d 176, 179 (Miss. 1990) (placing burden on nonrelocating parent to show "peculiar or unusual circumstances adversely affecting the children over and above the effect attendant upon the mere increase in miles between the children and the non-custodial parent"); Cook v. Cook, 898 P.2d 702, 705-07 (Nev. 1995) (custodial parent has initial burden to show that move will result in real advantage to parent and child, then noncustodial parent has burden to show that the move would be adverse to the child's interests); Holder v. Polanski, 544 A.2d 852, 856 (N.J. 1988) (allowing relocation absent showing of harm avoids constitutional infringement on parent's right to travel); Jaramillo v. Jaramillo, 113 N.M. 57, 63, 823 P.2d 299, 305 (1991) (placing the burden of proof on the relocating parent impermissibly impairs the constitutionally protected right to travel). *See also* Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1 (1996) (advancing a constitutional argument for imposing burden of proof on party opposing relocation). *But see*, Carlson v. Carlson, 661 P.2d 833, 836 (Kan. Ct. App. 1983) (upholding restriction on the residence of the custodial parent to protect best interest of the child); Rozborski v. Rozborski, 686 N.E.2d 546, 548 (Ohio Ct. App. 1996) (denying custodial parent's constitutional arguments).

22. *See, e.g.*, WIS. STAT. ANN. § 767.327 (West 1993 & Supp. 1997) (burden of proof is on the parent objecting to relocation); Osteraas v. Osteraas, 859 P.2d 948, 951 (Idaho 1993) (party moving for modification bears the burden of demonstrating that the modification serves the child's best interests).

23. *See, e.g.*, TENN. CODE ANN. § 36-6-108 (Supp. 1998) (no burden when residential time is actually shared substantially equally); Jaramillo v. Jaramillo, 113 N.M. 57, 67, 823 P.2d 299, 309 (1991) (neither party has the burden to show that relocation is or is not in the child's best interests where legal custody is shared); Ramirez-Barker v. Barker, 418 S.E.2d 675, 679 (N.C. Ct. App. 1992) (holding that party seeking modification must show change of circumstances, but neither party bears the burden of proving best interests of the child), *overruled by* Pulliam v. Smith, 501 S.E.2d 898 (N.C. 1998) (to the extent that *Ramirez-Barker* required a showing of adversity resulting from the change of circumstances).

the noncustodial parent's relationship with the child.[24] The noncustodial parent's good faith opposition to relocation is considered by some states.[25]

Notice requirements also differ among the states. Some states impose no notice requirements. Others require advance notice when a parent decides to relocate with the child either outside the state or at a great distance away within the state.[26] Of those states requiring notice, failure to notify may even affect custody or visitation.[27] However, some states prohibit custodial changes based on failure to comply with notice requirements.[28]

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24. *See, e.g.*, MINN. STAT. ANN. § 518.175(3) (West 1998) (court shall not permit relocation "if the purpose of the move is to interfere with visitation rights"); Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996) (quoting House v. House, 779 P.2d 1204, 1208 (Alaska 1989) ("Most states permit custodial parents to move out of state with their children if there is a legitimate reason for the move.")); Pollock v. Pollock, 889 P.2d 633, 636 (Ariz. App. 1995) (holding that "any sincere, good-faith reason will suffice"); *In re* Marriage of Francis, 919 P.2d 776, 784 (Colo. 1996) (requiring custodial parent to show a sensible reason for the move); Ireland v. Ireland, 717 A.2d 676, 681 (Conn. 1998) (requiring proof that relocation is for a legitimate purpose, adopting the position recommended by the American Law Institute, discussed *infra* Part VIII.C.); Williams v. Pitney, 567 N.E.2d 894, 897 (Mass. 1991) (noting "absence of a motive to deprive the noncustodial parent of contact" as a factor to be considered).

25. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(J)(2) (West Supp. 1998).

26. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(C) (West Supp. 1998) (requiring 60 days notice for a move outside the state or more than 100 miles within the state).GA. CODE ANN. § 19-9-1(c)(3) (1998) (requiring 30 days notice, except where otherwise provided by court order); 759 ILL. COMP. STAT. ANN. 5/609 (West 1993) (requiring notification for temporary removal); IND. CODE ANN. § 31-17-2-23 (Michie 1997) (requiring notice when relocating outside the state or 100 miles or more from the county of residence); KAN. STAT. ANN. § 60-1620(a) (1994) (requiring 21 days notice for relocation exceeding 90 days); LA. REV. STAT. ANN. §§ 9:355.3, 9:355.4 (West Supp. 1998) (requiring 60 days written notice or notice within 10 days of obtaining information necessary to give notice, when relocating outside the state or 150 miles within state, unless court provides otherwise); ME. REV. STAT. ANN. tit. 19-A § 1653(14) (West 1998) (requiring 30 days notice prior to relocation of a child; if relocation must occur before 30 days then parent must notify as soon as possible); MO. REV. STAT. § 452.377(2) (1998) (requiring sixty days written notice, absent exigent circumstances as determined by the court); MONT. CODE ANN. § 40-4-217 (1997) (requiring 30 days written notice); N.M. STAT. ANN. § 40-4-9.1(J)(4)(a) (1998) (requiring thirty days written notice); OHIO REV. CODE ANN. § 3109.051(G)(1) (Anderson 1996) (requiring notice filed with court and copy sent to non-residential parent, barring exceptions); TEX. FAM. CODE ANN. § 105.007 (West 1996) (requiring 60 days written notice or within 5 days of relocating parent's knowledge of relocation, unless waived by court, with a copy to the court); UTAH CODE ANN. § 30-3-37(1) (1998) (reasonable advance written notice of move outside state or 150 or more miles from current residence); WIS. STAT. ANN. § 767.327(1) (West 1993 & Supp. 1997) (requiring 60 days written notice if relocating outside state or 150 miles or more from the other parent for a period exceeding 90 consecutive days); Halliday v. Halliday, 593 A.2d 233, 235 (NH 1991) (interpreting trial court's requirement that the custodial parent obtain consent of other parent or court's permission prior to relocating as merely ensuring notice to the other parent of the relocation).

Some statutes give the court discretion to order notification of relocation. *See e.g.*, CAL. FAM. CODE § 3024 (West 1994) (45 days notice, when feasible for relocations of more than 30 days); OKLA. STAT. ANN. tit. 43, § 112(c)(5) (West 1990 & Supp. 1999) (court may require relocating parent to notify the other parent of relocation plans, absent agreement to relocate); OR. REV. STAT. § 107.159 (1990 & Supp. 1998) (court may require notification if either parent relocates more than 60 miles further away from the other parent); VA. CODE ANN. § 20-124.5 (Michie 1995) (requiring 30 days notice).

27. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(H) (West Supp. 1998) (allowing relocation only in accordance with the child's best interests); LA. REV. STAT. ANN. §§ 9:355.6 (West Supp. 1998) (stating that failure to provide notice of a proposed relocation, or relocation without court authorization, may be a factor when considering the relocation of a child, the return of the child, and an award of expenses and attorney's fees); MO. REV. STAT. § 452.377(5) (1997) (stating violation of relocation restrictions may constitute changed circumstances allowing court to modify custody); NEV. REV. STAT. ANN. § 125A.350 (Michie 1993) (stating that noncompliance with notice provisions may be considered in change of custody); *In re* Marriage of Whipp, 962 P.2d 1058, 1059 (Kan. 1998) (changing custody to father when mother left the state without notifying father of the move).

28. *See, e.g.*, Eddy v. Napier, 558 So. 2d 199, 201 (Fla. Dist. Ct. App. 1990) (holding that change of custody based on failure to give prior notice of relocation was abuse of discretion).

Where court approval is required, the court may[29] or may not[30] treat an unauthorized relocation as grounds for changing custody. If relocation is allowed, some states impose an obligation on the court to attempt to modify visitation to ensure the continuation and preservation of the noncustodial parent-child relationship.[31] In setting the revised visitation schedule, courts often opt for longer but less frequent visits to preserve the noncustodial parent-child relationship.[32] Some states allow the court to consider a downward deviation in child support based on the increased travel expenses associated with visitation following relocation.[33] Other states allow the court to consider placing the increased travel expense on the relocating parent.[34]

Private ordering is endorsed by some states such that agreements of the parties to allow or disallow relocation is binding unless the court finds that the agreement no longer serves the child's best interest.[35] In other states, stipulations of the parties replace the default rules that otherwise apply in relocation cases.[36] Some states restrict private ordering by refusing to permit parties to contract for relocation restriction clauses,[37] or to agree on "automatic" custody modification provisions that are triggered if one parent relocates.[38]

Not only are there great differences in approach among the various states when addressing relocation, but even within states the rules have varied greatly over time

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29. *See, e.g.*, Anderson v. Newman, 439 S.E.2d 442, 445 (W. Va. 1993) (noting that lower court placed great emphasis on unauthorized removal of children to support a change of custody).

30. *See, e.g.*, Lambert v. Lambert, 598 A.2d 561, 566, (Pa. Super. Ct. 1991) (failure to return children to father for two weeks due to relocation is grounds for contempt but not for change of custody).

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(H) (West Supp. 1998); FLA. STAT. ch. 61.13(2)(b)(1) (1998) (public policy of Florida to assure that each minor child has frequent and continuing contact with both parents after the parents divorce); LA. REV. STAT. ANN. § 9:335 (West Supp. 1998); Evans v. Lungrin, 708 So. 2d 731, 737 (La. 1998) (frequent and continuing contact should be maintained with the other parent).

32. *See, e.g.*, Schwartz v. Schwartz, 812 P.2d 1268, 1272 (Nev. 1991); Barstad v. Barstad, 499 N.W.2d 584, 588 (N.D. 1993); Fortin v. Fortin, 500 N.W.2d 229, 232 (S.D. 1993); Taylor v. Taylor, 849 S.W.2d 319, 331 (Tenn. 1993).

33. *See, e.g.*, TENN. CODE ANN. § 36-6-108(b) (Supp. 1998); *In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 44 (Cal. Ct. App. 1998); *In re* Marriage of Osborn, 564 N.E.2d 1325, 1336 (Ill. App. Ct. 1990).

34. *See, e.g.*, Burgess v. Burgess, 913 P.2d 473, 484 (Cal. 1996). *But see* Katz v. Katz, 445 S.E.2d 531, 531 (Ga. 1994) (finding abuse of discretion where trial court ordered custodial parent to deliver the children to the noncustodial parent every Thursday and ordered the noncustodial parent to pay half of the children's expense but none of the custodial parent's expense).

35. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(I) (West Supp. 1998) (rebuttable presumption that a provision in a parenting plan or other agreement is in the child's best interest); Landingham v. Landingham, 685 So. 2d 946, 950 (Fla. Dist. Ct. App. 1996) (reversing trial court's denial of custodial parent's request to set aside relocation restriction where doing so would be in child's best interest); Williams v. Pitney, 567 N.E.2d 894, 898 (Mass. 1991) (parties' relocation restriction may be ignored by court, which must focus on whether relocation provides real advantage for child).

36. *See, e.g.*, Tropea v. Tropea, 665 N.E.2d 145, 152 n.2 (N.Y. 1996) (geographic restriction agreed to by the parties might be an additional factor for the court to consider in determining best interests); deBeaumont v. Goodrich, 644 A.2d 843, 846 (Vt. 1994) (parties' stipulation that relocation would trigger evaluation of parental rights and responsibilities was enforceable where parties shared physical custody nearly equally, even though state's relocation standards did not contain such provisions).

37. *See, e.g.*, Bell v. Bell, 572 So. 2d 841, 845-46 (Miss. 1990) (refusing to enforce relocation restriction requiring child to remian in same community until age of majority); *In re Marriage of* Littlefield, 940 P.2d 1362, 1372 (Wash. 1997) (finding that relocation restrictions in parties' agreements are not enforceable).

38. *See, e.g.*, Hovater v. Hovater, 577 So. 2d 461, 463 (Ala. Civ. App. 1990) ("reversionary" custody clause is unenforceable).

as the courts and legislatures have struggled to find a panacea.[39] Different

39. Tennessee, for example, has adopted a number of approaches over the years that went from an almost absolute rule allowing relocation to a series of cases that applied a best interest standard and had the effect of making relocation much more difficult to obtain. *See* Evans v. Evans, 140 S.W. 745, 746 (Tenn. 1911) (noting that noncustodial parent has no voice as to where the child shall reside); Walker v. Walker 656 S.W.2d 11, 18 (Tenn. Ct. App. 1983) (placing burden on the nonrelocating party to show adversity). Later, the court shifted the burden from the party opposing the move, to the party seeking to move, or to the party filing a petition, either to move or to prevent the move. *See* Seessel v. Seessel, 748 S.W.2d 422 (Tenn. 1988). These cases led to a significant increase in litigation opposing relocation decisions. *See* Taylor v. Taylor, 849 S.W.2d 319, 326 (Tenn. 1993).

The current trend in other states is clearly in the direction of allowing greater discretion in the custodial parent to relocate. *See id.* Tennessee's Supreme Court joined that trend in 1996, coming full circle in its position on custodial relocation, again adopting, in *Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996), an almost absolute rule allowing relocation. In *Aaby*, the court held that the custodial parent was free to relocate with the child "unless the noncustodial parent proved, by a preponderance of the evidence, that the custodial parent's motives for moving were vindictive—that is, intended to defeat or deter the visitation rights of the noncustodial parent." *Id.* at 629. However, if the act of removal itself could pose a "specific, serious threat of harm" to the child, the noncustodial parent could file a petition for change of custody based on a material change of circumstances. *See id.* The *Aaby* court provided examples illustrating a " specific, serious threat of harm" including:

> 1. Wanting to take a child with a serious medical problem to an area where no adequate treatment is readily available;
> 2. Wanting to take a child with special educational requirements to an area with no acceptable educational facilities, or
> 3. Wanting to move and take up residence with a person with a confirmed history of child abuse.

