Relocation

Moving out of state with children after a divorce

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RELOCATION: How the States Decide

In an increasingly mobile society, it's becoming more common for parents to want to relocate themselves and their children after a divorce. No matter how the issue is decided, someone loses: either the custodial parent is prevented from moving to take advantage of job opportunities or family support networks, or the noncustodial parent only sees the kids on holidays and during the summers.

Most states now have laws that spell out exactly how a court will decide whether or not the custodial parent can legally move out of the local area with the children after a divorce.

In some states, the custodial parent must give the noncustodial parent official written notice of the intention to move, and it's up to the noncustodial parent to file an objection with the court, which kicks off a court battle.

In other states, the custodial parent must file a petition with the court asking for the court's permission to relocate.

Negotiate, Negotiate, Negotiate

Whether you're the custodial or noncustodial parent, you're more likely to reach an outcome you can live with by negotiating with your ex-spouse, trying to come to some compromise that will allow the custodial parent to move while still maximizing the noncustodial parent's time with the children.

If time allows, a formal mediation may help clarify the issues and reach an agreement without having to take the matter to court. A mediator is an impartial third party trained to help people come to an agreement on difficult issues.

In coming to a negotiated agreement, it's important to consider logistics such as when the childrens' school schedule allows visits outside the local area, and who will pay for and arrange transportation back and forth.

How the Court Decides

In some states, the court presumes the custodial parent's move will be allowed, unless the noncustodial parent can present compelling evidence that the children will be harmed more than helped by the move.

In other states, the custodial parent has the burden of proving that the relocation is in the "best interest" of the children.

Some of the factors courts look to in deciding whether the custodial parent should be permitted to relocate with the children include:

The relative strength, nature, quality, extent of involvement and stability of the child's relationship with each parent, siblings, and other significant people (such as grandparents) in the child's life.

Any previous agreements between the parties.

Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation.

The intent of each person for seeking or opposing the relocation, and the good faith of each of the parties in requesting or opposing the relocation.

Whether there's an established pattern of conduct of the parent seeking the relocation to promote or thwart the relationship of the child and the non-relocating parent.

The age, developmental stage and needs of the child.

The likely impact the relocation or its prevention will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

The quality of life, resources and opportunities available to the child and to the relocating party in the current and proposed geographic locations.

The feasibility of alternative arrangements to foster and continue the child's relationship with and access to the other parent, considering finances and practical concerns.

The alternatives to relocation and whether it's feasible and desirable for the other party to relocate at the same time.

The financial impact and logistics of the relocation or its prevention.

The child's preference, taking into consideration the age and maturity of the child.

The court may appoint what's called a "guardian ad litem" to thoroughly investigate and make a recommendation to the court. A guardian ad litem will want free access to your child and extended family and other support network connections. It's important to be honest and cooperative with a guardian ad litem.

If the court decides relocation is in the best interest of the children, the noncustodial parent is faced with either seeing the children only at holidays and summer visits, or relocating to the same location as the custodial parent and children.

Child Custody Laws & Moving to Another State

Unless the child custody order already permits you to move the child to another state, you may not do so without first obtaining the judge's approval.

This would normally require that the custodial parent have a legitimate - and perhaps compelling - reason to move out of state. The judge may grant approval, but she may also change the custody or visitation arrangements or make any other order that is in the best interest of the child, including an order that requires the custodial spouse to pay transportation costs to facilitate visitation rights.

What if your ex-spouse moves to another state, can the courts in that state change the custody or visitation order?

That depends. If your ex-spouse is the custodial parent and remains in the new state for more than six months, then the courts may change custody or visitation orders. If your ex-spouse is not the custodial parent, then the courts in the state that he/she moves to have no power to change the custody or visitation orders. He or she will have to come back to the state where the custodial parent resides. If you have questions about child custody laws, contact a family law attorney near you.

Preventing International Move-Aways

Common Red Flags

According to the American Bar Association, the chances of an international abduction may increase when a parent has:

- **previously abducted the child or threatened to do so,**
- **no strong ties to the child's home state,**
- **friends or family living abroad,**
- **a strong support network,**
- **no job, can earn a living almost anywhere, or is financially independent,**
- **recently quit a job, sold a home or terminated a lease, closed a bank account or liquidated other assets,**
- **a history of marital instability or a lack of parental cooperation,**
- **a prior criminal record.**

Call the Passport Services Office of Policy and Advisory Services at 1-202-955-0232 for information on preventing your ex from leaving the country with the child. This is what they will tell you:

Send a written request that the child(ren) be placed on a name check system. Send child(ren)'s names, dates and places of birth, plus Social Security Numbers (if you have them), and any other pertinent information (like a physical description), along with your name, address, and a phone number where you can be reached, to Passport Services. Make sure you sign the request. You can FAX the request letter to 1-202-955-0230.

Faxing it is the fastest way to go anyway. Once they receive your request, you will be assigned an investigator. This investigator will call you, to get further details of your situation. One thing that will speed this process along, is to include a copy of your

divorce decree or custody orders, that states that neither of you is to remove the child from a state or country (whichever) without the other parent's consent.

After the investigator makes her judgement, he/she will let you know that the passport has been blocked by the name registration system. A few weeks after that, you will get a letter in the mail, with other information from the State Department. This letter from the state department, proves to be another nail for the ex's coffin in District Court Proceedings. If for no other reason, than it shows that you have valid fears and concern for the well being of your and your childs rights.

Remember, it is your child's right to have involvement from both of his/her parents. Although many mothers believe children to be "theirs," most states have passed laws that prove that children are their own people with certain rights. If you stick to this, as a basis for your concerns, you may do well in your court proceedings.

CAUTION: Please note this does not stop foreign nationals from obtaining passports from their own country.

The following information comes from the Department Of States' Passport Assistance To Parents page, which also has links to more information on International Adoption & Child Abduction.

Parents involved in international custody disputes may receive information about the United States passport of a minor from the Department of State, Passport Services - address below. Either parent may request information about their child's U.S. passport. The request must be in writing, and may be sent by mail or by FAX. Provide the child's full name and date and place of birth and the requesting parent's address, phone number and signature.

If a parent fears that a child might be taken abroad by the other parent without the mutual consent of both parents, the child's name can be put in the U.S. passport namecheck system. Then, if an application is received, the requesting parent will be informed before issuance of the passport.

When there is a court order from a court of competent jurisdiction which either grants a parent sole custody, or which, in effect, forbids the child's travel without the consent of both parents or the court, and the order is provided to Passport Services, a U.S. passport may be denied.

Passport information may NOT be provided about the other parent.

Requests and, if relevant, court orders should be sent to:

Passport Services
CA/PPT/PAS
Suite 260
1111-19th Street, N.W.
Washington, D.C. 20524
Phone: (202) 955-0231
Fax: (202) 955-0230

This process does not apply to foreign passports. A child who has or may have the citizenship of another country (which could happen if one parent has a foreign nationality) may be eligible to hold, or be included in, a foreign passport in addition to a U.S. passport. The concerned parent may contact the embassy of the other nationality for information and assistance.

If your child is abducted:

-Insist that a missing person's report be posted immediately on National Crime Information Center and Interpol computers. Many

local police departments will mistakenly tell parents that they need to see a final custody order before issuing a missing child report or that a waiting period is required, but this is no longer true. Such delays are prohibited by the National Child Search Assistance Act (P.L. 101-647; 42 U.S.C. 5779, 5780), which requires law enforcement to immediately enter a missing child report into the National Crime Information Center (NCIC).

-Contact the National Center for Missing and Exploited Children at 1-800-THE LOST or 703-235-3900. The Web address of its international branch is www.icmec.co.uk. The center maintains a missing children's data base and publishes a booklet on preventing and reacting to abduction.

-Contact the local FBI office. If the FBI tells you that you first need a state warrant, point out that the 1993 International Parental Kidnapping Crime Act ended that requirement.

-Ask the state prosecutor or district attorney to request the local U.S. attorney's to issue a federal Unauthorized Flight to Avoid Prosecution (UFAP) arrest warrant. The Federal Parental Kidnapping Prevention Act of 1980 provides for the issuance of this warrant.

-Call the State Department's Office of Children's Issues (1-202-736-7000), and request the booklet, "International Parental Child Abduction." The booklet outlines what you should do and what the office can do for you.

-If you have to to litigate the matter in a foreign country, contact the State Department's office of the Overseas Citzens' Services of the Bureau of Consular Affairs for a list of attorneys available for such cases.

Preventing Domestic Move-Aways

Citing various reasons, a large number of custodial parents (often ex-wives) take the children and move to another State. This makes it next to impossible for the non-custodial parent (usually the father) to see his children or exercise his rightful parenting time in any meaningful way. In extreme cases a move-away may be done by a custodial parent specifically to help them in alienating the children from the non-custodial parent.

If your ex-spouse wants to move, fine, but the children stay. Uprooting the children from their established environment and reducing contact with the non-custodial parent is extremely unlikely to benefit them in any way, shape or form.

If you find out that your ex-spouse is planning to move, contact an attorney at once and do the following:

Immediately file a Temporary Restraining Order (TRO). In the TRO, specify that the children are to be prevented from leaving the State.

At the same time, file for Full Custody, citing "Substantial Change In Circumstances" (the move) as the reason for the proposed change in custody.
If your ex continues with her move, or has already moved, cite this as possible evidence of Parental Alienation Syndrome (PAS) and also as evidence thet they are unwilling to support the child's relationship with you.

Insist that your ex-spouse provide convincing proof to a judge that moving the children away is in their best interests. Make her explain why it would be better to uproot the children and make them change their school, neighborhood and friends, rather than to leave them where they are now, in falmiliar surroundings.

Prepare a list of the schools and recreational opportunities in your area and request that your ex show you a comparable list from her proposed new location. Also cite the fact that the child is used to and familiar with the present area and has friends and/or family where he/she is now.

Be aware that fighting a move by a custodial parent is often an uphill battle, but the alternative is to simply let your children go and risk losing virtually all contact with them.

Preparing For A 'Move-Away' by a Vengeful Custodial Parent

A common tactic by a vengeful custodial parent is to move, often out of state, separating the child geographically from the non-custodial parent (usually the father). For the vengeful custodial parent, this has numerous benefits: it becomes more difficult for the non-custodial parent to exercise visitation, and at the same time makes it more difficult (and expensive) for the non-custodial parent to seek relief through the courts for denied visitation or other wrongful acts by the custodial parent. A move-away also isolates the child from the non-custodial parent, making them more susceptible to Parental Alienation Syndrome.

If you even suspect your ex-spouse might do this, you need to be prepared. Fighting a move-away can be especially difficult due to the time-frame imposed by the custodial parent's moving date. This once again benefits the custodial parent unfairly, making it imperative that you secure a Temporary Restraining Order (TRO) specifying that the children are not to be removed from the state. You must do this as soon as you find out (or suspect) that the custodial parent is moving.

If you are in the process of divorce or custody dispute, a key item to make certain that is put in the final paperwork is an "anti-move-away" stipulation. Essentially, this states that if the custodial parent moves more than certain number of miles away, custody changes to the remaining parent. Even with this stipulation in the divorce/custody decree you can't count on this as being an iron-clad agreement; these kinds of stipulations have been defeated in various instances, but it certainly makes the argument against the move-away that much stronger.

In preparing for a future move away by your ex-spouse, consider the following items:

Being heavily involved with your child's life on a continuing basis is a definite MUST. Being "heavily involved" since last week doesn't count.

Keep a record of how much you have been involved with your child's school, how you foster the involvement with your child's brothers, sisters and family.

Attend school meetings and be involved to the max in fund raising, attending children's activities etc.

Teach your child family values, take her to church on a regular basis, visit your parents/grandparents gravesite, visit your child's relatives, invite friends over to stay, invite cousins, etc. over to stay.

Take your child on vacations and make sure if at all possible those are "family" vacations with your child's siblings.

Take your child to the dentist and doctor for every little thing he/she complains about. Sometimes those little things are not as little as they might appear to be.

Keep long and detailed records of what you have done with your child and keep long and detailed records if your ex participated in any of these events.

Keep records of extra activities your ex provides. Complement those with the activities and social involvement you provide for your child.

Try to expand the visitation, even if it is only a couple of hours a month. If your ex has given you this opportunity, definitely take advantage of it.

Try to swap weekends so you can have your child participate in company-sponsored activities like whitewater rafting, amusement park visits, etc.

Enroll your child in some nice activities he/she can attend like Space Camp for a week, horseback riding, etc. Attend or participate in those activities and keep records and take pictures as much as you can. Make a big photo album of activities done with you paste all the pictures in it.

Also foster the contact with her brothers, sisters and family members.

Attend every family outing you are invited to and things such as family weddings, graduations, etc. Take your child to them. Take pictures with your family members or ex family members.

Assume your case is active and collect all the case law you can find in an orderly manner.

Document any relevant case issues such as how you have demonstrated that you are a good custodial parent.

Support, or even better, initiate any college requirements for your child so you can get credit for this. Document this and correspond with your ex and file all those for later use.

There are a number of things you can do do help show that you are the better custodial parent, in some cases just by letting your ex default on her expected custodial parent responsibilities.

If you can be involved in your child's life enough to find out how his or her relationship is with your ex, you may be able to build a much better case to show that you are the better custodial parent, and in the meantime provide for your child “in his or her best interests.”

Don't overdo it. Don't spoil your child- discipline your child when necessary and document why you took this action and how you talked with your child about it. This is a good example of being a responsible custodial parent. On the other hand, "lack of discipline" on your ex's side is to your advantage.

Fighting Relocation with Children

As a result of our changing society, state legislatures have attempted to enact statues setting forth requirements that must be followed when one parent seeks to relocate with the minor children. Too often, fathers, who less often have the benefit of judicial discretion when it comes to custody pronouncements, find themselves fighting to remain an integral part of their children's lives.

State laws vary broadly regarding when a parent must provide notification or seek permission to relocate. All too often state statutes facilitate the relocation by carving out presumptions in the law that presume that the parent with custody or with the greater amount of parenting time should be allowed to relocate with the children. This results in the non-custodial parent, too often fathers, having to fight an uphill battle to maintain consistent contact with their children.

Even if the parenting time is equalized with additional time in the summer and on holidays, it removes that parent from their pivotal role in the child's development including schooling, religious education and even medical decision making. It is also a common theme in cases that involve Parental Alienation Conduct that seeks to systematically reduce the non-custodial parent's role in the child's upbringing. Unfortunately, most laws are far too permissive and once a relocation is allowed the ability of the non-custodial parent to contest increasing alienation is greatly diminished.

Generally, minor geographic changes are not considered significant. Yet, even seemingly minor changes can diminish a parent's role in a child's upbringing and make transportation for parenting difficult. The most common reasons cited include new jobs, new spouses or fiancés, or improved environmental conditions. It is the slippery slope that can result in a cascade of

later events that eventually make that parent little more than a post card and letter or an occasional visit in the child's upbringing.

Just what is considered a minor relocation may be a subject of dispute. In some states a relocation out of the county is significant. In others it is a relocation of a specified number of miles (50 to 150) away from the other parent. For example, in Wisconsin, a relocation of 150 miles or more requires notice to the other parent and potentially a hearing on custody issues. In yet other states, the laws are inconceivably inconsistent. A good example is the State of Minnesota. In Minnesota, a relocation within the state requires no advance notice or permission. That could mean a relocation of as much as eight hours one way from base to tip is acceptable. Meanwhile, a relocation of one mile to a bordering state would require the other parent's consent or a court order.

Since the laws vary broadly, it is extremely important for a parent seeking to prevent relocation with children to know, understand and follow the detailed rules to prevent that relocation. If the custodial parent fails to follow the rules, it can often result in a change in custody. State laws often spell out requirements which may include:

NOTIFICATION AND OBJECTION.

A parent seeking to relocate must generally notify the other parent well in advance of a move. The timelines for that notification are specified in many state laws. Those same laws also provide specific instructions regarding the information that must be included in the notification. In states that require notification, the other parent may also usually file an objection to the relocation or file a Motion seeking to prevent the relocation

CONSENT AND ORDER

Yet other states require not only notification, but consent of the other parent to allow the move. In the event the both parents do not consent, often the parent seeking to relocate most bring a motion seeking permission of the court. This often would include a request for a change in custody.

PRESUMPTIONS AND BURDENS

Regardless of the procedures required by state statutes, should the matter proceed to Court, decisions are made and swayed based on legal presumptions and burdens of proof. As a result the particular legal presumptions and burdens of proof in each state can dictate how a case should be presented and provide an early insight into the potential success or failure of a motion to relocate. One of the keys to preventing a relocation is maintaining consistent contact with children by non-custodial parents. Remain actively involved in their schooling, medical care and extracurricular activities.

Document their activities their friends and the benefits of the area that reside in including extended family. A parent with limited involvement has a greatly diminished chance to contest the relocation.

Under many state laws the presumption whether to allow or disallow a relocation may depend and change based on the custodial situation.

For example, in many states, where the parent with primary physical custody seeks to relocate, there is often a rebuttable presumption that the intended relocation of the child will be permitted. If there is an objection, the presumption may be rebutted by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child. Detrimental effects include whether the non-custodial parent's

role will be greatly diminished from what it has been historically. As a result, involvement before the requested relocation can be critical.

That presumption may change, however, if the parents share physical custody. In such cases, the presumption that exists is often to deny the relocation. Again, that presumption may be rebutted by presenting evidence that the relocation is in the child's best interest and that it will not interfere substantially with the nonmoving parent's relationship to their child. The main battle for fathers may be in seeking and gaining joint custody from the outset.

Every agreement that diminishes that role may have a significant impact later. In any divorce setting it is imperative to establish each parent's intentions for the future and whether they have any intention of relocating or what the possibility of that occurring may be. If it is established in a factual finding that it is in the best interests of the children to remain in a certain area or a certain school district as part of an initial divorce order, relocation may be significantly impaired in the future. This is something that must be considered in any divorce decree. A failure to address this issue may leave a parent exposed to potential relocation.

Some factors courts consider when making determinations to allow or disallow a move include:

1. The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;

2. Prior agreements in divorce decrees or orders of the parties. Such agreements are often given great deference;

3. Whether the relocation would substantially interfere with the other parent's relationship with the child;

4. Whether the benefit of the relocation outweighs any harm caused by the relocation;

5. The reasons of each person for seeking or opposing the relocation and whether the request is made in good faith or is intended to interfere with the other parent's rights;

6. The age, developmental stage, and needs of the child;

7. The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

8. The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

9. The financial impact of the relocation as it relates to parenting time.

HOW TO PREPARE TO FIGHT RELOCATION

To fight a motion for relocation, there are several musts. First, a finding that the children's best interests are served in their current school district can be key. As a result, you must think ahead and spell those presumptions out in any custody determination. Second, establishing that there is no intent to relocate is important. This again can pre-empt a subsequent request and undermine the intent of the parent who later seeks to move.

To attack the request, it is important to attack any documentation supporting the move. A parent should try to demonstrate that the moving parent has not thought the matter through carefully and that the relocation is not in the child's best interest. Evidence would include information that the parent seeking to move has not thought through the child's needs. For example, the parent did not provide sufficient evidence about:

NEIGHBORHOOD & SCHOOL.

There is little evidence regarding where the child will be living. A parent contesting the move may wish to bring up crime records, school performance or other deficiencies related to the area (photos are helpful).

DAYCARE.

Evidence that the parent relocating did not adequately consider or research daycare facilities that they intend to use, comparing what may be available in the new location to the present location including care by extended family members who may have children of a similar age;

EMPLOYMENT.

The parent moving has no definite plans for employment or evidence that the employment planned is more lucrative given the cost of living to benefit the child. A person contesting the move may wish to include cost of living data and the availability of reasonable jobs in the area. Often vocational experts called Qualified Rehabilitative Consultants (QRC's) can provide that data and may prove to be important witnesses to resisting the relocation.

In discovery, the person resisting the relocation should seek any information regarding the new proposed job or education including any employment contracts or offers, benefit information or brochures. They should counter act that evidence with local evidence that the same positions, income or education are available locally. This obviously takes time and it takes research. However, once a relocation is allowed, the chances of regaining a reasonable parenting position is greatly diminished. It is certainly true that with regard to relocation an ounce of prevention is worth a pound of cure.

HEALTH.

If there are any health considerations regarding the move, those should be explored in depth by consulting with physicians, particularly the physicians of the children if that is the stated reason. Medical reports and documentation can be critical. If there are local alternatives, those should be explored. What are the other options?

ULTERIOR MOTIVES.

Generally a parent seeking to relocate will not telegraph their ulterior motives to alienate the other parent. However, any e-mails, telephone messages, or letters that indicate an intent to alienate the children can be critical. If a parent threatens to "take the children away" or makes other comments of a similar impart,

those can easily swing a case in favor of disallowing the relocation. Listen and document. Those are keys to any family law case but, all to often, they are ignored. Retain letters, e-mails and voice messages that may be used later.

One truism is that if the Court allows the relocation, it often requires the party moving to pay more of the transportation costs related to visitation. This cost issue should be raised in any hearing as well as a request to change custody if the parent responsible for the transportation contemptuously fails to follow the court's orders. In the even the non-custodial parent does not prevail, a finding in that regard may change those fortunes if the moving parent fails to follow through on their obligations.

There is no "standard" visitation schedule when the parenting time must occur at a distance. Often, however, the courts grant the non-custodial parent extended access times for fall breaks, spring breaks, Christmas breaks and summer most months. Maximize that time as an alternative and use it. A failure to follow court orders by the relocating parent when coupled with consistent contact by the non-custodial parent, friends for the children in the non-custodial parent's geographic area and other issues could result in a change of fortune.

May I Move Out Of State? PART 1

This question comes up a lot. This question is very likely the one that child custody lawyers answer the most frequently, in a post-divorce situation. The answer, from a legal standpoint, is a very definite "maybe."

That's because the answer very much depends on just what it is that you're asking. What you are really asking is "May I move out of state and take the children with me?" First, let's examine the legal standard, the rules that apply to the judge.

Just about every divorce judgment has a paragraph in it that says "The custodial parent will not remove the domicile of the minor children from this state without the written permission of the judge in this case." You need court permission, you need for your divorce judgment or visitation order to be amended, to provide that you may move out of the state. What are the requirements? What do you need to do to get such an amendment to your order, especially if the matter is contested by the other side?

Some states require a determination that the move is in the best interests of the children. That means that the judge must hold a hearing, whether brief or lengthy, and must make a determination on all of the twelve factors that we've discussed earlier. A very cumbersome process, and, in addition, it just takes too long to get into court, when all of those factors need to be examined. But your state may have that language in it's statute or case law, and you need to discuss this with your lawyer.

Many states, including Michigan, recognizing that the process needed to be simplified, adopted an easier method for examining the proposed move, and listed several factors that apply, and said further that these factors, and no more, are what determines

whether or not the court will give permission for the move. Which means this: if you meet the criteria, you get permission. If you don't meet the criteria, you don't get permission, and further, the court is not going to hold a big cumbersome hearing on all those factors that make up "the best interest of the child." The court is going to hold a short hearing on the factors governing moving parents, and then make the decision.

Those factors read pretty much as follows:

1. Whether the prospective move has the capacity to improve the quality of life for both the custodial parent and the child;

2. Whether the move is inspired by the custodial parent's desire to defeat or frustrate visitation by the noncustodial parent and whether the custodial parent is likely to comply with the substitute visitation orders where he or she is no longer subject to the jurisdiction of the courts of this state;

3. The extent to which the noncustodial parent who resists the move is motivated by the desire to secure a financial advantage in respect of a continuing support obligation; and

4. The degree to which the court is satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.

[Note: this test comes from the Michigan case Constantini v. Constantini. In the Michigan case, the Michigan courts decided to adopt the rule from a New Jersey case, which was entitled D'Onofrio v. D'Onofrio. For those of you in states other than Michigan, you may find that your state has adopted the "D'Onofrio test" which governs this area of the law, just as Michigan has done.

As to factor #1: does the proposed move have the "capacity" (you notice they didn't say 'probability', or 'likelihood') to improve the life of both the custodial parent and the child? If a waitress has an opportunity to qualify for Dental School, or a trucker has an opportunity to become a trucking terminal manager, with the corresponding Raise In Pay, then obviously the quality of life is going up, and presumably the child will benefit from having all this extra money around, you can expect that the judge will be supportive of the effort.

Conversely, if you are a dental assistant, earning ten bucks an hour, and you want to move from Michigan to Mississippi, where you will be a dental assistant, earning nine bucks an hour, you can expect that the judge will not be supportive at all. The obvious reason is NOT good enough for a move (the obvious reason will be covered shortly), and permission to move is likely to be denied.

As to factor #2: your record, in the past, becomes VERY VERY important here. If you have a history of withholding visitation, or not cooperating, you may expect that court permission for the move will be denied. If your history is wonderful, if you have been a cooperative parent, you may expect that the court will reward you for that, and that anything 'close' is going to go your way, that you will receive the benefit of the doubt, as they say.

As to factor #3: You may be concerned about money if you want to. Just don't mention it. If you do, you will have fallen into the trap, and be labeled as "this person is withholding consent because this person wants his/her support obligation cancelled. Isn't that unreasonable?" Yes, it's unreasonable. That support obligation will never be cancelled. Even ASKING, or APPEARING TO ASK that the support obligation be cancelled labels you as one who is far more concerned about the money than about the

kid(s). Judges are specially trained to deal with people like that. It's a pretty short course.

As to factor #4:

4. The degree to which the court is satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.

You have to provide the non-custodial parent more than the non-custodial parent had prior to the move. You have to. If you don't, then you're not getting past this factor, and your request will, and likely should, be denied. Do a little simple math: if the non-custodial parent had (prior to the move out of state) "every other weekend, plus 2 weeks in the summer," then that parent had 63 overnights with the child [25 sets of Friday and Saturday night, plus 13 nights during the 2-week summer]. You propose that the child go stay with the non-custodial parent for three weeks in summer, after the move? 21 overnights? This will NOT be acceptable. Expect to lose, because you will.

If you propose, instead, that the child spend ALL of July and August with the non-custodial parent, then that's about sixty days, and if you throw in "...and every Spring school break..." there's another seven to ten overnights, and you've made it. Who could argue with formerly having 63 overnights with the child, and now having 70, over the course of a year?

If you're moving from Detroit to Toledo, it's only an hour away, but it's a different state. It's a one-hour drive. Now you know to say "...and I'll do the driving, both drop-off, and pickup...." Who could argue with that? Not the judge. If you're moving from Michigan to San Francisco, you can do the driving if you want to (and, if you do, you're still winning), but more likely that child will

be flying. It's expensive. Who's picking up that expense? If the answer is YOU, then you win. If the answer is THE OTHER SIDE, then you lose. Even if you propose a straight 50/50 split of that expense, you're likely to lose: the other side didn't have that expense before now, did they? You need to show, through all of this, that you are:

a. improving your life, and that of the child

b. not harming, and maybe even improving, the relationship of the child to the other parent, and

c. not dropping a financial bomb into the other parent's budget.

If you can show all of this, then you win. Permission to move (with the child) will likely be granted. If you can't show all of this, to one degree or another, permission to move (with the child) will likely be denied. You can always move by yourself, but leave the child here, with the other parent. Oh, and by the way: the visitation you proposed for the other parent will likely be awarded to you, after custody is changed. What do you mean "two weeks isn't enough?" You just sat there, in that witness chair, and said that you thought two weeks was fine FOR THE OTHER PARENT! Two weeks is what you will get.

May I Move Out Of State? Part 2

There are some things at work here that you need to know about. The court system is certainly not perfect. As you know by now, the court system has faced several problems that seem to come up over and over again, and the court system has imposed fairly rigid standards, in the belief, rightly or wrongly, that a "solution" has been achieved, and that a general rule has been announced, which people will, or should, be aware of, and will follow. There are several of these general rules, these rigid formulas, in the family law area, and here are a few of them:

a. "You just can't make it, financially, if the Court imposes the standard support? It makes no difference. The Child Support Guidelines apply to everyone, statewide. Standard support will be ordered."

b. "You withheld visitation again, after this Court warned you about that some eight weeks ago? Yes, you have to force the child to go, if that's what it takes, because this child is GOING TO have a relationship with the non-custodial parent. Makeup visitation is ordered, and you will pay the other side $450 in costs and attorneys fees."

Those general rules, and all of the other general rules, developed after the judges watched the problem for a little while, tried one solution or another, and then watched again to see if the situation got better. The general rules that stayed are the ones that worked. If a general rule just doesn't work, it will, sooner or later, be discarded in favor of a general rule that does work.

"May I Move Out Of State?" The answer to that question has changed over the last five to ten years. It will change some more, over the next five to ten years. There are some stereotypes to deal with, and there are some problems to be solved, that weren't

solved very well in the past. Those problems WILL be solved a little better in the future. Count on it.

Today, there is a stereotype that women will fall in love and need to move out of state for their new partner. This seems to be a gender-specific problem, and it's the women who are doing it, not the men. Men seem to realize that moving will be detrimental for the children, and so they tend not to move out of state as often. Whereas women, who comprise the majority of people exercising Parental Alienation Syndrome (PAS), seem to move for reasons of vengeance against the ex-husband (PAS is where one parent tries to alienate the child from the other parent).

Women: your new partner may be moving, and you may go with him, if you choose, but the kids are staying here. With dad. There is a legal standard to the granting of court permission to move the kids' domicile, and moving the kids to be with a new partner is just not acceptable. It's not even close. But the question gets asked of judges quite often. And, of course, those requests for permission to move are denied. (Obviously the above information applies to men exercising PAS, as well, but in the interest of addressing the fact that 90% of people engaged in alienating behavior are women, the term "women" is used here.)

May I Move Out of State? Part 3

A DAD IS JUST AS IMPORTANT AS A MOM.

Women, make sure that you recognize that this is the attitude of the courts. The law has given fathers short shrift in the custody area in the past, and that has changed, and it is still changing. The whole notion of "father's rights" is a hot topic in legal circles. The father has a right to reasonable contact with his children, and, more importantly, THE CHILDREN HAVE A RIGHT TO REASONABLE CONTACT WITH THEIR DAD.

The notion that a custodial mother can move away, and thus deprive a non custodial father of his children, and thus deprive the children of their dad, is a notion that is fading fast.

At the present, we are in some sort of middle ground: the old days, where a woman could, either out of malice (or PAS), or, to be fair, out of ignorance, deprive the dad and the kids that relationship of theirs, are gone forever. We are not yet, however, to the point where the courts will simply disallow the either parent the right to move without both parents moving. We are in the middle ground, and the legal test is the D'Onofrio test, with its four parts, which were discussed above. That test is not perfect, and will not fit every family, but it's the best one has, for the moment. Your judge will use that test. If the conditions of the test can be met, permission will be granted. Otherwise, it will not be granted.

On the one hand, you could petition the court with something like "Well, it involves a promotion, in my career, which will result in a sizeable raise, and my increased earnings will obviously lower the support that the Father is required to pay each week, and my new husband, who is an airline pilot, can arrange airfare for the kids each vacation period, and that airfare will cost the father nothing, you can put in the order that it's at my expense,

and the kids are old enough to fly, at ten and twelve, and I have here a letter from the school board president that the kids will be allowed to take their exams early, and leave on December 9th, rather than the 15th, so they can be with their father starting on December 10th, which is when Father's plant shuts down for Christmas, so he'll still get the whole layoff period with the kids...."

Permission will be granted in such a case, even if the dad is even contesting the move, which he is likely not to do, with a considerate plan like that being proposed.

On the other hand, you could petition the court, and propose, in addition to your moving, that child support be raised, since Dad got a promotion last year. You know support should go up, because you're still unemployed, but your new husband's earnings aren't counted, and, since you're still unemployed, it's only fair that Dad should pay the airfare as well, every time he wants to spring for a visit from the kids. Permission to move out of state in such a case will be denied.

Of course, most of the factual situations actually presented, by real people, will be somewhere in between these two extremes. The closer you get to the first example, the more likely you'll get that permission from the judge. The closer you are to the second one, the less likely.

Relocation: Everything You Need to Know, State By State

Precedent-setting legal cases (with discussion) from every state

NOTE: You might want to highlight cases that are similar to your case, even if they involve different states---your lawyer will find them valuable.

1. Moving Out-of-State with a Child

Law varies state to state on the right of a parent to move out of state with the child. In the past, most states automatically allowed the custodial parent to move wherever he or she wanted with the child.

Recently, some states have placed restrictions on the right of the custodial parent to move with the child. In these states, there is a strong policy in favor of preserving continuity in the relationship between the child and noncustodial parent. In addition, courts in these states are reluctant to allow the custodial parent to move with the child over the objection of the noncustodial parent unless there is a very good reason for the move.

In such states, permission of the other parent or of the court is required in order to move with the child. A parent who seeks such relocation may be required to give notice (such as sixty days) before a proposed moving date.

The law in this area is changing. A number of state legislatures are considering new standards for determining when a parent can move out of state with the child. Regardless of a particular state's law, there are several factors that courts consider when deciding whether to allow a move with the child:

1. Custodial parent's reason for the move. If the parent who seeks to move with the child has a good faith reason for the move, that is a positive factor in favor of the move. Good faith reasons include: obtaining a better job, joining a new spouse, and moving to be near extended family. If a job change is the basis for the move, the plan for a new job should be specific, not just a general hope of finding new employment. The main bad faith reason for moving is to deprive the noncustodial parent of contact with the child. If the court believes the main reason for the move is to diminish contact between the child and the noncustodial parent, the court is not likely to allow the move.

2. Noncustodial parent's reason for opposing the move. If the noncustodial parent has a good reason for opposing the move, that is a factor in favor of denying permission for the move. The main good reason for opposing relocation is the child's close relationship with the noncustodial parent and the disruption of frequent contact between the child and noncustodial parent that would result from the move. If the noncustodial parent is not close to the child or has not regularly exercised visitation, the court is more likely to allow the move.

3. Advantages to the child from the move. If it can be shown the child will benefit from the move, that is a factor in favor of the move. If, for example, the child will go to a better school or be in a climate that is better for the child's health, those factors will support the request for move. The parent asserting that the child will benefit from relocation should be ready with specific evidence, such as witnesses knowledgeable about the difference in school systems or medical testimony regarding the child's health.

4. The degree to which visitation can be restructured to preserve the relationship between the child and the noncustodial parent. If the court believes that reasonable restructuring of visitation can preserve and promote a good relationship between the child and the noncustodial parent, that is a factor in favor of allowing the move. Restructuring of visitation usually involves scheduling more visitation in the summer and over other holiday breaks. In some cases, the noncustodial parent and child may actually spend more time together each year under the restructured schedule than under the original schedule, although the restructured schedule will have less frequent periods of visitation. If the court believes that frequency of contact is more important than large blocks of time, then the move is less likely. If the parents cannot afford visits over a long distance, the court also is less likely to allow relocation. If visitation is affordable, the court might reduce child support to facilitate visits, or the court might assess the cost of travel on the parent who seeks to move.

If the parents have joint physical custody with the child spending a substantial amount of time with both parents, a court may treat the request to move like an original custody determination. The court will try to decide which parent will best meet the child's needs. The court will consider the above factors, along with other factors usually considered in custody cases, including the child's attachment to the current home, school, and community.

2. Relocation After Divorce

Motions To Relocate with Children

Our society used to be less mobile in past decades; it was not unusual for children to grow up, find jobs and marry in the same cities and states in which they were born. However, now we have improved transit systems, international business operations, and internet dating services, all of which provide opportunities for people to move out of state, or even across the country, based on employment changes, romance or simply the desire for a new location. Such relocations can destroy family relationships where children are torn between two parents and two states.

In recent years, state legislatures have attempted to enact statues setting forth requirements that must be followed when one parent seeks to relocate with the minor children. Laws vary broadly, according to state, regarding when a parent must provide notification or seek permission to relocate. Generally, minor geographic changes are not considered significant. However, just what is considered minor may be a subject of dispute. In some states a relocation out of the county is significant. In others it is a relocation of a specified number of miles (50 to 150) away from the other parent. In yet other states, a relocation out of the State is the topic of consideration.

Since the laws vary broadly, it is extremely important for a parent seeking to relocate with children to know, understand and follow the detailed rules in their particular state. A failure to follow the rules can often result in a change in custody. State laws often spell out requirements which may include:

NOTIFICATION AND OBJECTION

A parent seeking to relocate must generally notify the other parent well in advance of a move. The timelines for that notification are specified in many state laws. Those same laws also provide specific instructions regarding the information that must be included in the notification.

In states that require notification, the other parent may also usually file an objection to the relocation or file a Motion seeking to prevent the relocation.

CONSENT AND ORDER

Some states require not only notification, but consent of the other parent to allow the move. In the event the both parents do not consent, often the parent seeking to relocate most bring a motion seeking permission of the court.

PRESUMPTIONS AND BURDENS

Regardless of the procedures required by your states statutes, should the matter proceed to court, decisions are made and swayed based on legal presumptions and burdens of proof. The particular legal presumptions and burdens of proof in each state can dictate how a case should be presented and provide an early insight into the potential success or failure of a motion to relocate.

Under many state laws the presumption whether to allow or disallow a relocation may depend and change based on the custodial situation. For example, in many states, where the parent with primary physical custody seeks to relocate, there is often a rebuttable presumption that the intended relocation of the child will be permitted. If there is an objection, the presumption may be rebutted by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child.

If the parents share physical custody, however, that presumption may change. In such cases, the presumption that exists is often to deny the relocation. Again, that presumption may be rebutted by presenting evidence that the relocation is in the child's best interest and that it will not interfere substantially with the nonmoving parent's relationship to their child.

Some factors courts consider when making determinations to allow or disallow a move include:

1. The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;

2. Prior agreements in divorce decrees or orders of the parties. Such agreements are often given great deference;

3. Whether the relocation would substantially interfere with the other parent's relationship with the child;

4. Whether the benefit of the relocation outweighs any harm caused by the relocation;

5. The reasons of each person for seeking or opposing the relocation and whether the request is made in good faith or is intended to interfere with the other parent's rights;

6. The age, developmental stage, and needs of the child;

7. The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

8. The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

9. The financial impact of the relocation as it relates to parenting time.

HOW TO PREPARE TO SEEK RELOCATION

A motion to relocate requires documentation demonstrating that the relocating parent has thought the matter through carefully and that the relocation is in the child's best interest. A parent must be specific and thorough in their preparation. A parent should be concerned with:

• NEIGHBORHOOD SCHOOL. Know where they will be living and describe the benefits of the neighborhood and the schools the child will attend (photos are helpful);

• DAYCARE. Research any daycare facilities that they intend to use and include as part of your motion a brochure or contract from the provider;

• EMPLOYMENT. If a parent is moving to improve themselves financially, they should include information regarding their new job or planned education including any employment contracts or offers, benefit information or brochures.

• HEALTH. If there are any health considerations regarding the move, those should be included as part of the motion along with any medical documentation. For example, if the move is to a warmer climate that benefits asthma (parent or child), eth parent may wish to present medical evidence as part of their case.

If the Court allows the relocation, it often requires the party moving to pay more of the transportation costs related to visitation.

There is no "standard" visitation schedule when the visitation must occur at a distance. Often, however, the courts grant the non-custodial parent extended access times for fall breaks, spring breaks, Christmas breaks and summer months.

3. Relocation And Kids

Working out a visitation schedule challenging when raising teenagers during a divorce. While your teen is busy trying to exert independence, you still need to lay some ground rules to make sure that the other parent stays involved in your child's life. The following information will help you keep visitation fights to a minimum.

Teens and Visitation

If your divorce occurred while your child was younger, the teen years can create some problems regarding your visitation schedule. A schedule that worked for an elementary school age child is not going to fit a teen. If your divorce occurs during your child's teenage years, it can be difficult to devise a plan that will work for everyone involved simply because these teenage years are so difficult for a parent.

Not Yet Adults

The first thing to remember is that teens may look and act mature, but they aren't fully developed yet, psychologically. They still need two parents involved in their lives and regulating their behavior.

Teens work hard at learning to be independent, and sometimes they can do this healthily, other times, unhealthily. Teens need special consideration, but this does not mean that you and the other parent should assume there’s nothing you can do. It can be difficult to continue to parent someone who doesn't want to be controlled, but that's your job right now.

Maintain Flexibility

Several elements of a teen's life are essential: friends, school, sports, activities, dating, and jobs. If you have a visitation schedule that severely restricts your child's ability to enjoy these essential activities, all you'll end up with is resentment. You need to try to create a balance in your teen's life. Your teen should have plenty of time to do the things that matter to him/her, but he's/she's also got to make some room for spending time with both parents.

When you all lived in one house, you probably would not tell your daughter she had to skip the basketball game because you wanted to spend time with her. You didn't tell your son he couldn't spend time with friends because your spouse wanted to spend time with him.

As the divorced parent of a teen, you have to make the parenting schedule flexible to incorporate the things that your teen loves to do, that foster independence and responsiblity in him or her. If your spouse has visitation this weekend, but your teen has a prom to go to, the parent whose scheduled time it is should take her to and from the prom, and spend the rest of the available time with her. You need to find a balance between your teen's need to be a kid and the need for him or her to have time with both parents.

Set a Minimum

Since your schedule, that of your teen and your ex-spouse are most likely very busy, it's important to agree to some kind of minimum time per month which your teen spends with the non-custodial parent.

For example, decide that you'll try to arrange things so that the non-custodial parent sees your child for at least four overnights per month and 4 other evenings or afternoons - this is the flexible way to fit in the "every other weekend and one night a week" plan into a busy life. Adjust parenting times to accomodate your schedules.

Be creative when creating your time sharing plan. Take turns taking your daughter to basketball practice. Have one parent commit to teaching her how to drive. Have the other parent be involved with weekend music or club activities. Some parents have a hard time being so flexible because it feels like a loss of control. In fact it is just the opposite - you set a minimum and then work with your child to make it work for everyone. It takes a good deal of cooperation, but ultimately, you and your ex-spouse will have a better relationship with your child and he or she will feel more fulfilled and connected with both parents.

Stay Connected

Most teens enjoy modern modes of communication, so the non-custodial parent can maintain a close relationship with text messaging, cell phone calls, and instant messaging. Non-custodial parents can have a difficult time staying connected during the teen years - teens aren't typically open with their parents. If you divorced when your daughter was 6, she's a very different person at 15 and it can be hard to stay in touch and aware of her personality changes. Get to know her interests and activities and make yourself a part of them - either by showing up to his/her events, by offering help, or just by asking friendly, non-intrusive questions.

Surviving the teen years requires a mutual understanding. If you take your teen's life seriously, he or she will take both you, and your ex-spouse, seriously.

Custody and Relocation

These days, it's becoming more common for parents to want to relocate themselves and their children after a divorce. No matter how the issue is resolved, someone has to compromise: either the custodial

parent is prevented from moving to take advantage of job opportunities or familial support, or the noncustodial parent only sees the kids for erratically-scheduled chunks of time.

Most states have laws in place which determine how a court can decide whether the custodial parent can legally move out of the local area with the children post-divorce.

In some states, the custodial parent must give the noncustodial parent official written notice of the intention to move, and the noncustodial parent must file an objection with the court. This begins a conflict in court.

In other states, the custodial parent must file a petition with the court asking for the court's permission to relocate.

Negotiating

Whether you're the custodial or noncustodial parent, you're more likely to reach a favorable outcome by negotiating with your ex-spouse. Come up with a compromise that will allow the custodial parent to move while still maximizing the noncustodial parent's time with the children.

A formal mediation could help clarify the issues and bring about an agreement without having to take the matter to court. A mediator is an impartial third party trained to help people come to an agreement on difficult issues.

When creating a negotiated agreement, you must consider logistics such as when the childrens' school schedule allows for visits outside the local area, and who will pay for and arrange transportation back and forth.

4. How the Court Comes to a Conclusion

In some states, the court presumes the custodial parent's move will be allowed, unless the noncustodial parent can present compelling evidence that the children will be harmed more than helped by the move.

In other states, the custodial parent has the burden of proving that the relocation is in the "best interest" of the children.

Some of the factors courts look to in deciding whether the custodial parent should be permitted to relocate with the children include:

1. The relative strength, nature, quality, extent of involvement and stability of the child's relationship with each parent, siblings, and other significant people (such as grandparents) in the child's life.

2. Any previous agreements between the parties.

3. Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation.

4. The intent of each person for seeking or opposing the relocation, and the good faith of each of the parties in requesting or opposing the relocation (including identifying potential Parental Alienation Syndrome as a motivator for the move).

5. Whether there's an established pattern of conduct of the parent seeking the relocation to promote or thwart the relationship of the child and the non-relocating parent (such as Parental Alienation Syndrome).

6. The age, developmental stage and needs of the child.

7. The likely impact the relocation or its prevention will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

8. The quality of life, resources and opportunities available to the child and to the relocating party in the current and proposed geographic locations.

9. The feasibility of alternative arrangements to foster and continue the child's relationship with and access to the other parent, considering finances and practical concerns.

10. The alternatives to relocation and whether it's feasible and desirable for the other party to relocate at the same time.

11. The financial impact and logistics of the relocation or its prevention.

12. The child's preference, taking into consideration the age and maturity of the child.

The court may appoint what's called a "*guardian ad litem*" to thoroughly investigate and make a recommendation to the court. A *guardian ad litem* will want free access to your child and extended family and other support network connections during their evaluation. It's important to be honest and cooperative with a *guardian ad litem*.

If the court decides relocation is in the best interest of the children, the noncustodial parent is faced with either seeing the children only at holidays and summer visits, or relocating to the same location as the custodial parent and children.

What if the custodial parent wants to move away from the non-custodial parent?

Where the relocation distance is small, there might not even be a material change in circumstance upon which a parent could move the court to modify an existing custody and visitation order. Typically, a material change of circumstance is required before a court will modify an existing custody or visitation order. Therefore, a move across town ordinarily is an insufficient basis upon which the existing order would be changed. Although the relocation may make the visitation exchange more difficult, it may remain practical to comply with the existing order, so no change would be made.

Where the relocation distance is great, the case becomes more complicated. The primary factor of best interest of the child continues to be considered along with facts such as (1) the existing custody and visitation arrangement, (2) the attachment and support of the non-custodial parent and other relatives, (3) the child's ties to the community, school, church or synagogue, and friends, and (4) the child's desires and wishes. Only a small minority of states require a custodial parent to get the written consent of the non-custodial parent or a court order based upon a finding of the court that it is in the best interest of the child to allow the move. In many states, a custodial parent can relocate if there is a valid reason for the relocation and the move does not result in harm to the child.

The ability of the child to have continuing and frequent contact with both parents, without a detrimental effect due to the relocation, is the primary consideration for a court in modifying an existing order to allow the relocation. The modified order of the court could provide additional time with the non-custodial parent during summer and other school recesses and the obligation of the custodial parent

to pay the additional transportation expenses incurred in facilitating the visitation exchange. In California, the impact of a planned long-distance move on a noncustodial parent's relationship with his children may be considered before the children can be moved out of the state. If the moveaway will detrimentally harm the relationship between a child and a parent, together with other factors, it may be sufficient to justify a change in custody to the other parent.

Custodial parents who move away with the child without providing notice to the other parent may not only face a change in custody to the other parent but also criminal charges of kidnapping. Before any move is entertained, the non-custodial parent should be informed of the impending move and an effort made to reach a mutually acceptable parenting plan based upon the proposed location of both parents.

A relocation by the custodial parent requires careful consideration of the non-custodial parent's rights as early in the planning process as possible. Move-away cases can become very difficult to resolve and court involvement can be both costly and time consuming. Thus, leaving in secret without leaving a forwarding address could have very detrimental effects to the custodial parent.

5. Relocation as a Strategy to Interfere with the Child-Parent Relationship

The custodial parent who seeks to relocate creates a special problem for the noncustodial parent opposed to such a move. Geographical distance between the visiting parent and his or her offspring can become a serious impediment to their relationship. When a relocation effort is clearly in the best interest of the children, it is hard for courts to interfere. However, when it is unclear as to whether relocation is in the best interest of the children, the court must wrestle with a difficult problem.

In certain situations, a custodial parent may seek to relocate as a way to interfere with the relationship between the children and the noncustodial parent. However, at times such a motive may remain well hidden. Guidelines have yet to appear for assisting triers of fact in identifying interference-guided relocation efforts. The following essay provides a set of potential indicators for identifying interference-motivated relocation efforts.

THE STRATEGY BEHIND INTERFERENCE-BASED RELOCATION

Unique problems are created for families, attorneys, and judges by divorce-related child visitation interference.(1) When a custodial parent wishes to relocate to inflict emotional harm to the noncustodial parent, the family's problems multiply significantly. However, the custodial parent seeks apparent benefits as a result of such a manipulation.

First, relocation prevents the nonresidential parent from having an active and ongoing relationship with his or her offspring. A short commute to the former marital home is no longer available. Easy access to the child's school is removed. The family can no longer easily enjoy sports games, school festivals, and religious events. The emotional enrichment provided by the presence of two readily accessible parents is now denied the child.

Second, relocation of the custodial home creates inflated financial expenditures for the nonresidential parent who must travel to visit his or her children, or pay for his or her children to come visit. Short commutes are replaced by time-consuming journeys. Hotel stays become necessary. Phone bills increase in proportion.

Third, after the relocation has occurred, if the noncustodial parent's visitation is interfered with, it is more difficult to obtain legal recourse. Jurisdiction becomes a battle. Interstate legal expenditures accrue. Discovery, trial preparation, and hearings become increasingly complicated in their practical and emotional aspects.

Finally, in certain cases of visitation interference,(2) denying contact with the children becomes very attractive to the custodial parent who has relocated. Prior to relocation, the denied parent merely returned to his or her home a short commute away. After relocation, however, whenever the visitation interference takes place, he or she has absorbed a significant loss of money, effort, and time. The custodial parent with a sadistic predisposition in this regard(3) gains an additional sense of satisfaction.

Let it be noted that each risk factor may operate independently or may coexist with other risk factors.

Given the above-listed factors, one needs to identify custodial parents seeking relocation for interference purposes. Where appropriate and possible, such individuals should be stopped in their negative attempts. Certain risk factors have been identified to help one recognize an interference-based relocation.

DEFINITION OF A RISK FACTOR

A risk factor is something that increases the likelihood of a particular problem occurring. For example, sun exposure is a risk factor for skin cancer.

The presence of a risk factor does not guarantee the emergence of the associated problem. For example, some individuals may spend a lifetime exposed to sunlight and never develop skin cancer. The presence of a risk factor simply means that the problem at hand has an increased likelihood of occurring. However, even when a risk factor is present, in certain cases the problem in question may never manifest.

Paying attention to risk factors associated with intereference-based relocation can play a valuable role in preventing and solving such cases.

IDENTIFYING RISK FACTORS

Typically, a specialist will be the first to help you identify intereference-based relocation risk factors.

Parental Alienation Syndrome (PAS),(4) as defined by Dr. Richard A. Gardner, is one potential cause of interference-based relocation which is recognized by the professional community. However, a standardized list of risk factors for interference-based relocation has yet to be created and recognized by professionals.

RISK FACTORS FOR INTERFERENCE-BASED RELOCATION

Listed below are eight potential risk factors for identifying a custodial parent who desires to relocate based on an underlying motivation to interfere in the relationship between the nonresidential parent and his or her offspring:

1. A parent who threatens to relocate the children;

2 A parent with excessive anger;

3. A parent who has a habit of lying;

4. A parent with a history of interfering with visitation;

5. A parent who has not been punished by the court for prior interference with visitation;

6. A parent with a history of willfully defying a court order;

7. A parent exhibiting Parental Alienation Syndrome,(4) and

8. A parent exhibiting divorce-related malicious mother syndrome.(5)

ANALYZING RISK FACTORS

It should be noted that each risk factor may operate independently or coexist with other risk factors. For example, a parent with Parental Alienation Syndrome may also be very angry at the nonresidential parent. Similarly, a parent with a history of defying court orders may not exhibit any of the other risk factors; he or she may simply enjoy the impulsive thrill of violating rules (as occurs with certain personality disorders).(6)

The time when a risk factor emerges may also be variable. For example, in certain cases, before a petition for dissolution of marriage has been filed, the (eventual) primary residential parent may have threatened the (later to be) nonresidential parent with the possibility of moving the children away. Generally, this risk factor emerges during a time of high conflict in the marriage. In other cases, however, such a threat may emerge only during the custody battle or after the final divorce decree has been entered.

One must consider the degree of risk factor intensity. A parent may be angry with his or her ex-spouse, but not with enough intensity to deprive the ex-spouse the opportunity of involvement in the children's lives. On the other hand, some parents may be so angry that not relocating would be unbearable. In some cases, an angry and psychologically disturbed parent may deliberately not relocate so that he or she can torment the other parent with regular episodes of visitation interference.

In some casese, risk factors may be present while the intent to relocate may truly be based on the best interest of the child. For example, a parent may have a history of lying in the courtroom, yet his or her child may have developed a life-threatening medical condition which requires relocation to be near a specialized treatment facility. Thus relocation is necessary to the child's survival.

Recognizing interference-based relocation risk factors may help you to stop a harmful relocation from occurring—one in which the child is at risk to lose the benefits of two accessible parents. See articles on Parental Alienation Syndrome for more information related to this topic.

ENDNOTES

1 Ira Daniel Turkat, Management of Visitation Interference, 36 Judge's J. (forthcoming Feb. 1997).

2 Ira Daniel Turkat, Child Visitation Interference in Divorce, 14 Clin. Psychol. Rev. 737 (1994).

3 Ira Daniel Turkat, Divorce Related Malicious Mother Syndrome, 10 J. Fam. Violence 253 (1995).

4 Parental alienation syndrome was first described by Gardner in relation to a custodial parent who teaches his or her offspring to hold unjustified antagonistic beliefs and behaviors toward the nonresidential parent. R.A. Gardner, The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse (Creskill. N.J., Creative Therapeutics 1987); R.A. Gardner, Family Evaluation in Child Custody Mediation, Arbitration. and Litigation (Creskill, N.J., Creative Therapeutics 1989). Sec also Kenneth H. Waldron & David E. Joanis, Understanding and Collaboratively Treating Parental Alienation Syndrome, 10 Am. J. Fam. L. 121 (Fall 1996).

5 Divorce-related malicious mother syndrome was first described by this author regarding the custodial mother who aims to hurt her former marital partner through any means, including using the children as a tool for injury. Turkat, supra note 2, and Turkat, supra note 3.

6 Ira Daniel Turkat. The Personality Disorders (New York, Pergamon/Simon & Schuster 1990).

6. Relocation: General Information

In Relocation cases, the interests of a custodial parent who wishes to move away are up against those of a noncustodial parent who has a desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the interest of the child as most important. The child's interest may or may not be in irreconcilable conflict with those of one or both of the parents.

Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 578 (1996). The Nevada Supreme Court stated in a recent case that "[o]ne of the tragic aftermaths of the dissolution of families is that the environmental, physical, and temporal relationships between parents and their children must change in ways that tear at the heartstrings." Cook v. Cook, ___ Nev. ___, 898 P.2d 707 (1995). No doubt the parties and their counsel in such cases would agree.

Statutory vs. Common-Law Authority

Somes states have handled the increasing number of relocation cases through traditional common-law means. In other states, however, special statutes have been enacted to govern relocation cases. See, e.g., 750 ILCS 5/609 (Smith-Hurd 1993); Mass. Gen. Laws Ann. ch. 208, 30 (West 1987); Nev. Rev. Stat. Ann. 125A.350 (1992); N.J. Stat. Ann. 9:2-2 (West 1993). In addressing any relocation issue, therefore, the first step is to check for an applicable state statute. In the absence of a statute, of course, the courts have common-law authority to prevent the relocation. See Macek v. Friedman, 240 N.J. Super. 614, 573 A.2d 996 (App. Div. 1990).

Constitutional Concerns

The issue of relocation has undeniable constitutional implications. The United States Supreme Court has recognized that the right of an individual to travel freely throughout the country is protected by the Constitution. E.g., Jones v. Helms, 452 U.S. 412 (1981); Shapiro v. Thompson, 394 U.S. 618 (1969). As the Montana Supreme Court recognized in a relocation case, the fundamental right to travel interstate can be restricted only in furtherance of a compelling state interest. In re Marriage of Cole, 224 Mont. 207, 729 P.2d 1276 (1986) (citing Shapiro v. Thompson, supra).

Some courts have side-stepped the constitutional issue by pointing out that a denial of relocation does not affect the parent's right to travel alone. As the Indiana Court of Appeals explained, "The straightforward answer to [the wife's constitutional] argument is that the court's order does not impose any necessary burden whatever upon her right to travel. She remains free to go wherever she may choose. It is the children who must be returned to Indiana." Clark v. Atkins, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986).

Other courts have decided the constitutional issue head-on. These courts note that if a parent who seeks to travel must pay for that right by giving up custody of the children--which is itself a constitutionally protected right, see Santosky v. Kramer, 455 U.S. 745 (1982)--the right to travel has indeed been infringed. The inquiry then becomes whether that infringement is justified by a compelling state interest.

Most courts deciding this issue have held, as did the Montana Supreme Court in In re Marriage of Cole, supra, that "furtherance of the best interests of a child, by assuring the maximum oportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate." 729 P.2d at 1280-81 (1986). Therefore, in relocation cases courts must engage in a "delicate balancing," on the one side the child's best interests, and on the other side the custodial parent's fundamental right to travel, which is "qualified by the special obligations of custody . . . and the competing interests of the noncustodial parent." Id.

In most cases, therefore, the courts have balanced the custodial parent's right to travel against the compelling state interest in protecting the child's best interests. See, e.g., In re Marriage of Cole, supra; Zwerneman v. Kenny, 236 N.J. Super. 1, 563 A.2d 1139 (App. Div. 1989); In re Marriage of Sheley, ___ Wash. App. 2d ___, 895 P.2d 850 (1995), review denied, 128 Wash. 2d 1007, 910 P.2d 481 (1996). In some cases, however, the courts have used the child's best interests to "trump" the parent's constitutional right. See, e.g., Ziegler v. Ziegler, 107 Idaho 527, 691 P.2d 773 (Ct. App. 1985) (child's best interests take priority over parent's right to travel); Everett v. Everett, 660 So. 2d 599 (Ala. Civ. App. 1995) (following Ziegler). This approach reflects a poor understanding of and an insufficient regard for the fact that the parent's right is fundamental constitutional one.

II. RELOCATION OF THE PARENT WITH SOLE CUSTODY OR PRIMARY PHYSICAL CUSTODY

The vast majority of relocation cases involve a move or proposed move by a sole custodian or by a joint custodian with primary physical custody. Typically, the other parent opposes the move and also may seek a transfer of custody. Because petitions seeking or opposing relocation are decided under a different standard than are motions for custody modification, they will be examined separately, although both may be present in any given case.

Relocation Petitions

Relocation petitions may be filed by the parent seeking to move or by the parent opposing the move. Courts across the nation have taken a variety of general approaches to resolving the competing interests at stake in such cases.

Liberal Approach. Although the precise standard varies somewhat from state to state, a number of states have taken a liberal approach to relocation petitions. Perhaps the most liberal is the approach recently adopted by the Tennessee Supreme Court in Aaby v. Strange, 1996 WL 189801 (Tenn. Apr. 22, 1996). The mother in the case, who had sole custody of the parties' child, sought permission from the court to relocate to Kentucky, where her new husband's family was located. Both she and her new husband had received offers of employment there, and they believed that living in a smaller town would be beneficial for the child. The father opposed the move. Noting the strong interrelationship between the interests of a custodial parent and those of the child, the Tennessee Supreme Court held that a custodial parent will be allowed to remove the child from the state unless the noncustodial parent can show "that the custodial parent's motives for moving are vindictive--that is, intended to defeat or deter the visitation rights of the noncustodial parent." 1996 WL 189801, *7. If the noncustodial parent cannot make such a showing, then permission to relocate must be granted. The court is not to engage in a "child's-best-interests" inquiry. Of course, if the noncustodial parent believes that relocation would pose a specific, serious threat of harm to the child, he or she can seek a custody modification based upon changed circumstances.

A number of states apply a presumption in favor of relocation by a custodial parent with good-faith motives. These states include Florida, Colorado, Nevada, and Minnesota.

In 1993, the Florida Supreme Court expressed a general policy favoring relocation by the custodial parent. In Mize v. Mize, 621 So. 2d 417 (Fla. 1993), the mother, who had primary physical custody, sought permission to move to California with the parties' daughter. The father opposed the motion. Acknowledging that relocation cases do not lend themselves to bright-line rules, the supreme court adopted a general policy favoring relocation so long as the custodian has a well- intentioned reason and is not motivated by a vindictive desire to interfere with the other parent's custodial rights. The court then set forth six factors for consideration in each case:

1. Whether the move would be likely to improve the general quality of life for both the primary physical custodian and the children.

2. Whether the motive for seeking the move is for the express purpose of defeating visitation.

3. Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.

4. Whether the substitute visitation wil be adequate to foster a continuing meaningful relationship between the children and the noncustodial parent.

5. Whether the cost of transportation is financially affordable by one or both of the parents.

6. Whether the move is in the best interests of the child. (This sixth requirement we believe is a generalized summary of the previous five).
Id. at 420 (adopting the holding in Hill v. Hill, 548 So. 2d 705, 706 (Fla. Dist. Ct. App. 1989), review denied, 560 So. 2d 233 (Fla. 1990)).

Mize was recently clarified by the Florida Supreme Court in Russenberger v. Russenberger, 669 So. 2d 1055 (Fla. 1996), another case in which a mother with primary physical custody sought to move out of state. The court held that upon a demonstration of good faith by the parent seeking to relocate, a presumption arises that relocation should be permitted. The presumption is rebuttable, however, and in considering whether the presumption is rebutted, the court must weigh the factors set forth in Mize.

The Colorado Supreme Court also recently created a presumption favoring relocation by a custodial parent. In In re Marriage of Francis, 1996 WL 288755 (Colo. June 3, 1996) (en banc), a mother with sole custody sought to relocate to New York to attend a two-year physician's assistant's program. The father opposed the petition. The supreme court held that a parent with sole custody or primary physical custody who desires to relocate to another state must make a prima facie showing of "a sensible reason for the move." 1996 WL 288755, *8. Upon such a showing, a presumption arises that the child should relocate with the custodial parent, and the burden shifts to the other parent to demonstrate that the move is not in the child's best interests. The presumption can be overcome with evidence that "the negative impact of the move cumulatively outweighs the advantages of remaining with the primary care-giver." 1996 WL 288755, *9. Factors to be considered include:

1. Whether there is a reasonable likelihood 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;

2. Whether the court is able to fashion a reasonable visitation schedule for the noncustodial parent after the move and the extent of the noncustodial parent's involvement with the children at the old location;

3. Whether there is a support system of family or friends, either at the new or old location; and

4. Educational opportunities for the children at the new and old locations.
1996 WL 288755, *9. If the cumulative weight of these factors, together with other factors the trial court may find relevant, outweighs the presumption favoring the custodial parent, then the relocation petition should be denied. Otherwise, the custodial parent should be entitled to the benefit of the presumption.

Nevada applies a similar standard. In Gandee v. Gandee, ___ Nev. ___, 895 P.2d 1285, 1287 (1995), the Nevada Supreme Court held that a custodial parent seeking to relocate must make a threshold showing of a "sensible, good faith reason for the move." A good faith reason is one that is not designed to frustrate the other parent's visitation rights. In Cook v. Cook, ___ Nev. ___, 898 P.2d 702 (1995), the court further held that once the threshold showing has been made, the burden of proof shifts to the other parent to demonstrate that the move is not in the child's best interests, with reference to specific factors, including whether reasonable alternative visitation is possible. In Trent v. Trent, 111 Nev. 309, 890 P.2d 1309, 1313 (1995), the court emphasized that the state's removal statute, which was primarily a notice statute, should not be used "to chain custodial parents, most often women, to the state of Nevada."

Minnesota not only applies a presumption favoring removal, but also requires the parent opposing the move to make a prima facie showing of harm to the child in order to obtain an evidentiary hearing. In Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996) (en banc), the mother, who had primary physical custody, sought to relocate to Arizona to pursue a career opportunity. The father opposed the move and requested an evidentiary hearing. He presented his own affidavit, as well as several affidavits from family and friends, voicing concerns for the children's welfare if they were to move to Arizona. The Minnesota Supreme Court reaffirmed its prior decision in Auge v. Auge, 334 N.W.2d 393 (Minn. 1983), which held that the state's custody modification statute created an implicit presumption that relocation should be permitted. To rebut the presumption, the opposing parent must demonstrate that the move is not in the child's best interests and would endanger the child's health and well-being, or that the move was intended to interfere with visitation. Unless the opposing parent can make a prima facie showing against the move, permission to relocate should be granted without a full evidentiary hearing. The court in Silbaugh then held that evidence of disruption in a child's life typically associated with an interstate move is insufficient to make a prima facie showing against the move. Thus, the father's affidavits in this case failed to trigger an evidentiary hearing.

Moderate Approach. Many states require the relocating parent to prove that the move is in the child's best interests without the benefit of any presumption. Often, the child's best interests must be determined with reference to specific factors. States following the best-interests approach include Arizona, Illinois, Nebraska, New Mexico, New York, and Missouri.

In Pollock v. Pollock, 181 Ariz. 275, 889 P.2d 633 (Ct. App. 1995), a mother with sole custody sought to relocate to New Hampshire with her new husband, who had family in that state. She filed a motion to modify visitation, and the father sought an injunction prohibiting the move. The Arizona Court of Appeals held that the relocating parent bears the burden of proving that the move is in the child's best interests, with reference to specific factors. These factors include: (1) whether the relocation request is made in good faith; (2) whether the move will improve the general quality of life for the custodial parent and the child; (3) whether the custodial parent is likely to comply with visitation orders; (4) whether the move will permit a realistic opportunity for visitation; (5) the extent to which moving or not moving will affect the child's physical, emotional, and developmental needs; and (5) the integrity of the opposing parent's motives. The court emphasized that all the factors should be weighed collectively, with no single factor controlling.

Illinois also follows this approach. In In re Marriage of Eaton, 269 Ill. App. 3d 507, 646 N.E.2d 635 (1995), a mother with sole custody sought to relocate to Florida to marry an attorney with an

established practice in that state. The father opposed the move. The Illinois Appellate Court first noted that under In re Marriage of Eckert, 119 Ill. 2d 316, 518 N.E.2d 1041 (1988), a custodial parent seeking to relocate bears the burden of proving that the move is in the child's best interests. Factors for consideration include: (1) whether the proposed move will enhance the quality of life for both the custodial parent and the child; (2) whether the proposed move is a ruse designed to frustrate the other parent's visitation rights; (3) the motives of the other parent in resisting the move; (4) the visitation rights of the other parent; and (5) whether a reasonable visitation schedule can be achieved if the move is allowed. A "reasonable visitation schedule" is one that preserves and fosters the child's relationship with the noncustodial parent. The court in Eaton then held that the factors should be weighed and balanced, rather than being treated as separate prongs of a test.

Nebraska requires the relocating parent to show a legitimate reason for the move before proving that the move is in the child's best interests. In Harder v. Harder, 246 Neb. 945, 524 N.W.2d 325 (1994), a mother with sole custody sought permission to relocate to Arizona so that her new husband could pursue a business opportunity there. The father opposed the move. The Nebraska Supreme Court noted its prior holding in Demerath v. Demerath, 233 Neb. 222, 444 N.W.2d 325 (1989), that relocation is generally permitted when the custodial parent shows a legitimate reason for leaving the state and that it is in the child's best interests to continue to live with that parent. The court in Harder then held that remarriage, obtaining employment, and improving a career are legitimate reasons for leaving the state. See also Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991) (primary physical custodian must prove that relocation is in child's best interests).

Some courts do not expressly state which parent bears the burden of proof in the child's-best-interests determination. The New York Court of Appeals' recent decision in Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996), implicitly holds that the relocating parent bears the burden. In consolidated appeals involving a sole custodian relocating within the state and a primary physical custodian moving out of state, the court abrogated the state's stringent "exceptional circumstances" standard for relocation, see discussion infra, and replaced it with the child's-best-interest test. Factors to be included in the determination of the child's best interests include: (1) each parent's reasons for seeking or opposing the move; (2) the quality of the relationships between the child and the custodial and the noncustodial parents; (3) the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent; (4) the degree to which the custodial parent's and the child's life may be enhanced economically, emotionally, and educationally by the move; and (5) the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. That the relocating parent bears the burden of proof is suggested by the court's concluding statement, "In the end, it is for the court to determine, based on all the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests." 642 N.Y.S.2d at 581-82 (footnote omitted); see also McElroy v. McElroy, 910 S.W.2d 798 (Mo. Ct. App. 1995) (listing four specific factors relevant to child's-best-interests inquiry in relocation cases; implicitly holding that relocating parent bears burden of proof).

The California Supreme Court's recent decision in In re Marriage of Burgess, 13 Cal. 4th 25, 51 Cal. Rptr. 444 (1996), also does not state explicitly which parent bears the burden of proof on the child's-best-interests issue. Upon divorce, a mother obtained sole physical custody and permission to move to another town 40 miles away. The intermediate appellate court reversed, holding that the mother had failed to show the necessity of the proposed move. On appeal by the mother, the California Supreme Court held that a relocating parent is not required to prove that the move is necessary. The relevant statutes require the court to consider the effects of the proposed move on the best interests of the children, including their health, safety, and welfare, and the nature and amount of contact with both parents. No statutory basis exists, however, for "imposing a specific additional burden of persuasion on either parent to justify a choice of residence as a condition of custody." 51 Cal. Rptr. at 450 (emphasis in original). Thus, although the allocation of the burden of proof is unclear, the decision does clarify that a relocation petition is governed by the child's-best-interests standard without any

additional inquiry into the necessity of the move. See also Duckett and Duckett, 137 Or. App. 446, 905 P.2d 1170 (1995) (relocation petition governed by child's best interests standard; unclear who bears burden of proof).

Restrictive Approach. Until March of this year, New York took the most restrictive approach of any state in the nation to relocation petitions. Generally, the courts did not permit any relocation that would interfere with the other parent's visitation schedule absent "exceptional or compelling circumstances." Daghir v. Daghir, 56 N.Y.2d 938, 453 N.Y.S.2d 609 (1982). The standard was applied by the lower courts to deny relocation unless the custodial parent could show that the move was a matter of economic necessity rather than mere economic betterment or advantage. E.g., Sanders v. Sanders, 185 A.D.2d 716, 585 N.Y.S.2d 891 (1992). Personal reasons for the move, such as remarriage or a desire to make a fresh start in life, were wholly inadequate. E.g., Atkinson v. Atkinson, 197 A.D.2d 771, 602 N.Y.S.2d 953 (1993). Not surprisingly, most custodial parents were unable to prove the existence of exceptional circumstances. If the parent did manage to prove such circumstances, then the court would engage in a child's-best-interests inquiry and usually grant permission to relocate. See, e.g., Church v. Church- Corbett, 214 A.D.2d 877, 625 N.Y.S.2d 367 (1995) (exceptional circumstances were present and relocation was otherwise in the child's best interests).

Earlier this year, however, the New York Court of Appeals abrogated the exceptional circumstances test in Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996). As discussed more fully above, the court held that relocation petitions are to be decided in the child's best interests, with careful balancing of several specific factors. The court believed that the exceptional circumstances test was unsatisfactory because it erected artificial barriers to the courts' consideration of all the relevant factors. In a case in which no exceptional circumstances were proved, the test required denial of relocation without any consideration of whether the move would serve the child's best interests or whether the benefits to the child would outweigh the diminution in access by the noncustodial parent. The distorting effects of the test were amplified when the lower courts required a showing of economic necessity or health-related compulsion to establish exceptional circumstances. The court of appeals believed that relocation cases were too complex to be satisfactorily handled by any test that prevented a simultaneous weighing and comparative analysis of all the relevant facts and circumstances.

For pending cases governed by the former law, we note special types of cases in which a showing of exceptional circumstances is not required. First, the exceptional circumstances test is inapplicable when a prior agreement of the parties, and/or the divorce decree itself, expressly contemplates an out-of-state move. In such cases, relocation is permitted if it is in the child's best interests. See Wright v. Wright, ___ A.D.2d ___, 627 N.Y.S.2d 819 (1995) (because parties' incorporated agreement expressly permitted out-of-state relocation with 60 days' notice to other parent, exceptional circumstances test was inapplicable and child's-best-interests test applied; relocation of primary physical custodian to Mississippi was permitted); Smith v. Finger, 187 A.D.2d 711, 590 N.Y.S.2d 301 (1992) (because parties' incorporated agreement expressly contemplated out-of-state move, exceptional circumstances need not be shown; relocation of joint physical custodian to Virginia was allowed), appeal denied, 82 N.Y.2d 704, 601 N.Y.S.2d 578 (1993). In addition, when the proposed relocation does not affect the existing visitation schedule, or does not involve a significant geographical distance, exceptional circumstances need not be demonstrated. See Carroll v. Carroll, ___ A.D.2d ___, 628 N.Y.S.2d 316 (1995) (because noncustodial parent's visitation rights of 21 days a year were not affected by sole custodian's move to Florida, exceptional circumstances test was inapplicable; relocation was permitted); Henehan v. Henehan, 213 A.D.2d 761, 622 N.Y.S.2d 1013 (1995) (when primary physical custodian wished to move to nearby town, exceptional circumstances were not required). Finally, when the noncustodial parent has failed to exercise visitation rights, exceptional circumstances need not be proved. Cf. Wittig v. Wittig, 215 A.D.2d 927, 626 N.Y.S.2d 863 (1995) (if noncustodial parent had consistently failed to exercise visitation rights, primary physical custodian would not have been required to show exceptional circumstances).