Id. at 629 n.2. It is only when the circumstances have changed to the extent that "the behavior of the custodial parent clearly posits a danger to the physical, mental or emotional well-being of the child," that a court was justified in changing custody. *Id.* at 629. Barring any of the foregoing exceptions, the only issue for a Tennessee court in a relocation case is modification of the noncustodial parent's visitation schedule.

In 1998, the legislature responded to *Aaby*, a case perceived by some as placing too much emphasis on the rights of the custodial parent and giving too little protection to the child's interest, by passing a statute designed to focus on the child's interest and to address other issues such as the frivolous move, shared physical custody, the noncustodial parent who is the primary psychological parent, international relocations, and mediation. *See* TENN. CODE ANN. § 36-6-108 (Supp. 1998). The text of this statute forms much of the basis of the author's recommended statute found *infra* Part IX.B. *See also*, Richards, *Custodial Relocation: Tennessee's New Approach*, 7 TENN. FAM. LAW LTR. 11 (1993); Richards, *Custodial Relocation Revisited: Have We Thrown Out the Baby With the Bath Water?* 10 TENN. FAM. LAW LTR. 13 (1996).

New Jersey is another state that has changed its approach repeatedly over the years. The Superior Court of New Jersey, Chancery Division, authored the *D'Onofrio* factors for making a best interest determination in relocation cases, which were adopted by many other states. *See infra* note 116. *See also* D'Onofrio v. D'Onofrio, 365 A.2d 27 (N.J. Super. Ct. App. Div. 1976). The court later required the custodial parent to show a "real advantage" to relocation. Doing so would shift the burden to the noncustodial parent to show that the proposed visitation schedule would be so burdensome as to unreasonably affect the noncustodial parent-child relationship. *See* Cooper v. Cooper, 491 A.2d 606, 613 (N.J. 1984). In order to afford the custodial parent the same freedom of movement as the noncustodial parent, the New Jersey Supreme Court modified its test again to require only that the custodial parent show any good faith, sincere reason for the relocation. *See* Holder v. Polanski, 544 A.2d 852, 856 (N.J. 1988). A real advantage need not be shown. *See id.* The courts continued to focus on the rights of the noncustodial parent, however, prohibiting relocation on the ground that extended periods of visitation could not substitute for frequent contact between the noncustodial parent and child. *See* Levine v. Bacon, 705 A.2d 1204, 1206 (N.J. 1998). The burden of proving that the relocation visitation schedule is too burdensome is on the noncustodial parent. *See id.*

In Florida, the lower courts were applying three different standards, one favoring relocation, one opposing relocation, and one remaining neutral until the Florida Supreme Court decided *Russenberger v. Russenberger*, 669 So. 2d 1044 (Fla. 1996). In *Russenberger*, the court adopted a presumption in favor of relocation where the move is made in good faith and not as a vindictive action against the other parent. *See id. See also* Judge James S. Moody, Jr. & Philip S. Wartenberg, *The Birth of a Legal Presumption: The Law's Latest Answer to a Difficult Sociological Problem: Geographical Relocations After Dissolution*, 70 FLA. B.J. 68 (1996) (citing *Russenberger*, 669 So. 2d 1044). The following year the legislature amended the relocation statute specifically to provide that "[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary

philosophical approaches may help explain the lack of uniformity.

II. PHILOSOPHICAL DIFFERENCES

Much of the difference in approach in relocation cases stems primarily from two theories. The first is a focus on parental rights as opposed to children's rights. The second is a difference of opinion as to whether it truly is in the child's best interests for one party to be able to require the court to make a best interest determination in every relocation case.

A. *Focus on Parental Rights v. Child's Rights*

Courts' opinions and advocates often couch the relocation issue in terms of its effect on the parents involved.[40] This focus on parental rights is understandable since the attorneys representing the parents make arguments on behalf of their clients, who are the parties requesting that the court protect their rights.[41]

For example, the noncustodial parent may argue a right to the ongoing exercise of visitation, and charge that the custodial parent is free to move, but cannot remove the child from the jurisdiction without first satisfying some standard of proof regarding either the necessity of the move, or the benefits for the child, or both.[42]

The custodial parent may argue that custody has already been awarded on the basis of a best interest determination and that there is no need for another best interest analysis simply because the custodial parent is relocating. The custodial arrangement is staying the same; the parties are simply relocating, requiring an adjustment in the visitation schedule of the noncustodial parent. The custodial parent thus claims a right to relocate absent some showing of harm to the child.

The proper role for the court and the legislature is much clearer if the focus is placed on the child's best interests rather than the parent's rights. The Supreme

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residential parent." FLA. STAT. ch. 61.13(2)(d) (1998). The court must make a best interest determination based on factors enumerated in the statute. *Id.*

40. *See, e.g.*, Pollock v. Pollock, 889 P.2d 633, 635 (Ariz. Ct. App. 1995) ("The competing rights at the heart of this case are the Mother's right to travel and the Father's right to maintain a meaningful relationship with his child. These rights must be adjusted in accordance with the best interests of the child"); D'Onofrio v. D'Onofrio, 365 A.2d 27, 30 (N.J. Super. Ct. App. Div. 1976) (noting that noncustodial parent is free to leave the jurisdiction so the custodial parent should have the same right to relocate to seek a better life and custodial parent should not be tethered to the noncustodial parent's choice of residence).

41. *See generally* Bradley A. Grundy, *The Trial: Proposing Relocation*, 20 FAM. ADVOC. Fall 1997, at 37 (offering strategies for representing the relocating parent); Dorene Marcus and Jeffrey I. Garfinkel, *The Trial: Opposing Relocation*, 20 FAM. ADVOC. Fall 1997, at 41 (offering strategies for representing the noncustodial parent); Carlton D. Stansbury & Gwendolyn G. Connolly, *Map Out Your Relocation Case on the Web*, 20 FAM. ADVOC. Spring 1998, at 43 (explaining use of World Wide Web to prepare case either advocating or opposing relocation).

42. *See* Merril Sobie, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases? A Response*, 15 PACE L. REV. 685 (1995) (arguing that relocation should be allowed only upon a showing of exceptional circumstances). *But see* LaFrance, *supra* note 21, at 68 (arguing that the custodial parent is not really permitted a "choice." "The mother still has the "right" to travel, but she may exercise it only by abandoning the children whom she has borne, raised, loved, for whom she has made all of the investments and sacrifices of a loving parent and as to whom she had been deemed the appropriate custodial parent."); Rozborski v. Rozborski, 686 N.E.2d 546, 548 (Ohio Ct. App. 1996) (denying custodial parent's constitutional argument and stating that custodial parent was never ordered to stay in the county).

Court of Connecticut recently endorsed this child-centered approach in *Ireland v. Ireland*:[43]

> We recognize the difficult issues that relocation cases present. The interests of the custodial parent who wishes to begin a new life in a new location are in conflict with those of the noncustodial parent who may have a strong desire to maintain regular contact with the child. At the heart of the dispute is the child, whose best interests must always be the court's paramount concern. Those interests do not necessarily coincide, however, with those of one or both parents.[44]

From the child's perspective, the role of the court and the legislature is to establish rules that balance the child's need for stability and continuity in the custodial relationship with the child's need to have a loving and nurturing relationship with both parents. The focus is not on the parents' entitlements, but on the child's needs and the best way to meet the child's needs in light of the relocation.

B. Threshold Standards for Hearing Relocation Cases

Courts and legislature may agree that the focus of relocation decisions should be on the child's rights rather than the parents' rights. They may also agree that the polestar of relocation cases is the best interests of the child, just as it is in other custody determinations. Nevertheless, courts and legislatures are unlikely to agree on the outcome of relocation cases. Disagreement arises over what constitutes the best interests of the child, and whether to begin with a presumption in favor of, or against relocation.[45] Supporters of the custodial parent may argue that a default rule in favor of continuity of custody is in the child's best interests. Supporters of the noncustodial parent may argue that maintaining the status quo and disallowing relocation of the child, absent compelling circumstances, is in the best interests of the child. They may also argue that there should be no presumption and that a relocation, alone, is a sufficient basis for the court to reopen the custody determination and make a best interest determination anew.

Assuming that courts should act in the best interests of the child, how do courts determine what that best interest is? Obviously, it would be best if both parents would remain in the same location and cooperate in rearing the child after the divorce. Courts, however, do not prohibit noncustodial parents from moving, even where it can be shown that the move would be detrimental to the child.[46] Courts do not prohibit custodial parents from moving either, technically speaking.[47] Rather, the court just rules that the child cannot be removed from the jurisdiction and orders custody to be transferred to the other parent if the custodial parent relocates.[48] Such

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43. 717 A.2d 676 (Conn. 1998). *See also* Lamb v. Wenning, 600 N.E.2d 96, 99 (Ind. 1992) ("The child's welfare, not that of the parents, should be the primary concern of the trial court.") (citation omitted).

44. *Ireland*, 717 A.2d at 680.

45. *See supra* text accompanying notes 16-19.

46. *See id.*

47. For an opinion adopting this approach, *see* Maeda v. Maeda, 794 P.2d 268, 270 (Haw. Ct. App. 1990) (custodial parent is free to move, but not free to relocate the child absent a showing that relocation serves the child's best interest).

48. *See e.g.*, Lozinak v. Lozinak, 569 A.2d 353, 354 (Pa. Super. Ct. 1990).

a rule generally has the same practical effect as an order prohibiting the custodial parent from relocating.

Knowing this, should the court make a relocation decision based on whether the child is better off in the custody of the mother versus the father; or should the court make the relocation decision on the assumption that denying removal of the child will cause the custodial parent to abandon plans to relocate, thus maintaining the status quo, and, arguably, the best interests of the child?[49] Some courts have granted custody to one parent on the condition that the parent remain in the state and have further ordered an automatic transfer of custody to the other parent in the event of a later relocation by the first parent.[50] The Delaware Supreme Court chose not to affirm the "automatic removal clause" imposed by the family law court in *Anderson v. Anderson*[51] on the ground that the court could not predict what custodial arrangement might be in the child's interest in the future and that a new determination should be made in the event of a later relocation by the custodial parent.[52] The Hawaii appellate court, on the other hand, affirmed just such an automatic removal clause in *Maeda v. Maeda*[53] on the ground that there was no information before the court about the proposed relocation situation to enable the court to make a determination as to whether the move would be in the child's best interests.[54]

Even if the court is justified in denying relocation on the assumption that the custodial parent will abandon the move, can the court safely assume that if the custodial parent abandons relocation efforts, that the custodial arrangement will return to the status quo?[55] The custodial parent's plans to relocate have been frustrated.[56] That frustration may affect the custodial parent-child relationship and

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49. Cheryl S. Karner, *Relocation: What Ought to Be*, 20 FAM. ADVOC. Fall 1997, at 12, 14 (judge advocating restricting relocation, stating, "[h]ow much better for the child for the court to retain a good custodian but deny the relocation, making a decision that really is in the better interest of a child").

50. *See, e.g.*, Maeda v. Maeda, 794 P.2d 268 (Haw. Ct. App. 1990) (custodial award subject to transfer if custodial parent leaves the jurisdiction); Alfieri v. Alfieri, 105 N.M. 373, 733 P.2d 4 (Ct. App. 1987) (custodial award contingent upon return to New Mexico); Sullivan v. Sullivan, 594 N.Y.S.2d 276 (N.Y. App. Div. 1993) (custody contingent upon remaining in current school district); Lozinak v. Lozinak, 569 A.2d 353 (Pa. Super. Ct. 1990) (custodial award based on remaining in the jurisdiction, otherwise custody would change to other parent).

51. No. 513, 1997, 1998 WL 309848, at *1 (Del. 1998). *See also* Koenig v. Koenig, 782 S.W.2d 86, 90 (Mo. Ct. App. 1989) (trial court's conclusion, that if custodial parent chose to relocate it would be in child's best interest to change custody to other parent, could not stand as court's conclusion amounted to an automatic future change of custody); Wilson v. Wilson, 408 S.E.2d 576, 579 (Va. Ct. App. 1991) (automatic custodial reversal clause is clearly an abuse of discretion).

52. *See* Anderson v. Anderson, No. 513,1997 1998 WL 309848, at *1 (Del. May 28, 1998).

53. 794 P.2d 268 (Haw. Ct. App. 1990).

54. *See id.* at 270.

55. *See infra* Part III. for an argument that a return to the status quo is not always available.

56. The following is an excerpt from the affidavit filed by a custodial parent who was not allowed to relocate:

> Professor LaFrance and I have been married since ... June [of 1992]. Prior to our marriage, we, and the children, would often focus our conversations on things we would plan to do as a family, future goals that we had, trips we would take, and plans for our future together. He and I must now focus instead on ongoing legal battles. We don't know if there will be a future allowed us. I must choose between having a husband or having my children. I worry about whether or not my husband and I will ever be able to move beyond court battles and legal maneuvering or if the corrosive effects of this Order and its implications will leave us both financially and emotionally bankrupt. The long term survival of our marriage is in jeopardy as a result of the order.
>
> The Order has effectively imprisoned me without walls. I am unable to move from this town, even though the community and financial stability that were once here for me no longer exist.

the relationship between the parents is almost certain to deteriorate, at least temporarily.