Custody Modification Motions

As noted above, in many cases involving a relocation or proposed relocation by the custodial parent, the noncustodian may seek a transfer of custody of the children. This relief may be souhgt in addition to, or instead of, an order requiring the custodial parent to remain in the state.

Changed Circumstances Standard. Most states apply the traditional "changed-circumstances" test for custody modification to decide custody modification motions based on the other parent's relocation. In its usual formulation, this test permits custody modification upon a showing by the requesting party that (1) circumstances affecting the child have changed substantially since the prior order, and (2) the proposed modification is in the child's best interests. See generally 2 H. Clark, The Law of Domestic Relations in the United States 20.9 (2d ed. 1987); 2 J. Atkinson, Modern Child Custody Practice 9.05 (1986 & Supp. 1995).

Some courts have decided relocation/custody modification cases based only upon the first part of this inquiry, finding that the custodian's move did not constitute a sufficient changed circumstance for modification. In Ormandy v. Odom, 217 Ga. App. 780, 459 S.E.2d 439 (1995), the father, who had sole custody, was trnsferred by his employer to Illinois. When the mother learned of the impending move, she sought a custody transfer. The Georgia Court of Appeals held that relocation of a custodial parent, in and of itself, is not a changed circumstance for custody modification purposes. Absent a showing that the relocation would be detrimental to the children beyond the unavoidable "uprooting" effect of any move to a new state, the relocation cannot constitute a changed circumstance. In this case, the mother had failed to present evidence of any harm to the children other than the usual disruptive effect of a move to a new locale. Thus, an inquiry into the child's best interests was not warranted. See also Swonder v. Swonder, 642 N.E.2d 1376 (Ind. Ct. App. 1994) (out-of-state move is not of itself a sufficient changed circumstance); In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa Ct. App. 1994) (same); DeBeaumont v. Goodrich, 162 Vt. 91, 644 A.2d 843 (1994) (same).

Other courts have decided such cases with reference to the second prong of the test. In Wages v. Wages, 660 So. 2d 797 (Fla. Dist. Ct. App. 1995), a mother with primary physical custody moved to Kentucky with her new husband a few months after the divorce. When she petitioned for modification of the visitation schedule, the father sought a custody transfer. The Florida District Court of Appeal held that although the move to Kentucky may have constituted a changed circumstance, the father had not shown that the child's best interests would be served by a custody change. Similarly, in Warchol v. Warchol, 853 S.W.2d 165 (Tex. Ct. App. 1993), the father sought primary physical custody after the mother moved to Illinois, where her brother lived. The Texas Court of Appeals held that although the mother's move may have constituted a changed circumstance, the father had not shown that a custody transfer was in the child's best interests. On the contrary, the trial court had expressly found that the child's best interests would be served by remaining in the mother's custody, and no abuse of discretion was apparent in this finding. See also Smith v. Smith, 615 So. 2d 926 (La. Ct. App.) (primary physical custodian's out- of-state move, although it may have been a changed circumstance, did not warrant custody transfer), review denied, 617 So. 2d 916 (La. 1993); Gould v. Miller, 488 N.W.2d 42 (N.D. 1992) (same).

A number of states provide, either by statute or case law, that a custodian's out-of-state move is, as a matter of law, a changed circumstance requiring reevaluation of the child's best interests. For example, Mo. Ann. Stat. 452.411 (Vernon Cum. Supp. 1996) provides:

If either parent of a child changes his residence to another state, such change of residence of the parent shall be deemed a change of circumstances under section 452.410, allowing the court to modify a prior custody decree.

The Missouri Court of Appeals applied this statutory provison in In re Marriage of Lowe, 860 S.W.2d 813 (Mo. Ct. App. 1993). The mother as primary physical custodian moved with the child to Minnesota, where her new husband had accepted employment, and then sought approval from the Missouri court. The father sought a custody transfer. The court of appeals first noted that 452.411 rendered the mother's move a changed circumstance as a matter of law. Thus, the trial court was permitted to modify custody if it determined modification to be in the child's best interests. The court then held that ample evidence supported the trial court's finding that a transfer of primary custody to the father would serve the child's best interests. The trial court had based its finding on the "uprooting" effect of the move on the child and a general deterioration in the mother-child relationship. The trial court had also found that the move was made, at least in part, to frustrate the father's relationship with the child. See also Rowland v. Kingman, 629 A.2d 613 (Me. 1993) (applying statutory provision that parent's relocation out of state is changed circumstance as matter of law; court affirmed order transferring primary physical custody to father if mother moved to Oregon), cert. denied, 144 S. Ct. 884 (1994).

The same approach has been judicially adopted in other states. In In re Marriage of Bradley, 258 Kan. 39, 899 P.2d 471 (1995), the father obtained a transfer of primary physical custody based upon the mother's relocation to Washington, D.C. The Kansas Supreme Court held that a custodial parent's relocation, significant enough to render the original custody arrangement unworkable, constitutes a changed circumstance warranting a reexamination of the child's best interests. Such a move does not require a custody transfer in every case; it only demonstrates a need to reevaluate the existing arrangement. The court then held that although the issue was close, evidence supported the trial court's finding that the child's best interests would be served by remaining in Kansas with the father. The court noted the presence of extended family in the state. See also Canty v. Canty, 178 Ariz. 443, 874 P.2d 1000 (Ct. App. 1994) (out-of-state move is changed circumstance triggering child's-best-interests inquiry); Osteraas v. Osteraas, 124 Idaho 350, 859 P.2d 948 (1993) (same); Goldmeier v. Lepselter, 89 Md. App. 301, 598 A.2d 482 (1991) (same), cert, denied, ___ Md. ___, 600 A.2d 419 (1992).

Endangerment Standard. States that have enacted the Uniform Marriage and Divorce Act apply what has become known as the "endangerment standard" in custody modification cases involving a relocating parent. This standard adds a third proof requirement to the traditional test for modification of custody. For example, Colo. Rev. Stat. Ann. 14-10-131 (1987) provides that a custody decree shall not be modified unless the court finds that a change of circumstances is present, modification is necessary to serve the best interests of the child, and "[t]he child's present environment endangers his physical health or significantly impairs his emotional development[.]" The Colorado Supreme Court recently held in In re Marriage of Francis, 1996 WL 288755 (Colo. June 3, 1996), that this standard applies whenever a modification of physical custody is at issue. Thus, the standard was applicable to a noncustodial father's motion to transfer sole custody to himself, or to modify sole custody to joint custody with primary physical custody in himself, based on the custodial mother's proposed relocation to New York. Because the supreme court could not determine whether the trial court had applied this standard, its order transferring custody if the mother left the state was reversed and the case was remanded for reconsideration. See also In re Marriage of McDole, 122 Wash. 2d 604, 859 P.2d 1239 (1993) (endangerment standard applies to requests to modify physical custody based on physical custodian's out-of-state relocation).

III. RELOCATION IN SHARED PHYSICAL CUSTODY CASES

As noted above, the majority of relocation cases in the joint custody context involve a move by a parent having primary physical custody. The issue of relocation by a parent in a shared or alternating physical custody arrangement, in which the child spends approximately equal time with each parent, has been litigated much less frequently. The cases that have been decided, however, reflect a strong disinclination by the courts to permit a significant move by a parent who shares physical custody.

In In re Marriage of Johnson, ___ Ill. App. 3d ___, 660 N.E.2d 1370 (1996), the parties lived in close proximity and shared physical custody of the child almost equally, even though the mother had been awarded primary physical custody upon divorce. This arrangement continued for nearly four years until the mother's new husband was transferred to Texas by his employer. The mother sought permission to relocate, and the father opposed the petition. Examining the factors set forth in In re Marriage of Eckert, 119 Ill. 2d 316, 518 N.E.2d 1041 (1988), the trial court determined that relocation was in the child's best interests, granted the mother's petition, and modified the visitation schedule. The Illinois Appellate Court reversed, however, holding that the indirect benefit to the child of the mother's continuing to live with her new husband did not outweigh the direct benefit of a continued close relationship with the father. The court noted the trial court's finding of the father's "'extraordinary involvement'" in the child's life, and found the 50% reduction in the father's time with the child to be unreasonable. In re Marriage of Johnson, 660 N.E.2d at 1373. The court also noted the presence of extended family in Illinois.

Parents in a shared custody arrangement have also lost custody when they attempted to relocate. In In re Marriage of Hoover, 40 Cal. App. 4th 433, 46 Cal. Rptr. 2d 737 (1995), the mother had physical custody approximately 60% of the time; the father had custody about 40% of the time. When the mother made plans to move with her new husband to Pennsylvania, where they had accepted employment, the father opposed the move and sought primary physical custody. After finding that the move was economically necessary, that both parties were excellent parents, and that the mother's new husband was an excellent stepfather, the trial court modified custody to give the father primary physical custody with visitation rights to the mother of at least 100 days a year. In affirming, the California Court of Appeal distinguished prior cases involving relocation by a sole or primary physical custodian. The court noted that "here we have shared physical custody and established patterns of care and emotional bonds with both parents." 46 Cal. Rptr. 2d at 741.

Similarly, in DeBeaumont v. Goodrich, 162 Vt. 91, 644 A.2d 843 (1994), the parties shared physical custody on an approximate 50/50 basis, even though the mother had been awarded sole custody upon divorce by agreement. The divorce decree also contained an agreed provision that a move by either party of more than 50 miles would constitute a change in circumstances warranting a reexamination of the custody issue. Six months after the divorce, the mother made an unannounced move with the children to Pennsylvania, where her boyfriend had accepted employment. The father sought a custody modification, and the trial court granted him sole custody with visitation rights to the mother. In affirming, the Vermont Supreme Court held first that even absent the provision in the agreement, the mother's relocation to Pensylvania constituted a changed circumstance. The abrupt move had unilaterally terminated the parties' coparenting arrangement. The court then determined that the award of sole custody to the father was in the children's best interests. Although prior cases held that relocation with a sole custodian is generally in a child's best interests, this case involved a shared physical custody arrangement in which the father had almost daily contact with the children. This factor was entitled to great weight in the trial court's best-interests determination. See also Warlick v. Warlick, 661 So. 2d 706 (La. Ct. App. 1995) (in case involving shared physical custody, father obtained primary physical custody after mother moved 250 miles away to Texas).

A New Jersey court took a creative approach to balancing the competing interests at stake in such cases in Rampolla v. Rampolla, 269 N.J. Super. 300, 635 A.2d 539 (App. Div. 1993). The parties shared physical custody, with the father living in the former marital residence in Mercer County, New Jersey, and the mother living close by. The father commuted daily to his job in Manhattan in New York City. The mother married a man who resided in Staten Island in New York City and who worked at Kennedy Airport. Both the mother and her new husband had large extended families in Staten Island. The mother sought permission to move with the children to Staten Island, and the father sought primary physical custody based on the impending move. The trial court denied both petitions. Reversing the denial of the mother's petition, the Appellate Division of the New Jersey Superior Court

held that the trial court should have considered whether the father could also relocate to New York City. Consideration of this possibility would offer a welcome alternative to the "all or nothing outcome" that too often is the result in relocation cases. 635 A.2d at 543. Instead of the move being pitted against the status quo, the possibility of replicating the status quo in a new location becomes a viable alternative with benefits to all parties. The court remanded the case for consideration of this possibility.

IV. IN-STATE MOVES

A number of recent cases involve a move or proposed move to another location in the same state. Regardless of the particular test employed, such moves are usually permitted.

The Indiana Court of Appeals reversed a transfer of primary physical custody to the father based on the mother's in-state move in In re Marriage of Van Schoyck, 661 N.E.2d 1 (Ind. Ct. App. 1996). Four years after the divorce, the mother had moved to another city to live with her boyfriend and his parents. The court of appeals held that the father had failed to demonstrate a change in circumstances warranting a custody modification. The father's desire for the child to remain in the same school district was an insufficient basis for a custody transfer.

Similarly, in Basler v. Basler, 892 S.W.2d 749 (Mo. Ct. App. 1995), the Missouri Court of Appeals reversed a transfer of primary physical custody to the father based on the mother's in- state move. The move occurred six years after the divorce, when the mother remarried and moved to another county. Although the divorce decree provided that a move by either party outside a three-county area could justify a change of custody, the court did not believe that a move from southeast to central Missouri was significant enough to warrant a custody transfer. See also In re Marriage of Wycoff, 266 Ill. App. 3d 408, 639 N.E.2d 897 (1994) (reversing custody transfer based on primary physical custodian's in-state move); Peyton v. Peyton, 614 So. 2d 185 (La. Ct. App. 1993) (same); Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996) (reversing trial court's denial of sole custodian's request to move in- state); Bingham v. Bingham, 811 S.W.2d 678 (Tex. Ct. App. 1991) (affirming grant of primary physical custodian's petition to relocate to another county).

When the divorce decree prohibits a move outside a certain area, however, some courts will enforce the restriction even if the move is to another area in the same state. In Cohn v. Cohn, 658 So. 2d 479 (Ala. Civ. App. 1994), the parties' incorporated separation agreement gave primary physical custody to the mother but restricted her residence to the county. When she planned to move to a distant city in the same state, the father sought a custody modification. The trial court denied modification but enjoined the mother from changing the children's residence outside the county. In affirming, the Alabama Court of Civil Appeals held that enforcement of the parties' agreement was proper. Additionally, the evidence supported the trial court's finding that removal from the county would not be in the children's best interests. They had lived their entire lives in the county and had a large extended family there. See also Wood v. O'Donnell, 894 S.W.2d 555 (Tex. Ct. App. 1995) (reversing grant of permission to primary physical custodian to move to another county when parties' incorporated agreement restricted custodian's residence to same county).

V. RELOCATION PROVISIONS IN ORIGINAL DECREE

Not infrequently, the initial custody order contains an express prohibition against removing the child from the state. Does such a provision offer a noncustodian or a joint custodian any greater protection against the other parent's moving away with the child?

No clear-cut answer emerges from the reported decisions. In some cases involving express prohibitions, the parent seeking to relocate must meet a higher standard to obtain court approval. As noted above, the Florida Supreme Court adopted a general policy favoring relocation in Mize v. Mize,

621 So. 2d 417 (Fla. 1993). The court also held, however, that when the initial order contains an express prohibition against relocation of the child, the parent seeking to relocate must meet the more stringent changed-circumstances test. This requirement was applied in Card v. Card, 659 So. 2d 1228 (Fla. Dist. Ct. App. 1995), a case in which the divorce decree prohibited both the mother, who had primary physical custody, and the father from removing the child from Florida. When the mother's new husband was transferred to Colorado by his employer, the mother sought permission to relocate with the child. The Florida District Court of Appeal held first that the mother had demonstrated changed circumstances by showing that her new husband would be terminated if he refused the transfer and that he had been unable to find comparable employment in Florida. The court then noted that the family's standard of living would improve if the move were permitted, that the mother had extended family in Colorado, and that the substitute visitation proposed by the mother was adequate to maintain a meaningful father-child relationship. Noting that the father's active involvement in the child's life made the decision difficult, the court nevertheless determined that relocation was in the child's best interests.

Other courts have denied permission to relocate and/or transferred custody to the other parent when a custodian relocated in contravention of a residential restriction. In Cohn v. Cohn, 658 So. 2d 479 (Ala. Civ. App. 1994), the parties agreed upon divorce that the wife would have primary physical custody and the children would not be removed from the county. When the mother planned to move to a distant city in the same state for employment reasons, the father sought a custody transfer. The trial court denied the father's motion but enjoined the mother from relocating outside the county. In affirming, the Alabama Court of Civil Appeals held that the trial court had properly enforced the parties' agreement. In addition, the children's best interests required that they remain in the county. In a Louisiana case, Warlick v. Warlick, 661 So. 2d 706 (La. Ct. App. 1995), the parties agreed on divorce to share physical custody and not to move the child outside a 35- mile radius. When the mother accepted employment in Texas some 250 miles away, she petitioned for a modification of visitation; the father sought a custody modification. The trial court modified the physical custody arrangement to grant the father primary physical custody. The Louisiana Court of Appeals affirmed, holding that the mother's impending move was a changed circumstance because it rendered the original physical custody arrangement unworkable. Further, the relevant factors, including the parties' agreed residential restriction, supported the trial court's finding that the custody modification was in the child's best interests. See also Wood v. O'Donnell, 894 S.W.2d 555 (Tex. Ct. App. 1995) (permission to relocate to another county was denied, in part because divorce decree restricted child's residence to county).

In other cases, courts freely ignore antiremoval language in prior agreements or orders. In In re Marriage of Witzenburg, 489 N.W.2d 34 (Iowa Ct. App. 1992), the divorce decree incorporated the parties' agreement giving the mother primary physical custody and providing that if either party moved more than 60 miles from his or her present location, the move would constitute a substantial change of circumstances for custody modification purposes. Eleven days after the divorce decree was entered, the mother moved with the child to Florida to be with her boyfriend. The father sought a transfer of primary physical custody, but the trial court denied his petition, ruling that the mother's move was not a sufficient changed circumstance. The court did not believe itself bound by the provision of the incorporated agreement. The Iowa Court of Appeals affirmed. See also In re Marriage of Hunt, 476 N.W.2d 99 (Iowa Ct. App. 1991) (father's petition for transfer of primary physical custody based on mother's move 130 miles away was denied; court was not bound by antiremoval provision in incorporated agreement); Hill v. Robbins, 859 S.W.2d 355 (Tenn. Ct. App. 1993) (primary physical custodian's out-of-state move was permitted even though contrary to parties' incorporated agreement).

Occasionally, an incorporated agreement may anticipate relocation by one or both parties. In such cases, even the courts of New York have permitted the contemplated relocation. In Smith v. Finger, 187 A.D.2d 711, 590 N.Y.S.2d 301 (1992), appeal denied, 82 N.Y.2d 704, 601 N.Y.S.2d 578 (1993),

the parties' incorporated agreement provided that either parent had the "absolute right" to relocate out of the state to another area, including but not limited to Boston, Massachusetts, or Washington, D.C., so long as the parent's new residence was within one-hour direct flight time to or from New York. A year after the divorce, the mother married a dentist with an established practice in Woodbridge, Virginia, a suburb of Washington, D.C. She sought permission to relocate with the child to Virginia; the father opposed the petition and sought physical custody. The trial court granted the mother's petition. In affirming, the New York Supreme Court, Appellate Division, first noted that the parties' incorporated agreement expressly authorized a move to the Washington, D.C. area. In addition, the mother's relocation would not deprive the father of regular and meaningful contact with the child because both parents had the financial resources to pay the child's travel expenses. See also Wright v. Wright, ___ A.D.2d ___, 627 N.Y.S.2d 819 (1995) (primary physical custodian's move to Mississippi was permitted; parties' incorporated agreement contemplated out-of- state moves and proposed relocation was otherwise in child's best interests).

VI. INITIAL CUSTODY AWARDS

Although the vast majority of relocation cases involve a move or proposed move occurring after a permanent custody order has been entered, relocation issues sometimes arise in the initial custody determination--usually in the context of a divorce. Many states treat a proposed move by a parent seeking custody as another factor to be weighed in the overall child's-best- interests determination.

For example, in In re Marriage of Burgess, 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444 (1996), a divorcing mother who sought physical custody of the children expressed an intention to relocate to another town about 40 miles away. She had accepted a job transfer that she believed would be career-advancing. In addition, the children would have easier access to medical care, daycare facilities, and extracurricular activities in the new town. The trial court awarded the mother sole physical custody and permitted her to relocate. The court of appeal reversed, however, because the mother had not demonstrated that the move was "necessary." As discussed more fully above, the California Supreme Court reversed the court of appeal, explaining that California law contains no requirement that a proposed relocation be "necessary." In an initial custody determination, the law requires consideration of all the circumstances affecting the child's best interests, including a proposed relocation. But the law places no additional burden on either parent to justify a choice of residence as a condition of custody. In this case, no abuse of discretion was apparent in the trial court's determination that the children's best interests were served by granting the mother physical custody and permission to relocate.

Similarly, in McQuade v. McQuade, 901 P.2d 421 (Alaska 1995), a divorce proceeding, the trial court considered the mother's proposed relocation to Texas as a factor in its best- interests determination on custody. Both parties sought sole custody of the child, and the mother expressed a desire to return to her home state of Texas, where her family was located. The trial court awared the mother primary physical custody and allowed her to return to Texas. In affirming, the Alaska Supreme Court held that the trial court had weighed the child's-best- interests factors with no abuse of discretion. The court rejected the father's argument that a stricter standard should have been applied because of the impending relocation. See also Everett v. Everett, 660 So. 2d 599 (Ala. Civ. App. 1995) (upon divorce, child's best interests required that mother receive primary physical custody but that her residence be restricted to county); Boudreaux v. Boudreaux, 657 So. 2d 459 (La. Ct. App. 1995) (upon divorce, children's best interests required mother to receive primary physical custody even though she would relocate to California); In re Marriage of Sheley, ___ Wash. App. 2d ___, 895 P.2d 850 (1995) (upon divorce, children's best interests required that mother receive primary physical custody but that her residence be restricted to Seattle area).

Other states apply the same test that would govern a post- divorce relocation petition in the particular jurisdiction. For example, in Cerminara v. Cerminara, 286 N.J. Super. 448, 669 A.2d 837 (App. Div.

1996), a divorce proceeding, the mother sought custody and permission to relocate to Virginia, where her father had offered her a job in the family business. The trial court awarded the mother primary physical custody and allowed the move. In affirming, the Appellate Division of the New Jersey Superior Court held that the standard of Holder v. Polanski, 11 N.J. 344, 544 A.2d 852 (1988), a post-divorce relocation case, applied to this case. Under Holder, the parent wishing to relocate must make a threshold showing of a good-faith reason for the move. Then the court must consider additional factors, including the likelihood of an improved quality of life for the relocating parent and the child, as well as the adequacy of a modified visitation schedule. The court in Cerminara then held that the trial court had properly applied the Holder standard to the facts of the case. The mother's request was made in good faith, her reasons, which included improved job opportunities and a return to family, were valid, and adequate alternative visitation could be arranged.

Similarly, in Fuchs v. Fuchs, 887 S.W.2d 414 (Mo. Ct. App. 1994), a divorcing mother sought physical custody and permission to relocate to her home town in Mississippi, which was 385 miles away from the father's residence in Missouri. She had been convicted of embezzlement a few years before the divorce and had found it difficult to secure employment in southeastern Missouri following her release from prison. The trial court granted her primary physical custody but restricted her residence to southeastern Missouri. In reversing, the Missouri Court of Appeals treated the case as though it were a post-divorce relocation petition. The court noted four factors that have been recognized as particularly relevant in deciding relocation cases: (1) the prospective advantages of the move in improving the general quality of life for the custodial parent and the child; (2) the integrity of the custodial parent's motives for relocating; (3) the integrity of the noncustodial parent's motives for opposing relocation; and (4) the realistic opportunity for visitation that would provide an adequate basis for preserving the noncustodial parent's relationship with the child. Applying these factors, the court held that the trial court's restriction of the mother's residence was an abuse of discretion. The evidence showed that living in a different geographical area would minimize the stigma that had rendered the mother unemployable in southeastern Missouri, and the aid and support she would receive from her family in Mississipi would lead to a better quality of life for both her and the child. In addition, there was no evidence that the 385-mile distance would prevent the maintenance of a meaningful relationship between the father and the child. See also Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. Dist. Ct. App. 1994) (in divorce case in which mother sought custody and relocation to Massachsetts, appellate court remanded for consideration of Mize factors); Effinger v. Effinger, 913 S.W.2d 909 (Mo. Ct. App. 1996) (upon divorce, weighing of relocation factors required that mother, who received primary physical custody, be required to remain in Missouri).

VII. REASONS FOR RELOCATION

In addition to a state's general approach to the relocation issue, and to the presence or absence of antiremoval language in the initial custody decree, the outcome of a given relocation case also depends upon the reasons for relocation offered by the moving parent. A variety of reasons are reflected in the recent cases.

Legitimate Motive

A threshold issue addressed by all courts, either explicitly or implicitly, is the parent's underlying motive for relocation. If the court believes that the real motive is to interfere with or frustrate the other parent's custodial or visitation rights, permission to relocate will be denied no matter how legitimate the proffered reason may seem. See, e.g., Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996) (evidence of improper motive on part of mother justified denial of her relocation request); Lindell v. Coen, 896 S.W.2d 525 (Mo. Ct. App. 1995) (custody transfer to father was warranted by mother's relocation for purpose of frustrating father's visitation rights); In re Marriage of Lowe, 860 S.W.2d 813 (Mo. Ct. App. 1993) (permission to relocate was denied because motive was to frustrate other parent's visitation rights); In re Marriage of McDole, 122 Wash. 2d 604, 859 P.2d 1239 (1993)

(relocation was denied because motive, at least in part, was to interfere with other parent's visitation rights). When the relocating parent's motives appear legitimate, however, the court will proceed to consider other relevant factors. (In Tennessee, of course, there are no other relevant factors; permission to relocate must be granted once the court determines that the relocating parent's motives are proper. See Aaby v. Strange, 1996 WL 189801 (Tenn. Apr. 22, 1996) (discussed at length above).)

Economic Welfare of the Relocating Parent

The reason most commonly offered in support of a relocation request is the improvement of the parent's economic circumstances. This reason is often regarded as the most compelling one.

Employment Promotion or Transfer. A promotion or transfer by the custodial parent's present employer is usually considered a sufficient reason for relocation, especially if the alternative is loss of the job. In Gandee v. Gandee, ___ Nev. ___, 895 P.2d 1285 (1995), the father, who had physical custody, sought permission to relocate to Oregon to accept a job promotion. The trial court denied his request because it would eliminate the mother's opportunity for midweek and alternating weekend visitation. In reversing, the Nevada Supreme Court held that the father had made a threshold showing of a "sensible, good faith reason" for the move, 895 P. 2d at 1287, and that all the other factors supported the move. The father's and the children's standard of living and general quality of life would improve, and the mother would receive large blocks of visitation time that would adequately safeguard her relationship with the children.

Similarly, in Ormandy v. Odom, 217 Ga. App. 780, 459 S.E.2d 439 (1995), the father received sole custody of the parties' children upon divorce. Five years later, upon learning that the father's employer was transferring him to Illinois, the mother sought a custody modification. Concluding that the relocation would cause the children emotional trauma, the trial court granted the mother's petition. In reversing, the Georgia Court of Appeals held that the father's relocation did not constitute a changed circumstance, absent evidence of harm to the children beyond the temporary disruption that attends any move to a new location. The court noted that the father's reason for relocating was valid and that adequate alternative visitation could be arranged. See also In re Marriage of Burgess, 13 Cal. 4th 25, 51 Cal. Rptr. 444 (1996) (divorcing mother awarded sole physical custody and permitted to relocate to take better job with same employer).

A promotion or transfer is not always a sufficient reason for relocation, however, especially when other factors are present. In Van Dyke v. Van Dyke, 538 N.W.2d 197 (N.D. 1995), the wife received sole custody upon divorce. Four years later, she moved with the children to Iowa to accept a job promotion. The father sought a custody modification, and the trial court granted him primary physical custody. The North Dakota Supreme Court affirmed, holding that the mother's relocation without permission constituted a changed circumstance. Further, evidence of the children's close relationship with the father and the presence of extended family in North Dakota supported the trial court's finding that the children's best interests would be served by a custody transfer.

Specific Employment Offer. A specific offer of employment in another state that would improve the custodian's financial circumstances and/or advance his or her career is generally considered a sufficient reason for relocation. In In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa Ct. App. 1994), the father received primary physical custody upon divorce. Seven years later, he notified the mother of his intention to move to Wyoming to take a job with higher pay. The mother sought a custody transfer, but the trial court denied her petition. In affirming, the Iowa Court of Appeals held that the mother had failed to show a change in circumstances adversely affecting the children. The father's reason for relocation was valid, and the children's best interests were served by remaining in his custody. See also Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996) (mother with primary physical custody was permitted to move to Arizona to pursue career opportunity); Cook v. Cook, ___

Nev. ___, 898 P.2d 702 (1995) (mother with sole physical custody was permitted to move to Louisiana to take better job).

A custodian's chances of relocation to accept a better job are enhanced if the move will promote some additional benefit to the child, such as contact with relatives. In Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996), the mother received primary physical custody upon divorce. Six months later, she sought permission to move to Massachusetts to accept a job offer and to live near her parents and other extended family. The trial court allowed the move, finding it in the child's best interests, and the New York Court of Appeals affirmed. Similarly, in Cerminara v. Cerminara, 286 N.J. Super. 448, 669 A.2d 837 (App. Div. 1996), a divorcing mother sought custody and permission to move to Virginia, where her father had offered her a job in the family business. The trial court awarded the mother primary physical custody and permitted the move. The Appellate Division of the New Jersey Superior Court affirmed, noting that the mother had a valid reason for the move and that adequate visitation with the father had been arranged.

Permission to relocate to take a better job, however, is not always granted. In In re Marriage of Bradley, 899 P.2d 471 (Kan. 1995), the mother received primary physical custody upon divorce. Five years later, she gave notice of her intention to move to Washington, D.C. to accept a new job and to be with her fiance, whom she later married. In affirming a custody transfer to the father, the Kansas Supreme Court held that the impending move was a sufficient changed circumstance because it rendered the existing visitation schedule unworkable. Further, although the case was close, the trial court had not abused its discretion in concluding that the children's best interests would be served by remaining in Kansas, where they had lived all their lives and where extended family was present. See also McElroy v. McElroy, 910 S.W.2d 798 (Mo. Ct. App. 1995) (denying primary physical custodian's request to relocate to Iowa to accept better job and transferring custody to other parent).

In a case involving a shared physical custody arrangement, permission to relocate for employment reasons, or for any reason, is more difficult to obtain. For example, in Warlick v. Warlick, 661 So. 2d 706 (La. Ct. App. 1995), the parties agreed when they divorced to share physical custody, with each party having the child about 50% of the time. A year later, the mother accepted a higher-paying job 250 miles away in Texas and petitioned for modification of visitation. The father opposed the move and obtained primary physical custody. In affirming the custody modification, the Louisiana Court of Appeal held that the mother's relocaion ws a changed circumstance warranting a custody transfer because it had rendered the shared custody arrangement unworkable.

Better Employment Opportunities. The courts are generally less inclined to permit moves based upon enhanced employment opportunities in the new location rather than upon an actual employment offer. In In re Marriage of Creedon, 245 Il. App. 3d 531, 615 N.E.2d 19 (1993), a mother with primary physical custody sought to relocate to Texas, a state with a better pay scale for teachers with her level of education. Although she did not have a specific offer of employment, she presented a letter from a school district in Texas stating that she had an excellent chance of employment there. The trial court denied the mother's petition, explaning that the mother's desire for economic betterment, although laudable, was outweighed by the father's interest in maintaining a close relationship with the children. The Illinois Appellate Court affirmed, believing that lengthy summer visitation with the father, coupled with infrequent visitation during the school year, would be an unsatisfactory substitute for the frequent and regular contact he enjoyed with the children under the existing custody arrangement.

Other courts have permitted relocation when the custodian's enhanced employment opportunities in another state were coupled with another benefit to the children, such as the presence of relatives there. In Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991), the New Mexico Supreme Court affirmed the trial court's finding that the mother's move to New Hampshire, where her parents lived and where she believed she could find steadier employment, was in the child's best interests. Similarly, in Smith v. Smith, 615 So. 2d 926 (La. Ct. App.), review denied, 617 So. 2d 916 (La. 1993),

the Louisiana Court of Appeal reversed a transfer of physical custody to the father based on the mother's move to Indiana. The court noted that the mother was seeking improved employment opportunities for both herself and her new husband, who had enrolled in school in Indiana. In addition, the mother's parents were located in that state.

Second Spouse. Custodians frequently seek permission to relocate because a new spouse has obtained better employment in another state. This reason is generally held sufficient for a move. In Gandee v. Gandee, ___ Nev. ___, 895 P.2d 1285 (1995), a mother with primary physical custody sought to relocate after her new husband was transferred to Colorado by his employer. Acknowledging that the move would result in an improved lifestyle for the children, the trial court nevertheless denied permission to relocate because it would eliminate the husband's midweek and alternating weekend visitation. The Nevada Supreme Court reversed, holding that reasonable alternative visitation was possible and that the move was otherwise in the children's best interests. The court noted that the new husband's greater income would permit the mother to devote herself to child care full-time. Similarly, in Card v. Card, 659 So. 2d 1228 (Fla. Dist. Ct. App. 1995), a mother with primary physical custody sought permission to relocate when her new husband was transferred to Colorado by his employer. The trial court denied her petition, but the Forida District Court of Appeal reversed. The child's standard of living would improve greatly if the move were allowed, the new husband had been unable to find comparable employment in Florida, and the substitute visitation schedule proposed by the mother was adequate to maintain the father-child relationship. See also Harder v. Harder, 246 Neb. 945, 524 N.W.2d 325 (1994) (sole custodian's relocation to Arizona, where new husband could expand his business, was permitted); Church v. Church- Corbett, 214 A.D.2d 877, 625 N.Y.S.2d 367 (1995) (primary physical custodian's three-year relocation to Italy, where new husband had been stationed, was permitted); Duckett and Duckett, 137 Or. App. 446, 905 P.2d 1170 (1995) (primary physical custodian's relocation to Missouri, where new husband had accepted employment, was permitted).

Courts are even more inclined to grant relocation for this reason when the new spouse has been unemployed in the forum state. In In re Marriage of Roe, 18 Cal. App. 4th 1483, 23 Cal. Rptr. 295 (1993), the mother received primary physical custody upon divorce. She remarried, but her new husband was laid off from his employment in the aerospace industry in California. When he eventually obtained new employment in Alabama, the mother obtained permission to relocate. In affirming, the California Court of Appeal held that the interest in custodial continuity outweighed the interest in geographic stability in this case. Although the court did not expressly so state, it appears to have been influenced by the fact that the new husband was totally unemployed in California with no realistic job prospects. See also Pollock v. Pollock, 181 Ariz. 275, 889 P.2d 633 (Ct. App. 1995) (mother with sole custody sought relocation to New Hampshire, where unemployed new husband had family and better employment prospects; case remanded for determination of child's best interests).

Of course, relocation for this reason is not always granted, especially when other factors are present. In McDonough v. Murphy, 539 N.W.2d 313 (N.D. 1995), a mother with sole custody sought to relocate to Arizona, where her new husband had been transferred by his employer. The father opposed the move and sought a custody modification. In affirming a denial of the mother's petition and a transfer of custody to the father, the North Dakota Supreme Court held that the impending move, together with the boy's desire to live with his father and his history of depression, constituted changed circumstances warranting the custody transfer.
Relocation for this reason was denied in a shared physical custody case, In re Marriage of Johnson, ___ Ill. App. 3d ___, 660 N.E.2d 1370 (1996). Four years after the divorce, the mother sought permission to move to Texas, where her new husband had been transferred by his employer. The trial court allowed the move, but the Illinois Appellate Court reversed. Noting that the father had physical custody of the child about 50% of the time under the existing custody arrangement, the court believed that the child's best interests required a denial of the relocation petition. The proposed move would too drastically reduce the father's involvement with the child.

Educational Opportunities. Sometimes a custodian will seek permission to relocate in order to advance his or her education and/or to obtain professional training. Courts generally consider this reason a valid one, especially if the education or training will enhance the custodian's earning capacity and a comparable program is unavailable locally. In Boudreaux v. Boudreaux, 657 So. 2d 459 (La. Ct. App. 1995), a divorcing mother who sought custody revealed her intention to relocate to California to complete her college education and to obtain a teaching certificate. She planned to live with her parents while attending school to save money. The trial court awarded primary physical custody to the father, but the Louisiana Court of Appeal reversed. The court believed that the child's best interests clearly required an award of primary physical custody to the mother. In addition to being a superior candidate for custody generally, the mother had excellent reasons for desiring to relocate. See also In re Marriage of Francis, 1996 WL 288755 (Colo. June 3, 1996) (mother with sole custody sought relocation to New York to attend two-year physician's assistant's program; transfer of custody to father was reversed and case was remanded for application of correct standard); Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. Dist. Ct. App. 1994) (divorcing mother sought custody and relocation to Massachusetts to live with family and attend school; trial court's residential restriction was reversed and case was remanded for reconsideration under new standard).

In at least one case, permission to relocate for this reason was denied. In In re Marriage of Elser, ___ Mont. ___, 895 P.2d 619 (1995), a mother with primary physical custody sought to relocate to Kansas to attend a radiology technician's program. She had applied to a similar program offered in the state but had not been accepted. The father opposed the move and sought a custody transfer if the mother relocated. The trial court denied the mother's petition and granted the father's motion. In affirming, the Montana Supreme Court noted that although the mother's reason for relocation was legitimate, adequate alternate visitation could not be worked out in this case because of the father's work schedule. The father performed seasonal highway construction work from April through November, typically working 12-18 hours a day five or six days a week. Thus, scheduling extended blocks of visitation during the summer, when the children were out of school, would be impossible.

Personal Welfare of the Relocating Parent

Although the child's welfare is the main focus in any relocation case, the personal welfare of the petitioning parent is highly relevant because of its obvious relationship to the child's well-being. Frequently, custodial parents desire to relocate for reasons of personal happiness and fulfillment. Although courts generally do not view personal factors to be as compelling as economic reasons, personal factors are nonetheless recognized as relevant.
Remarriage. In an age in which divorce and second marriages have become commonplace, a custodian may remarry a person who lives in another state and then seek to move there with the children. In many cases, permission is given on the rationale that the child will benefit indirectly from the custodian's new-found happiness. Often an improved standard of living will inure to the child as well. In In re Marriage of Eaton, 269 Ill. App. 507, 646 N.E.2d 635 (1995), a mother with sole custody sought to relocate to Florida to marry a lawyer with an established practice there. Acknowledging that the move would result in a greatly improved standard of living for the mother and the children, the trial court nevertheless denied relocation, citing the father's visitation rights and the presence of extended family in Illinois. In reversing, the Illinois Appellate Court held that the trial court had given insufficient consideration to the "very real and meaningful connection" between the benefits of the move for the mother and the quality of life for the children. 646 N.E.2d at 641. The court declared that children derive direct benefits from the financial and emotional well-being of a custodial parent, and it is simply inaccurate to characterize such benefits as "indirect." Further, the court did not believe that statutory or case law provided a noncustodial parent with a "veto power" over a relocation request, even if the parent enjoyed a good relationship with the children. The trial court's ruling in this case gave the noncustodial parent such a power. The case was remanded for the limited purpose of revising the visitation schedule.

Similarly, in Trent v. Trent, 111 Nev. 309, 890 P.2d 1309 (1995), a mother with primary physical custody sought to relocate to Ohio to marry a man who worked in his family's business. The mother was employed as a manicurist, earning $1,000 a month, and she lived in a converted garage. Often she was forced to borrow money from her parents to meet expenses. If she were to move to Ohio, her new husband's income would permit her to stay at home with the child. The trial court denied her petition, believing that elimination of the father's weekend visitation would be detrimental to the father-child relationship. The Nevada Supreme Court reversed, holding that reasonable alternative visitation was possible and the move was otherwise in the child's best interests. The court quoted its prior holding in Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268, 1271-72 (1991), that "'[the trial court] should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable lifestyle for the mother . . . and children be forfeited solely to maintain weekly visitation by the father . . . where reasonable alternative visitation is available[.]'" Trent v. Trent, 890 P.2d at 1313. See also Wright v. Wright, ___ A.D.2d ___, 627 N.Y.S.2d 819 (1995) (mother with primary physical custody was allowed to move to Mississippi to marry man with established business there; child's-best-interests test governed case because parties' incorporated separation agreement expressly permitted relocation).

In some joint custody cases, however, courts have been less inclined to allow relocation for this reason. In Rowland v. Kingman, 629 A.2d 613 (Me. 1993), cert. denied, 114 S. Ct. 884 (1994), the mother, who had primary physical custody, was a physician with an established practice in Yarmouth, Maine. She lived in the former marital residence, while the father lived in a nearby town. The mother eventually married a man who lived in Oregon and sought permission to move with the children there. The trial court ordered that if the mother moved to Oregon, primary physical custody would shift to the father, on the condition that he reside in Yarmouth. On appeal, the mother argued that the trial court should have given more deference to her decision concerning the child's residence because she was the primary physical custodian. The Maine Supreme Judicial Court disagreed, finding nothing in the state's statutory or case law on joint custody that required any degree of deference to a primary physical custodian's decisions. In this case, the court believed that the children's interest in close contact with the father and in geographic stability outweighed the mother's interest in residing with her new husband.

At least one court in a remarriage case has considered whether the other parent could also relocate to the new state. In Rampolla v. Rampolla, 269 N.J. Super. 300, 635 A.2d 539 (App. Div. 1993), the parties shared physical custody of their children, with the father living in the former marital residence and the mother living close by. The father commuted on a daily basis to his job in New York City. The mother remarried a man who lived and worked in New York City, but her petition to move with the children there was denied. The Appellate Division of the New Jersey Superior Court reversed and remanded, directing the trial court to consider the feasibility of the father's relocation to New York City as well. The court believed that this possibility offered a welcome alternative to the "all or nothing outcome" of most relocation cases.

Return to Family. Another reason for relocation may be a custodian's desire to live near family members, who can offer assistance and support after the difficult experience of divorce. Courts sometimes permit relocation for this reason. In McQuade v. McQuade, 901 P.2d 421 (Alaska 1995), a divorcing mother planned to return to her native Texas to be near her family, who could offer financial assistance and emotional support. The trial court granted her primary physical custody and permitted the move. In affirming, the Alaska Supreme Court found no abuse of discretion in the trial court's finding that a custody award to the mother was in the child's best interests even though she planned to relocate. The mother's reasons for moving were legitimate and not intended to frustrate the father's rights.

Courts are more likely to permit relocation for this reason if another advantage, such as an employment or educational opportunity, is present. In Fuchs v. Fuchs, 887 S.W.2d 414 (Mo. Ct. App. 1994), a divorcing mother sought to return to her home town in Mississippi to be near her family and to escape the stigma of a felony conviction, which had hindered her efforts to secure employment in Missouri. The trial court awarded her primary physical custody but restricted her residence to southeastern Missouri. The Missouri Court of Appeals reversed the residential restriction, believing that the mother's relocation to Mississipi would lead to a higher quality of life for both herself and the child. The mother would be near family, her employment oportunities would be enhanced, and the stigma of her criminal conviction would be lessened for both herself and the child.

In a somewhat unusual case, Tamari v. Turko-Tamari, 599 So. 2d 680 (Fla. Dist. Ct. App. 1992), the Florida District Court of Appeal permitted a mother with primary physical custody to move to Israel, where her entire family had emigrated. The court noted that although the father planned to remain in the United States, many of his family members also were relocating to Israel. Further, the father's custodial contact would not be significantly affected by the move, as the father had been living in New York while the mother and child were in Florida. Thus, instead of flying from Florida for visitation with the father in New York, the child would simply fly from Israel.

In other cases, courts have denied permission to relocate to another state to be near family. In Effinger v. Effinger, 913 S.W.2d 909 (Mo. Ct. App. 1996), a divorcing mother sought to return to her home town in Illinois, where her family still lived. She also had a job offer there. The trial court awarded her primary physical custody but restricted her residence to Missouri. In affirming, the Missouri Court of Appeals held that the evidence failed to show a benefit or advantage to the children from the proposed move. Although the mother had a job offer in Illinois, there was no evidence that she could not obtain comparable employment in Missouri. Further, the house she had secured in Illinois was smaller than her house in Missouri, and no evidence had been presented that the school system in Illinois was superior.

In some cases, the child's special needs outweighed the advantages of being near family. In In re Marriage of Sheley, ___ Wash. App. 2d ___, 895 P.2d 850 (1995), review denied, 128 Wash. 2d 1007, 910 P.2d 481 (1996), a divorcing mother sought to return to her native Texas, where her family still lived. She also had a job offer there. The trial court awarded her primary physical custody conditioned on her remaining in the Seattle area. The Washington Court of Appeals affirmed, noting evidence that the children had experienced difficulty adjusting to the family's move from Alaska to Seattle a few years earlier. The trial court's conclusion that another move would traumatize the children was amply supported by the evidence. Similarly, in Everett v. Everett, 660 So. 2d 599 (Ala. Civ. App. 1995), a divorcing mother planned to return to her family in North Carolina. The trial court granted her primary physical custody but restricted her residence to the county. In affirming, the Alabama Court of Civil Appeals noted that the child was being treated for Attention Deficit Hyperactivity Disorder (ADHD). The trial court had not abused its discretion in concluding that the child's need for stability and continuity in his environment outweighed any advantage to be gained by the move.

Fresh Start. In some cases, a custodian desires to relocate to another state simply to make a fresh start in life after the unpleasant experience of a failed marriage. Often, the custodian desires to relocate with a companion or new spouse. The results in such cases have been mixed.

Relocation for this reason was permitted in Swonder v. Swonder, 642 N.E.2d 1376 (Ind. Ct. App. 1994). Two years after the divorce, a mother with sole custody filed a notice of intent to move to Colorado, where the family had frequently spent vacations. The father sought a custody modification. As her reason for the move, the mother stated that she wanted to start a new life for herself and that she believed the climate in Colorado was healthier for the child. The trial court held that custody would be transferred to the father if the mother moved out of the state. The Indiana Court of Appeals

reversed, however, noting that neither statutory nor case law placed any burden of proof on a relocating parent. Indeed, precedent established that a denial or transfer of custody based on the custodial parent's decision to move is improper when the move is made in good faith and out of a desire to improve the material or psychological life of the custodian, so long as the child's interests are not prejudiced thereby. In this case, the move was to improve the mother's psychological life, and the father failed to show resulting prejudice to the children. Thus, a modification of custody based on the move was improper. See also Wages v. Wages, 660 So. 2d 797 (Fla. Dist. Ct. App. 1995) (reversing custody transfer to father when mother with primary physical custody moved to Kentucky with new husband to start new life).

In contrast, a mother who moved out-of-state to start life anew lost physical custody of the child in Connelly v. Connelly, 644 So. 2d 789 (La. Ct. App. 1994). Ten years after the divorce, the mother moved to Virginia because she needed a change. The father obtained a transfer of physical custody, and the Louisiana Court of Appeal affirmed. The move constituted a changed circumstance, and the child's best interests required his return to Louisiana. The court noted the undesirable "uprooting" effect of leaving extended family, school, friends, and activities, and pointed out that the mother lacked a good reason for the move. See also DeBeaumont v. Goodrich, 162 Vt. 91, 644 A.2d 843 (1994) (mother who moved to Pennsylvania with boyfriend lost physical custody); Wittig v. Wittig, 215 A.D.2d 927, 626 N.Y.S.2d 863 (1995) (permission to relocate was denied to mother with primary physical custody who sought to move to California with boyfriend).

VIII. CONCLUSION

This survey of recent cases involving the relocation of a parent having sole custody or some form of joint physical custody of a child has revealed that there is no uniform approach to the issue. When deciding relocation petitions, a few states permit relocation upon a simple showing of proper motive, other states presume that relocation should be permitted and require the other parent to rebut the presumption with reference to specific factors, and still other states require the relocating parent to show that the move is in the child's best interests, often (but not always) with reference to specific factors. Until recently, the courts of New York required the relocating parent to prove that the move was required by "exceptional or compelling circumstances."

When deciding custody modification motions based upon relocation of the custodial parent, most states require the movant to show the existence of changed circumstances warranting a custody transfer. A few states require the movant to make an additional showing that the child's present environment endangers the child's health or well-being.

Despite the lack of a uniform approach, the general trend appears to be in favor of permitting properly-motivated relocations and denying custody transfers. The trend is demonstrated by the New York Court of Appeals' recent abandonment of the exceptional circumstances test in favor of a general child's-best-interest standard, Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996), the California Supreme Court's reversal of a requirement that the relocating parent prove the necessity of the move, In re Marriage of Burgess, 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444 (1996), the Florida Supreme Court's creation of a presumption favoring relocation, Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996), the Tennessee Supreme Court's strenthening of the presumption favoring relocation, Aaby v. Strange, 1996 WL 189801 (Tenn. Apr. 22, 1996), and the Nevada Supreme Court's declaration that the state's removal statute should not be used "as a means to chain custodial parents, most often women, to the state[.]" Trent v. Trent, 111 Nev. 309, 890 P.2d 1309 (1995). This trend recognizes that "'[t]he family unity which is lost as a consequence of the divorce is lost irrevocably, and there is no point in judicial insistence on maintaining a wholly unrealistic simulation of unity.'" In re Marriage of Sheley, ___ Wash. App. 2d ___, 895 P.2d 850, 855 (1995) (quoting Helentjaris v. Sudano, 194 N.J. Super. 220, 476 A.2d 828, 832 (1984)), reveiw denied, 128 Wash. 2d 1007, 910 P.2d 481 (1996). Each parent must be permitted to move on in life, and the child will benefit

directly from an improvement in the custodial parent's life circumstances. In re Marriage of Eaton, 269 Ill. App. 3d 507, 646 N.E.2d 635 (1995). Even though weekly contact with the other parent might be rendered impossible by a move, the child's relationship with that parent can be adequately and meaningfully preserved through visitation in large blocks of time. Trent v. Trent, supra.

Courts are most inclined to permit relocation when the proposed move will result in the economic betterment of the relocating parent, and thus of the child. Personal reasons for relocation, such as remarriage or a desire to be near family, also may justify relocation, especially if they are combined with an economic advantage. A simple desire to make a fresh start in a new location is ocassionally, but not always, regarded as a valid reason.

In cases involving shared or alternating physical custody, however, permission to relocate is much more difficult to obtain, for the obvious reason that relocation would require termination of the existing custody arrangement. In such cases, courts have usually denied permission to relocate or have modified custody in favor of the parent remaining in the state.

Few types of domestic relations cases present such difficult issues. In the vast majority of relocation cases, the motives of the parent seeking to relocate are sincere and the proffered reasons are legitimate. The desire of the other parent for continued regular contact with the child is equally valid. In the face of such strongly competing parental interests, a determination of where the child's best interests lie is often a formidable task. Whatever the court decides, the child will inevitably suffer some loss. The goal of the courts and parties alike should be to make that loss as minimal as possible.

7. A Custodial Parent’s Post Divorce Relocation Rights

Introduction:

Increasing divorce rates among two-income families coupled with demands for relocation by corporate employers, have created a niche of post-decree litigation in matrimonial cases in practically every state jurisdiction across the United States.

A typical relocation case involves a working mother, the primary caretaker, being awarded child custody in a circuit court of State X. The long term employee father is reserved Schedule "A" or, other reasonable visitation privileges. Subsequent thereto, mother is transferred by her employer to State Y; or alternatively, the mother chooses for economic, social or vindictive reasons to move to State Y. Whatever the cause of her relocation, the mother’s moving with the child severely limits, if not destroys, regular weekday and alternative weekend visitation, leaving only irregular major holidays and infrequent summer vacations. Moreover, non-consensual incidents of parental interactions which go along with structured visitation where parents reside in the same geographical area, such school events, PTO meetings and sports, have been terminated.

The legal community have not established any general rules or consensus in resolving the “move-away” problem, thereby removing any predictability in these cases.

Historical Perspectives of The Right to Travel:

A. Federal Organic Law

The Articles of Confederation, the form of government adopted by the United States after the Revolution, but before the Constitution of 1787, provided that the citizens of each State of the then United States would have the "...free ingress and regress to and from any other State,". (2) So basic and widely accepted was this right that no explicit provision regarding the same is embodied within the United States Constitution of 1787, apparently on the premise that the right to travel was

necessarily conjunctional with the general liberty concepts of a more centralized national government. (3)

In 1849, Chief Justice Roger Taney concisely ascribed this right to fundamental notions of federalism, when he stated:

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our States. (4)

The textual source of the right to travel has been alternately described as an incident of national citizenship and as an attribute of personal liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. (5)

Freedom to travel throughout the United States and within the individual States has been recognized as a fundamental right and privilege under the Constitution.(6) More precisely, our national judiciary from the beginnings of the Republic has accepted and embraced the idea that "...the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement."(7) In short, irrespective of its statutory or organic derivation, a state may not tax or penalize a federal citizen for exercising his or her right to move from one state to another. (8)

Under the guise of a "compelling state interest, states may impact on the travel right by any one or more of three recognized devices: (a) a law proscribing or preventing travel; or (b) a law that has as its primary purpose the hindrance or impeding of travel; or (c) a law of citizen classification that operates to penalize or exact a sacrifice in the exercise of the travel right.(9)

Citing protection of children as a compelling state interest, relocation restrictions upon a divorced custodial parent generally fall within the third category.(10)

West Virginia Endorsements

B. Although never squarely addressing the issue within a domestic relations case, West Virginia, in Spradling v. Hutchinson, has recognized a right to travel pursuant to the Federal Constitution in the statutory construction, and thus a limited application, of West Virginia Code 8-14-12, which required a local residency period for a municipal or county police candidate.(11) Specifically, the West Virginia Court, in an example of inverse logic, accomplished acceptance of the Federal travel precept, by declaring the statute unconstitutional to the extent of the residency prerequisite for police aspirants on the ostensible grounds that neither a rational basis nor a compelling State interest existed for the restriction.(12)

The only occasion offered to the West Virginia Court for expansion of the Federal travel right, adopted by Spradling, to the area of family law, occurred six years later when that precise challenge was mounted against a Wayne County divorce decree that limited a mother's exercise of custody to Wayne and Cabell Counties.(13)

Essentially affirming the Spradling concepts of travel rights, the West Virginia tribunal cryptically remarked that child welfare concerns may supersede the right to travel, then promptly side-stepped the issue and decided the case on the best interests standard.

Prevalent Litigation Issues - the Procedural/Substantive Mix:

A. Constitutional Rights of the Primary Caretaker vs. "Best Interests of the Child"

For over a decade the State of West Virginia has observed the rule that in contested custody matters, there is a presumption that the best interests of a child are served by placing custody in his or her primary caretaker, if such primary caretaker meets minimum objective standards for fitness.(15)

This rule, established by Garska v. McCoy, is composed of many elemental considerations. Firstly, from a legal standpoint, West Virginia Code 48-2-15 provides a sex-neutral standard for the resolution of custody issues, consistent with the best interests of the child; i.e., if the father is the primary caretaker of a child, then he is entitled to support awards as a mother would be in opposite, but exact circumstances. (16)

Secondly, the Garska Court enumerated certain "obvious criteria" to aid trial courts in determining who was or is the primary caretaker in a custody dispute by looking to which Party, as a matter of fact, assumed primary responsibility for the following non-exclusive domestic activities:

...(1) preparing and planning meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic. (17)

A third consideration is the avoidance or prevention of the so-called "Solomon syndrome" that metaphorically depicts the parent, who is more emotionally attached to a child, foregoing or surrendering legitimate property, alimony or support interests in favor of averting protracted, expensive or traumatic (to the child and such parent) custody litigation.(18)

The practical objectives in the judicial creation of the primary caretaker presumption of Garska is to remove children from the prospect of being used by one parent to hurt, or harm, the other parent in bitter custody battles.

The primary caretaker parent presumption was placed in historical/judicial/philosophical perspective in David M. v. Margaret M.,(19) wherein Justice Neely tersely and eloquently authored the following words:

Although the primary caretaker parent presumption may appear cut-and- dried and insufficiently sensitive to the needs of individual children, it serves the welfare of the child by achieving stability of care in the child's life, reducing the uncertainty of custody decisions, limiting the invasiveness of the custody determination process and reducing the expense of domestic litigation. Because litigation per se can be the cause of serious emotional damage to children (and to adults), we consider the primary caretaker parent presumption to be in the best interests of children. Even more important, children cannot be used as pawns in fights that are actually about money because a lawyer can tell a primary caretaker parent that, if fit, that parent has absolutely no chance of losing custody of very young children. The result is that questions of alimony, property distributions, and child support are settled on their own merits.(20)

Thus, the state of law in West Virginia on this point is that if the primary caretaker, from the preponderance of evidence, achieves the David M. standard of behavior, which establishes or qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker.(21)

Although Garska and its successively affirming decisions have manufactured the presumption that the best interests of a minor are advanced by consignment to his or her primary caretaker; and despite said line of cases also having delineated what factual evidence will identify such primary caretaker, little guidance is given concerning two residual and prospective issues: (a) what are the parameters of custody once awarded, and, (b) what impact, if any does a grant of custody have upon the constitutional right of travel belonging to the custodial parent.

One must assume that constituent parts(22) of the primary caretaker determination in conjunction with the standards of fitness(23) most recently established in David M., marks the definitional and responsibility boundaries, respectively, of child custody; but the second posit does not admit of such easy extrapolation.

By dicta in David M., the Court has implied that site of residence is with the prerogative of the custodial parent when it remarked that "...the parent who receives custody is primarily responsible for making decisions concerning the child and for providing the child's permanent home."(15)

A few States (not West Virginia) across the nation have sought to address the custodial parent/relocation dilemma by statute.(25) If no legislative enactment is in force, the common law provides the only vehicle to resolve the base question: Does the continuing jurisdiction(26) of courts subsequent to the first custody determination, in tandem with the admittedly compelling state interest of child welfare, function successfully to infringe upon the custodial parent's right to travel?

Some jurisdictions have specifically held that the parent with sole custody has a nearly unqualified, if not absolute, option to re-establish, in good faith, his or her residence, with child, outside the territorial limits of the court pronouncing the original custody award, if no restrictive provision of a court order prevents the same.(27) Taylor v. Taylor, 563 So.2d 1049 (Ala. CA 1990). Other visionary jurists, constituting in fact and in law the predominant view, reduce the removal inquiries to an unadorned single question -- irrespective of the custodial parent's constitutional right to travel, is relocation in the best interests of the affected child?(28)

Being aware that the cause of action a parent employs to raise all major and incidental issues of child removal, may influence or control in and of itself the burden of proof, and ultimately the outcome of the litigation, the procedural and substantive approaches to resolve the child's best interests are not cut and dry.(29)

B. Presumptions and the Burden of Proof

Notwithstanding the sentiment of a majority of those jurisdictions adhering to the best interests of the child test in relocation litigation, there is a great divergence of authority, internally, with respect to which parent, either custodial or non-custodial, enjoys any presumptions, and consequently, which opposite party must meet and carry the burden of proof regarding that interest.

New York subscribes to perhaps the strictest presumption, legally favoring the non-custodial parent. There, any relocation as a matter of law, will deny visitation to the parent left behind, and, a fortiori, produce a negative effect upon the child's welfare.(30) To overcome that very strong presumption, a relocating custodial parent must demonstrate "exceptional or compelling circumstances" to justify a geographical alteration of a child’s domicile from that of the original divorce venue.(31)

California(32), Florida(33), Illinois(34), Louisiana(35), Maine(36), Massachusetts(37), Nebraska(38), Nevada(39), Ohio(40), Oregon(41), South Carolina(42) and Tennessee(43) are representative of those jurisdictions that also subscribe to a presumption against removal; and therefore, the custodial parent, in varying degrees and standards, must justify the relocation in terms of the child's best interests. On the other hand, a number of States, in adopting a presumption in favor of removal,

require the non-custodial parent to make a threshold showing why the contemplated resettlement is materially contrary to the child's welfare and well-being; e.g., Alabama(44), Mississippi(45), Minnesota(46), New Jersey(47), Virginia(48) and Wisconsin(49). Still other high courts have abrogated the procedural rigidity of presumptions and burdens of proof and faced the best interests monolith from a purely clinical standpoint; i.e., a neutral or substantively objective approach, with neither party having the burden of proof. (50) Keeping in mind that the primary caretaker presumption has no application to proceedings subsequent to the initial custody award,(51) the West Virginia analysis, should the Court decide the issue within a domestic law fact pattern, will follow, in all probability, the reasoning commenced in Pugh v. Pugh(52) and Sparks v. Sparks.(53)

In Pugh(54), the mother and father of a four (4) year old were awarded equal (six months) or split custody by the Circuit Court of Preston County through a post divorce decree (habeas corpus) in September 1948. In addition, the mother was given, by a specific term in the September Order procured by her, permission to take the male child to California during her six month possession, until said minor attained school eligibility or approximately six years of age. The father appealed, citing as error, inter alia., the split award and the California removal provision.(55) Worthy of note is the absence of any constitutional claim regarding travel.(56)

Relying upon what it considered to be a plethora of similar sentiments in sister states, the West Virginia Court readily found:

...a court of competent jurisdiction has the inherent power, unless restricted by statute, to grant the custody of an infant to a person who does not reside in the jurisdiction and to permit the person to whom it awards the custody of the child to remove it to another state or foreign jurisdiction.(57)

Pointing to the annual east to west shift of the child, the deleterious effects of dissimilar environments and the absence of a "settled home",(58) the tribunal in reversing the lower court declared:

When the award of custody to a resident of another state, or the removal of the infant to another jurisdiction, will not serve, or is detrimental to, the welfare of the child, such award or such removal will not be permitted.(59)

More significantly, however, for the purposes enunciated herein, the Pugh court, while not creating any presumptions, clearly assigned the burden of proof to the party seeking removal, when it flatly stated:

To entitle [split custodian mother] to the custody of the child it was incumbent upon her, in this proceeding, to show that a change of the existing custody by the respondent would materially promote the welfare of the child. See State ex rel. Lipscomb v. Joplin, 131 W.Va. 302, 47 S.E.2d 221 [1948]. The evidence indicates clearly that she has failed to satisfy the requirement;... (60)

The result in Pugh seems dated and harsh, and may have been influenced, in part, by the peculiar nature of the remedy selected (habeas corpus). The Pugh decision, however, cannot be said to be confined only to its unique set of facts. It seems that the Court took recourse to the basic historical and statutory standard for what was essentially a change of custody action: whether the benefit and welfare of the subject child would be promoted.(61)

The Sparks case sheds some small insight upon West Virginia's legal evolution on the child removal question, which should be seen as a departure from the severe Pugh holding concerning the burden of proof.

Although the Sparks(62) court was limited to the fine point of whether the Kanawha County Circuit Court properly enjoined a divorced mother, a former British subject, from temporarily taking her two

children to her traditional home in Scotland for the summer months, Pugh was recalled with approval for the proposition of permanent child removal, if consistent with its best interests.(63) The Court then reasoned that there was less justification for preventing a temporary child relocation "absent a showing that the health or welfare of the children would be substantially impaired"(64); nor was the transportation of the infants revealed to be a device of "...subterfuge to remove [permanently] the children from the jurisdiction of the court..."(65)

The positive side of Sparks is that the party attempting to arrest, through injunction, the relocation of his or her children to a foreign jurisdiction, had the ability to demonstrate artifice, deception or improper motivation on the part of the moving parent, or that the intended trip was detrimental to the children involved.(66)

As in Pugh, Sparks did not entail a constitutional challenge grounded in organic entitlement to travel on the part of the custodial parent; and, as noted elsewhere, the West Virginia Court has manifested a clear disinclination to resolve custodial parent relocation against a constitutional backdrop.(67) Thus, the West Virginia Court could be considered as being in support of those jurisdictions that place the burden of proof upon the non-custodial parent to make a prima facie case of detriment to a child's best interests, or malevolent and illegal designs on the part of the custodial parent in child relocation cases.(68)

C. Qualifications to the Custodial Parent’s Travel Right

Most child removal litigation only secondarily revolves about the subject infant's relationship with the non-custodial parent. Indeed, the judicial experience has been primarily motive identification; i.e., the main inquiry centers on verification of the circumstantial considerations or fact catalysts offered for the move in the first instance. As a result, a dearth of opinion has surfaced as to what or what are not legitimate reasons, relevant determinants or at least usable elements in the best interests equation, where the idea of a relocation originates with the custodial parent.

Case fact models would indicate that not inconsiderable weight is attached to the following factors or combinations thereof with respect to the custodial parent's interest only:

a. return to ancestral home and/or areas of consanguinial family;(69)

b. remarriage, when relocation is predicated on a second spouse's career advancement or some other business compulsion;(70)

c. spending more time with child due to a job change for parent or second spouse;(71)
d. Post-divorce trauma, unpleasant associations or psychological well-being;(72)

e. higher salaried employment, increased standard of living, economic advantage, inability to find suitable position in the immediate area, or involuntary transfer.(73)

The above information is not intended to be comprehensive or exclusive, but the above criteria, among others, tend to recur in reported decisions, annotations, treatises and encyclopedic works on the subject.(74)

Loss or dilution of established or regular visitation privileges is the most common focal point of post-divorce, relocation actions by the non-custodial parent, with emphasis being placed on the alleged ongoing and close relationship between the child and the visitation parent as evidence of the projected move's invidious effects and the perfidious traits of its proponent. Understandably, relocation has been denied in certain instances on account of the strength of the bond between the child and the parent out of possession.(75)

Visitation deprivation, as a component standing alone, has proven to be insufficient to deter relocation on the theory that the child is a member of a transformed nuclear family after a divorce, to which public policy grants favor; and merely disrupted visitation will not transcend the custodial parent's right to free travel.(76)

Predicting what West Virginia would rule in an comparable factual situation would be nothing but an exercise in calculated speculation. On the one hand, there are the Pugh, Sparks and Rowsey chain of cases that can be asserted for the postulation that the best interests of that child standard will prevail, or at least play a major role, in any planned relocations of the custodial parent.

The counterpoint is that West Virginia, partially in deference to legislative intent(77), also espouses the right of the non-custodial parent to a close relationship with his or her child.(78) One cannot conceive of a more nearly unambiguous, unequivocal and comprehensive pronouncement from the Supreme Court of Appeals than that entered in White v. Williamson(79), on the subject of non-custodial visitation:

In considering visitation issues, the courts must be mindful of their obligation to facilitate the right of the non-custodial parent to a full and fair chance to continue to maintain a close relationship with his or her children.(80)

Succinctly stated, West Virginia has elevated visitation privilege to visitation right in custody cases.

In an effort to reconcile these two apparently conflicting principles within the closed environment of a relocation dispute, advocates on both sides of the issue could satisfy his or her competing interest by adopting the expanded summer accommodations furnished by the Schedule "B" visitation paradigm(81) presently utilized in a number of circuit courts in West Virginia, where either the child or the non-custodial parent does not reside in the state.

D. The Child's Preference

What if the child involved in a relocation case does or does not want to move?

At least one jurisdiction has advanced the notion that a child's rights are "as worthy of constitutional protection" as those of its parents.(83) Moreover, the United States Supreme Court has held unqualifiedly that "minors", as well as adults, are protected by the Constitution and possess constitutional rights.(84) However, notwithstanding intelligent articulation and despite being constitutionally laudable, the geographical preference of a young child may be accorded some but less than controlling weight in relocation controversies,(85) especially if a parent has exerted detectable or subtle influences.(86)

Drawing precedental sustenance and analogical direction from instances of initial custody awards only, West Virginia has identified and outlined three (3) distinct age groups in the counter-balance between primary caretaker and the custodial desires of children in original divorce proceedings, which are identified generally as follows: (a) with respect to a child of tender years, the primary caretaker presumption controls; (b) in the circumstance of an adolescent fourteen (14) years of age, or greater, West Virginia Code 44-10-4 allows he or she to nominate the guardian, if that person is otherwise fit; however, there is (c) a melding of these two extremes in favor of a more flexible technique, where the child, neither fourteen (14) years of age nor an infant of tender years, may designate a custodian; and if a sage, good and mature reason can be explicated by the child in support of his or her parental selection, the presumption militating in behalf of the primary caretaker may be rebutted by such preference.(87)

Once the primary caretaker has been established, the sequential problem is whether or not a trial court, in its discretion, should consult a (as identified above) class (c) infant in the first place through an in camera interview.(88)

Specifically, Justice Brotherton suggested in the Rose v. Rose (previous footnote) case, with approval of the majority of the Court, certain guidelines for utilization by trial courts in evaluating a child's expression of preference, in terms of evidentiary weight, which could be adapted with equanimity and pragmatism to relocation cases:
1. The trial court should investigate whether the statement of preference by the child was induced by the party in whose favor the preference was expressed. If so, said statement of preference should be accorded little, if any, weight. (Citation omitted).

2. Where an otherwise intelligent child makes an illogical decision based on unimportant factors, the trial court may disregard the child's statement of preference. (Citation omitted). [child's reason for preferring her mother's home was accessibility of boating, fishing, andswimming facilities on the lake near which the mother's trailer home was located.] (89)

The West Virginia Court as a whole, has reaffirmed recently in text rather than subscript, that the basis for a child's vocalization against a particular residential or domiciliary location may be "relatively unimportant" and born of "temporary dissatisfaction with a recent move."(90) In a word, the Rose footnote has become law.(91)

Implications on an International Basis:

A. Right to International Travel

A less refined and seldom discussed aspect of the right to travel is the extension of that prerogative outside of one’s country.

The United States Supreme Court has given some credence to the international corollary to the Shapiro right to travel interstate. International child removal, however, encounters an additional consideration from an unexpected quarter -- an affected child, capable of discretion, may assert a constitutional right not to be forced from the United States. In re Gault, observes that "...neither the Fourteenth amendment nor the Bill of Rights is for adults alone."

B. Across the Ocean

It would seem that the qualifications of a planned move and the invocation of the best interests standard do not ultimately depend on the destination. Although some state courts are sensitive to, if not apprehensive of, latent jurisdictional conflicts concerning enforcement, visitation, modification, or general decisions regarding the general welfare of the child, the growing list of nations that have ratified the Hague Convention on International Child Abduction has reduced considerably the chance of a substantial jurisdictional dispute. One commentator even argues that there are as many international means to enforce State custody visitation decrees as exist within the United States itself.

Conclusion:

If the primary caretaker presumption stands for the proposition that it is in the best interests of a child to be placed in the sole custody of the fit parent who so qualifies, then that presumption must accompany that parent and that child throughout any intrastate or interstate resettlements. The Garska presumption should not disappear with the entry of the final divorce decree.

To deny a custodial parent a better opportunity in life, an improved standard of living and enhanced financial advantage, wrought by bona fide relocation opportunities, is to make a custody award contingent upon the surrender of a constitutional right; i.e., travel and free movement across this nation. For this reason, the West Virginia Supreme Court of Appeals needs to meet, fully and fairly, the issue of parental moves within constitutionally protected travel terms. Given the central geographic location of this State, its relatively large transitory population and its historically migratory work force, clarification and guidance is not expected, but rather demanded.

A definitive constitutional analysis of custodial parent positions regarding relocation is not only essential to the general predictability function of law, but also, it will permit the implementation of a best interests of the child test as a compelling state reason tempering, qualifying and guaranteeing, as nearly as humanly possible, a proper antecedent to the exercise of the travel right. Naturally, it follows that any best interests standard adopted by the Court, should be forged from evidentiary metal of empirical purity, devoid of presumptions and free of burdens of proof.

Finally, with respect to the child preference corollary, the Rose and Reynolds test utilized in rebutting primary caretaker status in initial custody awards, should be extended to relocation disputes.

End Notes:

(1)Guidelines for Custody and visitation, Scedule "A", appears in appendix one.
(2)Article IV, Articles of Confederation.
(3)United States v. Guest, 383 U.S. 745, 758 (1966)
(4)In re Passenger Cases, 7 How. 283,492, 12 L. Ed 702, 790 (1849).
(5)Edwards v. California 314 U.S. 160, 177-181, (1941) and Williams v. Fears, 179 U.S. 270, 274 (1900)
(6)Shapiro v. Thompson, 394 U.S. 618, 629-631 (1969).
(7)Id. at 629
(8)Jones v. Helms, 452 U.S. 412, 418-419 (1981)
(9)Attorney General v. Soto-Lopez, 476 U.S. 898, 903 (1985).
(10) See, e.g., Zwernemann v. Kenny, 563 A. 2d 1134, 1144 (N.J. Super Ct. App. Div. 1989).
(11)162 W. Va. 768, 253 S.E. 2d 371 (1979).
(12)Id. at 775.
(13)Rowsey v. Rowsey, 174 W.Va. 692, 329 S.E. 2d 57 (1985).
(14)Id. at 696.
(15)garska v. McCoy, 167 W.Va. 59,278 S.E. 2d 357 (1981)
(16)Id. at 64.
(17)Id. at 69-70.
(18)Id. at 66-68.
(19)182 WV 57, 385 S.E. 2d 912 (1989)
(20)At 69 (Emphasis not supplied).
(21)Id.; Bickler v. Bickler, 176 W.Va. 407, 344 S.E. 2d 630 (1986) ; and Mormanis v. Mormanis 170 W.Va. 717, 296 S.E.2d 680 (1982).
(22)David M. supra., at 67
(23)Id. at 68
(24)Id. at 69(emphasis not supplied).
(25)See, e.g., massachusetts General Law Anno., 208, Section 30; Wisconsin Statutes Anno., Section 767.327; and New jersey Stutes Anno., 9:2-2(Native Children or those residing in new Jersey for five [5] years shall not be removed from the jurisdiction without their consent, if of a suitable age, or consent of both parents if under age, or by Court order).
(26)Smith v. Smith, 138 W.Va. 388, 76 S.E.2d 253 (1953).
(27)See, e.g., Evans v. Allen, 91 S.E.2d 518 (ga. 1956); Casida v. Casida, 659 P.2d56 (Colo App. 1982); and, Taylor v. Taylor, 563 So.2d 1049 (Ala. CA 1990).