The general rule, stated earlier, that courts ordinarily do not allow a parent to relitigate the custody issue, once an initial determination has been made, absent some material changed circumstance affecting the child's welfare, is designed to protect the child.[57] Divorce can be very difficult for children. Young children fear abandonment, older children fear loss of financial and emotional support, and the worries of all children are exacerbated when they are exposed to strong parental conflict.[58]

In relocation decisions, the child has already been through the breakup of the family and at least one custody determination. Exposing the child to another court battle and the stress associated with both parents battling over the child should be avoided, unless there is greater potential for harm to the child from not having a hearing. As the Colorado Supreme Court recently noted, "[n]either the child nor the parents benefit from repeat appearances before the court or from the uncertainty caused thereby. Instead, uncertainty only serves to threaten the child's stability and undermine the parties' acceptance of the original award of custody."[59]

States should develop a relocation standard containing a presumption in favor or against relocation, depending on which rule better serves the child's interest in most instances. Such presumption or default rule would have the effect of greatly reducing the indeterminacy[60] of relocation decisions, thereby reducing the number

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> I have a husband, yet am not allowed a marriage. My children have a stepfather, yet are denied an ongoing male presence in their home. I am unable to fully participate in my children's activities or in activities for myself both because of the uncertain nature of my future and because of my commitment to try to spend time with my husband.
>
> I have been the primary parent—emotionally, spiritually, and financially—for Eddie and Meagan both during and since my marriage to their father. To live within the terms of Judge Beaudoin's Order I am faced with an impossible choice. I can either choose to remain as the primary parent for my children or I can enjoy the freedoms that I never before questioned—the freedom to marry and live with the man I love, the freedom to choose the community within which I shall live, the freedom to pursue the job of my choosing, the freedom to make my own decisions about my life. Since I cannot abandon my children, there is, in effect, no choice available to me.

LaFrance, *supra* note 21, at 39.

57. *See supra* text accompanying note 7.

58. *See* Judith S. Wallerstein and 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, 309 (1996).

59. *In re* Marriage of Francis, 919 P.2d 776, 786 (Colo. 1996). *See also* Silbaugh v. Silbaugh, 543 N.W.2d 639, 642 (Minn. 1996) (noting the "legislature's preference for permanence and closure on custody matters, except under the most extraordinary circumstances, where changed circumstances endanger the child's physical or emotional health," citing MINN. STAT. ANN. § 518.18(d) (West 1995)).

60. If relocation can be the sole basis for a custody rehearing, there is no disincentive to filing, as long as one can afford to do so. If the standard is merely a general "best interest of the child" test, there is every incentive for the losing side to appeal, again so long as the funds hold out. In a number of cases, the custody decision is reversed at every stage of the litigation, increasing the incentive for the losing party to appeal. *See e.g.*, *Ex parte* Murphy, 670 So. 2d 51, 53 (Ala. 1995), *citing Ex parte* McLendon, 455 So. 2d 863 (Ala. 1984) (trial court awarded custody to the father, court of appeals to the mother, and supreme court to the father); *Ex parte* Jones, 620 So. 2d 4, 6 (Ala. 1992) (citing Wood v. Wood, 333 So. 2d 826, 828 (Ala. Civ. App. 1976)) (trial court awarded custody to the father, court of appeals to the mother, and supreme court to the father); Burgess v. Burgess, 913 P.2d 473 (Cal. 1996) (trial court awarded custody to the mother, court of appeals to the father, and supreme court to the mother).

of petitions filed[61] and the number of children subjected to another contested proceeding.[62] Like other presumptions, it would also reduce the burden on already scant judicial resources as well as provide more consistency and predictability in relocation decisions.[63]

The relocation presumption should, however, be rebuttable in those instances in which the child's best interests are not served by the presumption. In such cases, the court should have discretion to make a best interest determination to better serve the child's needs. States must first decide whether it better serves most children to have a presumption in favor of or opposing relocation. Then states must carefully carve out necessary exceptions to the presumption. A review of social science research is helpful in evaluating the presumption.

III. SOCIAL SCIENCE RESEARCH

Relocation of children following divorce has not yet been studied on a long-term basis.[64] Dr. Judith Wallerstein, who has done extensive research on the effect of divorce on children, has been a powerful and persuasive voice regarding the approach courts should take in resolving relocation cases.[65] Dr. Wallerstein argues that prohibiting relocation may force that parent to choose between retaining custody of his or her child and seeking opportunities that are tied to relocation which may be beneficial to the child as well as the rest of the family unit.[66] Such beneficial relocation opportunities might include a new marriage, job advancement, or closer access to extended family.[67]

Dr. Wallerstein posits that a parent who foregoes such a desirable relocation opportunity in order to retain custody may suffer negative emotional consequences

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The North Carolina court noted the importance of limiting unnecessary custody litigation in order to protect children, stating:

> [A] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Pulliam v. Smith, 501 S.E.2d 898, 900 (N.C. 1998).

61. *See* Karner, *supra* note 49, at 14 (judge observes that the "more predictable (if not formulaic) the outcome, the less likely parties will be to take their chances in a trial or hearing").

62. Children of divorce relocate more frequently than do children in intact families. *See* Wallerstein & Tanke, *supra* note 58, at 310 (citing E. Mavis Hetherington et al., *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 J. AMER. ACAD. CHILD PSYCH. 518 (1985), ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992), and JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 297-301 (1989)).

63. *See* Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 737 (1992) (discussing the benefits and use of the natural parent presumption in custody conflicts between natural parents and third parties).

64. *See* Wallerstein & Tanke, *supra* note 58, at 307 (suggesting that such a study would be costly and difficult to conduct because parties would, of course, not be centrally located).

65. *See id.*

66. *See id. cited with approval in* Ireland v. Ireland, 717 A.2d 676, 681 (Conn. 1998).

67. *See id.*

such as depression.[68] The parent's loss may result in negative consequences for the child both in terms of diminished parenting and guilt felt by the child who knows that he or she was the "cause" of the parent's lost opportunity.[69]

Dr. Wallerstein cites a case study involving a custodial mother who abandoned her plans to move in order to attend medical school when the court refused to allow the child to relocate.[70] The mother lacked financial resources to pursue the case and thought that she could lessen the trauma for her child by dropping the fight.[71] The mother became depressed and the child was profoundly affected, feeling responsible for the mother's pain and disappointment.[72] Eventually, the mother went back to court and obtained permission to relocate with the child.[73] This case illustrates that the "custodial status quo" was clearly not obtained by simply refusing to allow the relocation.

In deciding what is in the best interests of the child, the court should also be cognizant of the detrimental effect a custody fight can have on the child, regardless of its outcome. The child has already been through the trauma of a divorce and possibly a fight over the initial determination of custody.[74] Now the child is being threatened with another upheaval, if the court allows a full hearing and best interest determination whenever the custodial parent seeks to relocate.

We are a mobile society.[75] Allowing a hearing in every relocation case will subject a great number of children to potential conflict and trauma without a demonstrated need to do so. Courts can greatly reduce the number of children that will be subjected to relocation hearings. By relying on social science research to identify a child-centered presumption to be applied in most relocation cases, thus precluding a full adversarial hearing.

According to Dr. Wallerstein, social science research identifies three factors that are associated with good outcomes for children in post-divorce families. They are:

1. A close, sensitive relationship with a psychologically intact, conscientious custodial parent.
2. The diminution of conflict and reasonable cooperation between the parents.[76]

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68. *See id.*
69. *See id.*
70. *See id.* at 325.
71. *See id.*
72. *See id.*
73. *See id.* at 326.
74. *See* Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AMER. ACAD. CHILD & ADOLESCENT PSYCH. 349 (1991); WALLERSTEIN & BLAKESLEE, *supra* note 62, at 297-301.
75. Approximately one American in five changes residences each year. (How many readers of this article have always lived in the same city?) Based on 1983 figures, a newborn will change residences about 10.5 times during a lifetime. *See* Bruch & Bowermaster, *supra* note 8, at 249 (citing Kevin E. McHugh, *Book Review*, 67 ECON. GEOGRAPHY 376 (1991) (discussing chapter by Robert R. Sell in LABOUR MIGRATION (James H. Johnson & John Salt eds., 1990))). *See also* Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1, 3 (stating that during the first four years following divorce or separation, 75% of custodial mothers moved at least once and over half of those mothers move again).
76. *See* Wallerstein & Tanke, *supra* note 58, at 311, (stating that the high potential for conflict between parents, as in a relocation battle "can severely threaten the child's sense of security, confirming a view of the world as an armed camp in which the child can trust no one") (citing JANET R. JOHNSTON & LINDA E. G. CAMPELL, IMPASSES OF DIVORCE 153, 174 (1988); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Sole Physical Custody Families*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989). *See also*

3. Absence of pre-existing psychological problems of the child.[77]

Based on these findings, children are likely to benefit from a presumption in favor of relocation in most instances. This presumption would protect the child-custodial relationship and would reduce the number of contested relocation hearings. Such a presumption, therefore, supports two of the three factors shown to be consistent with children's best interests.

Courts have begun to recognize the importance of custodial stability. In 1996, Dr. Wallerstein submitted an amicus brief for the court in *Burgess v. Burgess*[78] that contained the results of her research and her views on the issue of relocation.[79] The California Supreme Court in *Burgess* reversed its previously highly restrictive stance on relocation and allowed the custodial parent to move, creating national headlines.[80] New York, also a restrictive state, changed its position, just weeks earlier, in *Tropea v. Tropea*.[81] Dr. Wallerstein is credited with influencing both of these outcomes and reversing the national trend in relocation cases.[82] Also in 1996, the Tennessee Supreme Court in *Aaby v. Strange*[83] relied on the "collective wisdom of both the courts and child psychologists [for the proposition that] children, especially those subjected to the trauma of divorce, need stability and continuity in relationships most of all."[84] Other states recognized the importance of the custodial parent-child bond much earlier. In 1990 the Pennsylvania Supreme Court allowed a relocation in *Gruber v. Gruber*,[85] after opining:

> We think it is indisputable, under the circumstances of this case, that appellant's ability to be an effective parent to her children is seriously undermined by the

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James A. Twaite & Anya K. Luchow, *Custodial Arrangements and Parental Conflict Following Divorce: The Impact on Children's Adjustment*, 24 J. PSYCHOL. & L. 53 (1996) (level of parental conflict is a better predictor of child adjustment than the custodial arrangement). Frank F. Furstenberg and Andrew J. Cherlin list two similar principles for guiding social policy: 1) "The more effectively custodial parents can function, the better will be their children's adjustment and 2) The less parental conflict children are exposed to, the better will be their adjustment." FRANK F. FURSTENBERG & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 108 (1991).

77. Wallerstein & Tanke, *supra* note 58, at 311, citing Marsha Kline, Jeanne M. Tschann, Janet R. Johnston, & Judith Wallerstein, *Children's Adjustment in Joint and Sole Physical Custody Families*, 25 DEV. PSYCHOL. 430, 435 (1989).

78. 913 P.2d 473 (Cal. 1996).

79. *See id.* at 476. *But see* Jaramillo v. Jaramillo, 113 N.M. 57,62, 823 P.2d 299, 304 (1991) (recognizing a presumption in favor of a relocating parent with sole custody but declining to recognize a presumption in favor of the relocating parent or the resisting parent in cases involving joint legal custody, even when one parent is the primary residential parent, and stating that "one parent's status as primary physical custodian has no particular significance and should not entitle that parent to the benefit of [a presumption]").

80. *See Burgess*, 913 P.2d at 480.

81. 665 N.E.2d 145, 150 (N.Y. 1996) (replacing former restrictive relocation standard, requiring a showing of "exceptional circumstances," with a "best interests" standard).

82. Norma Levine Trusch, *Relocation of Children After Divorce: The Winds of Change*, 18 No.4 FAIR$HARE 2, 3 (1998). *See* Paulson v. Bauske, 574 N.W.2d 801, 803 (N.D. 1998) ("[i]t is axiomatic that a newlywed couple wants to live together and that the child is benefited by the satisfaction the custodial parent derives from residing with her spouse").

83. 924 S.W.2d 623 (Tenn. 1996).

84. *Id.* at 627. *See also* Silbaugh v. Silbaugh, 543 N.W.2d 639, 642 (Minn. 1996) ("[O]ur concern must be for the Silbaugh children and their need for a sense of stability in their familial arrangements."); JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE, 32-39 (1996) (emphasizing the child's need for continuity in relocation decisions).

85. 583 A.2d 434 (Pa. 1990).

> difficulty and unhappiness of her life in Pennsylvania. Conversely, there is no question that the move to Illinois is likely substantially to promote the well-being of the mother and, consequently make her a more effective, superior parent. We think it is fundamental that the best interests of the children cannot, in this case, be severed from the interests of the mother with whom they live and upon whose mental well-being they primarily depend.[86]

Social science researchers have also studied the role of the noncustodial parent from the child's perspective.[87] Although father participation has been correlated to children's academic performance and participation in extracurricular activities,[88] surprisingly, the *amount* of visitation with the noncustodial parent is not consistently related to the child's adjustment, post-divorce.[89]

The *quality* of the relationship with the noncustodial parent, however, is very important. Dr. Wallerstein states that "[a] child who feels abandoned by the noncustodial parent suffers tragically, often turning the feelings back on himself or herself as unworthy of being loved."[90] Children need the access and the freedom to create a loving relationship with both parents, if at all possible under the facts of each case. In fact, some legislatures have specifically recognized the importance of both parents' involvement in a child's development. Nebraska's provision states:

> The Legislature finds it is in the best interests of a minor child to maintain, to the greatest extent possible, the ongoing involvement of both parents in the life of the minor child. * * * It is the policy of this state to assure the right of children, when it is in their best interests, to frequent and continuing contact with parents who have shown the ability to act in the best interests of the children and to encourage parents to share in the rights and responsibilities of raising their children after divorce or separation.[91]

While social science evidence supports a presumption in favor of relocation, special emphasis on modifying visitation in order to protect and facilitate an

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86. *Id.* at 441 (footnotes omitted). The *Gruber* court, in a footnote to the opinion, quoted a 1980 Illinois appellate court for support on the link between the child's welfare and that of the custodial parent: "[G]ranting [relocation] would likely benefit the child by making the custodian a happier, better adjusted parent than would be the case if the custodian's freedom of movement was more restrained." *In re* Marriage of Burgham, 408 N.E.2d 37, 40 (Ill. App. Ct. 1980).