(28)See, e.g., Rowsey, supra.; Auge v. Auge, 334 N. W.2d 393 (minn.1983) ; Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985).
(29)Normally, pleading mechanics consist of an application for permission (custodial parent) ; petition for a change of custody (non-custodial parent) ; injunctive relief (non-custodial parent) ; petition to modify visitation including identifying transportation logistics, setting responsibilities therefor, and assessing expenses in accordance therewith (both parents) ; and a rule to show cause in contempt, where an agreement preventing removal had been incorporated previously into a final divorce decree (non-custodial parent).
(30)Weiss v. Weiss, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1985).
(31)Id. at 380-81; see also, Pecorello v. Snodgrass, 530 N.Y.S.2d 350 (1988) ; and, Atkineson v. Atkineson, 602 N.Y.S.2d 953 (1993).
(32)In re Roe, 23 cal. Rptr.2d 295 (CA 1993).
(33)Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989).
(34)In re Eckert, 518 N.E.2d 1041 (Ill.1988).
(35)Hertzack v. Hertzack, 616 So.2d 727 (La. CA 1993)
(36)Rowland v. Kingman, 629 A.2d 613 (Maine 1993).
(37)Williams v. Pitney, 567 N.E.2d 894 (Mass.1991).
(38)Demerath v. Demerath, 444 N. W. 2d 894 (Mass.1991).
(39)Schwartz v. Schwartz, 812 P.2d 1268 (Nev.1991).
(40)Powe v. Powe, 525 N.E.2d 845 (Ohio CP 1987).
(41)In re Meior, 595 P.2d 474 (Ore. 1979).
(42)Mcalister v. patterson, 299 S.E.2d 322 (S.C. 1982).
(43)Seesel v. Seessel, 748 S.W.2d 422 (Tenn.1988).
(44)Taylor v. Taylor, 563 So. 2d 1049 (Ala. CA 1990)
(45)Bell v. Bell, 572 S.2d 844 (Miss. 1990).
(46)Augev. Auge, 334 N.W.2d 844 (Minn.1983).
(47)Holder v. Polanski, 544 A.2d 852 (N.J. 1988).
(48)Simmons v. Simmons, 339 S.E.2d 198 (Va. 1986).
(49)In re Long, 381 N.W.2d 350 (Wis.1986) ; but before the present codification of Wisconsin Statues Annotated, Section 767.327. See footnote 25.
(50)Jarmillo v. Jarmillo, 823 P.2d 299 (N.M. 1991), see also Blake v. Blake, 541 A.2d 1201 (Conn. 1988).
(51)Thomas v Thamas, 174 W.Va. 387, 327 S.E. 2d 149 (1985).
(52)133 W. va. 501, 56 S.E. 2d 901 (1949).
(53)165 W. Va. 484, 269 S.E.2d 847 (1980).
(54)See pages 503-506 for the precise factual formulation.
(55)Id. at 506.
(56)Id.
(57)Id. at 508 (citations omitted)
(58)Id at 507 and 509
(59)Id. at 509
(60)id. at 512 (emphasis supplied).
(61)See Merredu v. Merredu 160 W.Va. 610, 236 S.E.2d 452 (1977) ; In regard Brandon L.E., 183 W. Va. 113, 394 S.E.2d 515 (1990) ; and West Virginia Code 48-2-15 (e).
(62)Comprehensive factual scenario found at 495-486.
(63)Sparks at 487-488.
(64)Id. at 488 (emphasis supplied).
(65)Id.
(66)Id.
(67)Rowsey, supra; and Reynolds, infra.
(68)Auge, supra., etc., at footnotes 44-49
(69)Hill v Hill, 548 So2d 750 (Fla. 3rd DCA 1989); Polanski supra.

(70)In re Taylor, 559 N.E.2d 1150 (1990) ; Zaleski v. Zaleski, 513 N.Y.S.2d 784 (1987) (rationale: children belong to a new family unit and harmony of that unit should be preserved).
(71)Pearmen v. Pearmen, 781 S.W.2d 585 (Tenn. CA 1989)
(72)Gruber v, Gruber, 583 A.2d 434 (Pa. 1990)
(73)Pecorella v. Snodgrass, 530 N.Y.S.2d 350 (1988) ; In re carnich, 780 S.W.2d 62 (Mo. CA 1989). Cf. Zwernermann, supra.
(74)See, e.g., 28 ALR 4th 9, Sections 3 and 6; and brett R. Turner, The Price of stability: Recent Case Law on Relocation of the Custodial Parent, 3 Divorce Litigation 5 (1994).
(75)Powe, supra.
(76)In re Sleight, 786 P.2d 202 (Ore 1990) and Scinaldi v. Scinaldi, 347 S.E.2d 149 (Va. 1986).
(77)West Virginia Code 48-2-15 (b)(1) (1993) ; to-wit: "...the court shall specify a schedule for visitation by the non-custodial parent..."
(78)Weber v. Weber, 193 W.Va. 551, 457 S.E.2d 488 (1995).
(79)192 W.Va. 683, 453 S.E.2d 666 (1994).
(80)Id. at 686; see also Weber, supra., at 554 ('But, in all cases, the family law master must consider both of the child's needs and the non-custodial parent's right to visitation'). (Emphasis Supplied).
(81)The pertinent excerpts from Guidelines for Custody and Visitation, Scedule "B", are reproduced in appendix two.
(82)For the legal ramifications and nuances created by joint and split custody arrangements, see Turner, op cit., at 57-58; and nadine E. Roddy, Joint Child Custody in the 1990's: Parent Relocation, 6 Divorce Litigation 10 (1994).
(83)Zwerneman, supra. at 1144.
(84)Planned Parenthood of Cenrat Missouri v. Danford, 428 U.S. 52, 74, (1971).
(85)See Powe, supra.; 4 ALR 3rd 1396; and 10 ALR 4th 812.
(86)kelly v. kelly, 518 N.Y.S.2d 508 (1987).
(87)J.B. v. A.B., 161 W.Va. 332, 242 S.E.2d 248 (1978), Note 5; and Rose v. Rose, 176 W.Va. 18, 340 S.E.2d 176 (1985).
(88)see C.J. Miller's dissent in Graham vs. Graham, 174 W.Va. 345, 326 S.E.2d 189, 191 (1984): and Rose, supra., at 21.
(89)Rose, supra., note 4 at page 21.
(90)Reynolds v. reynolds, 189 W.Va. 566, 570, 433 S.E.2d 277, 281 (1993).
(91)Id.
(92)See section II., Historical Perspectives of the Right to travel, supra.
(93)califano v. Torres, 435 U.S. 1 (1977)
(94)bergstrom v. bergstrom, 296 N.W.2d 490, 10 ALR 4th 812 (1980); Acosta v. gaffney, 558 F.2d 1153 (CA 3d 1977); and Lopez v. Franklin, 427 F. Supp. 345 (E.D.Mich.1977).
(95)387 U.S.1, 13 (1967)
(96)Vail v. Vail, 532 So.2d 639 9Ala.CA 1988); Viltz v. Viltz, 384 So.2d 1348 (Fla. 3d DCA 1980).
(97)Sambola v. Sambola, 493 So.2d 206 (La. CA 1986).
(98)For more detailed treatment of international custody questions, see James Grayson, International Relocation, the Right to Travel, and the Hague Convetion: Additional Requirements for Custodial Parents, 28 Family Law Quarterly 3 (1994)
(99)Id.
(100)David M., supra., at 69.
(101)Rose v. Rose, supra.
(102)Reynolds v. Retnolds, supra.
(103)Jaramillo, supra.
(104)Rowsey and Reynolds, supra.
(105)Joplin, supra.

8. State X Relocation Statute

This is the text of the State X Relocation Statute, codified at State X Code § 30-3-160 et seq. It applies to all relocations of children occurring after September 1, 2003.

§ 30-3-160. Short title

This article shall be known and may be cited as the " State X Parent-Child Relationship Protection Act" and promotes the general philosophy in this state that children need both parents, even after a divorce, established in Section 30-3-150.

§ 30-3-161. Definitions

As used in this article, the following words and phrases shall have the following meanings, unless the context requires a different definition:

(1) Change of principal residence. A change of the residence of a child whose custody has been determined by a prior court order, whether or not accompanied by a change of the residence of a person entitled to custody of the child, with the intent that such change shall be permanent in nature and not amounting to a temporary absence of the child from his or her principal residence.

(2) Child. A minor child as defined by subdivision (2) of Section 30-3B-102. As used in this article, the term may include the singular and the plural.

(3) Child custody determination. A judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) Commencement. The filing of the first pleading in a proceeding.

(5) Court. An entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(6) Modification. A child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(7) Person acting as a parent. A person, other than a parent, who has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding and has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(8) Person entitled to custody or visitation. A person so entitled to physical custody of a child as defined by Sections 30-3-1 through 30-3-4.1, inclusive, or visitation with respect to a child by virtue of a child custody determination as defined by subdivision (3) of Section 30-3B-102.

(9) Physical custody. The physical care and supervision of a child.

(10) Principal residence of a child. Any of the following:

a. The residence designated by a court to be the primary residence of the child.

b. In the absence of a determination by a court, the residence at which the parents of a child whose change of principal residence is at issue have expressly agreed that the child will primarily reside.

c. In the absence of a determination by a court or an express agreement between the parents of a child whose change of principal residence is at issue, the residence, if any, at which the child lived with the child's parents, a parent, or a person acting as a parent, for at least six consecutive months or, in the case of a child less than six months of age, the residence at which the child lived from birth with the child's parents, a parent, or a person acting as a parent. Periods of temporary absence from such residence are counted as part of the period of residence.

(11) Relocate or Relocation. A change in the principal residence of a child for a period of 45 days or more. The term does not include a temporary absence from the primary residence, or an absence necessary to escape domestic violence.

§ 30-3-162. Applicability

(a) Except as provided otherwise by this article, the provisions of this article apply to all orders determining custody of or visitation with a child whether such order was issued before or after September 1, 2003. To the extent that a provision of this article conflicts with an existing order determining custody of or visitation with a child or other enforceable agreement, this article does not apply to alter or amend the terms of such order or agreement which addresses the rights of the parties or the child with regard to change in the primary residence of a child. Any person entitled to the legal or physical custody of or visitation with a child may commence an action for modification to incorporate the provisions of this article into an existing order determining the custody of or visitation with a child. Except as provided in subsection (c) of Section 30-3-165, this article shall not apply to a person who is on active military service in the Armed Forces of the United States of America and is being transferred or relocated pursuant to a non-voluntary order from the government.

(b) Sections 30-3-169.1 to 30-3-169.7, inclusive, shall not apply to a change of principal residence of a child to a residence which is 60 miles or less from the residence of a non-relocating parent who is entitled to custody of or visitation with the child or if the change or proposed change results in the child residing nearer to the non-relocating parent than before the change or proposed change, unless such change in the principal residence of a child results in the child living in a different state.

§ 30-3-163. Principal residence; child

Except as provided by Section 30-3-167, a person who has the right to establish the principal residence of the child shall provide notice to every other person entitled to custody of or visitation with a child of a proposed change of the child's principal residence as required by subsection (b) of Section 30-3-165.

§ 30-3-164. Principal residence; custodian

Except as provided by Section 30-3-167, a person entitled to custody of or visitation with a child shall provide notice to every other person entitled to custody of or visitation with a child of an intended change in his or her principal residence as required by subsection (b) of Section 30-3-165.

§ 30-3-165. Notice requirement

(a) When a notice is required by either Section 30-3-163 or Section 30-3-164, except as provided by Section 30-3-167, the notice of a proposed change of principal residence of a child or the notice of an intended or proposed change of the principal residence of an adult as provided in this article must be given by certified mail to the last known address of the person or persons entitled to notification under this article not later than the 45th day before the date of the intended change of the principal residence of a child or the 10th day after the date such information required to be furnished by

subsection (b) becomes known, if the person did not know and could not reasonably have known the information in sufficient time to comply with the 45-day notice, and it is not reasonably possible to extend the time for change of principal residence of the child.

(b) Except as provided by Section 30-3-167, all of the following information, if available, must be included with the notice of intended change of principal residence of a child:

(1) The intended new residence, including the specific street address, if known.

(2) The mailing address, if not the same as the street address.

(3) The telephone number or numbers at such residence, if known.

(4) If applicable, the name, address, and telephone number of the school to be attended by the child, if known.

(5) The date of the intended change of principal residence of a child.

(6) A statement of the specific reasons for the proposed change of principal residence of a child, if applicable.

(7) A proposal for a revised schedule of custody of or visitation with a child, if any.

(8) A warning to the non-relocating person that an objection to the relocation must be made within 30 days of receipt of the notice or the relocation will be permitted.

(c) A person entitled to custody of a child who is on active military service in the Armed Forces of the United States of America and is being transferred or relocated pursuant to a non-voluntary order of the government shall provide notice of change of principal residence of a child to the persons entitled to custody of or visitation with a child with the information set forth in subsection (b) except that such notice need not contain a warning to the non-relocating person as provided in subdivision (8) of subsection (b) that an objection to the relocation must be made within 30 days or the relocation will be permitted.

(d) A person required to give notice of a proposed change of principal residence of a child under this section has a continuing duty to provide the information required by this section as that information becomes known. Such information should be provided by certified mail to the last known address to the person or persons entitled to such notice within 10 days of the date such information becomes known.

§ 30-3-166. Required notice provision

After September 1, 2003, every child custody determination shall include the following language:

State X law requires each party in this action who has either custody of or the right of visitation with a child to notify other parties who have custody of or the right of visitation with the child of any change in his or her address or telephone number, or both, and of any change or proposed change of principal residence and telephone number or numbers of a child. This is a continuing duty and remains in effect as to each child subject to the custody or visitation provisions of this decree until such child reaches the age of majority or becomes emancipated and for so long as you are entitled to custody of or visitation with a child covered by this order. If there is to be a change of principal residence by you or by a child subject to the custody or visitation provisions of this order, you must

provide the following information to each other person who has custody or visitation rights under this decree as follows:

(1) The intended new residence, including the specific street address, if known.

(2) The mailing address, if not the same as the street address.

(3) The telephone number or numbers at such residence, if known.

(4) If applicable, the name, address, and telephone number of the school to be attended by the child, if known.

(5) The date of the intended change of principal residence of a child.

(6) A statement of the specific reasons for the proposed change of principal residence of a child, if applicable.

(7) A proposal for a revised schedule of custody of or visitation with a child, if any.

(8) Unless you are a member of the Armed Forces of the United States of America and are being transferred or relocated pursuant to a non-voluntary order of the government, a warning to the non-relocating person that an objection to the relocation must be made within 30 days of receipt of the notice or the relocation will be permitted.

You must give notice by certified mail of the proposed change of principal residence on or before the 45th day before a proposed change of principal residence. If you do not know and cannot reasonably become aware of such information in sufficient time to provide a 45-day notice, you must give such notice by certified mail not later than the 10th day after the date that you obtain such information.

Your failure to notify other parties entitled to notice of your intent to change the principal residence of a child may be taken into account in a modification of the custody of or visitation with the child.

If you, as the non-relocating party, do not commence an action seeking a temporary or permanent order to prevent the change of principal residence of a child within 30 days after receipt of notice of the intent to change the principal residence of the child, the change of principal residence is authorized.

§ 30-3-167. Exceptions

(a) In order to protect the identifying information of persons at risk from the effects of domestic violence or abuse, on a finding by the court that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the identifying information required by Section 30-3-163 or Section 30-3-164 in conjunction with a proposed change of principal residence of a child or change of principal residence of a person having custody of or rights of visitation with a child, the court may order any or all of the following:

(1) The specific residence address and telephone number of a child or the person having custody of or rights of visitation with a child and other identifying information shall not be disclosed in the pleadings, other documents filed in the proceeding, or in any order issued by the court, except for in camera disclosures.

(2) The notice requirements provided by this article may be waived to the extent necessary to protect confidentiality and the health, safety, or liberty of a person or a child.

(3) Any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the interests of the child.

(b) If appropriate, the court may conduct an ex parte hearing under subsection (a). Issuance of a final order of protection under Sections 30-5-1 to 30-5-11, inclusive; a conviction for domestic violence pursuant to Sections 13A-6-130 to 13A-6-135, inclusive; or an award of custody of the child pursuant to Sections 30-3-131 to 30-3-135, inclusive, shall be considered prima facie evidence that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of identifying information or by compliance with the notice requirements of this article.

§ 30-3-168. Failure to provide notice

(a) Except as provided in Section 30-3-167, if a person required to give notice as required by Section 30-3-163 or Section 30-3-164 shall fail to provide the notice or the information required by subsection (b) of Section 30-3-165, the court shall consider the failure to provide such notice or information as a factor in making its determination regarding the change of principal residence of a child; a factor in determining whether custody or visitation should be modified; a factor for ordering the return of the child to the former residence of the child if the change of principal residence of a child has taken place without notice; a factor meriting a deviation from the child support guidelines; a factor in awarding increased transportation and communication expenses with the child; and a factor in considering whether the person seeking to change the principal residence of a child may be ordered to pay reasonable costs and attorney's fees incurred by the person objecting to the change.

(b) Additionally, the court may make a finding of contempt of court if a party willfully and intentionally violates the notice requirement of an order issued by any court pursuant to Section 30-3-166 and may impose the sanctions authorized by law or rule of court for disobedience of a court order.

§ 30-3-169. Change of residence

The person entitled to determine the principal residence of a child may change the principal residence of a child after providing notice as provided herein unless a person entitled to notice files a proceeding seeking a temporary or permanent order to prevent the change of principal residence of a child within 30 days after receipt of such notice.

§ 30-3-169.1. Objection proceeding

(a) A person entitled to custody of or visitation with a child may commence a proceeding objecting to a proposed change of the principal residence of a child and seek a temporary or permanent order to prevent the relocation.

(b) A non-parent entitled to visitation with a child may commence a proceeding to obtain a revised schedule of visitation, but may not object to the proposed change of principal residence of a child or seek a temporary or permanent order to prevent the change.

(c) A proceeding filed under this section must be filed within 30 days of receipt of notice of a proposed change of principal residence of a child, except that the court may extend or waive the time for commencing such action upon a showing of good cause, excusable neglect, or that the notice required by subsection (b) of Section 30-3-165 is defective or insufficient upon which to base an action under this article.

(d) Except as otherwise specifically provided in this article, the State X Rules of Civil Procedure shall apply to all proceedings under this article.

§ 30-3-169.2. Temporary restraining order

(a) Where the ends of justice dictate, the court may grant a temporary order restraining the change of principal residence of a child or ordering return of a child to the former residence of the child if a change of principal residence has previously taken place without compliance with this article, and may consider, among other factors, any of the following:

(1) The notice required by this article was not provided in a timely manner.

(2) The notice required by this article was not accurate or did not contain sufficient information upon which a person receiving the notice could base an objection.

(3) The child already has been relocated without notice, agreement of the parties, or prior court approval.

(4) The likelihood that on final hearing the court will not approve the change of the principal residence of the child.

(b) The court may grant a temporary order permitting the change of principal residence of a child and providing for a revised schedule for temporary visitation with a child pending a final hearing if the court finds that the required notice of a proposed change of principal residence of a child as provided in this article was provided in a timely manner, contained sufficient and accurate information, and if the court finds from an examination of the evidence presented at a hearing for temporary relief that there is a likelihood that on final hearing the court will approve the change of the principal residence of the child.

(c) If the court has issued a temporary order authorizing a party to change the principal residence of a child before final judgment is issued, the court may not give weight to the temporary change of principal residence as a factor in reaching its final decision.

§ 30-3-169.3. Custody considerations

(a) Upon the entry of a temporary order or upon final judgment permitting the change of principal residence of a child, a court may consider a proposed change of principal residence of a child as a factor to support a change of custody of the child. In determining whether a proposed or actual change of principal residence of a minor child should cause a change in custody of that child, a court shall take into account all factors affecting the child, including, but not limited to, the following:

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

(2) The age, developmental stage, needs of the child, and the likely impact the change of principal residence of a child will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(3) The increase in travel time for the child created by the change in principal residence of the child or a person entitled to custody of or visitation with the child.

(4) The availability and cost of alternate means of communication between the child and the non-relocating party.

(5) The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.

(6) The preference of the child, taking into consideration the age and maturity of the child.

(7) The degree to which a change or proposed change of the principal residence of the child will result in uprooting the child as compared to the degree to which a modification of the custody of the child will result in uprooting the child.

(8) The extent to which custody and visitation rights have been allowed and exercised.

(9) Whether there is an established pattern of conduct of the person seeking to change the principal residence of a child, either to promote or thwart the relationship of the child and the non-relocating person.

(10) Whether the person seeking to change the principal residence of a child, once out of the jurisdiction, is likely to comply with any new visitation arrangement and the disposition of that person to foster a joint parenting arrangement with the non-relocating party.

(11) Whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the change of principal residence of the child and the child, including, but not limited to, financial or emotional benefit or educational opportunities.

(12) Whether or not a support system is available in the area of the proposed new residence of the child, especially in the event of an emergency or disability to the person having custody of the child.

(13) Whether or not the proposed new residence of a child is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial 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.

(14) The stability of the family unit of the persons entitled to custody of and visitation with a child.

(15) The reasons of each person for seeking or opposing a change of principal residence of a child.

(16) Evidence relating to a history of domestic violence or child abuse.

(17) Any other factor that in the opinion of the court is material to the general issue or otherwise provided by law.

(b) The court making a determination of such issue shall enter an order granting the objection to the change or proposed change of principal residence of a child, denying the objection to the change or proposed change of principal residence of a child, or any other appropriate relief based upon the facts of the case.

(c) The court, in approving a change of principal residence of a child, shall order contact between the child and the non-relocating party and telephone access sufficient to assure that the child has frequent, continuing, and meaningful contact with the non-relocating party and shall equitably apportion transportation costs of the child for visitation based upon the facts of the case.

(d) The court, in approving a change of principal residence of a child, may consider the costs of transporting the child for visitation 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 for visitation.

(e) The court, in approving a change of principal residence of a child, may retain jurisdiction of the parties and of the child in order to supervise the transition caused by the change of principal residence of the child; to insure compliance with the orders of the court regarding continued access to the child by the non-relocating party; to insure the cooperation of the relocating party in fostering the parent-child relationship between the child and the non-relocating party; and to protect the relocating party and the child from risk of harm in those cases described in Section 30-3-167.

§ 30-3-169.4. Presumption

In proceedings under this article unless there has been a determination that the party objecting to the change of the principal residence of the child has been found to have committed domestic violence or child abuse, there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child. The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue. If that burden of proof is met, the burden of proof shifts to the non-relocating party.

§ 30-3-169.5. Security requirements

If on final hearing the change of principal residence of a child is permitted, the court may require the person seeking to change the principal residence of a child to provide reasonable security guaranteeing that the custody of and visitation with the child will not be interrupted or obstructed by the relocating party.

§ 30-3-169.6. Abuse of process

(a) Where a party commences an action without good cause or for the purpose of harassing or causing unnecessary financial or emotional hardships to the other party, after notice and a reasonable opportunity to respond, the court may impose sanctions on a person proposing a change of principal residence of the child or objecting to a proposed change of principal residence of a child if it determines that the proposal was made or the objection was filed based upon any of the following:

(1) To harass a person or to cause unnecessary delay or needless increase in the cost of litigation.

(2) Without being warranted by existing law or based on frivolous argument.

(3) Based on allegations and other factual contentions, which had no evidentiary support nor, if specifically so identified, could not have been reasonably believed to be likely to have evidentiary support after further investigation.

(4) Designed to elicit or discover or lead to the discovery of information protected by Section 30-3-167.

(b) Sanctions imposed under this section shall be limited to those that are sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The sanction may include directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the other party of some or all of the reasonable costs, attorney's fees, and expenses incurred as a direct result of the violation.

§ 30-3-169.7. Collateral proceedings

If the issue of change of principal residence of a child is presented in a petition for divorce or dissolution of a marriage or other petition to determine custody of or visitation with a child, the court shall consider, among other evidence, the factors set forth in Sections 30-3-169.2 and 30-3-169.3 in making its initial determination.

§ 30-3-169.8. Fees and expenses

The court may award any party necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings.

§ 30-3-169.9. Relocation out of state

(a) In those instances where the change of principal residence of a child results in the relocation of a child to a residence outside this state, the provisions of Sections 30-3B-101 to 30-3B-314, inclusive, shall apply to actions commenced under this article.

(b) Where the parties have been awarded joint custody, joint legal custody or joint physical custody of a child as defined in Section 30-3-151, and at least one parent having joint custody, joint legal custody, or joint physical custody of a child continues to maintain a principal residence in this state, the child shall have a significant connection with this state and a court in fashioning its judgments, orders, or decrees may retain continuing jurisdiction under Sections 30-3B-202 to 30-3B-204, inclusive, even though the child's principal residence after the relocation is outside this state.

(c) In a proceeding commenced to modify, interpret, or enforce a final decree under this article, where jurisdiction exists under this section or otherwise as provided by law and where only one person having joint custody, joint legal custody, or joint physical custody of a child continues to maintain a principal residence in this state, notwithstanding any law to the contrary, venue of all proceedings under this article is changed so that venue will lie either in the original circuit court rendering the final decree or in the circuit court of the county where that person having joint custody, joint legal custody, or joint physical custody has resided for a period of at least three consecutive years immediately preceding the commencement of an action under this article. The person having joint custody, joint legal custody, or joint physical custody who continues to maintain a principal residence in this state shall be able to choose the particular venue as herein provided, regardless of which party files the petition or other action.

§ 30-3-169.10. Appeal procedure

An appeal may be taken from a final order in a proceeding under this article in accordance with State X law. Unless the court enters a temporary order under Section 30-3-169.2, the court may not stay an order enjoining a change in principal residence of a child pending appeal.

Alabama Relocation

Understanding Alabama's Relocation Statute

This is the text of my newsletter article about the statute Alabama has passed dealing with cases where one of the parents wants to move away from the other parent and take the children.

The New Alabama Statute

The Alabama legislature passed and Gov. Riley signed on June 22 a statute to address the relocation of one parent after divorce. The new statute took effect September 1, 2003 and governs all

relocations occurring after that date, regardless of when the decree became effective. The statute isn't yet codified.

When a custodial parent (CP) wants to move to a new area and take the children along, there is always disappointment and often conflict. On one hand are the interests of the CP and perhaps the children in an improved life in a different area. On the other are the equally legitimate interests of the noncustodial parent (NCP) and perhaps the children in maintaining existing relationships.

In one sense, the statute is a good thing, if for no other reason than because it codifies and clarifies principles that have been unsettled in the past. It provides more certainty when the CP wants to relocate, and in law, there is value in certainty in and of itself.

Under the statute a parent must notify the other parent before moving to a different state or to a location more than 60 miles from the other parent's address, unless the move brings the children closer to the other parent. The moving parent must use certified mail (FedEx presumably is not acceptable). The notice must occur at least 45 days before the move or within 10 days after learning of the move if later.

The notice must include the address and phone number of the new residence and of the new school the child or children will be attending, the date of the move, the specific reason(s) for the move, a proposal for revising custody and visitation, if any (although the statute offers no guidance about what the parties will do with this information), and a warning that the other parent must object to the move within 30 days or the move will be permitted. If information is missing or unknown at the time of the notice, the parent must supply it as soon as it is available.

After the notice, the other parent has 30 days within which to object (longer upon a showing of good cause or excusable neglect). Upon objection, the court may delay the move until after a hearing.

At the hearing, the judge is to evaluate whether the move is in the best interest of the child, applying factors like the age and maturity of the child, alternative means of communication available, and how much the non-relocationg parent has used visitation in the past.

Unless there has been a finding of domestic violence, the statute sets up a rebuttable presumption that a move is NOT in the best interest of the child. Once the relocating parent overcomes this presumption (presumably by showing benefits available to the child at the new residence that are not available now), the burden shifts to the non-relocating parent.

The new statute tilts the balance of custody determinations in relocation cases decidedly toward the "Fathers' Rights" perspective (assuming that most NCPs are fathers). First, it is stunningly long, running for nearly 5,000 words on nine single-spaced pages. The very complexity of the statute will likely have a chilling effect on decisions of CPs to move. Some CPs, unable to understand what the statute requires, may stay put simply out of bewilderment.

Second, the statute requires the CP in most cases to notify the NCP 45 days before moving (this has always been the courteous thing to do but has not been required before) and gives the NCP the right to demand a hearing about whether the move is in the best interest of the children.

Third, the presumption that a move is not in the child's best interest is a fundamental change from existing law, under which the judge simply considers the best interest of the child. Existing law makes no presumption of any kind.

Potential Traps

The statute has several consequences that will surprise parents. First, it requires every decree addressing child custody after September 1 to include a page-long statement about the relocation statute. This will of course require the cutting down of more trees. Also, judges being who they are and the complexity of the law being what it is, scores if not hundreds of such decrees will violate the statute from the beginning.

Second, the statute requires notice of many moves that will catch people by surprise. For example, a move to a different state requires notice, even if it brings the children closer to the NCP. So if Dad lives in Huntsville and Mom and the children live in Mobile, Mom must notify Dad before moving to Chattanooga, even though the move would reduce Dad's driving time to the children from six hours to two hours.

Third, the statute seems to require judges after a relocation to order contact and telephone access between the NCP and the child to assure that the child has "frequent, continuing, and meaningful" contact. The statutes gives the judge no discretion here, presumably even if the NCP has just raped and abused the child repeatedly. The legislature obviously didn't intend this result, and one hopes no court would permit it, but the problem needs to be fixed.

Fourth, the statute requires anyone who has custodial or visitation rights to give notice before moving. This ensures that NCPs will routinely violate the statute when they move and neglect the required notice.

Default Judgement and Relocation

When you hear the opening facts of Hambright v. Hambright, Case No. 2040837 (Ala. Civ. App. January 27, 2005), you anticipate a good case offering precious guidance on the Alabama relocation statute, the Alabama Parent-Child Relationship Protection Act. What the case delivers instead is an unremarkable revisiting of the guidelines for setting aside a default judgment.

The case started with the mother's announcement to the father after divorce that she and the parties' child were moving from Hoover to Jackson, MS. The father filed to enjoin her from moving and to modify the divorce decree pursuant to the relocation statute. The mother responded that she and the child had moved to Brandon, MS (about 20 miles from Jackson), that she was moving for a job change that offered more money, that the father's visitation with the child had not been interrupted or disturbed, and that she had notified the father of her intention to move. She also counterclaimed for an increase in child support.

There followed an extended period during which the mother failed to attend scheduled depositions and was in and out of touch with her attorney. Eventually, the mother's Mississippi attorney withdrew on the grounds the mother wasn't cooperating and that the attorney hadn't been able to contact the mother for several months.

The trial court conducted a hearing not attended by the mother or her lawyer. It transferred child custody to the father and ordered the mother to pay child support.

Less than a month later, the mother filed a "motion for emergency hearing" and a "motion to alter, amend, or vacate and petition to show cause." in her motions the mother said that she moved and therefore did not receive the letters her attorney sent her. She pointed out that the father had maintained regular contact with her throughout the period of her failures to appear and had told her nothing about them. After a hearing, the trial court denied the mother's motions, and she appealed.

The appeals court first quoted ARCP 55(c) which permits the trial court in its discretion to set aside any default on motion filed before the judgment or within 30 days after the judgment. The appeals

court then explored the test for setting aside default, articulated in Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600 (Ala. 1988).

The now-familiar Kirtland test has two steps. In the first, the trial court must presume that a case should be decided on the merits if it's practicable to do so, because the right to have a trial on the merits ordinarily outweighs the need for judicial economy. In the second, the trial court must apply a three-factor analysis. It must consider "'1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct.' Kirtland, 524 So. 2d at 605."

In this case, the appeals court stated that (1) the mother had made allegations that, if proven at trial, would constitute a complete defense to the action; (2) the record did not suggest, and in fact the father did not allege, that substantial prejudice would result if the judgment were set aside; and (3) there was at least a genuine issue whether the mother engaged in culpable conduct.

The appeals court didn't label it as such, but it's safe to conclude from this case and the one like it in December, Sumlin v. Sumlin, that any case involving child custody should carry with it an even stronger presumption (an "extraordinary presumption," if you will) in favor of allowing a trial on the merits if practicable.

Alaska Relocation

Alaska is a remote location. Often families relocate here as a result of military and job transfers, or because one spouse has an urge to live in the last frontier. Later, another job transfer occurs or a parent may find that living in a northern climate so far from family and friends is too much to bear. A parent's decision to leave Alaska undermines the ability of both parents to have continuous and equal contact with the children and forces parents or the court to choose which of the parents will enjoy primary physical custody of children. This article examines this troubling issue.

For married parents who know before a divorce occurs that one spouse will relocate at the time of the divorce or soon thereafter, the court can consider this issue in advance and make specific findings about what will occur in the best interests of the children when a parent relocates. Parents who resolve their marriages through the process of dissolution can put specific language into their agreement which tells the court what will happen if either parent later moves out of state. Coming up with a solution to this issue in advance may avoid costly litigation in the future.

What happens when parents already have a custody and visitation order in place which does not include any provisions concerning an out of state move by one parent? Generally, in order to ask a court to take another look at a custody award, a parent seeking modification must first prove that the circumstances have changed since the prior order was entered. For changes to custody, a substantial change of circumstances must be shown. The Alaska Supreme Court has stated that if a parent moves outside of Alaska, this change constitutes a substantial change of circumstances. As a result, a court will normally hold a hearing so that it can next determine whether to change custody and/or visitation and fashion another order which is in the best interests of the children.

A recent Alaska Supreme Court decision held that where one parent has moved to a distant locale, a six month alternating physical custody arrangement disrupts the stability of a young child's life and is not in the children's best interests absent compelling evidence to the contrary. Therefore, it is likely that one parent will spend the majority of time with the children and that the other parent will have visitation on a schedule set by the court. While there are no such schedules written in Alaska law, ordinarily the court attempts to give the non-custodial parent as much visitation as possible during the summer and school holidays, depending on the specific facts of each case.

Other issues that the court needs to consider include whether the parents will share legal custody or if one parent will have sole legal custody, how to allocate transportation costs, whether the children will fly unaccompanied or with an escort, how contact between the children and the parents will occur, and how the non-custodial parent will obtain important information about the child. Once custody and visitation changes, the court may also need to recalculate child support.

It may be beneficial to consult with an attorney who can answer your questions regarding changing an existing custody, visitation or support order, and explain the options available to you. Many attorneys will consult with potential clients for a nominal fee to answer your questions and define the services they offer. It is often important to consult with a lawyer at the start of the process in order to make preliminary decisions regarding how to proceed.

The Alaska Bar Association can refer you to an attorney who can answer your legal questions regarding custody.

Arizona Relocation

Arizona Child Custody Court Decisions

206 Ariz. 418, *; 79 P.3d 667, **;
2003 Ariz. App. LEXIS 188, ***; 413 Ariz. Adv. Rep. 8

In re the Marriage of: ELIZABETH CLARK OWEN, Petitioner-Appellant, v. CHARLES EDWARD BLACKHAWK, Respondent-Appellee.

1 CA-CV 02-0363

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT E

206 Ariz. 418; 79 P.3d 667; 2003 Ariz. App. LEXIS 188; 413 Ariz. Adv. Rep. 8

November 18, 2003, Filed

SUBSEQUENT HISTORY: [***1] Review denied by, Request denied by Owen v. Blackhawk, 2004 Ariz. LEXIS 49 (Ariz., Apr. 19, 2004)

PRIOR HISTORY: Appeal from the Superior Court of Maricopa County Cause No. DR 98-004357. The Honorable J. Richard Gama, Judge.

DISPOSITION: Reversed and remanded.
COUNSEL: Mead & Associates Glendale, By Judith E. Abramsohn, Attorneys for Petitioner-Appellant.

Bellah, Harrian & Pearson, P.L.C. Glendale, By Robert F. Harrian and Stanley David Murray, Attorneys for Respondent-Appellee.

JUDGES: JON W. THOMPSON, Judge. CONCURRING: G. MURRAY SNOW, Presiding Judge, JOHN C. GEMMILL, Judge

OPINION BY: THOMPSON

OPINION:

[**669] [*420] THOMPSON, Judge

P1 Elizabeth Clark Owen (mother) appeals from the trial court's orders preventing her from relocating the parties' minor child to Wyoming, designating Charles Edward Blackhawk (father) as the primary residential parent, and denying mother's motion for relief from order and motion for new trial. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

P2 Pursuant to a 1999 divorce decree, the parties shared joint [***2] legal custody of their minor child. Mother was the primary residential parent, and father had the child for at least one thirty-six-hour period and one twelve-hour daytime period each week.

P3 In January 2001, mother informed father that she was planning to marry a man who lived in Wyoming and that she wanted to relocate there with the child in May 2001. Father initially agreed but soon changed his mind and opposed the relocation. Mother married in February 2001 and had another child in September 2001. Mother continued to live and work in Arizona pending the custody resolution.

P4 Father filed a petition to prevent relocation. The trial court held evidentiary hearings on May 1, 2001 and January 8, 2002. The court-appointed custody evaluator, Al Silberman, Ed.D., concluded that it was in the child's best interests to remain living in Arizona with mother as the primary residential parent, but, if mother moved, the child should stay in Arizona with father.

P5 The trial court found that it was not in the child's best interests to relocate because the move would adversely affect father's rights and interfere with his relationship with the child. The trial [***3] court continued joint custody but designated father as the primary residential parent during the school months, typically from September to May. Mother had parenting time during spring breaks, alternating Thanksgivings, half of the winter/Christmas break, and most of the summers.

P6 Mother filed a motion for relief from order and motion for new trial in which she argued that the custody order imposed a long-distance access schedule despite the fact that she still lived in Arizona and that irregularities in the evidentiary hearings prejudiced her so as to justify a new relocation hearing. The trial court denied the motion without comment. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101 (B), (C), and (F)(1) (2003).

DISCUSSION

A. Relocation

P7 Mother argues that the trial court abused its discretion by not allowing her to relocate with the child to Wyoming. We review the trial court's decision regarding child custody for an abuse of discretion. In re Marriage of Diezsi, 201 Ariz. 524, 526, P3, 38 P.3d 1189, 1191 (App. 2002). Specifically, mother [***4] argues that the trial court failed to follow the framework for deciding relocation issues set forth in A.R.S. § 25-408(J) (Supp. 2002). Mother contends that the trial court erroneously focused on the fact that relocation would interfere with father and child's relationship and would adversely affect father's rights.

P8 The trial court is required to consider the factors set forth in A.R.S. § 25-408(J) in determining whether a relocation is in the child's best interests. See A.R.S. § 25-408(J). [**670] [*421] Here, the trial court listed A.R.S. § 25-408(J)(3), (5), (6), and (8) and referenced A.R.S. § 25-403 (Supp. 2002), which is a factor listed in A.R.S. § 25-408(J)(1), as factors it considered relevant. However, the trial court did not elaborate or explain how it weighed any factor, other than to state that the relocation

would interfere with the continuation of a meaningful relationship between father and child and would adversely affect father's rights.

P9 Father argues that detailed findings of fact are not required [***5] under A.R.S. § 25-408, only under A.R.S. § 25-403(J), which father asserts does not apply to this case. We disagree. Although A.R.S. § 25-408 does not require that trial courts make specific findings of fact in deciding whether to allow relocation, A.R.S. § 25-403(J) requires the court, in a contested custody case, to "make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." This case involved contested custody. Mother sought to retain primary physical custody of the child in Wyoming. Father opposed relocation and sought a change of physical custody if mother did move to Wyoming. Physical custody was contested even though this case was brought under the relocation statute. Ultimately, the trial court modified physical custody.

P10 Father argues that a change in parenting time does not constitute a change of custody, and, therefore, A.R.S. § 25-403(J) does not apply. He cites Hindsley v. Hindsley, 145 Ariz. 428, 701 P.2d 1236 (App. 1985), in support [***6] of this claim. Hindsley involved an order continuing joint legal custody but changing the primary residence from the mother to the father. Id. at 429-30, 701 P.2d at 1237-38. The court concluded that a change in "physical presence" was not a modification of joint custody and so the change did not violate the predecessor to A.R.S. § 25-403(T), which prohibited a change of custody within one year of the original decree. Id. at 430, 701 P.2d at 1238.

P11 Hindsley does not hold that a change of physical custody is not a contested custody matter for purposes of A.R.S. § 25-403(J). Further, the mother in Hindsley first sought sole custody and only objected to the court's consideration of an asserted change of custody after primary physical custody was granted to the father, and, therefore, mother could be seen to have acquiesced in the court's determination of the child's physical placement. Id. at 429, 701 P.2d at 1237. Conversely, a more recent case specifically addressing the requirements of A.R.S. § 25-403(J) held that specific findings [***7] must be made in a case that involved a change of physical custody but continuing joint legal custody. Diezsi, 201 Ariz. at 525-26, PP1, 4, 38 P.3d at 1190-91. An order designating one parent as primary residential parent constitutes an order regarding physical custody as opposed to an order regarding parenting time. Physical custody involves the child's residential placement, whereas parenting time is what is traditionally thought of as "visitation." See A.R.S. § 25-402(3) (1999) (defining "joint physical custody" as when the parties share the residence of the child equally and "parenting time" as time that the child is physically placed with a parent). The statute requiring specific findings is not limited to contested "legal" custody cases and applies equally to physical custody matters. Therefore, a change in joint physical custody is a change in custody, whereas visitation is one aspect of custody. Because this case involved a substantial change in physical custody that mother disputed, we hold that the trial court was obligated to make the specific findings required by A.R.S. § 25-403(J).

P12 The [***8] trial court's order lists some statutory factors by number and makes detailed findings only as to A.R.S. § 25-408(J)(1). Those detailed factors do not favor either parent. The evidence suggests that there are reasons weighing both in favor of and against relocation. Without further explanation from the trial court regarding its consideration of the applicable factors, we cannot say that the trial court did not focus too much attention on the impact on the child's relationship with father to the exclusion of other relevant considerations. Accordingly, we conclude that the trial court abused its discretion in changing the primary residential parent and altering the parenting [**671] [*422] time schedule without making findings on the record that comply with A.R.S. § 25-403(J). See Deizsi, 201 Ariz. at 526, P5, 38 P.3d at 1191. We reverse and remand to allow the trial court to state on the record its findings in compliance with A.R.S. § 25-403(J).

B. Modification of Physical Custody and Parenting Time

P13 The trial court's order continues joint legal custody but modifies physical custody [***9] from mother to father and imposes a long-distance parenting time schedule for mother. Mother argues that the modification of physical custody was an abuse of discretion because father never requested it in his petition and because the evidence does not support such a change. We agree.

P14 Father's petition sought to prevent mother from relocating with the child, but father only sought a change of physical custody and parenting time if mother moved to Wyoming without the child. Father never asked to become the primary residential parent in the event that both parents remained in Arizona.

P15 The evidence was uncontested that mother would remain in Arizona if the child could not move with her. She so testified several times, and the expert psychologist noted such in his custody evaluation. The expert also testified that he believed it was in the child's best interests to remain with mother as the primary residential parent if mother stayed in Arizona. Mother apparently traveled to Wyoming during these proceedings but has kept her employment and house in Arizona. There also is no evidence to support father's assertion that mother will move to Wyoming. There is no [***10] suggestion that mother has ever violated court orders or denied father access to the child. In addition, there is no reason to believe that mother would move the child to Wyoming in violation of an order that the child stay in Arizona. Thus, father's claim that the change of physical custody is needed to prevent such a move is unfounded.

P16 "To change a previous custody order, the court must determine whether there has been a material change in circumstances affecting the welfare of the child." Canty v. Canty, 178 Ariz. 443, 448, 874 P.2d 1000, 1005 (App. 1994) (citing Pridgeon v. Superior Court, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982)). There was no request for a change of the designated primary residential parent if mother did not move to Wyoming. The evidence clearly showed that mother had no intention of moving to Wyoming if the child was not permitted to go with her. There is no evidence of any material change to justify changing the primary residential parent or restricting mother's parenting time as long as mother remains living in Arizona. We reverse the order designating father as the primary residential parent and imposing a [***11] long-distance parenting time schedule for mother.

C. Denial of Motion For Relief from Order and New Trial

P17 Mother argues that she was entitled to a new hearing because of several procedural irregularities that resulted in denying her a fair hearing. We will not disturb the trial court's ruling on a motion for relief from order under Arizona Rule of Civil Procedure 60(c) absent an abuse of discretion. Tovrea v. Nolan, 178 Ariz. 485, 490-91, 875 P.2d 144, 149-50 (App. 1993) (citing Bickerstaff v. Denny's Restaurant, Inc., 141 Ariz. 629, 688 P.2d 637 (1984)).

P18 Mother contends that father served his petition to prevent relocation in an untimely manner. Even if service was one day short under Arizona Local Rule of Practice Superior Court (Maricopa County) 6.9(h), mother appeared at the hearing prepared, requested that the trial court proceed on the merits, and objected to any continuation. Accordingly, she has not shown prejudice.

P19 In addition, mother objects to the continuation of the hearing from May 1, 2001 to January 8, 2002. While such a delay in a custody matter is lengthy, our review of the record convinces [***12] us that the delay was due to the court's heavy calendar and the schedules of the parties and attorneys.

P20 Mother also asserts that she may have been prejudiced by father's failure to disclose all the materials he provided to Dr. [**672] [*423] Silberman. However, Dr. Silberman testified that he relied on very little of the material that father gave him. Mother failed to establish what undisclosed material Dr. Silberman relied on and thus has not shown how she was prejudiced.

P21 Mother further claims that Dr. Silberman's report was issued eight months after he was appointed and only a few days before the January hearing. Both parties were equally prejudiced by the late filing of Dr. Silberman's report. Mother was disadvantaged to a greater extent because she did not know until she received the report what materials or references father gave Dr. Silberman. Although this lengthy delay hindered mother's response to the material that father supplied to Dr. Silberman, mother was not precluded from seeking additional expert information before the January hearing. Mother also was allowed to testify at the second hearing in response to the evaluation. Thus, we cannot say that the [***13] delay warranted a new hearing.

P22 Mother notes that father failed to inform Dr. Silberman of his engagement and that Dr. Silberman failed to interview the fiancee and her children. Dr. Silberman's report makes passing reference to the fact that father was engaged but contains no discussion of the impact of that fact on the custody evaluation. Because Dr. Silberman was not questioned about this issue at the hearing, we cannot ascertain what, if any, effect this information had on his evaluation. Father's engagement is an important factor in the child's life and should be considered by the expert conducting the custody evaluation. Indeed, mother's marital history and remarriage factored heavily in Dr. Silberman's evaluation. The court is required to consider "the interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interests." A.R.S. §§ 25-403(A)(3) (emphasis added); 25-408(J)(1). However, given the trial court's limited findings, we cannot say that this factor was given adequate consideration. Accordingly, on remand the trial [***14] court should consider father's engagement.

P23 Mother's motion also asserted that there was newly discovered evidence of an order of protection taken out by father's fiancee that covered father and his residence. The order of protection was taken out after the hearing and was the proper subject of a motion for relief from order pursuant to Ariz. R. Civ. P. 60(c)(2). Given the allegations made in father's fiancee's order of protection, we believe that the trial court at least should have considered the newly discovered evidence and heard from father regarding the order of protection. This evidence is related to father's engagement, which should be given full consideration on remand.

P24 Accordingly, we hold that on remand the trial court shall consider father's engagement pursuant to A.R.S. § 25-403(A)(3) and the newly discovered evidence of an order of protection covering father and his residence.

D. Attorneys' Fees on Appeal

P25 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 25-324 (2000). The parties shall bear their own attorneys' fees because neither party has taken [***15] an unreasonable position on appeal, and the parties have comparable financial resources.

CONCLUSION

P26 We reverse and remand for further proceedings in accordance with this decision.

JON W. THOMPSON, Judge

CONCURRING:

G. MURRAY SNOW, Presiding Judge

JOHN C. GEMMILL, Judge

Arkansas Relocation

Unlike most states, the state of Arkansas still prefers to award sole custody to one parent. Unfortunately, this leads to quite a bit of litigation, as both parents usually believe they are the better parent. The law in Arkansas changed in 2002 creating a presumption in favor of the custodial parent regarding relocation. If your ex-spouse is the custodial parent and wants to move to New York City, there isn't a lot that can be done about it. Arkansas is also unique in that the physical custody and legal custody are almost always given to the same parent.

The Arkansas Supreme Court has held that a custodial parent's relocation with the children is not a material change in circumstances justifying a modification of custody and announced a presumption in favor of relocation for custodial parents with primary custody. This same Supreme Court has found that the trial court abused its discretion in modifying primary custody of two boys from their mother to their father based in part on the mother's roommate being a lesbian. The father failed to demonstrate any actual harm or adverse effect to the boys attributable to the roommate's presence in the household, and that there was no showing the two women were engaged in a lesbian relationship and the roommate was no longer sleeping in the mother's bed.

Arkansas law provides a presumption in favor of relocation of a custodial parent with primary custody. Hollandsworth v. Knyzewski, 353 Ark. 470, 109 S.W.3d 653 (2003). The custodial parent does not have the obligation to prove a real advantage to the child and relocation alone is not a material change in circumstances sufficient to justify a change in custody. The trial court, however, found that this rule was inapplicable, based on the parent's pattern of sharing custody. The trial court ordered that the parent's informal agreement to share custody continue while Mother remained close enough to continue the agreement. However, the court ordered that, if Mother relocated in a way that would make the current arrangement unworkable, the decree would be modified to award custody of child to Father.

The Arkansas Court of Appeals reversed. As to Grandmother's rights, the appellate court found that the fact that Grandmother was mentioned in the divorce decree gave her no rights, either under contract or domestic-relations law. "Parents cannot elevate grandparents into a quasi-parental role by agreeing to name the grandparents as babysitters." Rather, the court noted that Grandmother's rights, if any, needed to be determined under provisions of the Arkansas Grandparent visitation statutes. The court held that she failed to satisfy the statutory requirements pertaining to grandparent visitation, and found that the trial court committed reversible error when it allowed her to intervene as a third-party plaintiff.

The court of appeals also found reversible error in the trial court's rejection of the presumption in favor of relocation. The appellate court noted that the parent had never formally sought court modification of the custody order, which had given Mother primary custody. "The parties cannot modify the divorce decree without permission from the court. Absent a subsequent modification, the language in the divorce decree is controlling. Thus, the circuit court had no basis for holding that the terms of the divorce decree had essentially been nullified by the parties' conduct." Thus, the Hollandsworth presumption should have been applied. The appellate court found that the trial court "ordered a prospective change of custody, citing relocation as the triggering event, thereby finding that appellant's relocation would constitute a material change in circumstances to justify a change in circumstances. Such a finding violates our supreme court's holding that relocation, by itself, does not constitute a material change in circumstances."

Basic Custody Terms

Legally, the set of parental responsibilities regarding day-to-day care of the child as well as the rights to direct the child's activities and make decisions regarding the child's upbringing have been split into the separate categories of physical and legal custody for family law purposes.

Physical Custody means the actual living arrangements of the child and the rights and responsibilities associated with daily childcare; and

Legal Custody mean the responsibilities associated with raising a child and includes such questions as religious upbringing, school choice, medical care and issues like discipline, driving age and whether or not to attend summer camp.

Common Custody Solutions
There are many options regarding the division of these rights and responsibilities between divorcing parents. Some options are available as part of an agreement and some options may be required by court order.

Sole Custody: When sole physical custody is awarded or agreed upon, one parent has the exclusive, primary right to have the child live with him or her. That parent is then known as the custodial parent and the other parent becomes the non-custodial parent.
Sole physical and legal custody generally only occurs when there is a history of abuse and neglect. In such instances the non-custodial parent may be limited to restricted or supervised visitation. Currently, the most common type of sole custody is sole physical custody with joint legal custody including the grant of generous visitation for the non-custodial parent.

Joint Custody: In joint custody, parents share responsibility for decision-making and/or for physical control and custody of the children. Couples may agree upon joint custody or the court may order it. Couples with joint physical custody usually share legal custody, but joint legal custody does not necessarily mean joint physical custody.

Split Custody: A less popular resolution where each parent takes custody of different children.

"Nesting" or "Bird Nesting": Children remain in the pre-divorce family home and the parents rotate residence in the home.

Shared Parenting: Shared parenting is a relatively new concept in child custody, recently adopted in some states. Where recognized, shared parenting standards replace previously used custody and visitation rules, using a plan of cooperative parenting as a framework. Shared parenting involves both legal and physical custody. Children may spend equal time with both parents, though no pre-set formula as to how parents share responsibilities is in place. Parents jointly budget for the children's expenses, and each pay equitably for these expenses.

Custody in the Divorce Process

Questions of custody usually first arise when a divorcing couple with children finally decides to separate. While some couples immediately reach an agreement for either short or long-term custody arrangements, others require court intervention for an intermediate or final decision. Custody is addressed throughout the divorce process in the following procedures:

Temporary Hearing: Shortly after the initial papers are filed seeking termination of a marriage, the family court will hold a temporary hearing and then issue an order that controls the relationship of the parties until there is a final Divorce Decree. When custody is contested, the order creates a temporary custody solution. Unless there is evidence that doing so would not be in the best interest of the child, temporary custody is typically granted to the person who stays in the marital home. Temporary custody orders should have no bearing on which party will ultimately be awarded permanent custody. However, depending on the circumstances, the temporary custody order may indicate which parent the court thinks is the more suitable.

Custody and Mandatory Mediation: Most states now require parties in a contested divorce to attempt mediation. Mediation is an alternative dispute resolution process where divorcing couples work with a specially trained neutral third party to try and resolve some or all of their disagreements. Couples may choose to reach mediated agreements on issues like child custody while keeping other issues like property division open for a judge to decide. Couples who resolve their custody disputes through mediation can include a provision in their final divorce agreement that makes it mandatory to return to as a means of resolving future custody and visitation disputes.

Custody Evaluations: If the parties are unable to reach an agreement regarding custody, most courts will order a custody evaluation prior to trial. A court appointed mental health professional such as a psychologist or a social worker usually does the custody evaluation. The evaluation will include interviews with both parents and the involved children, observation of the children, conversations with teachers and possible psychological testing of both parents and the child. It usually takes four to six weeks to conclude a custody evaluation and courts will usually not enter a final determination without a completed evaluation.

Custody Trial: Every state has statutes and procedures for the legal resolution of disputed child custody. While specific statutory standards differ from state to state, most courts decide contested custody cases based upon a determination of what arrangement is in the best interests of the child. Considerations that go into a best interests determination may include review of the child's age and attachment to the parent that has been the primary caretaker, parental physical and mental health, any history of domestic violence and the child's wishes depending upon the age of the child and the motivation for the preference.

Modifications

Once custody has been established either through agreement or court order, parents may seek court involvement to modify the established arrangement if they cannot agree to a change. In order to support a request for a change the parent seeking the modification must show a substantial change in circumstances. Some states will only consider a request for modification within two years of an original custody determination if there is a showing that the child is endangered by the ordered custody arrangement. Additionally, states that follow the Uniform Child Custody Jurisdiction Act will only consider requests for modifications if they occur in the state where a child has an established residence in order to prevent forum shopping and custody motivated child removals. Courts give modification requests motivated by the relocation of one parent special consideration.

California Relocation

Delayed Justice is Denied Justice: LaMusga v. LaMusga

The 1996 landmark California Supreme Court case In Re Marriage of Burgess was supposed to prevent this kind of thing from happening.

Suzy Navarro, her husband Todd, her sons Garrett, 11, and Devlen LaMusga, 9, and their daughter, 3, moved this week from their little rented house in Pleasanton, California, to a spacious new home purchased in Mesa, Arizona.

They just could not wait any longer.

The latest iteration of a rancorous seven-year battle with the boys' father, Navarro's first husband, Gary LaMusga, has been languishing in the California Supreme Court since September 2002. No court has prohibited the family from moving with the two boys to Arizona, but no court has been willing

to modify the father's visitation schedule to accommodate the move. And the issue to be decided? It is whether the family may move -- not to Arizona -- but to Ohio.

Two years ago, Navarro's husband had a job offer there. That job is long gone. It was Suzy Navarro's second request to move to Ohio. Once before, she had asked the court to permit her to move with her sons back to the state in which she grew up and has family in order to go to law school, a life-long dream. That dream was thwarted when her first request to move was denied. The case now pending in the California court system is her second request, made five years later. But while the California Supreme Court ponders its decision, there is no more job for Todd Navarro or future awaiting for the family in Ohio. After moving alone, without his family and infant daughter, and waiting nearly a year for them, Navarro's husband moved back to California in late 2002, to take a job at half the pay.

Recently, Todd Navarro got another much-needed job offer in Arizona. Once again Suzy Navarro tried to get the assistance of California courts to modify her boys' visitation schedule with Gary LaMusga. But this time Navarro was told by Superior Court Judge Kennedy on June 16, 2003, that because the Supreme Court is hearing the matter of her prior request, now moot, that he was without jurisdiction to rule on this one.

Also pending in the court system is the request the children's mother made in February 2001 to increase the below-guidelines child support originally established in 1996 when Suzy and Gary LaMusga were divorced. A trial date on this issue only recently has been set for January 2004.

During the seven-year-long forced march through an expensive legal nightmare, Suzy Navarro, her husband, her sons and their baby half-sister have endured repeated litigation expenses and intrusions into their family and homelife. Court-ordered custody evaluations, mediation under the auspices of the court's family conciliation services, occupational evaluations and psychological counseling continually have disrupted the family's schedule, as well as the children's schooling. But they have not been able to improve the problem that caused the courts to deny Suzy Navarro's first request to move five years ago: her sons' father's tenuous, detached relationship with his children.

Meals, bedtimes, education and study habits, after-school play, and issues of personal hygiene and moral conduct all have been sacrificed to accommodate court orders made to appease LaMusga, whose claims have succeeded in holding the lives and futures of five other people twisting at the mercy of the system. While the "wheels of justice" grind, Suzy Navarro's dream of becoming a lawyer has been frustrated, her husband's career has been jeopardized, her family's finances have been devastated, her children's lives have been destablized? and the lives of all of them have been poked, prodded, harangued, analyzed, and meddled with.

And so last week Suzy Navarro and her family just picked up and moved.

Background

Suzy and Gary LaMusga, a well-to-do businessman, divorced in 1996. At that time, the California family court awarded sole physical custody of Garrett, then 4, and Devlen LaMusga, then 2, to their mother, who had been their primary caregiver since their births.

Suzy Poston, the youngest of eight children, had grown up in Ohio, and had moved to California to join her husband when they married in 1988. The marriage lasted seven years. A finance major in college, she had dropped out of graduate school in 1982 for lack of funds. She got a job as a flight attendant, then rapidly was promoted into management. As she gained success, Suzy saved her money and held onto her goal of becoming a lawyer, perhaps specializing in business or aviation. But marriage to LaMusga meant a move to a new state, the cessation of her blossoming career with the

airlines, and a lifestyle as homemaker and stepmother to LaMusga's troubled teenage daughter from his first marriage. In a few years there was a baby, and then another one.

After her divorce, Suzy Poston LaMusga was ready to try again. She asked the court to permit her to move with her children to Cleveland, Ohio, where she had been accepted at Case Western Reserve Law School. Her brother-in-law taught there, and close relatives lived nearby, including first cousins her children's age.

But the California court said "no." The boys were too young. Gary LaMusga needed more time to develop a relationship with them.

So Suzy stayed. And cooperated. And did everything the courts and therapists told her to do. Over the next few years, LaMusga's relationship with the boys did not improve, despite therapy, despite efforts by all parties. The parents had difficulty getting along, and disagreed about LaMusga's sometimes harsh parenting practices. In 1998, Suzy met Todd Navarro and remarried. The next year they had a baby daughter. A year after that, in December 2000, Suzy Navarro again asked the California courts if she could move. The growing family needed money. Todd Navarro had been offered a position in Ohio that nearly doubled his salary. Suzy Navarro had started thinking about the possibilities back home, the lower cost of living, the help of extended family that she did not have in California, of ending the ongoing conflicts with Gary LaMusga, and of maybe finally going back to law school. In order to not lose the position, Todd Navarro moved to Ohio ahead of his family and they waited for California courts.

But in August 2001 Superior Court Judge Terence Bruiniers again said "no." LaMusga still had a "tenuous and somewhat detached relationship" with his sons, which had not improved in the nearly five years since the LaMusgas' divorce.

The court reasoned that a move of more than 2,000 miles would interfere with relationship therapy between LaMusga and his sons. He told the boys' mother that if she moved to Ohio, the children would be removed from her custody and sent to live with their father, notwithstanding the difficult relationship that he (and his now-third wife) had with them, and notwithstanding that this would separate them from their primary caregiver and sister.

The Navarros appealed. Six months later, however, after enduring the strain of living apart from his family for nearly a year, Todd Navarro resigned his new job, and returned to California, taking a job at half the pay. Three months later, in May 2002, the Court of Appeal for the First Appellate District in San Francisco reversed the trial court's decision. But it was too little, too late. Gary LaMusga appealed the decision to the California Supreme Court, where fifteen months later, the case still is pending.

LaMusga v. LaMusga is being hailed as a revisitation of the landmark 1996 California Supreme Court case of In re Marriage of Burgess . In that year, the same one in which the LaMusgas divorced, the Court held that a custodial parent has a presumptive right to relocate with his or her children.

In connection with this case, the findings of a new study by fathers' rights icon Sanford Braver released by the APA on June 25, 2003, are being touted as showing that children suffer detriment from post-divorce relocations, but controversy exists regarding what that study actually shows. Statements made by Ira Ellman issued in connection with the press release by Arizona State University, as well as his class syllabus on law and public policy, indicate that the Braver study (which he co-authored), as well as an article published in June 2003 by Joan Kelly and Michael Lamb actually were conceived and carried out for the intended purposes of moving public policy and changing California law. The writeup of the actual findings of the study "Relocation of Children After

Divorce and Children's Best Interests" and the APA press release misrepresented those findings and ignored the rather controversial and surprising correlations the study actually did make.

Colorado Relocation

Changes to Colorado's Relocation Procedure and Standard

Divorced or unmarried Colorado parents sometimes find themselves considering moving out-of-state, or relocating to a community substantially more distant (from the other parent) than stated in their original parenting plan.

One often wonders if such a move is permissible in the face of the objection of the other parent. Legally, this is often referred to as a child custody or visitation “relocation” or “removal” issue and dispute. Colloquially, these are often called “move-away” cases.

Recent Colorado divorce and custody statutes (laws passed by the Colorado legislature) and Colorado case law (decisions by judges hearing appeals of Colorado custody-visitation trials) appear to change the legal landscape. Parents considering moving or relocating with their children, or considering their spouse or co-parent's request to move or relocate, will find a new approach and test applied to their case if they are unable to reach an agreement and proceed to court.

Colorado Laws' New Procedure, and Additional Factors for Custody Relocation Cases

In September, 2001, the Colorado statutes established a new procedure and standard for review of cases in which the parent with whom the child resides a majority of the time seeks to relocate or move to a residence substantially changing the geographic ties between the child and the other parent.

The New Colorado Custody and Visitation Relocation Procedure

The new Colorado child custody and visitation relocation law requires a parent seeking to relocate with the parties' child, to provide written notice to the other parent, of:

1. the requesting parent's intent to relocate;

2. the location of the proposed new home;

3. the reasons for the requested relocation and move; and

4. a proposed and revised new parenting time schedule and plan.

The new Colorado child custody and visitation relocation law further requires the Court considering such a request, to determine whether relocation “is in the best interests of the child,” considering all relevant circumstances, including ordinary custody-visitation-parenting time factors, and additionally nine special concerns:

1. the reasons why the parent wishes to relocate with the child;

2. the reasons why the other parent objects to the proposed move;

3. the history and quality of each parent's relationship with the child since earlier court orders;

4. the educational opportunities for the child in the present home community and/or in the proposed new community;

5. whether there is extended family in the present home community and/or in the proposed new community;

6. the benefits of the child remaining with the parent with whom the child presently resides a majority of the time;

7. the anticipated impact of the move on the child;

8. whether meaningful parenting time-visitation can be afforded the other parent if the move or relocation is granted; and

9. any other factors relevant in considering the best interests of the child.

The law contemplates that moving within Colorado may also materially disrupt present parenting plans and timesharing arrangements. The new Colorado parenting law applies to any intended relocation that “substantially changes geographic ties.”

Colorado Courts: New Custody-Visitation Law Changes Legal Framework - Relocation Now Best Interests Standard

The Colorado Court of Appeals (Colorado's intermediate appellate court) has invoked this new Colorado family law statute and framework in two recent Colorado child custody - visitation relocation cases, emphasizing that the “best interests of the child” standard now controls Colorado courts' rulings in relocation/move-away cases.

In a May, 2004 case, the Colorado Court of Appeals agreed with a Jefferson County trial court's ruling in support of a parent's (in this case, the Father's) objection to a proposed move. In the particular circumstances of this family, the Colorado divorce court disallowed a mother's request to relocate with their son to Arizona.

In an April, 2005 case, the Colorado Court of Appeals approved an Adams County, Colorado divorce judge's decision that a mother's proposed move to Missouri with the parties' children was also contrary to the children's best interests. To prevent the move-away, the Adams County trial court changed the parties' decision-making authority (formerly called “custody”) to a shared approach and designated father as the primary residential parent.

What factors influenced this particular decision? The Colorado trial judge found that the children had thrived in the same school since preschool, were highly involved in community activities and school sports, enjoyed meaningful relationships with their half-brother in father's home and with their grandparents residing in the neighborhood, and that the father was a vital part of their lives. Specifically, the Colorado trial judge and reviewing appellate court noted that − in this case − the mother's decision to move seemed “predicated on her needs and desires” and failed to grasp “how the children would be affected by separation from their father, their extended family, their half-brother and the community.”

Importantly, the Court of Appeals ruled that the new Colorado statute had the effect of abolishing the earlier approach of Colorado divorce-child custody-visitation relocation law cases that created a presumption in favor of the parent with whom the child then resided a majority of the time. (Under the earlier approach of Colorado case law, the parent seeking to relocate was required to show a sensible reason for the move, but then the burden of proof shifted to the parent opposing the move.)

These recent Colorado Court of Appeals cases − if not overruled by the Colorado Supreme Court − establish that Colorado courts must now decide whether to permit a parent to relocate with a child (over the other parent's objection) purely on whether such a move or relocation is, on balance and considering all the factors of Colorado law, in the best interests of the child.

Colorado Supreme Court June 2005 Child Custody Relocation Rulings

In June, 2005, Colorado's highest and final appellate court, the Colorado Supreme Court, decided two important child custody cases involving the issue of a parent's moving or relocation.

Relocation at the Initial Determination on Colorado Child Custody

In the first of these (the Spahmer case), the mother wished to move from Colorado to Arizona with her daughter prior to an initial order establishing parenting rights (an “initial custody case”). The Boulder County trial judge had ordered the mother to seek employment and housing in the Denver-Boulder, Colorado metropolitan area while she completed her education at Colorado State University in Ft. Collins.

The Colorado Supreme Court disapproved the trial court's approach, and declared that Colorado trial courts have no authority to order a parent to continue living in Colorado. Instead, a court must accept parents' plans regarding where they intend to live and allocate parental responsibilities (how the parents will share parenting time, and how they will make major upbringing decisions) in the child's best interests — given those plans.

Colorado’s highest court noted that in an initial custody case, parents stand “on equal ground” regarding parental responsibilities. The goal of divorce proceedings is to evaluate the best interests of the child and “create a stable situation between the new family units arising out of a divorce.” Therefore, an analysis of these separate family circumstances is appropriate, rather than the Court’s dictating what these circumstances should be (i.e., where parents will reside).

Relocation Following an Initial Determination of Child Custody

The second of these cases (the Ciesluk case) involved the issue of “removal” or relocation by a parent after an initial determination of parenting and custody rights (a “post decree” after-divorce case). The Colorado Supreme Court agreed with the Colorado Court of Appeals (and finally settled the matter): the new child custody relocation statute eliminates the law's earlier presumption in favor of the majority time parent seeking to relocate. Instead, both parents equally share the burden of proving what parenting time plan and child custody arrangements will serve the best interests of the child following a parent’s relocation.

The Colorado Supreme Court acknowledged two competing concerns:

1. the constitutional right of all citizens to travel — here, an interest of the relocating parent, and

2. the constitutional right of personal choice in matters of family life (and thus of parents to maintain close association with, and to meaningfully participate in the upbringing of their children) — here, an interest of the parent remaining in Colorado.
In deciding these relocation cases and determining the best interests of the child, the Colorado trial judge must weigh both these rights and concerns.

If the majority time parent is no longer favored in such cases, neither is he or she disadvantaged. The Colorado Supreme Court found that the Jefferson County trial court erred in its analysis by requiring the primary caregiver (in this case the mother) to show the move would provide advantages to the

child. Colorado's highest court ruled that requiring the mother to show this "enhancement" of her son's quality of life with a move (thus infringing upon her right to travel) was inappropriate because it tilted the analysis and placed a greater weight on her as the parent requesting the move.

So, how does a judge make such a decision, should parents be unable to come to their own agreement?

Because both parties stand on equal footing and neither has a special burden of proof, the trial court must consider the right to travel and the right of choice in family life along with the list of twenty factors specifically set forth by Colorado's statutory law. Eleven of these are the same factors that influence the allocation of parenting rights in an initial custody case. Nine additional special factors must be weighed in after-divorce or post-custody orders relocation cases.

These factors must be weighed in light of all information the parents present at trial, or the court learns from other sources including child and family investigators ("CFI's" — formerly called "special advocates"). The majority time parent must present specific, non-speculative information about the child's proposed new living circumstances and a concrete plan for modifying parenting time as a result of the move. The minority parent may: (1) wholly contest the move and seek to become the majority time parent; or (2) object to the approach of the revised parenting plan proposed by the majority time parent and provide an alternative.

Basic Principles of Parent Relocation and Move-Away Cases — Colorado Child Custody-Visitation Law

Where does this leave the Colorado child custody relocation or "move-away" law? What factors in Colorado family and divorce law control where children will reside when a parent seeks to move a significant distance?

These principles seem to be apparent:

Colorado parents stand on an equal playing field as Colorado judges weigh what is in the best interests of children when a parent seeks to move.

In initial child custody decisions, courts may not order a parent to reside in Colorado. In subsequent child custody decisions, the court must balance the child's best interests along with the interests of one parent's right to move and of the other parent's right to maintain a close connection with the child. In either case, there is no special burden of proof on either parent, and courts must determine the best interests of the child given the two locations the parents have determined to establish their homes.

Mediation of Colorado Custody Relocation and Visitation Issues

Choices and decisions by parents or judges in this aspect have great impact on children's and their parents' lives. As a result, Colorado divorce law prioritizes hearings on relocation issues. Nonetheless, Colorado judges recognize that these difficult and far-reaching issues are particularly likely to benefit from the family mediation process. As a result, most Colorado courts require mediation before granting a court trial or hearing on a parent's request to move with a child.

Moreover, these changes to Colorado laws regarding custody and visitation relocation remind parents how important it is that they continue to work together and determine cooperatively the design and management of their parenting plan.

In mediation, parents can candidly discuss the practical realities and choices confronting them and their child, as they contemplate relocating or the other parents' desire to relocate. (These may include perceived special opportunities and/or hardships with respect to employment, family, school and other circumstances.) At a time when all choices may present challenges, family mediation offers the best opportunity for both parents to be heard and for constructive problem-solving.

Colorado Legal Terms re Relocation-Custody-Visitation

Colorado's laws regarding relocation embrace the same progressive language of its approach to what is traditionally called “custody and visitation law”. Primary residence means only the home where a child lives a majority of the time. The terms “custody” and “visitation” have been replaced with the terms “allocation of parenting responsibilities” or “decisionmaking” (how major upbringing decisions are made by the parents) and “parenting time” or “timesharing” (how time with the child is shared between the parents).

The terms “custody” and “visitation” have been used in this essay because of their common usage by parents in relocation or removal cases.

Connecticut Relocation

Connecticut Relocation Cases

The question of whether the parent who has primary physical custody of a child can relocate after a divorce is a difficult one for courts and the parties. The Connecticut Supreme Court recently provided guidelines for parental relocation after divorce in Ireland v. Ireland, 256 Conn. 413 (Aug. 18, 1998). Commentators agree that the Ireland decision will make it easier for custodial parents to relocate for legitimate purposes if the purpose of the move is not vindictive or to undermine the other parent's relationship with the child. A subsequent decision has limited the Ireland analysis to relocation cases that arise "post-judgment," or after the parties are divorced. (See discussion of Ford v. Ford, below). At the time the initial decision is made, the court will focus on the "best interests of the child standard".

In Ireland, the parties had been awarded joint custody of the child with primary physical custody awarded to the mother. The child's mother sought to move to California in order to allow her new husband to take a computer consulting job after his previous consulting contract expired. The trial court (Stanley, J.) denied the motion on the grounds that the child's father enjoyed a close relationship with the child, the move to California would substantially interfere with that relationship and would not be in the best interests of the child. Writing for a majority of the en-banc (fully-assembled) Supreme Court, Associate Justice Katz reversed the trial court and returned the case for further proceedings.

Justice Katz reasoned that the realities of divorce result in an alteration of the relationship between both parents and the child and it is not realistic to attempt to preserve completely the quality and nature of the relationship that the non-custodial parent enjoyed, especially if such preservation is at the cost of the custodial parent's ability to start a new life and financially support herself. Justice Katz also found it important to balance the interests of the old family unit against the interests of the new blended family unit which resulted from the custodial parent's second marriage. Justice Katz drew on the thinking of family psychologists that the interests of the child are intertwined with the interests of the custodial parent--limiting a parent's choices as to life's opportunities may result in a diminished quality of life, diminished economic resources and lower personal satisfaction which would impact on both the parent and the child. 246 Conn. at 422-24 (citing J. Wallerstein & T. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce," 30 Fam. L. Q. 305, 315 (1996)). The Court emphasized, however, that its analysis was predicated upon legitimate and proper motives for the move. If the purpose of the move was vindictive or to thwart or

interfere with the relationship between the non-custodial parent and child, the court would consider such motives improper and would not sanction the move. 246 Conn. at 424.