87. *See* sources cited *supra* note 74.

88. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, FATHERS' INVOLVEMENT IN THEIR CHILDREN'S SCHOOL (Sept. 1997).

89. *See* Wallerstein & Tanke, *supra* note 58, at 312, citing JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 238 (1989), and Furstenberg & Cherlin, *supra* note 76, at 107-8 (arguing that support for the custodial parent-child relationship should take precedence over the noncustodial parent-child relationship based on the presence of a strong link between the well-being of the custodial parent and the child and the absence of a similar link between visitation and the child's well-being). *See also* F. F. Furstenberg, Jr. et al., *Parental Participation and Children's Well-being After Marital Dissolution*, 52 AM. SOC. REV. 659-701 (1987) (noting that frequent visitation neither fostered nor hindered child's adjustment); Steve Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 WASHBURN L. J. 497, 542 (1998) (conceding that "no precise minimum level of visitation has been found to be either optimal or critical" but also criticizing the validity of some research methodology).

90. Wallerstein & Tanke, *supra* note 58, at 312.

91. NEB. REV. STAT. § 43-2902 (Supp. 1993).

ongoing noncustodial parent-child relationship is also necessary.[92] Nurturing or even just maintaining a noncustodial parent-child relationship may be almost impossible in some cases depending on the distance between the parties and their resources. The degree of participation in the child's life by the noncustodial parent will also be affected.

A model approach to relocation should recognize a presumption in favor of relocation.[93] A model approach should also carefully consider the several exceptions necessary to protect the interests of children who may not be best served by the presumption.

IV. EXCEPTIONS JUSTIFYING A BEST INTEREST DETERMINATION

Recognizing a presumption in favor of relocation will preclude a full hearing in most relocation cases. While a presumption in favor of relocation is beneficial in most cases, because of the importance of insuring custodial stability and avoiding adversarial proceedings where possible, some presumptions go too far. For example, in *Aaby v. Strange*,[94] the Tennessee Supreme Court recognized a presumption in favor of relocation, making the presumption almost conclusive.[95] The court allowed rebuttal only upon a showing of vindictive motive on the part of the custodial parent to thwart visitation of the noncustodial parent, or in limited cases of actual harm.[96] However, allowing the court to make a best interest determination only in cases involving vindictive motive does not sufficiently protect children. Moreover, there are several other instances in which the presumption in favor of relocation is not necessarily consistent with the best interests of the child. In those instances, discussed more fully below, the court should have a full hearing and make a best interests determination.

A. *Frivolous Move*

A number of states require that the custodial parent have a valid reason for the move.[97] "Valid" is defined as a relocation that is not primarily designed to interfere

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92. *See* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433, 448, (1998) [hereinafter Bowermaster, *Domestic Violence*] ("Other prominent social science researchers have reported findings that support [a preference for relocation]," citing ROBERT EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 84-90 (1988); ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 295 (1992); Robert D. Hess & Kathleen A. Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 J. SOC. ISSUES 79 (1979); and Valarie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. FAM. ISSUES 78 (1994)).

93. *See* Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 J. FAM. L. 791, 883 (1992-93) (recommending giving priority to the child's relationship with the custodial parent in resolving relocation disputes).

94. 924 S.W. 2d 623 (Tenn. 1996).

95. *See id.* at 630. Tennessee courts were given greater discretion in hearing relocation cases by the subsequent passage of TENN. CODE ANN. § 36-6-108 (Supp. 1998).

96. *See Aaby*, 924 S.W.2d at 630.

97. *See e.g.*, TENN. CODE ANN. § 36-6-108 (Supp. 1998) (requiring reasonable purpose); Harder v. Harder, 524 N.W.2d 325 (Neb. 1994) (requiring legitimate reason); Garrison v. Mulcahy, 636 A.2d 732, 733 (R.I. 1993) (requiring compelling reason).

with noncustodial visitation.[98] Relocation standards should also prohibit moves based on a frivolous reason or no reason.

Assume that a court is presented with a situation in which the child regularly spends every other weekend and every Wednesday night with the noncustodial parent. Further assume that the noncustodial parent also coaches the child's soccer team and helps with the scout troop activities. The relationship between the child and the noncustodial parent is very close. The custodial parent decides to move several states away, "to be nearer the ocean." Neither parent earns enough money to pay for airfares without great hardship.

Under a rule that prohibits only vindictive moves, the court cannot weigh the capriciousness of the desire to relocate against the disruption to the child in losing close and intimate contact with the noncustodial parent and possibly other extended family members.

In order to balance the competing interests of the parents and to protect the child's interests, the court should consider both the validity of the reason for the move and the motive regarding visitation. The noncustodial parent's visitation rights should not be an anchor on the custodial parent. This does not mean, however, that the visitation rights of the noncustodial parent and, more importantly, the child's right to access to the noncustodial parent are to be disregarded in all cases absent proof of intent to interfere with same by the custodial parent.

The American Law Institute's tentative draft on relocation endorses an inquiry into the legitimacy of the reason for the move, requiring the relocating parent to show "that the relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of the purpose."[99] If the reason is found to be legitimate, the location should be considered reasonable unless it would be possible to avoid moving altogether or move to a location that is substantially less disruptive.[100] The draft provides a list of several examples to aid the court in determining the threshold question of the whether to move is for a legitimate purpose.[101] The relocating parent bears the burden of establishing the legitimacy of a relocation for reasons not contained in the list.[102]

B. Noncustodial Parent as the Primary Psychological Parent

Another exceptional situation that should be addressed in a model relocation standard is the situation in which the noncustodial parent is the primary psychological parent even though the child lives primarily with the custodial parent. The term,

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98. *See Aaby*, 924 S.W.2d at 628; Hayes v. Hayes, 922 P.2d 896, 899 (Alaska 1996).

99. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.20 (4)(a) (Tentative Draft No. 3, Pt. I, 1998).

100. *See id.*

101. *See id.*

102. *See id.* The nonexclusive list of legitimate reasons include:

> [T]o be close to significant family or other support networks, for significant health reasons, to protect the safety of the child or another member of the child's household from a significant risk of harm, to pursue a significant employment or educational opportunity, or to be with one's spouse [or spouse equivalent] who is established, or who is pursuing a significant employment or educational opportunity, in another location.

Id.

"primary psychological parent" is used here to identify the person the child primarily looks to for support, love, nurturing and guidance. Usually, the custodial parent is also the primary psychological parent. That is not always the case, however, particularly where the child "lives with a psychologically troubled parent, or a parent who is dependent on the child in ways that burden the child's life."[103] In such instances, relocation may not be in the best interests of the child and may, in fact, be quite detrimental.[104]

A default rule that favors relocation would assume that the custodial parent is also the primary psychological parent. Where that is shown not to be the case, the court needs the discretion to make a best interest determination in order to protect the child's interests.

C. *Shared Physical Custody*

A model relocation standard should differentiate between the majority of cases, involving a primary residential parent, and the increasing minority of cases, involving shared physical custody.[105] Presumably, in the case of equally shared physical custody, both parents would be significant psychological parents, thus obviating the justification for a presumption in favor of relocation based on preserving custodial stability. Most courts have not addressed the distinction between cases involving a primary residential parent and those involving shared physical custody.[106] Courts that have addressed shared physical custody cases treat them differently than cases involving a primary residential parent.[107] As more divorcing couples opt for shared physical custody, the issue of removal involving shared physical custody will have to be addressed by all states.

If the parents have been able to coparent successfully with shared physical custody, they most likely have learned to put the child's interests above their own and to reach agreement on parenting issues. In such cases, hopefully, the parents would be able to reach an agreement regarding relocation. If not, and assuming that both parents are *actually* sharing physical custody on a nearly equal basis, such that

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103. Wallerstein & Tanke, *supra* note 58, at 319.

104. *See id.*

105. Shared physical custody may include "joint physical custody," in which the child spends nearly equal time in each parent's home, and "split custody," in which the child spends a majority of the year with one parent (usually the school year) and the rest with the other parent (usually summer vacation). Other variations are possible, such as weekdays with one parent and weekends with the other.

106. Colorado imposes a presumption in favor of relocation in sole custody cases, but the supreme court stated in dicta that such presumption would necessarily be weakened in the case of actual joint residential custody citing COLO. REV. STAT. ANN. § 14-10-131 (West Supp. 1998). *See In re* Marriage of Francis, 919 P.2d 776,785 (Colo. 1996) (declining to address the standard that would apply in a case of actual shared physical custody). Furthermore, the court held that § 14-10-131.5, providing for a best interest standard in deciding joint custody modification petitions, only applied to joint legal custody. *See In re* Marriage of Francis, 919 P.2d 776, 782 (Colo. 1996).

107. *See* Burgess v. Burgess, 913 P.2d 473, 483 n.12 (Cal. 1996) (relocation in cases of joint physical custody justifies modification under the best interests test); Ayers v. Ayers, 508 N.W.2d 515, 519 (Minn. 1993) (relocation must be justified by the relocating parent in cases involving shared physical custody); Jaramillo v. Jaramillo, 823 P.2d 299, 309 (N. M. 1991) (neither party has the burden of proof where physical custody is shared). *See also* Stevison v. Woods, 560 So. 2d 176, 179 (Miss. 1990) (recognizing split custody and relocating mother's strained relation with child not in her custody as "peculiar or unusual circumstances adversely affecting the children over and above the effect attendant upon the mere increase in miles between the children and the non-custodial parent," thus allowing the court to modify custody, where relocation alone was not grounds for modification).

both are de facto custodial parents,[108] the court should make a best interest determination regarding relocation, as in an initial custody determination. Under these circumstances, neither parent should have the burden of proof or the benefit of a presumption.

D. Actual Danger to the Child's Health or Welfare

Where there is proof of actual danger to the child as a result of the move, the presumption in favor of relocation should be rebutted. The court should make a best interest determination after a full hearing, taking into account all relevant factors. Examples of actual danger include moving a child with a serious medical problem to an area where no adequate treatment is readily available, moving a child with specific educational requirements to an area with no acceptable education facilities, or moving in order to take up residence with a person with a history of child or domestic abuse or who is currently abusing alcohol or other substances.[109]

E. Unstable Custodial Parent

Courts may also need to make a best interest determination where the custodial parent is mentally ill or emotionally unstable or otherwise dependent. For example, it is possible that a parent will decide not to contest the initial custody award to the disabled parent if the disabled parent is presently in a situation where he or she has a sufficient support system to allow proper parenting of the child. This may occur when the custodial parent lives with his or her parents and the noncustodial parent is not able to serve as the primary custodial parent. Such arrangements presumably serve the child's best interests. A very different situation is presented if that custodial parent decides to relocate to an area where alternative support systems are not available. In such cases, the presumption that relocation is in the child's best interest is rebutted and the court should make a best interest determination, based on a full hearing, specifically addressing the relocation issue.

F. International Relocations

International relocations present unique jurisdictional problems in addition to the other factors influencing the outcome of these cases. Some countries have attempted to cooperate on custodial issues by becoming signatories to the Hague Convention.[110] Judgments made by foreign courts pursuant to the act are entitled to full faith and credit in American courts.[111] American judgments are likewise entitled

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108. In joint physical custody cases, continuity and protection of the child's relationship with each parent is paramount. *See* Wallerstein & Tanke, *supra* note 58, at 318. *See also* Farnsworth v. Farnsworth, 576 N.W.2d 476 (Neb. Ct. App. 1998) (reversing trial court's decree allowing relocation where the noncustodial parent spent one-half of the year with the child and the custodial parent did not have a necessary or legitimate reason for the move).

109. *See* Taylor v. Taylor, 849 S.W.2d 319, (Tenn. 1993) (listing these examples of substantial harm in a relocation case).

110. The Hague Convention is codified as the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq. (1996).

111. *See* 42 U.S.C. § 11603(g) (1996).

to enforcement in the courts of foreign signatories.[112] Congress also passed the International Parental Kidnaping Crime Act of 1993,[113] making international child abduction a federal felony punishable by a fine or three years in prison, or both.[114]

If the proposed relocation is to a country that does not recognize custody orders of this country, the child may be beyond the protection of U.S. courts and may be subject to special risks such as being cut off from all contact with the nonrelocating parent. Because of the special risks involved, if the relocation is to a foreign country whose laws or public policy does not normally enforce the visitation rights of noncustodial parents, the presumption in favor of relocation should not apply. The presumption should not apply if the proposed relocation is to a foreign country that does not have an adequately functioning legal system, due to war, political upheaval, etc., or which otherwise presents a substantial risk of specific and serious harm to the child. An example of specific and serious harm to the child would be a proposed relocation of a female child to a country that still practices genital excision or long stays in "fattening rooms" to force excessive weight gain which is seen as a sign of fertility and beauty.[115]

V. "BEST INTEREST" FACTORS

If the presumption in favor of relocation has been rebutted, the court should decide whether or not to allow relocation, based on the best interests of the child. Several states list factors[116] that the court should or must consider in making a best

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112. The following countries are also signatories: Argentina, Australia, Austria, the Bahamas, Belise, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), Croatia, Colombia, Cyprus, Denmark, Ecuador, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Macedonia, Mauritius, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, St. Kitts and Nevis, Slovenia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and Zimbabwe.

113. *See* 18 U.S.C. § 1204.