The court held that the custodial parent who wishes to relocate the child bears the initial burden of demonstrating to the court that (1) the relocation is for a legitimate purpose and (2) that the proposed location is reasonable. Once the custodial parent establishes those elements, the burden shifts to the non-custodial parent to prove to the court that the relocation would not be in the best interests of the child. 246 Conn. at 428. The non-custodial parent bears the latter burden because he or she will have access to the information concerning distance, difficulty in maintaining visitation, etc., that would be relevant to the court's determination of the issue.
In order to determine the "best interests of the child," the Ireland court incorporated the multi-factored approach adopted by the New York Court of Appeals in Tropea v. Tropea, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996). The court will consider:

1. each parent's reasons for seeking or opposing the move,

2. the quality of the relationships between the child and the custodial and non-custodial parents,

3. the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent,

4. the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move,

5. the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements, and

6. the negative impact, if any, from continued or exacerbated hostility between the custodial and non-custodial parents, and the effect that the move may have on any extended family relationships.

246 Conn. at 433-34. The Court emphasized that no one factor is so important as to determine the outcome of the case. As an example, the Court stated that in a given case the loss of midweek or every weekend visits necessitated by a move might be "devastating" to the relationship between the non-custodial parent and the child. However, the Court reasoned that less frequent but more extended visits over summers and school vacations would be equally effective in maintaining a close parent/child relationship. 246 Conn. at 434. The Court also also warned that the list of factors was not exclusive and that trial judges can consider other circumstances that have a bearing on the child's best interests.

In Ireland, the parent seeking to relocate had been awarded primary physical custody of the child. The Court did not address the issue of whether it would approach the relocation question differently if the parents had been awarded shared physical custody of the child.

Relocation decisions as part of the initial divorce judgment.

In Ford v. Ford [PDF], 68 Conn. App. 173, 789 A.2d 1104 (Feb. 12. 2002) the Appellate Court ruled that the Ireland analysis applies only to cases in which the relocation issue arises after the divorce has gone to judgment. The opinion was authored by Judge Dranginis, the former statewide chief judge for family matters and therefore the opinion should carry great weight. Judge Dranginis ruled that (1) relocation issues that exist at the time the couple is initially divorce are governed the the "best interest of the child standard," which is the general standard governing custody decisions; and (2) the Ireland burden-shifting scheme that was developed in post-divorce relocation cases, does not apply to relocation issues that arise at the initial judgment for the dissolution of marriage.

Judge Dranginis reasoned that at the time of the divorce, the post-divorce relationship between the child and the custodial parent has not yet been established. In addition, there is not a new family unit (such as existed in Ireland) to take into consideration. And because the parties are on a more equal footing at the time the original custody decision is made, it makes no sense to shift the burden to the party seeking to change the court's previous order, as Ireland requires. At the time the original custody decision is made, the focus is squarely on the best interest of the child. When one of the parents seeks to relocate, the focus is on the parent's interests and how those interests are intertwined with the best interest of the child. Finally, Judge Dranginis concluded that while the Ireland factors may be considered as "best interest factors" and give guidance to the trial court, they are not mandatory or exclusive.

Connecticut Relocation Cases as a Model for Nationwide Cases

After two long years in a bitter divorce and custody fight, John and Mary Doe have finally put their disagreements behind them. During the course of the litigation, virtually every issue was contested and ultimately litigated, including alimony, property division, custody and visitation. In addition to entering its financial orders, the court ordered joint custody of the parties' three sons (ages 14, 11 and 8) with Mary having primary physical custody. Although John was not thrilled with the court's decision to grant Mary primary physical custody, he has accepted it and has religiously followed the court's visitation schedule of alternating weekends from Fridays at 6:00 p.m. through Sundays at 8:00 p.m and every Wednesday from 4:00 p.m. to 8:00 p.m. In addition, Mary and John have also arranged additional visitation when it is convenient for both of them. As a result, John has developed a close bond with all three children. John owns and operates his own stationary store in Norwalk so he is able to be flexible with his hours to accommodate the children. Mary and the children also live in Norwalk, less than 15 minutes away from John's home.

The trial ended in the summer of 1994 and for the last two and one-half years there have surprisingly been no problems. The parties have of course had a few disagreements over the years regarding educational issues, yet there have been no return trips to the Superior Court and no modifications to the dissolution judgment. However, Mary has just informed John that she and her new husband, Fred (they were married only six months ago), plan to move to Bangor, Maine with the children because Fred has finally found a job which will pay him what he was previously making in Connecticut, before he was fired. John is very much against this proposed move because he believes it will irreparably damage his relationship with the three boys and break the very tight bonds he has worked so hard to develop. Mary has filed with the superior court a motion seeking permission to relocate and John has filed a motion seeking to enjoin the relocation. The issue of relocation was not addressed by the parties or the court at the time of trial.

CHARACTERISTICS OF A RELOCATION CASE

The above scenario is becomingly increasingly more common in family courts throughout the country in general, and the Connecticut Superior Court in particular. These types of cases, commonly referred to as "relocation cases, " raise some of the most difficult legal, psychological and emotional issues facing our courts today. The court must balance, among other things, the custodial parent's constitutional right to move with the noncustodial parent's right to regular and consistent parenting, all against the backdrop of what is in the best interests of the children, which may or may not be consistent with either of the parents' rights.

The increasing number of relocation cases being litigated throughout the country may be attributed to some or all of the following factors: (1) society is becoming more mobile in general; (2) the downsizing of corporate America; (3) women, who statistically are traditionally the custodial parent, gaining a greater presence in the work force; (4) increase in divorce and therefore second marriages; and (5)

the "grass is always greener" theory. The increasing number of relocation cases being litigated throughout the country means that courts will be faced with perhaps the most difficult and heart wrenching decisions that any judge must make. A court's decision in these cases represents a turning point in the life of a child. Whether the court permits or restricts the custodial parent's relocation efforts, the future development of the child will be set forever in motionin one direction or the other. The child's emotional, psychological, physical, educational, financial and perhaps even spiritual well-being will all be permanently affected by the scope of the court's decision. In fact, it may turn out to be the trial judge who becomes the most influential person in the child's life.

HOW STATES HANDLE RELOCATION CASES

Many states have enacted statutes to provide guidance to the trial court in resolving relocation disputes, while others states have left the matter solely to the developing body of case law. States with statutory enactments include California, Illinois, Nevada and Texas.i California's statute permits a custodial parent to relocate with a child so long as the move does not prejudice the rights or welfare of the child. The Illinois statute places upon the relocating party the burden of proving that relocation is in the best interest of the child. Texas takes a somewhat different approach and penalizes the relocating parent who moves more than 100 miles from the noncustodial parent's home by requiring the custodial parent to pick up and drop off the child at the noncustodial parent's home. The courts in Connecticut do not have the benefit of a clear statutory enactment outlining such things as who has the burden of proof and what factors should be considered by the court in reaching a decision in a relocation case. Moreover, neither the Connecticut Supreme Court nor the Appellate Court has spoken on the issue of post-dissolution relocation. Thus, family law practitioners throughout the state have instead been handling their cases on an ad hoc case by case basis.ii Furthermore, without any Connecticut appellate authority on the subject, the Superior Court has frequently turned for guidance to cases from other jurisdictions. In 1996 alone, the highest courts in California, Colorado, Florida, New York and Tennessee have issued significant decisions in relocation cases.iii

DAVIS V. DAVIS

Recently, however, the Connecticut bench and bar has been the beneficiary of a comprehensive superior court decision from perhaps the most learned trial judge in the state in the area of child custody law, Judge Joseph Steinberg. In Davis v. Davis, (Middletown, Oct. 3, 1996), Judge Steinberg, relying primarily upon the well known New Jersey case of D'Onofrio v. D'Onofrio (1976), sets forth in detail the criteria to be used by the court "as a basic foundation for evaluating relocation issues." The court further discusses some additional basic principles established by D'Onofrio.

In Davis, the parties were divorced in September of 1993, at which time the court adopted the terms of a Separation Agreement granting joint legal and physical custody of their two children, ages 11 and 7. The judgment provided neither a specific visitation schedule nor a child support order. Following the divorce, the parties continued to live together for ten months and continued to co-parent the children in the very same manner they did during the marriage, as the mother played the primary role in organizing the children's schedules. After the ten months, the father moved outside of the children's school district while the mother rented a home in the children's school district.

The children lived with their mother during the week and spent three out of every four weekends with their father from Fridays at 5:00 p.m. until Sundays at 8:00 p.m. The father also had the children on Wednesdays from 4:00 p.m. until 8:00 p.m. The children also spent two weeks every summer in Illinois with both their maternal and paternal grandparents.

Both parties developed relationships with other individuals; the father began dating another woman and developed a close relationship with her, while the mother became engaged to an individual holding a Doctorate in Pharmaceutical Sciences and a Doctorate in Pharmacy. Despite repeated and

well intentioned efforts, the mother's fiancee was unable to find employment anywhere in Connecticut. He eventually accepted a job in Maryland with the Food and Drug Administration. Mrs. Davis, a trained biochemist who worked part-time during the marriage, also accepted a job with the FDA in Maryland.

Mrs. Davis therefore requested permission from the court to relocate to Maryland with the children and Mr. Davis, who initially considered relocating , objected because he was just beginning a new job and because his girlfriend did not have physical custody of her children and would be forced to forfeit much visitation is she were to relocate.

It is against these facts that Judge Steinberg provided much needed guidance in the area of relocation law. The opinion begins with the recognition that "Connecticut has not yet had the benefit of an appellate review of relocation criteria in its most virulent form, post dissolution" and that relocation disputes "now represent a significant portion of this court's docket and would benefit from a clear statement of the criteria to be used in determining if relocation is in the best interests of the minor children involved." The court then immediately adopts the following criteria "as a basic foundation for evaluating relocation issues."

The prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children.
The integrity of the motives of the custodial parent in seeking the move. Whether the removal is inspired primarily to defeat or frustrate visitation by the noncustodial parent and whether the custodial parent is likely to comply with substitute visitation orders when no longer subject to the jurisdiction of the courts of this state.
The integrity of the noncustodial parent's motives in resisting the removal.
The court must be satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.
The court in Davis, in addition to formally adopting the above criteria for Connecticut relocation cases, also espoused three basic principles initially set forth by the New Jersey court in D'Onofrio. These three principles, which the court describes as "basic" are, quite frankly, all favorable to the party seeking to relocate. The first principle suggests that courts should not insist on sacrificing relocation advantages and forfeiting a better lifestyle for the custodial parent and the children solely to maintain weekly visitation by the noncustodial parent, at least where reasonable alternative visitation is available and where the advantages of the move are substantial.

Second, the court notes that it is uncontradicted that "the possibility that uninterrupted visitation of a week or more several times a year, where the noncustodial parent is in constant and exclusive parental contact" and has to provide daily for the children as if he or she were the primary physical custodian may well work better than the usual and customary "weekly visitation which involves little if any parental responsibility."

The third principle noted by the court is that a noncustodial parent is perfectly free to leave the state despite the children's continuing residence in order to seek a better life without interference by the noncustodial parent (query whether a custodial parent may seek to restrain a noncustodial parent from relocating on the ground that such a move is not in the best interest of the child). The custodial parent is entitled to the same option, the court reasons,particularly where relocation is truly advantageous and where the noncustodial parent can continue to maintain adequate contact with the children, albeit by a different visitation schedule.

After setting forth both the criteria to be applied by the court and the principles of D'Onofrio to be considered, Judge Steinberg adds:

[u]nless the facts of the case dictate otherwise, divorce should not empower a non-custodial parent to control the major life decisions of a custodial parent. Divorce is intended to sever that control. As a corollary, divorce should not empower a custodial parent to arbitrarily excise the non-custodial parent from the children's lives. Alienation should not be countenanced. Those difficult balances can be achieved only through painstaking exploration of the disparate facts in each relocation case.

Applying the above criteria and principles to the facts of Davis, the court awarded primary physical custody of the two children to the mother and permitted her to relocate to Maryland. The court found the father to be a good and loving parent yet limited in his skills and judgment, while the mother was found to be more competent and credible. At trial, the mother refused to speak ill of the father while the father "was unable to restrain himself from speaking harshly of her social patterns and activities when his attorney opened the door and invited him through." The court further determined, notwithstanding the older child's preference to remain in Connecticut, that all of the activities the boys enjoyed in Connecticut are available in Maryland, where the children have already made friends.

The court determined that the general quality of life of the mother and the children would be improved in Maryland where the family will benefit from a substantial joint income and the flexible work schedules of Mrs. Davis and her fiancee will allow them to be available to the children. As far as visitation to Mr. Davis, the recommendations of the Family Relations Officer were adopted by the mother and provide the father with a base for preserving and fostering the father's parental relationship with the children; specifically, one weekend per month, with extended summer and Easter vacations.

In addition to being significant for providing specific criteria to be applied in a Connecticut relocation case, Davis is also significant for what it does not say. The court does not formerly establish a burden of proof on either party. Rather, the court, in addition to noting the important criteria, applied a general best interest of the child test. Since the courts in Connecticut are likely to apply the best interest of the child test, arguments by either party as to which of them should bear the burden of proof may largely be academic. Yet, it is this very issue which has provided the most controversy in the attempt of some family lawyers to draft a Model Relocation Act.

MODEL RELOCATION ACT

The American Academy of Matrimonial Lawyers (AAML) has prepared a Model Relocation Act it hopes will be used by the courts and state legislatures in developing their own relocation laws. Among other things, the proposed Model Act sets forth detailed notice requirements designed to ensure that both the custodial and non-custodial parent are kept aware of any changes in either the child's or the parents' residence. The Act further defines the specific factors to be considered, and not to be considered, by the court in evaluating relocation cases.

Among the factors to be considered under the terms of the Act are the quality and extent of involvement of the child's relationship with both parents, the developmental needs of the child, the impact of the proposed move on the child, the feasibility of alternative visitation schedules, the child's own preference, the motives of both parents, and whether the general quality of life of the child will be enhanced by the relocation, including the financial, emotional and educational well-being of the child.

The Act further proposes three alternative provisions regarding the burden of proof in relocation cases. The first option would place upon the relocating party the burden of proof that the proposed relocation is made in good faith and in the best interest of the child. The second option would place upon the nonrelocating party the burden of proof that the objection to the move is made in good faith and that relocation is not in the best interest of the child. The third alternative represents a compromise and provides that the relocating parent has the burden of proof that the proposed relocation is made in good faith. If that burden is met, then the burden shifts to the non-relocating

parent to demonstrate that the proposed relocation is not in the best interest of the child. Under the terms of the Act, each state legislature would have the choice of selecting which of the above options to be implemented.

The Model Relocation Act developed by the AAML would offer jurisdictions such as Connecticut a model for a statutory solution to the developing issue of relocation. Until the Connecticut legislature passes a statute such as the Model Relocation Act, the bench and bar alike will be guided by Judge Steinberg's recent decision. In Davis, Judge Steinberg has provided a helpful blueprint for family law practitioners to follow in gathering their evidence in relocation cases, and one which the courts can use to evaluate that evidence in reaching their decisions.

Florida Relocation

In Florida, primary residential parents seeking relocation with their children need to file what's called a "petition for modification of final judgment" to re adjust visitation schedules and child support obligations for the soon to be out of state non custodial parent. If the relocation is in the best interests of the children, i.e. moving for a better paying job, or to be near family, and is not done to frustrate the visitation schedule of the non custodial parent, or for vindictive reasons, chances are the court will grant the relocation of the primary residential parent with the children. Since the primary residential parent will now have the children more frequently, child support to that parent should generally be increased.

Georgia Relocation

WHY CUSTODIAL PARENT'S RE-LOCATION IS A SUFFICIENT CHANGE OF CONDITION TO SUPPORT A PETITION FOR MODIFICATION OF CUSTODY BY THE NON-CUSTODIAL PARENT.

A REVIEW OF THE RECENT SUPREME COURT OF GEORGIA DECISION,
BODNE V. BODNE, , 277 Ga. 445, 588 S.E.2d 728, (2003)

Preface

This chapter attempts to identify recent case law involving Petitions for Change of Custody based upon a change of condition. This chapter is directed toward those divorced, with minor children.

In November 2003, the Supreme Court of Georgia in Bodne v. Bodne, 277 Ga. 445, 588 S.E.2d 728, (2003) (Benham, J., dissenting) overruled or changed many years of child custody law as the Court rescinded the well established presumption that custodial parents have a prima facie right to retain custody.

In Bodne, the parties divorced in 1999, and the divorce decree provided both mother and father joint legal custody of the two minor children. In other words, the mother would have the minor children 50% of the time physically and the father would have the minor children 50% of the time physically. The parties agreed to share the children in equal amounts of time and anticipated alternating every two weeks. In 2001, Mr. Bodne (the father) remarried and informed his ex-wife that he planned to move to Alabama from Georgia and filed a petition to modify the visitation of his ex-wife in contemplation of the move. Ms. Bodne (the mother) filed a counterclaim opposing the move and sought primary physical custody of the children. The trial court awarded the mother primary physical custody of the minor children, which was based on the father's move to Alabama. Thereafter, Mr. Bodne appealed.

The trial court heard a great deal of evidence supporting irreparable harm to the children and held that their was a substantial change in a material condition affecting the children's welfare and ordered a

change in custody to the mother. Bodne, supra. On Appeal, the Court reversed the decision of the trial court finding that the father, as custodial parent, had a prima facie right to retain custody absent a showing that the new location put the children at risk. Id. The Georgia Supreme Court reversed the Court of Appeals decision holding that the previous presumption that the custodial parent has a prima facie right to retain custody, unless the objecting parent shows that the environment of the proposed re-location endangers the child's physical, mental, or emotional well being." Id.

As a result of Bodne, when a custodial parent relocates from Georgia, this relocation will allow for the non-custodial parent to petition the trial court for custody. The relocating parent will not lose custody automatically, but the relocation is a sufficient change in condition to enable the non-custodial parent to seek a change of custody. [1]

The dissenting opinion in Bodne v. Bodne by Justice Benham states the following:
"The opinion of the majority in this case abandons clear and workable guidelines for resolving conflicts regarding the custody of children, substituting a vague and undefined overarching principle for specific and objective rules of law which have been a useful part of this State's jurisprudence for many years." The effect of this change in the law will be increased litigation, uncertainty in the area of domestic law, increased cost for the parties attendant to the expansion of litigation, unnecessarily contentious custody proceedings, and inconsistency from circuit to circuit, court to court, and judge to judge." In essence, Justice Benham could not join the court's decision because he thought it was an abandonment of established Georgia law.

After a divorce, many former spouses endure many changes. Some meet new people, marry, and have more children. Others find new jobs, go back to school, which would lead to a possible relocation. Does the Bodne decision prevent the custodial parent from moving from the State of Georgia for any of these reasons? Will a primary physical custodian's move from one county to another serve as a basis for change of custody? There are thousands of questions regarding the ramifications of the Bodne decision. Time will tell whether this decision will be long standing precedent in child custody matters.

1 Bodne v. Bodne,588 S.E.2d 728 (2003) overruled Ormandy v Ormandy, 217 Ga. App 780(1)459 S.E.2d (1995), which held that relocation by the custodial parent is in the best interest of the child.

Illinois Relocation

OVERVIEW: “Removal” is the legal term of art lawyers use to describe the situation where a divorced parent with custody or joint custody of minor children wants to move out of state and take the kids with him / her. Removal cases can be quite easy. They can also be very difficult – it depends largely on the way the case is prepared. Our advice is to begin working with an attorney very early on – certainly well before the relocation is finalized. Don’t wait to the last minute to do what needs to be done in court. Start early so that our skilled and experienced attorneys have time to address any unconsidered factors that may possibly prevent the move. Perhaps more important, start your removal case early enough to account for a slow court system that could delay the move beyond a critical deadline.

IN-STATE RELOCATION: Illinois’ removal law and the cases decided under it do not apply to situations where a custodial parent wants to relocate within Illinois. Even where parents have joint custody, if one parent is identified as the “primary,” or “residential” parent, that parent can sometimes move within Illinois with virtually no opposition from the court. (1)

HISTORY OF REMOVAL IN ILLINOIS: As our society has become more and more mobile, removal cases have become more and more common. The various appellate districts handled removal cases in very different ways up until 1988. In that year, the Illinois Supreme Court decided that the

application of the law had become too out-of-balance between the appellate districts and sought to make things more uniform by handing down a rule and a formula in the case of In re: Marriage of Eckert. In the Eckert case, the Supreme Court instructed judges faced with removal cases to consider:

The likelihood that the move will enhance the general quality of life for both the custodial parent and the children;

The motives of the custodial parent in seeking to move to determine whether the removal is merely a ruse intended to defeat or frustrate visitation;

The motives of the non-custodial parent in resisting the removal;

That it is in the best interest of the child to have a healthy and close relationship with both parents and therefore the visitation rights of the non-custodial parent should be carefully considered; and

Whether a realistic and reasonable visitation schedule can be reached if the move is allowed.

Some courts applied the Eckert factors differently than others. Many courts (2) took the language "that the move will enhance the general quality of life for both the custodial parent and the children…" to mean that the child had to experience a direct benefit – an indirect benefit through the moving parent was insufficient.

Other courts found that an indirect benefit to the child through the moving parent was sufficient to justify the move. That reasoning went like this: "A happy parent makes for a happy child; and if the move will make the parent happy, then the move will benefit the child."
In 2003, the Illinois Supreme Court endorsed the "a-happy-parent-makes-for-a-happy-child" logic and ruled that indirect benefits to a child could partly justify an out-of-state relocation. (3) Since then, recent cases have permitted removal much more liberally. In one notable case, removal was permitted to Switzerland. (4) On the other hand, the Eckert factors are still the law of the land – even if they have been softened by recent decisions – and what seems like routine requests to move the children only a few miles from Northern Illinois to Milwaukee have been denied. (5)

WHAT IT TAKES TO SUCCEED AT REMOVAL: Like most issues involving children, the standard by which courts make removal decisions is "the best interest of the child." It used to be that in most counties in Illinois, generally, removal was disfavored, because it tends to disrupt the connection between the child and the remaining parent. (6) Today, however, where the removal can be shown to be of benefit to the child – notwithstanding the change in the frequency of contact with the remaining parent – removal should be permitted where a direct benefit to the removing parent can be shown or where a direct or indirect benefit to the child can be shown. (7)

NEW SPOUSE IN ANOTHER STATE: Illinois law used to frown on removal cases predicated on the need to be near a new spouse in another state. As noted above, however, case law has changed drastically in recent years and such arguments now carry much more weight in a court's determination. Ultimately, the service of the child's best interest is the final determining factor and so the child's relationship with the new stepparent, the increase in standard of living brought by the new relationship and possible employment, and the extent to which the new relationship / locale will better enable the removing biological parent to enhance the child's welfare will all come into play in any determination.

NEW JOB IN ANOTHER STATE: When deciding to allow a particular request to remove children from Illinois, our courts may consider whether the custodial parent has a better job opportunity in another state and the extent to which the increased earnings will provide for a better lifestyle for the child. (8)

NEIGHBORHOOD AND SCHOOL COMPARISONS: Any removal case necessarily involves neighborhood and school comparisons. When you get to this point, be sure to work with an experienced attorney to ensure that the evidence you develop may be used in the court case. Most information prepared by non-lawyers ends up not being admissible when the case goes to trial because, lacking knowledge and training, non-lawyers overlook the technical requirements needed to satisfy the court's rules of evidence. Whether you're seeking to remove a child from Illinois, or opposing such an attempt, always work with an experienced, skilled attorney from the outset to ensure the best possible success for your case.

WHAT IS TAKES TO PREVENT THE OTHER PARENT'S REMOVAL: Notwithstanding recent changes in the ways courts analyze removal cases, the foundation for opposing any removal action goes back to the days of Eckert. Again, work with an experienced, skilled attorney to prepare your opposition. Successful oppositions include at least one of the four Eckert factors:

The move will not enhance the general quality of life for either the custodial parent or the children;

Your motives in resisting the removal are based not in attempting to thwart your former spouse's efforts at a new life, but merely in your love for your child and your attempt to secure your child's best interests (consider, for example, the strategic difference between the argument that you won't see your child as much, as opposed to the more powerful argument that your child won't see you as much);

That it is in the best interest of the child to have a healthy and close relationship with both parents and therefore the visitation rights of the child to spend substantial time with you should be carefully considered;

That no matter how convenient, frequent, or robust, any visitation schedule that requires the child to travel significant distances merely to have contact with the other parent imposes an unreasonable burden on the child. Additionally, your opposition case may examine the motives of the custodial parent in seeking the relocation to determine whether the removal is merely a ruse intended to defeat or frustrate visitation – obviously, this last element will depend on the facts and history of your case.

OUT-OF-STATE VACATIONS AND TEMPORARY REMOVAL: Illinois law requires a parent to inform the other parent (or his or her attorney) of the location (including a phone number) of where the child will be staying and the duration of the absence from Illinois. (9)

When a divorce case is first filed, a restraining order is automatically imposed on both parents to not remove the children from Illinois for any reason – including vacations – without first obtaining written consent from the other parent or a court order authorizing the trip. (10) Once your divorce case is concluded this shouldn't be much of a problem. (11) At the time of the initial filing, however, this little section of law can prove most helpful to attorneys facing cases where one parent will flee to another jurisdiction with the child. The law allows courts to get a good firm handle on a case and calm the parties down before things get too out of hand.

SECURITY FOR THE RETURN OF CHILD AND VISITATION COMPLIANCE: The assured return to Illinois of the child is a concern raised in many removal cases – especially cases of temporary removal where the divorce case is still being fought before the court. Consider the situation, for example, where one parent is a foreign national and, during the divorce case, wants to travel with the children to visit family in the old country. How can we guarantee the safe return of the children? Illinois law (12) provides a method for dealing with such situations. Essentially, the court sometimes needs to ensure that once the child is beyond Illinois' borders, the removing parent will continue to adhere to visitation and other court requirements. The posting of a bond, a bank account, and even the signing

over of the removing parent's assets (including real estate and business interests) into escrow have all been used by courts to ensure that the removing parent will not turn into an international child abductor, but will instead return the children safely and timely.

A word to the wise: work with an attorney when dealing with the issue of removal, and especially when crafting these "removal-security agreements." There are many cases that demonstrate that the smallest mistake can result in huge and irreparable damage. (13)

UNMARRIED PARENTS: Generally speaking, unmarried, custodial parents, may remove children from Illinois without consulting the other parent or the court. In some cases, however, pre-existing court orders may prevent such a move. Unmarried, non-custodial parents do not have the right, under Illinois law, to enjoin a removal action, per se. (14) They may, however, accomplish the same ends by enforcing existing custody and visitation orders. When parents have never been married, the custodial parent's desire to leave the state with a child, in and of itself, constitutes a "change of circumstances" that may justify the out-of-state relocation. (15)

JURISDICTION OVER UNBORN CHILDREN: Illinois' removal law does not affect a pregnant woman – she may leave the state at any time prior to the child's birth and an Illinois family court may not enjoin her from departing. The Illinois court may, however, still keep jurisdiction over the husband and wife, and may retain jurisdiction over the issue of custody of the unborn child until the issue becomes ripe. (16)

LONG DISTANCE VISITATION AND CONTACT AFTER REMOVAL: Sometimes the proposed visitation arrangements themselves can be the death knell for a proposed removal. Consider the differences, for example, between the case where a child has both parents living near major airports, and the case where the parents live a hundred miles from the nearest, small, airport.

One child may have to spend a few hours in the air to go between homes, while the other child may face a layover, having to make a connection, and a long drive at each end of the trip – for each and every trip, both ways! Such complications in transportation have undone more than one proposed removal. (17) Likewise, where the parents cannot afford airfare and driving is the intended method of transportation, long distance visitation is probably too impracticable to be considered and, for that reason, most removal petitions accompanied by such transportation plans are denied. (18)

WHEN REMOVAL IS ALLOWED: Illinois courts almost always alter the parents' respective rights and responsibilities regarding visitation and other types of contact. In most cases, these are the most important issues – and they are also the issues that are most neglected by parents and attorneys alike. If you are, or your former spouse is, thinking of removing a child from Illinois, do yourself (and the child) a favor by working with a team of attorneys who can accomplish your goal (whether seeking or objecting to the removal) and, if removal is allowed, establishing rights and responsibilities that will ensure things flow smoothly for everyone – especially the child.

Generally speaking, when removal is allowed, visitation rights of the remaining parent are preserved by allowing him or her less frequent visitation, but for more extended periods of contact. (19) Our law firm has been successful in obtaining visitation schedules that afforded a remaining parent more time with the child after the removal than before. Depending on the distance of the removal (up to 2,000 is not uncommon), in most cases it shouldn't be hard to accomplish. (20)

HELPING KIDS TRANSITION TO REMOVAL: Moving – whether out-of-state or in-state can be a disruptive experience for children because so many changes take place. Don't bring up the subject with them without first talking with your lawyer. For kids who have no control in the post-decree process, the possibility that a move MIGHT happen can be more stressful than knowing with certainty that a move WILL happen. Leave them out of it until you have a very good idea from your attorney

about what to do and how to proceed. If you've already successfully obtained permission to move, here are some suggestions on how to help kids cope with the stress and change that comes with relocation:

Tell them why you are moving. Tell them early.

Have a discussion and talk with them about what they will be sad about leaving and what they may be looking forward to at the new location and ask them what they'd like to know about the new location.

Plan a party to say goodbye to friends and develop a way to stay in touch.

Prepare a calendar that explains to them what will happen in what order to accomplish the move.

Read stories about moving.

If you can, take the children to the new locale and show them where their new school is (and, meet their new teacher / class), the local parks and playgrounds, and other areas of interest. If you can't take the kids along, bring back photos or video to show them.

When packing, pack the kids' things last – so they're unpacked first.

Spend lots of time with the kids after your arrival. Explore the new neighborhood so they won't be worried about getting lost, help them plan their first day at the new school (what to wear, what to take, class schedules, etc.).

Listen to their concern – a problem defined is half solved.

TRANSPORTATION COSTS: Visitation transportation costs are frequently assessed to the parent who removes the child from Illinois. (21) Our attorneys have some very creative ideas about allocating the transportation expenses – like having the removing parent pay, deducting transportation expenses from child support, (22) and establishing an escrow account with child support payments to cover the costs of transportation. (23)

TELEPHONIC CONTACT AND "VIRTUAL VISITATION": Virtual visitation should also be a major consideration in any case where removal is likely. With all of the communication options available today, a remaining parent should be able to have contact with a child on a daily basis. Telephone contact is the most common form of contact. E-mail and instant messaging sessions are fast becoming common elements of removal agreements. (24) Where high-speed internet is available, video contact is also a viable option: a child and parent with a good video link can share in the day's events – the child can display trophies, awards, homework problems, etc., and, with voice-over technology, child and parent can make much good use of such "virtual visitation."

Indiana Relocation

Some courts have side-stepped the constitutional issue by pointing out that a denial of relocation does not affect the parent's right to travel alone. As the Indiana Court of Appeals explained, "The straightforward answer to [the wife's constitutional] argument is that the court's order does not impose any necessary burden whatever upon her right to travel. She remains free to go wherever she may choose. It is the children who must be returned to Indiana." Clark v. Atkins, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986).

Other courts have decided the constitutional issue head-on. These courts note that if a parent who seeks to travel must pay for that right by giving up custody of the children--which is itself a

constitutionally protected right, see Santosky v. Kramer, 455 U.S. 745 (1982)--the right to travel has indeed been infringed. The inquiry then becomes whether that infringement is justified by a compelling state interest.

Most courts deciding this issue have held, as did the Montana Supreme Court in In re Marriage of Cole, supra, that "furtherance of the best interests of a child, by assuring the maximum oportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate." 729 P.2d at 1280-81 (1986). Therefore, in relocation cases courts must engage in a "delicate balancing," on the one side the child's best interests, and on the other side the custodial parent's fundamental right to travel, which is "qualified by the special obligations of custody . . . and the competing interests of the noncustodial parent." Id.

The Indiana Court of Appeals reversed a transfer of primary physical custody to the father based on the mother's in-state move in In re Marriage of Van Schoyck, 661 N.E.2d 1 (Ind. Ct. App. 1996). Four years after the divorce, the mother had moved to another city to live with her boyfriend and his parents. The court of appeals held that the father had failed to demonstrate a change in circumstances warranting a custody modification. The father's desire for the child to remain in the same school district was an insufficient basis for a custody transfer.

Similarly, in Basler v. Basler, 892 S.W.2d 749 (Mo. Ct. App. 1995), the Missouri Court of Appeals reversed a transfer of primary physical custody to the father based on the mother's in- state move. The move occurred six years after the divorce, when the mother remarried and moved to another county. Although the divorce decree provided that a move by either party outside a three-county area could justify a change of custody, the court did not believe that a move from southeast to central Missouri was significant enough to warrant a custody transfer. See also In re Marriage of Wycoff, 266 Ill. App. 3d 408, 639 N.E.2d 897 (1994) (reversing custody transfer based on primary physical custodian's in-state move); Peyton v. Peyton, 614 So. 2d 185 (La. Ct. App. 1993) (same); Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996) (reversing trial court's denial of sole custodian's request to move in- state); Bingham v. Bingham, 811 S.W.2d 678 (Tex. Ct. App. 1991) (affirming grant of primary physical custodian's petition to relocate to another county).

When the divorce decree prohibits a move outside a certain area, however, some courts will enforce the restriction even if the move is to another area in the same state. In Cohn v. Cohn, 658 So. 2d 479 (Ala. Civ. App. 1994), the parties' incorporated separation agreement gave primary physical custody to the mother but restricted her residence to the county. When she planned to move to a distant city in the same state, the father sought a custody modification. The trial court denied modification but enjoined the mother from changing the children's residence outside the county. In affirming, the Alabama Court of Civil Appeals held that enforcement of the parties' agreement was proper. Additionally, the evidence supported the trial court's finding that removal from the county would not be in the children's best interests. They had lived their entire lives in the county and had a large extended family there. See also Wood v. O'Donnell, 894 S.W.2d 555 (Tex. Ct. App. 1995) (reversing grant of permission to primary physical custodian to move to another county when parties' incorporated agreement restricted custodian's residence to same county).

Better Employment Opportunities. The courts are generally less inclined to permit moves based upon enhanced employment opportunities in the new location rather than upon an actual employment offer. In In re Marriage of Creedon, 245 Il. App. 3d 531, 615 N.E.2d 19 (1993), a mother with primary physical custody sought to relocate to Texas, a state with a better pay scale for teachers with her level of education. Although she did not have a specific offer of employment, she presented a letter from a school district in Texas stating that she had an excellent chance of employment there. The trial court denied the mother's petition, explaning that the mother's desire for economic betterment, although laudable, was outweighed by the father's interest in maintaining a close relationship with the children.

The Illinois Appellate Court affirmed, believing that lengthy summer visitation with the father, coupled with infrequent visitation during the school year, would be an unsatisfactory substitute for the frequent and regular contact he enjoyed with the children under the existing custody arrangement.

Other courts have permitted relocation when the custodian's enhanced employment opportunities in another state were coupled with another benefit to the children, such as the presence of relatives there. In Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991), the New Mexico Supreme Court affirmed the trial court's finding that the mother's move to New Hampshire, where her parents lived and where she believed she could find steadier employment, was in the child's best interests. Similarly, in Smith v. Smith, 615 So. 2d 926 (La. Ct. App.), review denied, 617 So. 2d 916 (La. 1993), the Louisiana Court of Appeal reversed a transfer of physical custody to the father based on the mother's move to Indiana. The court noted that the mother was seeking improved employment opportunities for both herself and her new husband, who had enrolled in school in Indiana. In addition, the mother's parents were located in that state.

Fresh Start. In some cases, a custodian desires to relocate to another state simply to make a fresh start in life after the unpleasant experience of a failed marriage. Often, the custodian desires to relocate with a companion or new spouse. The results in such cases have been mixed.

Relocation for this reason was permitted in Swonder v. Swonder, 642 N.E.2d 1376 (Ind. Ct. App. 1994). Two years after the divorce, a mother with sole custody filed a notice of intent to move to Colorado, where the family had frequently spent vacations. The father sought a custody modification. As her reason for the move, the mother stated that she wanted to start a new life for herself and that she believed the climate in Colorado was healthier for the child. The trial court held that custody would be transferred to the father if the mother moved out of the state. The Indiana Court of Appeals reversed, however, noting that neither statutory nor case law placed any burden of proof on a relocating parent. Indeed, precedent established that a denial or transfer of custody based on the custodial parent's decision to move is improper when the move is made in good faith and out of a desire to improve the material or psychological life of the custodian, so long as the child's interests are not prejudiced thereby. In this case, the move was to improve the mother's psychological life, and the father failed to show resulting prejudice to the children. Thus, a modification of custody based on the move was improper. See also Wages v. Wages, 660 So. 2d 797 (Fla. Dist. Ct. App. 1995) (reversing custody transfer to father when mother with primary physical custody moved to Kentucky with new husband to start new life).