114. The act recognizes three affirmative defenses: 1) That the defendant acted pursuant to a custody order valid under the Uniform Child Custody Jurisdiction Act (UCCJA); 2) that the defendant was fleeing domestic abuse; 3) that the defendant failed to return the child because of circumstances beyond the defendant's control and that the defendant notified or tried to notify the other parent within 24 hours and returned the child as soon as possible. *See id.*

115. *See* Ann M. Simmons, *Nigerian Girls Get Fat to Reach Womanhood Ideal*, THE COMMERCIAL APPEAL, Oct. 18, 1998, at A7. *But see* Ayyash v. Ayyash, 700 So. 2d 752 (Fla. Dist. Ct. App. 1997) (rejecting mother's argument that she hid the children for more than six years because she feared that the father would flee with the children to Jordan).

116. These factors are based loosely on several standards. The *D'Onofrio* standard, announced by the New Jersey superior court in D'Onofrio v. D'Onofrio, 365 A.2d 27 (N.J. Super. Ct. App. Div. 1976) offers four factors to consider: 1) The prospective advantages of the move to improve the quality of life for both the parent and child; 2) the motives of the custodial parent in seeking to relocate and the likelihood of compliance with the substitute visitation decree; 3) the motives of the noncustodial parent in resisting the relocation; and, 4) the likelihood of being able to fashion substitute visitation that will preserve and foster the noncustodial parent-child relationship. These factors have been adopted by courts either specifically or generally in the following states: Arizona (Pollock v. Pollock, 889 P.2d 633 (Ariz. Ct. App. 1995)); Arkansas (Staab v. Hurst, 868 S.W.2d 517, 520 (Ark. Ct. App. 1984)); Colorado (*In re* Marriage of Francis, 919 P.2d 776, 785 (Colo. 1996)); Connecticut (Ireland v. Ireland, 717 A.2d 676, 684 (Conn. 1998)); Florida (Mize v. Mize, 621 So. 2d 417, 420 (Fla. 1993)); Illinois (*In re* Marriage of Eckert, 518 N.E.2d 1041, 1045 (Ill. 1988)); Iowa (*In re* Marriage of Quirk-Edwards, 509 N.W.2d 476, 479 (Iowa 1993)); Massachusetts (Williams v. Pitney, 567 N.E.2d 894, 897 (Mass. 1991)); Michigan (Costantini v. Costantini, 521 N.W.2d 1 (Mich. 1994) (Riley, J., concurring)); Missouri (Shaw v. Shaw, 951 S.W.2d 746, 748 (Mo. Ct. App. 1997)); Nevada (Cook v. Cook, 898 P.2d 702, 705 (Nev. 1995)); North Dakota (Stout v. Stout, 560 N.W.2d 903, 908-909 (N.D. 1997)); Pennsylvania (Gruber v. Gruber, 583 A.2d 434, 439 (Pa. Super. Ct. 1990));

interest determination. In relocation cases, in addition to the ordinary best interests factors considered in initial custody determinations, the court should consider the additional factors that are outlined below.

A. *Motives*

In a model statute, proof of a vindictive or frivolous motive should overcome the presumption in favor of relocation. The court should also consider the motives of the parties thereafter in making a best interest determination.[117] If a parent has attempted to relocate for vindictive or frivolous motives, that parent is not likely to foster a close relationship between the child and the noncustodial parent. Such a finding would not automatically, however, result in a denial of permission to relocate or a change in custody, as there are many additional factors the court should consider. In making a best interest determination, the court could find that relocation is in the child's best interest, despite the custodial parent's motives[118] or, if relocation is denied, that custody should, nevertheless remain unchanged.[119]

The motive of the noncustodial parent should also be considered[120] where there is proof that the objection to relocation is motivated in part by a desire to control the custodial parent.[121] Proof of other negative motives of the noncustodial parent in objecting to relocation should also be considered, such as gaining a financial advantage regarding child support obligations.[122]

B. *Child's Preference*

If one of the foregoing exceptions applies, causing the court to make a best interests determination, the court should, in some cases, consider the child's preference. If the child is mature, the court should give serious consideration to his or her preference regarding relocation.[123] While younger children are very

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South Dakota (Fortin v. Fortin, 500 N.W.2d 229, 232 (S.D. 1993)); Tennessee (Taylor v. Taylor, 849 S.W.2d 319, 331 (Tenn. 1993)); Wyoming (Love v. Love, 851 P.2d 1283, 1288 (Wyo. 1993)).

117. *See, e.g.*, Ireland v. Ireland, 717 A.2d 676, 684 (Conn. 1998) (requiring consideration of custodial parent's good faith or motivation and evidence of noncustodial parent's vindictive motive and good faith in resisting the move).

118. For instance, where there is proof of vindictive motive in addition to a legitimate motive that serves the child's interest such as availability of special medical services.

119. For instance, where the noncustodial parent is not able to meet the child's needs on a full-time basis, or where the relationship between the custodial parent and child is so close and nurturing that custody should remain unchanged. In such case, the court may order the custodial parent to undergo counseling or the court may address the visitation interference issue through its contempt powers.

120. *See, e.g.*, *In re* Smith, 665 N.E.2d 1209, 1213 (Ill. 1996) (considering motives of both parents in determining child's best interests).

121. *See, e.g.*, Burgess v. Burgess, 913 P.2d 473, 477 (Cal. 1996); Ireland v. Ireland, 717 A.2d 676, 684 (Conn. 1998).

122. *See, e.g.*, *In re* Marriage of Soraparu, 498 N.E.2d 565, 569 (Ill. App. Ct. 1986) (finding father's failure to pay child support was relevant in denying his petition to modify custody); Cook v. Cook, 898 P.2d 702, 705 (Nev. 1995) (requiring court to consider the "extent, if any, the opposition is intended to secure a financial advantage regarding ongoing support obligations or otherwise"); D'Onofrio v. D'Onofrio, 365 A.2d 27, 30 (N.J. Super. Ct. Ch. Div. 1976) (noting that a factor for courts to consider in relocation cases is the "integrity of the noncustodial parent's motives in resisting the removal and. . . the extent to which. . . opposition is intended to secure a financial advantage in respect of continuing support obligations").

123. *See, e.g.*, Burgess v. Burgess, 913 P.2d 473, 483 (Cal. 1996); MASS. GEN. LAWS ANN. ch. 208, § 30 (West 1998) (child over 14 must consent to relocation or the court must give permission "upon cause shown").

dependent upon their custodial parent, the older child may be more involved with, and dependent on friends and community outside the home.[124]

The Supreme Court of Wyoming identified the following six factors to consider when weighing a child's custodial preference:

1. The age of the child;
2. The reason for the preference;
3. The relative fitness of the preferred and non-preferred parent;
4. The hostility, if any, of the child to the non-preferred parent;
5. The preference of other siblings; and
6. Whether the child's preference has been tainted or influenced by one parent against the other.[125]

The child's preference should not be outcome determinative, but it should be given great weight when the child is determined to be sufficiently mature to make a circumspect choice regarding relocation. The court should also be sensitive to the child's feelings and should avoid putting the child in the position of choosing between the parents.

C. Quality of Life

The court should also consider whether there is a reasonable likelihood that the proposed move will enhance the quality of life for the child and the custodial parent, including the short and long term effects of the move on the custodial parent's ability to support the child.[126] Quality of life considerations should include access to educational opportunities or medical services for the child.

A sufficient showing is made if the overall quality of life will improve for the family unit on the theory that if the family unit is happier, the child will benefit indirectly.[127] Proof of loss of quality of life by the child, as a result of the move, should be balanced against the gain from relocation. The Supreme Court of North Dakota recognized the importance of focusing on the interests of the custodial family unit in Fortin v. Fortin:[128]

> The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole . . . is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the noncustodial parent must be considered.[129]

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124. *See* Wallerstein & Tanke, *supra* note 58, at 322.

125. Love v. Love, 851 P.2d 1283, 1290 (Wyo. 1993), citing Roberts v. Vilos, 776 P.2d 216, 219 (Wyo. 1989).

126. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(J) (West Supp. 1998); Ireland v. Ireland, 717 A.2d 676, 684 (Conn. 1998); *In re* Smith, 665 N.E.2d 1209, 1213 (Ill. 1996).

127. *See, e.g.*, Zalenko v. White, 701 A.2d 227, 228 (Pa. Super. Ct. 1997) ("[W]hen the move will significantly improve the general quality of life for the custodial parent, indirect benefits flow to the children with whom they reside.").

128. 500 N.W.2d 229 (N.D. 1993).

129. *Id.* at 232 (quoting D'Onofrio v. D'Onofrio, 365 A.2d 27, 29 (N.J. Super. Ct. App. Div. 1976)).

Maintenance of the noncustodial parent-child relationship is crucial, but it should not take precedence over protection of the stability of the custodial parent-child relationship in most instances.

D. Visitation

The court should consider the extent to which the noncustodial parent is presently involved in the child's life, the negative effect of the move on the noncustodial parent-child relationship,[130] and the extent to which that relationship can be fostered and preserved through modified visitation and allocation of increased travel expenses created by relocation.[131] The court should also consider the likelihood that the custodial parent will comply with the modified visitation order after relocating, taking into account the level of cooperation demonstrated prior to the relocation.[132] Where cooperation in visitation was deficient or lacking altogether, the court should consider evidence of justifiable cause related to good faith efforts to protect the child's welfare, such as preventing visitation in the good faith, but mistaken, belief that the noncustodial parent is inebriated. The issue in such cases should be the good faith of the custodial parent. Good faith but misguided efforts to protect a child do not evidence bad parenting or intent to interfere with visitation.

E. Support Systems

The existence of extended family or other support systems, including friends, is relevant to determining the child's best interest.[133] The court should consider both the child's and the parent's support systems. The child's support system will include extended family members and, as the child gets older, may include friends, teachers, and other influential adults.

VI. STANDARD APPROACH ABSENT EXCEPTIONS

If the presumption in favor of relocation, described above,[134] is not rebutted, the only issue for the court is modification of the visitation schedule. Every effort should be made to preserve and foster the noncustodial parent-child relationship.[135] In revising visitation, the court should take into account developmental consider-

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130. *See, e.g.*, IND. CODE ANN. § 31-17-2-23 (Michie 1997) (requiring court to consider the distance involved in the move and the hardship and expense involved in maintaining visitation).

131. *See, e.g., In re* Marriage of Francis, 919 P.2d 776, 785 (Colo. 1996) (noting that court may consider whether it "is able to fashion a reasonable visitation schedule for the noncustodial parent after the move and the extent of the non-custodial parent's involvement with the children at the old location"); Ireland v. Ireland, 717 A.2d 676, 684 (Conn. 1998) (noting that one of the factors to consider is whether visitation is possible that will preserve and foster the noncustodial parent-child relationship); *In re* Smith, 665 N.E.2d 1209, 1213 (Ill. 1996) (noting the court should consider "the visitation rights of the noncustodial parent").

132. *See, e.g.*, Ireland v. Ireland, 717 A.2d 676, 684 (Conn. 1998).

133. *See, e.g., In re* Marriage of Francis, 919 P.2d 776, 785 (Colo. 1996) (listing as a consideration, whether there is a support system of family or friends, either at the new or old location).

134. *See* Part V. *supra.*

135. *See, e.g.*, IOWA CODE ANN. § 598.21(8A) (West 1998) (requiring court, to preserve as nearly as possible, the existing relationship between the child and the nonrelocating parent). *See also* Beth M. Erickson, *The Importance of Continuing the Father Relationship*, 8 No. 4. AM. J. FAM. L. 197 (1994).

ations and the psychological makeup of the child.[136] The court may consider extending vacation and holiday visits in order for the child to maintain a meaningful relationship with the noncustodial parent.[137]

The goal, as stated by Dr. Samuel Roll, is to make the child feel "that the loved one is never far away and that the child is recorded in some indelible way on the parent."[138] Dr. Roll concludes that the child is at reduced risk when the child feels emotionally related to the noncustodial parent and has a sense of holding that parent close.[139]

The court should also consider the increased expenses associated with the modified visitation and the relative ability of each parent to assume part of that cost. It may be appropriate to allocate the increased travel costs to the custodial parent or to require the custodial parent to provide transportation of the child to the noncustodial parent's home.[140] The increased costs of travel associated with the modified visitation should also be the basis for a deviation from child support guidelines, where appropriate to achieve equity between the parties, or when necessary to protect the best interests of the child.

VII. ADDITIONAL FACTORS AFFECTING THE RELOCATION DECISION

A. Burden of Proof and Presumptions

There should be a presumption that relocation is in the best interests of the child if the primary residential parent alleges a good faith and legitimate reason for the move. The burden should then shift to the other parent to prove one of the exceptions outlined in part IV, in order to rebut the presumption. As the Connecticut Supreme Court explained in *Ireland v. Ireland*,[141] a presumption in favor of relocation is consistent with the trust placed in the custodial parent, when custody was initially determined, that he or she would make decisions, including a relocation decision with the best interests of the child in mind.[142]

If the parent objecting to relocation proves that an exception applies, the court should make a best interest determination regarding relocation, based on the factors outlined in part V, without either party enjoying a presumption or having the burden of proof.

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136. *See* Samuel Roll, *How a Child Views the Move*, 20 FAM. ADVOC. Fall 1997, at 27, 31. The length of hiatus from noncustodial parent contact that can support a viable relationship depends on the age-related development of the child: 12-year-olds can tolerate absences of 6-9 months; 6-7-year-olds can tolerate absences 4 months or longer; 3-6-year-olds can tolerate absence of three months; 2-year-olds can tolerate absences of one week. *Id.* at 30.

137. *See, e.g.*, IOWA CODE ANN. § 598.21(8A) (West 1998) (stating that modified visitation order may include extended visitation during summer vacations and school breaks).

138. *See* Roll, *supra* note 136, at 30.

See also 10+ Easy Ways a Long-Distance Parent Can Stay in Touch, 20 FAM. ADVOC. Fall 1997, at 33.

139. *See* Roll, *supra* note 136, at 30. "Even when relocation occurs, damage to children can be minimized through predictable contact with both parents and reduced hostilities." *Id.*

140. *See, e.g.*, IOWA CODE ANN. § 598.21(8A) (West 1998) (noting court may assign responsibility for transportation to either or both parents); Burgess v. Burgess, 913 P.2d 473, 484 (Cal. 1996).

141. 717 A.2d 676 (Conn. 1998).

142. *See id.* at 682.

B. *Separating the relocation issue from the custody determination that follows a court decision against relocation*

Where relocation is the only issue before the court, the decision regarding permission to relocate should be made independently of the custodial modification decision that would normally follow a decision against relocation. The reason for unlinking the decisions is to give the custodian parent the option to remain in the jurisdiction and retain custody. The relocating parent may decide to give up the new job, pursuit of further education, etc., rather than to lose custody of the child when faced with that draconian choice. The court should not make the choice for the parent by combining the decision to disallow relocation with a decision to change custody.[143]

Generally, if there was no petition to change custody pending prior to the relocation issue arising, there should be no basis for a change of custody, assuming the custodial parent abandons the plan to relocate. This approach is recommended, not to protect the custodial parent's rights, but rather to protect the child's interest. Unlinking the two issues of relocation and custodial modification preserves the opportunity to remain with the "custodial status quo" that has already been determined to be in the child's best interests.

C. *Guardian/Attorney ad litem*

If the court is required to make a best interest determination, a Guardian ad litem or Attorney ad litem should be appointed in order to protect the child's interests.[144] Ideally, both would be appointed, the guardian to fact find and to represent the child's best interests and the attorney to serve in the full capacity of an attorney advocating his clients' preference. If the child is sufficiently mature so that the child's preference will be a factor in the best interest determination, it is especially important that an attorney ad litem be appointed to insure advocacy of the child's preference.[145] If the child's preference will not be a factor in the court's determination, the court may prefer to appoint only a guardian ad litem to serve as a fact finder for the court, rather than as an attorney for the child. If the guardian serves only as a fact finder, there is no one to examine witnesses and otherwise advocate on the child's behalf. Some courts attempt to combine the roles of attorney and guardian by allowing the guardian to examine witnesses, etc. This merging of roles

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143. *See* Masters v. Masters, 630 N.E.2d 665 (Ohio 1994) (reversing trial court's order to change custody to father solely on the basis of mother's notice of intention to relocate where mother later asserted that move was not imminent).

144. The ABA-approved Juvenile Justice Standards Relating to Counsel for Private Parties specify mandatory appointment of an attorney for the child "who is the subject of proceedings affecting his or her status or custody." JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 2.3(b) (1979). The 1996 Conference on Ethical Issues in the Legal Representation of Children recommended that a lawyer appointed to represent a child in a legal proceeding should serve as the child's lawyer, if possible, regardless of the title of the appointment. *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996).

145. Typically, the attorney ad litem serves as an advocate for the child, advancing the child's preference, while the guardian ad litem is "the representative of the child's best interest." Ireland v. Ireland, 717 A.2d 676, 688-89 (Conn. 1998).

can lead to conflicts, particularly where the guardian's view of the child's best interests do not coincide with the mature child's wishes.

If a guardian ad litem is appointed, his or her report and opinion should be presented through testimony subject to cross-examination,[146] unless both parents waive their rights to do so. Such waiver should ordinarily be obtained at the time of the appointment because the disfavored parent may later refuse to allow a hearsay report that contains adverse statements.

Costs associated with the appointment of a guardian ad litem or attorney ad litem should be allocated among the parties by the court. The court should, however, allocate the fee of the guardian ad litem or attorney ad litem, and ascertain that it has been paid prior to issuing a ruling. Otherwise, the dissatisfied parent may refuse to pay. The court should appoint a guardian ad litem or attorney ad litem on a *pro bono* basis if the parents are indigent. Acceptance of a certain number of *pro bono* cases can be a prerequisite to membership on the court's approved list of guardians or attorneys ad litem.

D. Mediation

Legislatures and courts should take affirmative steps to avoid having to make relocation decisions for the parties by requiring mediation as a prerequisite to a contested court hearing.[147] If the parents can be encouraged and admonished to put the child's interests first, in those cases in which the parents do truly love their child and want to protect that child's best interest, a solution can usually be reached which does meet the child's needs.[148]

An adversarial hearing is not designed to facilitate such a solution. Mediation, however, with specially trained mediators, may have much better success in guiding the parties to reach a compromise agreement that they can live with and which truly reflects the best interests of the child. A resolution is most likely where the parties are dealing in good faith.[149]

The goal of court-ordered mediation is to reach the parents before they have become entrenched in their adversarial positions. As one Tennessee legislator put it, the idea is "to get to the parties *before* they get their guns loaded." Mediation is designed to encourage parents to work out a post-relocation visitation plan that maintains the child's emotional growth, health, stability and physical care and which allows the child to maintain a close parental relationship with each parent.

There is wide disagreement over the viability of mediation in cases involving domestic abuse. Special provisions should provide for mediation in abuse cases only when the victim consents, when the mediator is trained in mediating in abuse cases

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146. *See, e.g., Ireland*, 717 A.2d at 688.

147. Montana provides for court-ordered alternative dispute resolution, except in abuse cases, for nonrelocation custody disputes. *See* MONT. CODE. ANN. § 40-4-219 (Supp. 1998). *See also* Levine v. Bacon, 705 A.2d 1204, 1206 (N.J. 1998) (suggesting that courts refer relocation disputes to mediation).

148. *See* Sandra Morgan Little, *A Move in the Right Direction*, 20 FAM. ADVOC. Fall 1997, at 32.

149. *See* Hanley M. Gurwin, *Settling Relocation Issues Through Alternative Dispute Resolution*, 20 FAM. ADVOC. Fall 1997, at 24. (1997) (encouraging the use of mediation and arbitration in relocation disputes).

regarding the safety of the victim, and when the victim is allowed to have a support person present.[150]

E. Private Ordering

At the time of the divorce, parties may seek to negotiate an agreement either allowing, prohibiting, or restricting relocation.[151] However, nonrelocation agreements should not be enforceable. If such agreements were enforceable,[152] the parent who was willing to be a noncustodial parent as long as the custodial parent agreed not to relocate would have a powerful bargaining chip assuming the quid pro quo for the relocation prohibition was acquiescence on the residential custody issue. One scholar stated that permission to relocate was being used as a bargaining chip in Florida to get lower child support payments or to avoid alimony obligations, with the result that "the second family is controlled by the first spouse."[153]

If the private ordering issue is viewed from the parents' perspective, the noncustodial parent could argue that the agreement represents a fair exchange. The custodial parent could claim that the agreement was obtained under duress and through bad faith bargaining.

If the private ordering issue is viewed from the child's perspective, it is simplified. Social science research, reviewed in part III, substantiates the importance of stability in the custodial arrangement. That part also addresses the adverse consequences that may affect the child if the custodial parent is frustrated in his or her relocation plans. The custodial parent's frustration would surely be exacerbated if the nonrelocation agreement was not the result of a freely entered into bargained-for-exchange. Finally, the parties should not be able to bind the court regarding the court's continuing oversight of the child's best interests during the child's minority. At the very least, the nonrelocation agreement should be subject to a best interest analysis at the time of its enforcement.

F. Cases Involving Domestic Abuse or Substance Abuse

Victims of domestic abuse are most at risk when they attempt or threaten to escape from the control of their perpetrator.[154] Relocation can trigger this same

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150. Tennessee has a statute containing these protective provisions. *See* 6A TENN. CODE ANN. § 36-6-107(Supp. 1998).

151. *See supra* discussion in text accompanying notes 35-38. *See also Sample Relocation Clauses*, 20 FAM. ADVOC. Fall 1997, at 44.

152. Arizona allows private ordering by the parties on this issue. ARIZ. REV. STAT. ANN. § 25-408(I) (West Supp. 1998) provides as follows:

> The court shall not deviate from a provision of any parenting plan or other written agreement by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child's best interests. There is a rebuttable presumption that a provision from any parenting plan or other written agreement is in the child's best interests.

Id. See also Williams v. Pitney, 567 N.E.2d 894, 898 (Mass. 1991) (Parents' separation agreement, which conditioned removal upon consent of the noncustodial parent, was subject to the statutory provision allowing removal by permission of the court "upon good cause shown.").

153. *See Divorced Parents Finding a Move Can Alter Custody*, COMMERCIAL APPEAL, February 5, 1989, at A1, *quoting* University of Florida law professor, Anne Spitzer.

154. *See* Joan Zorza, *Recognizing and Protecting the Privacy And Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 274 (1995).

danger for the custodial parent who was a victim of domestic abuse, even when the abuse seems to have subsided after the divorce. In cases where the abuse is ongoing, the victim may seek to relocate to avoid the abuse. Some states have recognized the problems and dangers associated with relocation involving abuse and have, therefore, adopted protective provisions.[155] Others states have not. In those states that do not have protective provisions, results have varied, including awarding custody to the abusive parent,[156] a finding of contempt of court,[157] and a holding specifically limiting protection for the abused parent to the specific facts of the case,[158] when the custodial parent fled with the children.

One scholar in the area of domestic abuse argues that violent men use custody and visitation as the "continuing arena for their domination and control" of former spouses.[159] Under such circumstances, restrictive relocation standards facilitate the continuing abuse which, in turn, negatively impacts the child.

The Model Code on Domestic Violence addresses the issue of abused parents in custody cases and takes the position that the safety of the victims should take priority over visitation rights of the abuser.[160] One way to protect the victims would be to establish a procedure to allow the parent to relocate without notifying the abuser.

Custodial parents, who are victims of abuse, should be allowed to present a relocation request to the court, ex parte. The request should be accompanied by an affidavit stating the history of abuse and the custodial parent's grave concern that relocation will trigger more violence, or that violence will continue if the parent does not relocate. The court should require corroboration of such allegations,

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155. *See e.g.*, ALA. CODE § 30-3-132(b) (Cum. Supp. 1997); GA. CODE ANN. § 19-9-3(3)(C) (Supp. 1998); HAW. REV. STAT. ANN. § 571-46(9)(C) (1997); KAN. STAT. ANN. § 60-1620 (Supp. 1998); MO. REV. STAT. § 452.377 (West 1998); OHIO REV. CODE ANN. § 3109.051(G)(1) (Anderson 1996); TEX. FAM. CODE ANN. § 105.007 (West 1996). In 1994, the Model Code on Domestic and Family Violence of the National Council of Juvenile and Family Court Judges provided for a presumption against custody with the violent parent where the court determines that domestic violence has occurred (sec. 401). The Model Code also calls upon the court to consider as primary the safety and well-being of the child and the abused parent in setting visitation and provides that parental absence and relocation of the abused parent cannot be weighed against that parent (sec. 402). *See also* International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204 (West Supp. 1998) (which makes fleeing an incident or pattern of domestic violence a complete defense to international kidnapping).

156. The custodial decision was, however, reversed on appeal and custody was awarded to the abused parent who was also the primary caretaker. *See* Marshall v. Marshall, 690 N.E.2d 68 (Ohio Ct. App. 1997).

157. *See e.g.*, Olmo v. Olmo, 528 N.Y.S.2d 880,881 (N.Y. App. Div. 1988) (lower court's finding of contempt reversed on appeal). *See also* NEV. REV. STAT. ANN. § 125A.350 (Michie 1993) (stating that relocation without written consent of other parent or permission of court may be considered by the court if the noncustodial parent seeks a change of custody).

158. *See* Desmond v. Desmond, 509 N.Y.S.2d 979,983 (N.Y. Fam. Ct. 1986) (Although holding that mother's removal in order to flee abuse would not be weighed against her in the instant case, the court stated that its decision "must, under no circumstances, be construed as giving a general license to parents to flee the jurisdiction with their children simply because there is some history of marital abuse."). In North Dakota, a parent who intentionally removes a child with the intent to deny the other parent's rights under a custody decree is guilty of a class C felony. Detaining a child out of state for more than seventy-two hours is prima facie evidence of such intent. *See* N.D. CENT. CODE § 14-14-22.1 (1997).

159. Bowermaster, *Domestic Violence*, *supra* note 92, at 449-50 (recounting a case in which the custodial parent seeks a divorce after a violent episode of physical, sexual, and verbal abuse, but was not allowed to relocate until two-and-a-half years later, suffering severe abuse, loss of employment, constant fear, helplessness, bankruptcy and destitution in the interim).

160. *See* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401-403 (Advisory Committee of the Conrad N. Hilton Foundation, Model Code Project Family Violence Project 1994).

barring exigent circumstances. If the court finds a reasonable basis for the custodial parent's fear of domestic violence from the noncustodial parent upon learning of the relocation, the court may allow the custodial parent temporarily to relocate.[161] The court should first obtain information that the move is not likely to be detrimental to the child. The court should also obtain the relocating address, phone number and employer, as well as the name and address of the child's school. As soon as possible after the custodial parent relocates, the noncustodial parent should be notified of the relocation, but not provided with identifying information concerning the location. The noncustodial parent should then be given an opportunity for a full hearing if he or she objects to the relocation or a limited hearing for the purpose of determining visitation.[162] The court may determine that the noncustodial parent must undergo counseling or evaluation prior to allowing unsupervised visitation, depending on the proof in the case. The paramount concern of the court in these cases must be the child's safety, including protection against parental kidnapping.

Alcohol or other drug abuse by the noncustodial parent raises similar issues as domestic abuse and thus can also create special risks in the event of a relocation. The custodial parent should be allowed to approach the court ex parte for permission to relocate temporarily without first notifying the noncustodial parent, if the custodial parent presents sufficient allegations of danger to the parent or child. Following the relocation, the noncustodial parent should be notified and afforded a full hearing on the relocation or visitation issues. The court should take into account social science studies which indicate that children suffer emotional harm when frequent visitation is ordered where domestic violence or high conflict is present.[163]

G. New terminology

This article has used conventional terms such as custodial parent and noncustodial parent. These terms may connote a "winner" and a "loser," a "good" parent and a "bad" parent, a "real parent" and a "mere visitor." A model statute, however, should use less adversarial terms that recognize the important role that each parent plays after the divorce, in continuing to parent the child. Some examples include "nonresidential parent," instead of "noncustodial parent"; "residential parent," instead of "custodial parent"; "parenting time," instead of "visitation"; These terms are used in the model statute set out in Part IX.

VIII. OTHER MODELS

Several learned bodies have considered or are in the process of considering the question of relocation. The model relocation statute proposed in this Article was not

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161. *See e.g.*, N.C. GEN. STAT. § 50-13.2(C) (1997) (allowing the court to require the custodial parent to give bond or other security conditioned upon the return of the child to North Carolina in accordance with the order of the court).

162. *See e.g.*, OHIO REV. CODE ANN. § 3109.051(G)(1) (Anderson 1996) (allowing court to withhold copy of notice of relocation from parent convicted of abuse).

163. *See* Bowermaster, *Domestic Violence*, *supra* note 92, at 447, citing Janet Johnson et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCH. 576 (1989).

created from whole cloth. The approaches of other model acts, outlined below, were carefully considered and, in varying degrees, incorporated into the proposed model relocation statute contained in this Article.

A. *Uniform Marriage and Divorce Act*

The Uniform Marriage and Divorce Act, promulgated in 1970, does not directly address the issue of relocation.[164] In that act, relocation falls under the more general section on custodial modification.[165] That section prohibits motions to modify prior custody awards within two years, absent court permission based on affidavits alleging endangerment to the child's physical, mental, moral, or emotional health.[166] Two years after the entry of a custody decree, one party may seek a modification by showing such changed circumstances of the child or custodial parent that a modification of custody is necessary to serve the best interest of the child.[167] Such a showing must be based upon facts that have arisen since the prior decree or that were unknown to the court at that time.[168] Even if the court finds sufficient proof of changed circumstances to hear the motion, custody will not be changed unless the court also finds one of the following three requirements:

1. That the custodial parent agreed to the modification;
2. That the child has been integrated into the noncustodial parent's home with the custodial parent's consent; or
3. That the child's present environment endangers the child's physical, mental, moral, or emotional health and that the advantages of custodial modification outweigh the possible harm caused by such change.[169]

The first issue for courts that adopted the Uniform Marriage and Divorce Act was whether relocation, alone, was sufficient evidence of changed circumstances to justify a hearing on a motion to modify custody. Some courts held that relocation was a sufficient change of circumstances to grant jurisdiction to the trial court to consider a motion to change custody,[170] but that relocation by itself does not

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164. *See* UNIF. MARRIAGE AND DIVORCE ACT § 101 et seq., 9 and 9A U.L.A 159-688 and 1-549 (1973). States that have adopted the Uniform Marriage and Divorce Act include: Arizona, ARIZ. REV. STAT. ANN. §§ 25-311 to 25-330, 25-401 to 25-411 (1998); Colorado, COLO. REV. STAT. §§ 14-2-101 to 14-2-113 (1974); Illinois, ILL. COMP. STAT. ANN. ch. 750 para. 5/101 to 5/802 (West 1977); Kentucky, KY. REV. STAT. ANN. §§ 403.010 to 403.350 (Michie 1984); Minnesota, MINN. STAT. ANN. §§ 518.002 to 518.66 (1998); Missouri, MO. REV. STAT. §§ 452.300 to 452.416 (West 1997); Montana, MONT. CODE ANN. §§ 40-1-101 to 40-1-104, 40-4-101 40-4-226 (1997); and Washington, WASH. REV. CODE §§ 26.09.002 to 26.09.914 (1997).

165. *See* UNIF. MARRIAGE AND DIVORCE ACT § 409(b), 9A U.L.A. 439 (1973).

166. *See id.* at § 409(a).

167. *See id.* at § 409(b).

168. *See id.*

169. *See id.*

170. *See, e.g.*, Rice v. Shepard, 877 S.W.2d 229 (Mo. App. (1994); Pfeiffer v. Pfeiffer, 364 N.W.2d 866 (Minn. App. 1985) (relocation constituted a change of circumstances for purpose of hearing a motion to modify custody).

constitute grounds sufficient to enable the noncustodial parent to obtain a change of custody.[171] Other states passed legislation specific to the issue of relocation.[172]

The Act, however, contains no clear standards regarding the proof required to meet the endangerment standard. In fact, case law suggests that the courts were applying a best interest standard rather than the higher endangerment standard contained in the Uniform Marriage and Divorce Act. For example, the Illinois Supreme Court denied permission to relocate where the custodial parent failed to show that the new job would include higher wages, or that the move would improve the asthmatic condition of a son from a prior marriage, and where the custodial parent had not cooperated regarding visitation.[173] The Montana Supreme Court found that the statutory requirements for changing custody were met where the move within the state would hinder the effectiveness of the existing custodial arrangement.[174] The Missouri court of appeals changed custody of two children, ages 12 and 14, when the custodial parent moved to take another job and the children preferred to remain with the noncustodial parent, where they had developed relationships with friends and relatives and where they were active in community and school-related events.[175] As these decisions indicate, more specific standards were needed to guide the parties and the courts and to ensure greater consistency and predictability.

B. The American Academy of Matrimonial Lawyer's Model Relocation Act

The American Academy of Matrimonial Lawyer's (AAML)Model Relocation Act[176] is not intended to be a uniform act. Furthermore, it does not promote a particular resolution of the relocation conundrum. The proposed Act is designed, instead, to serve as a template, offering alternative language on significant issues such as the burden of proof and whether relocation triggers a full custody inquiry.[177] It requires all parties entitled to residential custody or visitation, to give written notice sixty days prior to relocating.[178] The notice must contain a proposed visitation schedule if the move would make the current visitation schedule unworkable.[179] Relocation is permitted by default if the noncustodial parent does not object within thirty days after receiving notice.[180] Notice is not required in cases involving domestic violence.[181] If the noncustodial parent files an objection to

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171. *See, e.g., In re* Marriage of Lichtenstein, 487 N.E.2d 1293 (Ill. App. 1986); *In re* Marriage of Johnson, 777 P.2d 305 (Mont. 1989) (MONT. CODE. ANN. § 40-4-219 (1997) currently provides that relocation which significantly affects contact with the other parent is grounds for modification.).

172. *See* ARIZ. REV. STAT. ANN. § 25-408(H) (West Supp. 1998); 750 ILL. COMP. STAT. ANN. 5/602, 609 (West 1998).

173. *See In re* Marriage of Eckert, 518 N.E.2d 1041 (Ill. 1988).

174. *See In re* Marriage of Syverson, 931 P.2d 691 (Mont. 1997).

175. *See* Becker v. Becker, 745 S.W.2d 229 (Mo. App. 1987).

176. *See* PROPOSED MODEL RELOCATION ACT § 101 *et seq.* (American Academy of Matrimonial Lawyers 1997). Copies of this Act are available from the AAML office: American Academy of Matrimonial Lawyers, 150 North Michigan venue, Suite 2040, Chicago, Illinois 60601, phone: 312-263-6477.

177. *See id.*

178. *See id.* at § 203.

179. *See id.*

180. *See id.* at § 301.

181. *See id.* at § 205. The domestic violence exception is patterned after similar provisions in the Uniform

relocation, the act requires a hearing and permits the court to allow or prohibit removal on a temporary basis pending the final outcome of the hearing.[182] The court must consider certain factors[183] in making its determination:

> 1. The nature, quality, extent of involvement and duration of relationship of the child with each parent;
> 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;
> 3. The feasibility of preserving the child's relationship with the non-custodial parent;
> 4. The child's preference, considering age and maturity level;
> 5. Whether there is an established pattern of the person seeking relocation either to promote or thwart the child's relation with the other parent;
> 6. Whether the relocation of the child will enhance the general quality of life for both the party seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
> 7. The reasons each person seeks or opposes relocation; and
> 8. Any other factor affecting the best interest of the child.[184]

The issue of assigning the burden of proof is left open. The act proposes three alternatives:

> 1. That the relocating person bears the burden of proving that the relocation is made in good faith and is in the best interest of the child; or
> 2. That the nonrelocating person bears the burden of proving that the objection is made in good faith and that relocation is not in the best interest of the child; or
> 3. That the relocating person initially has the burden of proving that the proposed relocation is made in good faith, and, if that burden is met, the burden shifts to the nonrelocating person to show that the proposed relocation is not in the best interest of the child.[185]

The AAML proposed Act is helpful in that it carefully sets out a number of relocation issues with a selection of alternatives for the states to consider. Its shortcoming is that it does not take a position on the approach that states should adopt, an approach that best protects the child's interests.

C. *The American Law Institute Tentative Draft*

The American Law Institute is currently considering the issue of relocation.[186] The tentative draft is similar to The American Academy of Matrimonial Lawyer's

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Interstate Family Support Act (UIFSA) § 312.

182. *See* PROPOSED MODEL RELOCATION ACT § 302, 401 (American Academy of Matrimonial Lawyers 1997).

183. *See id.* at § 405. These factors were recently adopted by the Delaware Family Court in Stephanie v. Steven, Nos. CN97-06107, 9706262, 9706263, 1997 WL 906044, at *3-4 (Del. Fam. Ct. Nov. 7, 1997).

184. *See* PROPOSED MODEL RELOCATION ACT § 405 (American Academy of Matrimonial Lawyers 1997).

185. *Id.* at § 407.

186. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, Principles Governing the Allocation of Custodial and Decisionmaking Responsibility for Children § 2.20 (Tentative Draft No. 3, 1998).

Model Relocation Act in that it requires notice of intent to relocate and a proposed revised visitation schedule.[187] The ALI draft differs significantly from the AAML model in that the ALI draft takes a definitive position on the proper outcome of controversial issues related to relocation, rather than simply offering alternatives as is the case with the AAML model.[188] The ALI draft adopts a presumption in favor of relocation, subject to some limitations discussed below.[189]

The ALI draft differs from the AAML model in a number of other areas as well. First, failure to comply with the notice provision without good cause[190] may be considered in determining whether the move is in good faith and can be the basis for an award of attorney's fees and expenses.[191]

Second, a relocation that does not significantly interfere with either parent's currently exercised parental responsibilities does not constitute a substantial change in circumstances justifying the court's consideration of a custodial modification.[192] When changed circumstances are shown, the court should try to revise the parenting plan to accommodate the relocation and retain the same proportional allocation of custodial responsibilities currently being exercised.[193]

If proportional allocation of custodial responsibilities cannot be maintained, the court should modify the parenting plan based on the best interests of the child, as defined in the act,[194] and also based on four principles:

> 1. There is a presumption in favor of relocation for the parent exercising a significant majority[195] of the custodial responsibility if the decision is made in good faith for a legitimate purpose[196] and to a location that is reasonable[197] in light of the purpose.[198]
> 2. If the requirements of "1" are met, except that neither parent is currently exercising a significant majority of custodial responsibility, the court should

187. *See id.*

188. *See id.*

189. *See* § 2.20, cmt. a.

190. *See id.* Good cause includes failure to give notice in an emergency flight from domestic abuse. *See* § 2.03(8) Domestic abuse is defined as "the infliction of physical injury, or the creation of a reasonable fear thereof, ... against the child or another member of the household." *Id.* Good cause may also be based on other circumstances of the case. In all events, the relocating parent should seek permission from the court before violating the notice provision or as soon thereafter as is practical. *See* § 2.20, cmt. c.

191. *See* § 2.20(2).

192. *See* § 2.20(1).

193. *See* § 2.20(3).

194. *See* §§ 2.09 and 2.10.

195. The "proportion of custodial responsibility that constitutes a significant majority" should be defined and applied uniformly in the state. *See* § 2.20(4)(a).

196. "Legitimate purpose" includes moving "to be close to significant family or other support networks, for significant health reasons, to protect the safety of the child or another member of the child's household from significant risk of harm, to pursue a significant employment or educational opportunity, or to join one's spouse [or spouse equivalent, if defined] who is established, or who is pursuing a significant employment or educational opportunity in another location. The relocating parent has the burden of proving the legitimacy of any other purpose." § 2.20(4)(a).

197. A relocation is reasonable unless the legitimate purpose for relocating can be "substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship with the child." § 2.20(4)(a).

198. *See* § 2.20(4)(a).

> apply a best interest test[199] without a presumption favoring relocation and should consider all relevant factors, including the effects of relocation on the child.[200]
> 3. If a parent cannot establish good faith, legitimate purpose, and reasonable location, the court may modify the parenting plan based on the best interests of the child and the effects of relocation on the child. The court may order a change of custody if and when relocation occurs, but such contingency should not be considered if the relocating parent shows that relocation would be in the best interests of the child[201]
> 4. The court should attempt to minimize harm to the nonrelocating parent-child relationship through alternate arrangements for the exercise of custodial responsibility appropriate to the parents' resources and circumstances and the child's needs.[202]

The ALI draft focuses the court's attention on the actual custodial arrangement, rather than what has been ordered, when assessing the proposed relocation. If the noncustodial parent is not currently exercising visitation rights but wants to assert them to prevent relocation, the court may find there is no substantial change of circumstance to justify review of the custodial arrangement.[203]

If, on the other hand, the noncustodial parent's lack of participation is due to interference by the custodial parent, the court would find a substantial change of circumstances and should reassess the allocation of custodial responsibility, applying the third principle listed above.[204]

The ALI draft fails to address several issues, including 1) the situation in which the primary psychological parent is not the primary residential parent, 2) other proof of harm to the child resulting from the relocation, 3) the effect of domestic violence, and 4) international relocations. These additional issues are addressed in the proposed model relocation act that follows.

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199. The best interest test is based on factors set out in §§ 2.09-2.10.

Section 2.09 states that court ordered custody arrangements should approximate the prelitigation allocation experienced by the parties, except where a change is made to achieve one of the following objectives: to permit the child to have a relationship with the other parent, including minimum visitation allowed by state law; to accommodate the child's preference when authorized by state law; to keep siblings together; to protect the child's welfare by taking into account the child's emotional attachment to one parent or by considering one parent's ability or availability to meet the child's needs; to consider the parents' agreement; to avoid an allocation that would be extremely impractical or would substantially interfere with the child's need for stability.

Section 2.10 provides that the court should also consider the level of each parent's participation in past decisionmaking on behalf of the child, the parent's wishes, the demonstrated ability and cooperation in prior decisionmaking, any parental agreements, and the existence of limiting factors as found in § 2.13, such as domestic abuse or drug, alcohol, or other substance abuse.

200. *See* § 2.20(4)(b).

201. *See* § 2.20(4)(c).

202. *See* § 2.20(4)(d).

203. *See* § 2.20, cmt. a., illus. 1. The draft does not seem to distinguish between objecting to removal and seeking modification of parenting responsibilities because of the relocation. A parent who has failed to exercise parental responsibilities prior to relocation, but who is "waked up" by the proposed relocation and wants to petition the court to revise the parenting plan to preserve that parent's opportunity to exercise parental responsibilities should be able to do so because of the importance to the child of maintaining a healthy relationship with both parents where possible.

204. *See* § 2.20, cmt. a., illus. 4., applying § 2.20(4)(c).

IX. RECOMMENDATION

A. *Goals*

A model statute should incorporate all the recommendations set forth in the preceding sections of this Article. The model statute should be designed to accomplish, at least, the following goals:

(1) Protecting the stability of the custodial parent-child relationship in all its forms;
(2) Discouraging litigation in the vast number of cases;
(3) Identifying those infrequent, but serious instances in which the best interests of the child require that the court be afforded discretion to change custody if necessary;
(4) Allowing a less adversarial venue for negotiating a modified visitation schedule that will preserve the noncustodial parent-child relationship;
(5) Separating the relocation issue from the custody determination that follows a court decision against relocation;
(6) Making every effort to foster and maintain the relationship between the noncustodial parent and the child.

The proposed model relocation statute that follows attempts to incorporate all of the goals stated above. The statute draws heavily upon the work of other model statutes discussed above, particularly the ALI tentative draft, and attempts to expand, and, hopefully, even to improve on them.

B. *Proposed Model Relocation Statute*[205]

Section 101.

A. If a parent who is spending intervals of time with a child desires to relocate with the child outside the state or more than one hundred (100) miles from the nonrelocating parent within the state, the relocating parent shall, unless excused by the court under §102, send a notice to the nonrelocating parent at the nonrelocating parent's last known address by registered or certified mail. Unless excused by the court for exigent circumstances, the notice shall be mailed not later than sixty (60) days prior to the move. The notice shall contain the following:

(1) Statement of intent to move;
(2) Location of proposed new residence;
(3) Reasons for proposed relocation; and
(4) Statement that the nonrelocating parent may file a petition either to oppose the relocation of the child or only to modify the allocation of parental responsibilities, within thirty (30) days of receipt of the notice.

B. If a parent desires to relocate without the child outside the state or more than one hundred (100) miles from the other parent within the state, the

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205. The proposed model relocation statute incorporates much of the relocation statute just passed by the Tennessee General Assembly. TENN. CODE ANN. § 36-6-108 (Supp. 1998). The author was a member of the Tennessee Bar Association Family Law Code Revision Commission that drafted the initial version of this statute for submission to the legislature.

relocating parent shall send a notice to the other parent at the other parent's last known address by registered or certified mail. Unless excused by the court for exigent circumstances, the notice shall be mailed not later than sixty (60) days prior to the move.

The notice shall contain the following:

(1) Statement of intent to move; and

(2) Location of proposed new residence.

C. If the nonrelocating parent does not object to the child's relocation and the parents can agree on a new parenting plan, the relocating parent should file the new plan with the court prior to relocating.

D. If the nonrelocating parent does not file an objection to the relocation or to the revised parenting plan within thirty days after service of notice of the relocation, the relocating parent may move without further court action.

E. If the nonrelocating parent does not object to the relocation of the child, but the parents cannot agree on a new parenting plan, the relocating parent shall file a petition seeking to alter the parenting plan. The court shall alter the parenting plan in anticipation of the relocation with the goal of allowing the child to relocate and also fostering and continuing the child's relationship with and access to the nonrelocating parent. If possible, the court should try to retain the same ratio of time that the child currently spends with each parent. The court shall assess the costs of transporting the child and determine whether a deviation from the child support guidelines should be considered in light of all factors including, but not limited to, additional costs incurred for transporting the child.

F. If one parent is the primary residential parent and that parent proposes to relocate with the child, the nonrelocating parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds sufficient proof of any of the following grounds to rebut the presumption in favor of relocation:

(1) The relocation does not have a reasonable purpose; or

(2) The relocation would pose a threat of specific and serious harm, as defined in the next subsection, to the child which outweighs the threat of harm to the child of a change in designation of the primary residential parent.

(3) The parent's primary motive for relocating with the child is vindictive in that it is intended to defeat or deter rights of the parent spending less time with the child.

Prior agreements between the parties or prior decrees of the court restricting or prohibiting relocation are not enforceable and are not to be considered in determining whether the presumption in favor of relocation has been rebutted.

G. Specific and serious harm to the child shall include, but is not limited to, the following:

1. If a parent wishes to take a child with a serious medical problem to an area where no adequate treatment is readily available;

2. If a parent wishes to take a child with specific educational requirements to an area with no acceptable education facilities;

3. If a parent wishes to relocate and take up residence with a person with a history of child or domestic abuse or who is currently abusing alcohol or other drugs;

4. If the child relies on the parent not relocating who provides emotional support, nurturing and development such that removal would result in severe emotional detriment to the child;

5. If the primary residential parent is emotionally disturbed or dependent such that he or she is not capable of adequately parenting the child in the absence of support systems currently in place in this state, and such support system is not available at the proposed relocation site; or

6. If the proposed relocation is to a foreign country whose public policy does not normally enforce the rights of non-primary residential parents, which does not have an adequately functioning legal system or which otherwise presents a substantial risk of specific and serious harm to the child.

H. If the court finds sufficient proof of one (1) or more of the grounds designated in subsection F, the presumption in favor of relocation is rebutted and the court shall determine whether or not to permit relocation of the child based on the best interest of the child. The court shall make specific findings of fact in support of its holding and shall consider all relevant factors including those set forth in subsection J.

I. If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the nonrelocating parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child. The court shall make specific findings of fact in support of its holding and shall consider all relevant factors including those set forth in subsection J.

J. In making a best interest determination, the court shall make specific findings of fact in support of its decision and shall consider all relevant factors including the following when applicable:

1. The prospective advantage of the move for improving the general quality of life for the child directly or indirectly;

2. The extent to which parental rights and responsibilities have been allowed and exercised by the nonrelocating parent;

3. Whether the relocation will allow a realistic opportunity for intervals of time with each parent;

4. The extent to which allowing or prohibiting relocation will affect the emotional, physical or developmental needs of the child;

5. Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any revised parenting plan;

6. The love, affection, and emotional ties existing between the parents and child;

7. The capacity and disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;

8. The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

9. The stability of the family unit of the parents;

10. The mental and physical health of the parents;

11. The home, school and community record of the child;

12. The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

13. Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

14. The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

15. The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;

16. The gender of the parent who seeks to relocate for the reason of career, educational, professional, or job opportunities, or otherwise, shall not be a factor in favor or against the relocation of such parent with the child;

17. Prior agreements between the parties or prior decrees of the court restricting or prohibiting relocation are not enforceable and are not to be considered in deciding whether relocation is in the best interests of the child.

K. If the court finds it is not in the best interests of the child to relocate as defined herein, the court shall modify the parenting plan, subject to the condition of the relocating parent actually relocating without the child. In doing so, the court will decide what residential arrangements are best for the child taking into account the relocation. The court can decide to designate the nonrelocating parent the primary residential parent or the court may order a more equal sharing of residential responsibilities based on the best interest of the child. The court shall make specific findings of fact in support of its holding and shall consider all relevant factors including the following where applicable:

(1) The court shall consider the availability of alternative arrangements to foster and continue the child's relationship with and access to the relocating parent.

(2) The court shall make a new determination of child support obligations among the parents.

(3) The court shall assess and allocate the costs of transporting the child for and determine whether a deviation from the child support guidelines should be considered in light of all factors including, but not limited to, additional costs incurred for transporting the child.

Section 102.

A. Notice to the other parent may be waived upon application to the court before relocating or as soon thereafter as is practical, if the move is under emergency conditions to protect the safety of the relocating parent, child, or other household member. The court may waive notice to the other parent upon a showing of domestic abuse, child abuse, substance abuse or other exceptional circumstances where the court makes a finding that the health or safety of any

adult or child would be unreasonably placed at risk by the disclosure of the required identifying information concerning a proposed relocation of the child. The specific residence address and telephone number of the child, parent or person, and other identifying information shall not be disclosed in the pleadings, notice, other documents filed in the proceeding or the final order except for an in camera disclosure. The court may take any other remedial action necessary to facilitate the legitimate needs of the parties and the best interest of the child.

B. If notice is waived, the court will hold a hearing as soon as practical after the relocation in order to give the nonrelocating parent an opportunity to be heard regarding the other provisions of this section. The court may withhold information regarding the new residence, but should consider allowing phone or other contact with the child if determined to be in the child's best interest, pending the final outcome of the hearing.

C. An order permitting temporary relocation of a minor child may require the relocating parent to give bond or other security conditioned upon the return of the child to this State in accordance with future orders of the court.

Section 103.

A. Prior to scheduling any contested hearing as required in Section 101, the court should consider the advisability of ordering the parties to undergo mediation.

B. If an order of protection was previously issued involving the parties, or if there is a court finding of domestic abuse or any criminal conviction involving domestic abuse during the parties' marriage or earlier relationship, the court may order mediation only if:

(1) Mediation is agreed to by the victim of the alleged domestic or family violence;

(2) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and

(3) The victim is permitted to have in attendance at mediation a supporting person of the victim's choice, including, but not limited to, an attorney or advocate. No victim may provide monetary compensation to a non-attorney advocate for attendance at mediation.

C. Illustrations

One way to test the success of a model statute is to apply it to hypothetical facts and ask whether the goals of the statute are met as applied to those facts. Assume that the primary custodial parent wanted to relocate for a frivolous reason. If the nonrelocating parent objected to the relocation and the court found that the reason was frivolous, the presumption in favor of relocation would not apply and the court would make a best interest determination. If the nonrelocating parent was an involved, caring, fit, attentive parent who already spent a great deal of time with the child, the court might find that the move was not in the child's best interest and might change the child's primary residential parent to the nonrelocating parent, conditioned on the actual relocation of the relocating parent. If the relocating parent

decides not to relocate in light of this ruling, the parenting plan stays just as it was and the conditional decree is moot.

Assume the same scenario as above, except that the nonrelocating parent is not a fit person to serve as the primary residential parent. The finding of a frivolous motive for the move will overcome the presumption in favor of relocation and the court will have to make a best interest determination, as before. The court may find, however, that relocation is in the best interests of the child, even though the reason for the move is frivolous, because of the detriment to the child of disrupting the existing residential arrangement.[206] The court will, however, modify the current parenting plan to ensure ongoing contact with the nonrelocating parent with the goal of retaining the same proportion of time with each parent after the relocation as actually existed before the relocation.

The preference for relocation will discourage contests in the vast number of cases in which the best interests of the child are served by allowing relocation and denying an opportunity for litigation that is likely to be traumatic for the child and expensive for the parties. Categories are listed to allow the preference to be rebutted where it cannot be assumed that the move will be consistent with the child's best interest.

In those cases where relocation is not allowed and in those where it is, the court is bound to modify the parenting plan with a goal of maintaining and fostering the child's relationship with both parents. Conditioning the court's decree on actual relocation, where the court finds relocation not to be in the child's best interest, affords the relocating parent an opportunity to choose not to move and to maintain the status quo, which presumably would be better for the child than the modified parenting plan because it would promote stability.

Finally, the model encourages a less adversarial approach to relocation through the use of parent-friendly terminology, mediation, and special protections for abuse situations. Every effort should be made to allow and assist the parents to reach an agreement that reflects their love for and understanding of their child rather than defaulting to a court-ordered parenting plan.

X. CONCLUSION

Relocation cases are among the most difficult decisions a court must make. The approach advocated in this Article is based on protecting the child's interests rather than parental rights. Protection of children can best be accomplished by limiting the number of children subjected to a full adversarial hearing where relocation is consistent with the child's best interest and by allowing a full hearing in the other cases after requiring the parties to mediate in an attempt to minimize the acrimony between the parties and the accompanying trauma for the child. When relocation is decided by the court, the relocation decision should be separated from the custody determination that follows a court decision against relocation. When relocation is allowed, every effort should be made to foster and maintain the relationship

206. *See* Kerkvliet v. Kerkvliet, 480 N.W.2d 823, 829 (Wis. Ct. App. 1992)(denying motion to change custody on the basis that "although [custodial parent's] reasons for her proposed move are feeble and insensitive, the fact remains that she is an excellent primary caregiver to the children").

between the noncustodial parent and the child. The paramount interest of the court in relocation cases must be the child. The model relocation statute attempts to keep the child's interest paramount.