Kansas Relocation

The Kansas law regarding relocation of a child is found at Kansas Statutes Annotated section 60-1620. The law requires a party who plans to either change the residence of the child or remove the child from the state for more than ninety days to provide the other parent written notice at least thirty days in advance of the relocation or removal. The notice shall be sent by restricted mail, return receipt requested, to the last known address of the other parent. The statute goes on to say failure to provide the notice is indirect civil contempt which can result in the assessment of attorney’s fees against the party. Failure to provide notice may also be grounds for modifying custody, residency, child support or parenting time. Finally, the statue states the notice is not required if the other parent has been convicted of certain crimes where the child was the victim.

The Kansas statue spells out in detail the type of mail required to be used for the notice. No mention is made, however, of the options available to the parent who receives the notice. In fact, the statute itself seems to imply that once notice is given the move is permitted. There is no process for filing an objection and no direction of who to notify of such an objection. Three questions arise from the statue. First, what information does the moving parent have to provide regarding the relocation? Second,

does the other parent have any say in the relocation process? Third, if so, how does the other parent raise a concern or objection to the relocation?

The statute does not require any specific information regarding the relocation other than the intention to change the residence or remove the child from the state. A simple statement of “I intend to move the child’s residence in five weeks” appears to be sufficient to satisfy the statute. Keep in mind, however, this is true only of the Kansas statute. The rule in other states will differ. If there is no additional information provided how can the other parent determine whether or not the proposed relocation is a good idea? The answer to this question is also the answer to the second question raised by the statute.

Most divorced or non-married parents have joint legal custody of their children. Joint legal custody means both parents are entitled to participate in making “major life decisions” for a child. Parents are entitled to know where their children live and attend school, and how to contact the children. If the information is not provided in the relocation notice the other parent is entitled to request it from the parent proposing to move. Joint legal custody gives the non-moving parent a voice in the child’s relocation. If you object to the proposed relocation the other parent cannot ignore your opinion and relocate the child anyway. Neither parent’s opinion is more important than the other. If the parties cannot reach an agreement a third party, typically the trial judge, will have to make the decision.

Be cautious. The Kansas relocation statute does not require approval of the other parent or the court. If you fail to object and seek the court’s assistance the other parent may legally relocate the child. All Kansas requires is giving the notice thirty days in advance. Since your approval is not required you must not only notify the moving party of your objection you must seek help from the court. You have the right to participate in making this major life decision but if you fail to bring the issue to the court you may waive your right. Immediate response is extremely important in this situation if you wish to prevent the child from being relocated.

This brings the discussion to the third question, how does the non-moving parent properly raise an objection? This response will also vary from state to state. In Kansas the appropriate response is to file a Motion in the original domestic case seeking to prevent the relocation until such time as the court can make a decision. The temporary order issued by the court will not be a final determination of the issue; instead, the order will hold the status quo until the court can hear the evidence and make a final determination. Once the order is issued by the court you must arrange to have them served on the other parent. The other parent will then have the opportunity to request a hearing from the court on the relocation issue. If they do not request a hearing the temporary order will remain in effect. The relocation may then only proceed if the court finds, after hearing all of the evidence, the relocation is in the child’s best interest.

There are a few final things to remember in responding to a relocation case. First, the only issue is your child’s best interest. The court will not prohibit the other parent from relocating; you do not have any control over their lives. The options before the court will be for your child to move with the other party or to stay with you. The court will focus on what is best for your child. Your response must therefore focus on why it is better for the child to remain in the current locale, with you, rather than move with the other party. Your argument should be based on why the current situation is better than the alternative. It is not enough to simply attack the other party’s motives. You must show remaining with you is better for your child. If you cannot convince the court it is in your child’s best interest to stay with you, you probably cannot prevent the relocation.

Second, the Kansas statute requires notice be provided to you at your last known address. If you fail to provide the opposing party your current address you may never receive the notice. The statute does not require you actually get the notice, it only requires the notice be mailed. It is very important, therefore, for you to make sure the other parent knows where you live at all times. Simply telling them

you are moving to a new neighborhood or area is not sufficient you must make sure to provide your current address.

Third, the Kansas statute specifically requires notice to be provided restricted mail, return receipt requested. This is the most specific part of the statute. You might believe if you receive notice any other way you have an ace in the hole in trying to convince the judge to rule in your favor. Most of the time courts are reluctant to make decisions as important as the custody of your child based on these types of technicalities. If you receive notice over the telephone or by e-mail you should presume the court will accept the notice as sufficient and respond immediately. Failure to respond may prejudice your ability to fight the relocation.

Fourth, the statue requires notice only once the decision to relocate the child has been made. Your defenses, however, are not limited in this way. If the other parent mentions to you they might be thinking about moving in the future, you can seek a court order preventing the relocation until such time as the court can hear evidence on the matter. The order will not change the current parenting arrangement but it will prevent the relocation until the court can make a decision.

Fifth, there has been a great deal of recent literature suggesting it is best for very young children to have frequent, but shorter, contact with each parent rather than extended time with one or the other. This information is often used to oppose shared residential custody because it is believed the child will suffer if it goes for a week without seeing one parent or the other. As the child ages it becomes more appropriate to use less frequent visits which last for a longer time. If the child is very young this same literature may be a powerful tool to oppose the relocation. The concerns about a child not seeing a parent for a period of several days are greatly magnified if the visits only occur every few months due to the distance between the parties.

Kansas Child Custody Statute:

Child custody proceedings in Kansas follow two general rules. First, both parents have equal rights as the natural guardians to supervise, rear, and educate their children. Secondly, fit parents are entitled to custody over nonparents. If one parent dies, the other parent automatically has full custody rights, even if the parents are divorced. The state as parens patria, has a duty to protect children and will intervene if a child is in danager or if someone brings a custody dispute before the court.

K.S.A. 60-1610 details the different types of custody, both legal and residential arrangements in Kansas. The two types of legal custodial arrangements are, joint legal custody and sole legal custody. Joint custody may be ordered by the court, with both parties. In that event, the parties shall have equal rights to make decisions in the best interest of the child. The court may also order sole legal custody with one of the parties when the court finds that it is not in the best interest of the child that both of the parties have equal rights to make decisions pertaining to the child.

In Kansas, and pursuant to K.S.A. 60-1610, there are three types of residential arrangements. First, residency is where the court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interest of the child. Second, divided residency is used only in an exceptional case. The court may order a residential arrangement in which one or more children reside with each parent and have parenting time with the other. And, finally nonparental residency. Special circumstances are required to be met before this happens. If during the proceedings the court determines that there is probable cause to believe that the child is a child in need of care as defined by subsections (a)(1), (2) or (3) of K.S.A. 38-1502 and amendments thereto or that neither parent is fit to have residency, the court may award temporary residency of the child to a third party. And this includes grandparents.

For full details of the language of K.S.A. 60-1610 are below:

60-1610

Chapter 60.--PROCEDURE, CIVIL
Article 16.--DIVORCE ANDMAINTENANCE

60-1610. Decree; authorized orders. A decree in an action under this article may include orders on the following matters:

(a) Minor children. (1) Child support and education. The court shall make provisions for the support and education of the minor children. The court may modify or change any prior order, including any order issued in a title IV-D case, within three years of the date of the original order or a modification order, when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. If more than three years has passed since the date of the original order or modification order, a material change in circumstance need not be shown. The court may make a modification of child support retroactive to a date at least one month after the date that the motion to modify was filed with the court. Any increase in support ordered effective prior to the date the court's judgment is filed shall not become a lien on real property pursuant to K.S.A. 60-2202 and amendments thereto. Regardless of the type of custodial arrangement ordered by the court, the court may order the child support and education expenses to be paid by either or both parents for any child less than 18 years of age, at which age the support shall terminate unless: (A) The parent or parents agree, by written agreement approved by the court, to pay support beyond the time the child reaches 18 years of age; (B) the child reaches 18 years of age before completing the child's high school education in which case the support shall not terminate automatically, unless otherwise ordered by the court, until June 30 of the school year during which the child became 18 years of age if the child is still attending high school; or (C) the child is still a bona fide high school student after June 30 of the school year during which the child became 18 years of age, in which case the court, on motion, may order support to continue through the school year during which the child becomes 19 years of age so long as the child is a bona fide high school student and the parents jointly participated or knowingly acquiesced in the decision which delayed the child's completion of high school. The court, in extending support pursuant to subsection (a)(1)(C), may impose such conditions as are appropriate and shall set the child support utilizing the guideline table category for 16-year through 18-year old children. Provision for payment of support and educational expenses of a child after reaching 18 years of age if still attending high school shall apply to any child subject to the jurisdiction of the court, including those whose support was ordered prior to July 1, 1992. If an agreement approved by the court prior to July 1, 1988, provides for termination of support before the date provided by subsection (a)(1)(B), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(B). If an agreement approved by the court prior to July 1, 1992, provides for termination of support before the date provided by subsection (a)(1)(C), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(C). For purposes of this section,"bona fide high school student" means a student who is enrolled in full accordance with the policy of the accredited high school in which the student is pursuing a high school diploma or a graduate equivalency diploma (GED). In determining the amount to be paid for child support, the court shall consider all relevant factors, without regard to marital misconduct, including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child.

Until a child reaches 18 years of age, the court may set apart any portion of property of

either the husband or wife, or both, that seems necessary and proper for the support of the child. Except for good cause shown, every order requiring payment of child support under this section shall require that the support be paid through the central unit for collection and disbursement of support payments designated pursuant to K.S.A. 23-4,118, and amendments thereto. A written agreement between the parties to make direct child support payments to the obligee and not pay through the central unit shall constitute good cause, unless the court finds the agreement is not in the best interest of the child or children. The obligor shall file such written agreement with the court. The obligor shall maintain written evidence of the payment of the support obligation and, at least annually, shall provide such evidence to the court and the obligee. If the divorce decree of the parties provides for an abatement of child support during any period provided in such decree, the child support such nonresidential parent owes for such period shall abate during such period of time, except that if the residential parent shows that the criteria for the abatement has not been satisfied there shall not be an abatement of such child support. (2) Child custody and residency. (A) Changes in custody. Subject to the provisions of the uniform child custody jurisdiction and enforcement act (K.S.A. 38-1336 through 38-1377, and amendments thereto), the court may change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown, but no ex parte order shall have the effect of changing residency of a minor child from the parent who has had the sole de facto residency of the child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances. If an interlocutory order is issued ex parte, the court shall hear a motion to vacate or modify the order within 15 days of the date that a party requests a hearing whether to vacate or modify the order.

(B) Examination of parties. The court may order physical or mental examinations of the parties if requested pursuant to K.S.A. 60-235 and amendments thereto.

(3) Child custody or residency criteria. The court shall determine custody or residency of a child in accordance with the best interests of the child.

(A) If the parties have entered into a parenting plan, it shall be presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreed parenting plan is not in the best interests of the child.

(B) In determining the issue of child custody, residency and parenting time, the court shall consider all relevant factors, including but not limited to:

(i) The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;

(ii) the desires of the child's parents as to custody or residency;

(iii) the desires of the child as to the child's custody or residency;

(iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;

(v) the child's adjustment to the child's home, school and community;

(vi) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent; and

(vii) evidence of spousal abuse.

Neither parent shall be considered to have a vested interest in the custody or residency of any child as against the other parent, regardless of the age of the child, and there shall be no presumption that it is in the best interests of any infant or young child to give custody or residency to the mother.

(4) Types of legal custodial arrangements. Subject to the provisions of this article, the court may make any order relating to custodial arrangements which is in the best interests of the child. The order shall provide one of the following legal custody arrangements, in the order of preference:

(A) Joint legal custody. The court may order the joint legal custody of a child with

both parties. In that event, the parties shall have equal rights to make decisions in the best interests of the child.

(B) Sole legal custody. The court may order the sole legal custody of a child with one of the parties when the court finds that it is not in the best interests of the child that both of the parties have equal rights to make decisions pertaining to the child. If the court does not order joint legal custody, the court shall include on the record specific findings of fact upon which the order for sole legal custody is based. The award of sole legal custody to one parent shall not deprive the other parent of access to information regarding the child unless the court shall so order, stating the reasons for that determination.

(5) Types of residential arrangements. After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options, which arrangement the court must find to be in the best interest of the child. The parties shall submit to the court either an agreed parenting plan or, in the case of dispute, proposed parenting plans for the court's consideration. Such options are:

(A) Residency. The court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interests of the child.

(B) Divided residency. In an exceptional case, the court may order a residential arrangement in which one or more children reside with each parent and have parenting time with the other.

(C) Nonparental residency. If during the proceedings the court determines that there is probable cause to believe that the child is a child in need of care as defined by subsections (a)(1), (2) or (3) of K.S.A. 38-1502 and amendments thereto or that neither parent is fit to have residency, the court may award temporary residency of the child to a grandparent, aunt, uncle or adult sibling, or, another person or agency if the court finds the award of custody to such person or agency is in the best interests of the child. In making such a residency order, the court shall give preference, to the extent that the court finds it is in the best interests of the child, first to awarding such residency to a relative of the child by blood, marriage or adoption and second to awarding such residency to another person with whom the child has close emotional ties. The court may make temporary orders for care, support, education and visitation that it considers appropriate. Temporary residency orders are to be entered in lieu of temporary orders provided for in K.S.A. 38-1542 and 38-1543, and amendments thereto, and shall remain in effect until there is a final determination under the Kansas code for care of children. An award of temporary residency under this paragraph shall not terminate parental rights nor give the court the authority to consent to the adoption of the child. When the court enters orders awarding temporary residency of the child to an agency or a person other than the parent, the court shall refer a transcript of the proceedings to the county or district attorney. The county or district attorney shall file a petition as provided in K.S.A. 38-1531 and amendments thereto and may request termination of parental rights pursuant to K.S.A. 38-1581 and amendments thereto. The costs of the proceedings shall be paid from the general fund of the county. When a final determination is made that the child is not a child in need of care, the county or district attorney shall notify the court in writing and the court, after a hearing, shall enter appropriate custody orders pursuant to this section. If the same judge presides over both proceedings, the notice is not required. Any disposition pursuant to the Kansas code for care of children shall be binding and shall supersede any order under this section.

(b) Financial matters. (1) Division of property. The decree shall divide the real and personal property of the parties, including any retirement and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts, by: (A) a division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale.

Upon request, the trial court shall set a valuation date to be used for all assets at trial, which may be the date of separation, filing or trial as the facts and circumstances of the case may dictate. The trial court may consider evidence regarding changes in value of various assets before and after the valuation date in making the division of property. In dividing defined-contribution types of retirement and pension plans, the court shall allocate profits and losses on the nonparticipant's portion until date of distribution to that nonparticipant. In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property. The decree shall provide for any changes in beneficiary designation on: (A) Any insurance or annuity policy that is owned by the parties, or in the case of group life insurance policies, under which either of the parties is a covered person; (B) any trust instrument under which one party is the grantor or holds a power of appointment over part or all of the trust assets, that may be exercised in favor of either party; or (C) any transfer on death or payable on death account under which one or both of the parties are owners or beneficiaries. Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy.

(2) Maintenance. The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. The court may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court. In any event, the court may not award maintenance for a period of time in excess of 121 months. If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments. Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. The recipient may file subsequent motions for reinstatement of maintenance prior to the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the court may exceed 121 months. Maintenance may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Except for good cause shown, every order requiring payment of maintenance under this section shall require that the maintenance be paid through the central unit for collection and disbursement of support payments designated pursuant to K.S.A. 23-4,118, and amendments thereto. A written agreement between the parties to make direct maintenance payments to the obligee and not pay through the central unit shall constitute good cause. If child support and maintenance payments are both made to an obligee by the same obligor, and if the court has made a determination concerning the manner of payment of child support, then

maintenance payments shall be paid in the same manner.
(3) Separation agreement. If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree. A separation agreement may include provisions relating to a parenting plan. The provisions of the agreement on all matters settled by it shall be confirmed in the decree except that any provisions relating to the legal custody, residency, visitation parenting time, support or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, shall not be subject to subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties.
(4) Costs and fees. Costs and attorney fees may be awarded to either party as justice and equity require. The court may order that the amount be paid directly to the attorney, who may enforce the order in the attorney's name in the same case.
(c) Miscellaneous matters. (1) Restoration of name. Upon the request of a spouse, the court shall order the restoration of that spouse's maiden or former name.
(2) Effective date as to remarriage. Any marriage contracted by a party, within or outside this state, with any other person before a judgment of divorce becomes final shall be voidable until the decree of divorce becomes final. An agreement which waives the right of appeal from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case shall be effective to shorten the period of time during which the remarriage is voidable.

History: L. 1963, ch. 303, 60-1610; L. 1965, ch. 355, § 6; L. 1975, ch. 305, § 1; L. 1976, ch. 256, § 1; L. 1978, ch. 231, § 30; L. 1979, ch. 185, § 1; L. 1980, ch. 175, § 2; L. 1981, ch. 236, § 1; L. 1982, ch. 152, § 9; L. 1983, ch. 199, § 1; L. 1985, ch. 144, § 6; L. 1985, ch. 115, § 48; L. 1986, ch. 218, § 1; L. 1986, ch. 219, § 1; L. 1986, ch. 137, § 25; L. 1988, ch. 215, § 1; L. 1991, ch. 171, § 2; L. 1992, ch. 273, § 2; L. 1995, ch. 268, § 2; L. 1996, ch. 186, § 2; L. 1997, ch. 182, § 4; L. 1998, ch. 162, § 3; L. 2000, ch. 171, § 15; L. 2001, ch. 195, § 7; July 1.

Louisiana Relocation

In a recent Louisiana case, the conflicting rights of parents and children were demonstrated together with a discussion as to how to arrive at a decision. There is no good "solution" in these cases. No matter what decision is made, there will be a negative impact on at least one of the parties. However, the Louisiana courts have at least come to some conclusions as to how the problem should be approached.

In Hodges v. Hodges (827 So.2d 1271) decided in October of 2002, the court was faced with deciding how to handle the petition of a divorced father ("Dan") who wanted to move from Louisiana to Virginia with his children. The trial court denied his request which meant he would either have to move without the children or stay in Louisiana. In fact, the children had spent much of their time in Virginia and that is where the father's job was. There were many other factual issues in the case, including the mental stability of the mother ("Lily") and, apparently, a great deal of acrimony between the mother and father.

The Third Circuit Court of Appeals reversed the trial court and found that the father should have been allowed to move to Virginia with the children. One of the important features of this case is the way it spells out the existing law in Louisiana and the way the law should be applied. The court said:

This state's "relocation statute" requires a parent with primary custody to give notice to the non-domiciliary parent of the intent to relocate the primary residence of the minor child within their care. The non-domiciliary parent who is given adequate notice then has the opportunity to initiate a hearing wherein he or she can set before the court any objection to the relocation.

The relocating parent has the burden of proving: 1) the proposed relocation is in good faith; and 2) it is in the best interest of the child. La.R.S. 9:355.13. La.R.S. 9:355.12 sets forth the factors a court shall consider when determining a relocation issue. These factors are:

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

(2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(3) The feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating party.

(6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.

(7) The reasons of each parent for seeking or opposing the relocation.

(8) Any other factors affecting the best interest of the child.

It is evident from our review of the record that Dan carried his burden of proof in both establishing that this proposed relocation is in good faith and that it is in the best interest of the children.

In this particular case, it was found that the trial judge did not properly analyze the facts from the perspective of 1) good faith, and 2) whether the move was in the best interest of the children. Once these two factor are determined, then the considerations contained in paragraphs (1) through (8) should be addressed. In Hodges, the appeals court then found from the evidence and testimony that each of the factors favored the father's petition to relocate.

As an example, when discussing factor (5) as to the conduct of the parties, the court said:

With regard to factor five, it is clear that Dan has attempted to cooperate with visitation. It is equally clear that Lily has been uncooperative and worked at thwarting visitation and has punished the children for her perception that they side with their father. Lily has assigned as error the trial court's determination that Dan is the parent most likely to encourage and continue the children's relationship with the other parent. As noted above, the record supports the trial court's determination.

Maine Relocation

In some joint custody cases, however, courts have been less inclined to allow relocation for this reason. In Rowland v. Kingman, 629 A.2d 613 (Me. 1993), cert. denied, 114 S. Ct. 884 (1994), the mother, who had primary physical custody, was a physician with an established practice in Yarmouth, Maine. She lived in the former marital residence, while the father lived in a nearby town. The mother eventually married a man who lived in Oregon and sought permission to move with the children there. The trial court ordered that if the mother moved to Oregon, primary physical custody would shift to the father, on the condition that he reside in Yarmouth. On appeal, the mother argued that the trial court should have given more deference to her decision concerning the child's residence because she was the primary physical custodian. The Maine Supreme Judicial Court disagreed, finding nothing in the state's statutory or case law on joint custody that required any degree of deference to a primary physical custodian's decisions. In this case, the court believed that the children's interest in close contact with the father and in geographic stability outweighed the mother's interest in residing with her new husband.

At least one court in a remarriage case has considered whether the other parent could also relocate to the new state. In Rampolla v. Rampolla, 269 N.J. Super. 300, 635 A.2d 539 (App. Div. 1993), the parties shared physical custody of their children, with the father living in the former marital residence and the mother living close by. The father commuted on a daily basis to his job in New York City. The mother remarried a man who lived and worked in New York City, but her petition to move with the children there was denied. The Appellate Division of the New Jersey Superior Court reversed and remanded, directing the trial court to consider the feasibility of the father's relocation to New York City as well. The court believed that this possibility offered a welcome alternative to the "all or nothing outcome" of most relocation cases.

Massachusetts Relocation

AMY P. RAWSTRON ROSENTHAL vs. PAUL S. MANEY

51 Mass. App. Ct. 257 (2001)

Docket No.: 99-P-943

Worcester .

October 6, 2000 . - April 5, 2001 .

Present: Greenberg, Kaplan, & Duffly, JJ.

Divorce and Separation, Child custody, Modification of judgment. Parent and Child, Custody. Minor, Custody. Complaint for divorce filed in the Worcester Division of the Probate and Family Court Department on October 17, 1995.

A complaint for modification, filed on June 23, 1997 , was heard by Susan D. Ricci, J.

Carol A. Erskine for the plaintiff.

James D. O'Brien, Jr., for the defendant.

DUFFLY, J. A judge of the Probate and Family Court denied the request of the plaintiff, Amy P. Rawstron Rosenthal (mother), who had been adjudicated the primary custodial parent in an earlier divorce judgment, to relocate with the parties' minor child from the Commonwealth. In the same proceeding, the judge changed physical custody from the mother to the defendant, Paul S. Maney

(father), pursuant to his request for modification of custody. From these judgments the mother appeals.

The mother claims that the change in custody was not, as is required by G. L. c. 208, § 28, supported by a material and substantial change in the circumstances of the parties. She argues that neither a custodial parent's relocation, nor a temporary change in custody that was judicially imposed on the parties during the pendency of the proceedings, constitute changes warranting modification of a previously adjudicated custody arrangement. We agree. We also decide that the mother has established a "good, sincere" reason for moving to Rhode Island (to join her new husband, who is employed there), evidencing a "real advantage" for the move. Yannas v. Frondistou-Yannas, 395 Mass. 704, 711 (1985) (Yannas). This, in combination with the judge's failure to assess or give appropriate weight to other relevant factors, requires reversal.

Background and proceedings. We summarize the proceedings, setting forth "relevant background facts as determined by the probate judge . . . supplemented by the record where necessary," A.Z. v. B.Z., 431 Mass. 150, 151 (2000), reserving other facts for our discussion of the issues. The parties were married in Worcester on November 22, 1987 , and resided during the marriage in Northborough, where their extended families, including both sets of parents, also live. Their only child, Caleb Page Maney (Caleb), was born June 16, 1991 . During the marriage, both parties provided for Caleb's care, but the mother was his "primary caretaker and [saw] to the child's daily needs." Since 1990, the mother has been employed as principal second violinist for the Rhode Island Philharmonic Orchestra, commuting to Providence from Northborough during the concert season. The father is, and was throughout the marriage, employed as a service manager for a business owned by his family. In October, 1995, the parties separated. The father moved into an apartment in his parents' home in Northborough. The mother moved with Caleb into an apartment in Shrewsbury , where Caleb attended preschool, then kindergarten. During the parties' separation, the mother began to date Perry Rosenthal.

The parties were divorced by a judgment of divorce nisi entered on January 16, 1997 . The divorce judgment incorporated and, with respect to child-related issues, merged the parties' agreement, which was found to be fair and reasonable by a probate judge. Under this agreement, the mother had sole physical custody of Caleb. The father was entitled to visits on alternating weekends from Friday at 5:30 P.M. until Sunday at 7:30 P.M. , overnight every Monday and Wednesday, and on specified holidays and observances.

On June 23, 1997 , the mother filed a complaint for modification of the divorce judgment in which she sought leave to remove Caleb from Shrewsbury , to Providence , Rhode Island . On July 4, 1997 , she married Rosenthal.

The father filed an answer and counterclaim to the complaint for modification on July 8, 1997 , alleging that removal would limit visitation with his son, "disrupt the warm and close personal relationship between the [father] and his son and is not in his son's best interests." On this basis he requested physical custody of Caleb. On July 28, 1997 , the court appointed a guardian ad litem "to investigate -- evaluate -- and report in writing" on the issues of removal and custody; "to act as . . . next friend to represent [Caleb's] interests"; and to act as an "investigator to review the matter and report to the Court."

On August 15, 1997 , the mother and Rosenthal moved into the house they had purchased in Providence . On August 25, 1997, pursuant to a "Motion For Further Temporary Order" filed by the father requesting that the mother be prohibited from removing Caleb from the Commonwealth until the completion of the guardian ad litem's report(1) and a hearing on the merits, the motion judge (who was also the trial judge) modified the existing divorce judgment that gave physical custody of Caleb to the mother, and ordered that the child "reside with the father from Monday after school through Friday

delivery to school," and with the mother on weekends.(2) This was a change in custody during the pendency of a complaint for modification of a prior custody order, and must therefore have been based on "specific findings of fact . . . which clearly demonstrate the injury, harm or damage that might reasonably be expected to occur if relief pending a judgment of modification is not granted." G. L. c. 208, § 28A.(3) The record reflects no reason for the order changing custody other than the mother's motion to remove the child to Rhode Island . The order should not have been made.

In the mother's motion for reconsideration of the August 25 order, filed September 18, 1997 , she sought reinstatement of the original custody arrangement on the basis that she would be able to reside with her parents in Northborough until a hearing on the merits, and that Caleb's schooling would therefore not be interrupted. The motion was denied without explanation by endorsement on September 26, 1997 . The mother's motion requesting that Caleb temporarily be allowed to relocate to Providence was denied on October 9, 1997 . Pursuant to subsequent temporary orders, the parties established a schedule for holiday and vacation visitation.

Trial on the parties' claims took place on October 2, October 5, and November 12, 1998 , well over a year following the entry of the temporary order modifying custody. On January 20, 1999 , the court entered a judgment denying the mother's request to relocate and modifying custody in conformity with the temporary orders already in place.

Modification of custody. Efforts by a custodial parent to relocate a child out of the Commonwealth often give rise to a claim for custody by the parent not seeking the move. See, e.g., Hersey v. Hersey , 271 Mass. 545 (1930); Usen v. Usen, 359 Mass. 453 (1971); Yannas, 395 Mass. 704; Williams v. Pitney, 409 Mass. 449 (1991); Haas v. Puchalski, 9 Mass. App. Ct. 555 (1980); Signorelli v. Albano, 21 Mass. App. Ct. 939 (1985).(4) Our decision today, that a request for modification of custody is distinct from a request to relocate and must be based on a material and substantial change in circumstances other than the move, is consistent with these decisions and with G. L. c. 208, § 28 ("the court may make a judgment modifying its earlier judgment as to the care and custody of the minor children of the parties provided that the court finds that a material and substantial change in circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children"). The custody claim must be considered in light of established principles governing custody determinations. See, e.g., Hersey v. Hersey , supra at 554; Grandell v. Short, 317 Mass. 605, 607 (1945); Yannas, supra at 711-712; Haas v. Puchalski, supra at 557; Delmolino v. Nance, 14 Mass. App. Ct. 209, 211 (1982).

The original judgment awarded sole physical custody to the mother, and "must be presumed to have been right." Hersey v. Hersey , supra at 554. See Delmolino v. Nance, supra at 211. The probate judge's finding that the mother was the child's primary caretaker during the marriage is consistent with the original award of physical custody to the mother. A judgment modifying custody must be based on findings grounded in the evidence that, since the date of the prior custody order, there has been a change in circumstances "of sufficient magnitude to satisfy the governing principle by which the court must be guided in these cases, namely, whether the transfer of custody will be conducive to the welfare of the [child]." Fuller v. Fuller, 2 Mass. App. Ct. 372, 376 (1974). "The uprooting of a child . . . should be done only for compelling reasons." Tolos v. Tolos, 11 Mass. App. Ct. 708, 710-711 (1981) (citation omitted).

We have reviewed the extensive findings (entitled "Findings of Fact on the Issue of Removal") and summarize below those that arguably could be said to support the judgment. Although it is nowhere stated in her findings that a material change in circumstances had occurred,(5) that conclusion may be inferred from the judge's finding that "the minor child's best interests dictate that . . . the Judgment [of divorce] be modified to include shared physical and legal custody," and her passing reference to the relevant changed circumstances standard.

The probate judge found that, following the divorce, "[b]ecause both parties were working full-time . . . the minor child was in need of and received daycare." She also found that "[t]he Mother's work schedule was quite hectic. . . . [Her] schedule is a combination of odd hours and concert schedules. The Father has some flexibility in his work schedule . . . [as] he is employed by a family-owned business and works in the same town where he lives."

Detailed findings set forth the mother's work history. During the marriage as well as following the parties' separation and divorce, the mother's employment as a professional musician(6) and private violin teacher (and, we assume, the father's full-time employment) required the assistance of child-care providers other than the parents. Other than in Caleb's first year, when childcare was provided by the father's sister, childcare was provided primarily by the maternal grandmother, in addition to other family members and nonfamily caregivers. The maternal grandmother continued to provide childcare two to three days a week after the parties separated and for a time following the divorce. After the separation, the mother, compelled by financial need, took on additional students until the number reached twenty to twenty-five a week. However, in May of 1997, when her imminent remarriage to Rosenthal made it financially feasible, she stopped teaching and accepting extra performance commitments in order to spend more time with Caleb.

We note, first, that a parent who works outside the home, even one with a "hectic" schedule, may still be the appropriate primary caretaker and that, standing alone, such employment would not warrant a custody modification. Second, by the time of trial, the probate judge found that positive changes in the mother's work schedule "allowed her to spend more time with the minor child. For example, she began to drive Caleb to school in the mornings and became a volunteer classroom parent." Thus, to the extent that changes in the mother's work schedule did occur, they were not changes warranting a modification in the custody arrangement.

The trial judge found that both sets of grandparents "live in Northboro . . . and are very involved in Caleb's life and care. Caleb has a close and loving relationship with both his maternal and paternal grandparents, [whom] he sees on almost a daily basis.(7) [He] also has a close relationship with all of his aunts, uncles, and cousins who live in" the area.

Caleb's close relationship and frequent contact with his extended family predates the divorce. That he remains close to his grandparents and other family members since the divorce reflects a concerted effort on the part of both parents to foster and maintain familial relationships that had existed during the marriage. The findings fail to support the conclusion that it is in Caleb's best interests to change custody to his father in order that he be able to spend portions of his weekdays with his extended family members instead of with his primary caretaker.(8)

The probate judge found, "[b]ecause Caleb spends the majority of his week in Northboro . . . most of his activities take place there." This was a change in Caleb's living arrangments brought about solely as a consequence of the mother's compliance with the August 25 order. That order, entered in the absence of any finding of a substantial and material change in circumstances, let alone the requisite findings of "injury, harm or damage," G. L. c. 208, § 28A, cannot form the basis upon which a final judgment modifying custody is granted. Were we to decide otherwise, tactical delays or overcrowded court dockets could come to dictate the result in every custody modification proceeding, and render meaningless any eventual hearing on the merits.

There is nothing in the findings or the record before us to indicate that anything occurred after the divorce that so altered the circumstances of the parties as to warrant a change in custodial arrangements which, on all of the uncontested evidence, had been in place with no ill effect on the child since the parties' separation in October, 1995. To the contrary, the findings reflect that the mother is a loving and appropriate caretaker.(9) The probate judge took note of the fact that both

parents love the child, and that "both parents have safe and secure homes. . . . The child is happy in each party's home."

Although great deference is accorded a probate judge's custody determination, "[t]here are limits to deference," as when the judge's action is not supported by the findings, or the findings are not supported by the evidence, as here. Freedman v. Freedman, 49 Mass. App. Ct. 519, 521 (2000). The judgment modifying custody must be reversed.

Removal from the Commonwealth. A request for removal is governed by G. L. c. 208, § 30,(10) as that statute has been interpreted by Yannas, 395 Mass. at 710, and Hale v. Hale, 12 Mass. App. Ct. 812, 815 (1981).(11) A parent's request to relocate with a child from the Commonwealth must be "grounded on the 'realization that after a divorce a child's subsequent relationship with both parents can never be the same as before the divorce . . .[and] that the child's quality of life and style

of life are provided by the custodial parent.' Although the best interests of the children always remain the paramount concern, '[b]ecause the best interests of a child are so interwoven with the well-being of the custodial parent, the determination of the child's best interest requires that the custodial parent be taken into account." Yannas, supra at 710, quoting from Cooper v. Cooper, 99 N.J. 42, 53-54 (1984). See Hale v. Hale, supra at 815-818, quoting from D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 204-206, aff'd per curiam, 144 N.J. Super. 352 (1976) (a court must consider the advantages of the move in terms of whether the move is likely to improve the general quality of life for both the custodial parent and the child, the "new family unit"(12)). These considerations lie at the root of the specific factors described in Yannas, collectively referred to as the "real advantage" standard. We proceed to discuss the extent to which the probate judge's findings and conclusions reflect appropriate consideration of each of the requisite elements.

Real advantage/good and sincere reason for the move. In weighing the factors to be considered, "the first consideration is whether there is a good reason for the move, a 'real advantage.'" Yannas, supra at 711. This is determined by assessing "the soundness for the reason for moving and the presence or absence of a motive to deprive the noncustodial parent of reasonable visitation . . . ." Ibid.

The mother's reasons for relocating to Providence -- which include the fact that she has remarried; that her new husband is a long-time Rhode Island resident employed in Providence(13); and that the mother's primary employment is in Providence -- establish a "good reason" for the move. See Yannas, supra at 712 (move to Greece where mother found new job and would be geographically close to her relatives "would be to [her] advantage"); Williams v. Pitney, 409 Mass. at 455 (that mother found employment and would live near her relatives in California were "good and sincere reasons"); Signorelli v. Albano, 21 Mass. App. Ct. at 940 (that mother had remarried, given birth to a child of the new marriage, and new husband obtained higher paying job in New Jersey were "good and sincere reasons" for move); Vertrees v. Vertrees, 24 Mass. App. Ct. 918, 919 (1987) (that mother wanted to move to Illinois because her relatives there would provide emotional support and social interaction was "good and sincere reason"). There was no finding, nor is there evidence in the record to support a finding, that the mother was motivated to deprive the father of reasonable visitation. The probate judge's conclusion that "the Mother's request to remove the minor child from the Commonwealth . . . is not founded on a good, sincere advantage," was clearly erroneous, meaning it was not supported by the evidence. See Yannas, supra at 709-710.

We turn now to the judge's consideration of the interests of the child, the mother, and the father, in light of factors established by Yannas. "If the custodial parent establishes a good, sincere reason for wanting to remove to another jurisdiction, none of the relevant factors becomes controlling in deciding the best interests of the child, but rather they must be considered collectively." Id. at 711-712.

1. Interests of the child. (a) Improvement in child's quality of life. The probate judge was bound to consider "whether the quality of the child's life may be improved by the change (including any improvement flowing from an improvement in the quality of the custodial parent's life) . . . ." Id. at 711. The probate judge concluded that "[t]he Mother has not provided any evidence which is tantamount to finding such a removal would be an improvement upon this child's life. The evidence indicates that such removal would be disruptive to this child's life." We first note that it was not the mother's burden to provide evidence of improvement, but that the factors must be considered collectively. "The judicial safeguard of [all parties'] interests lies in careful and clear fact-finding and not in imposing heightened burdens of proof." Id. at 712.

The probate judge's subsidiary findings supporting her conclusion focus on Caleb's relationship with his father and adjustment to the court-imposed change in physical custody.(14) There were no findings reflecting consideration of "the relationship of the mother to the [child]," Hale v. Hale, 12 Mass. App. Ct. at 815, or "any improvement flowing from an improvement in the quality of the custodial parent's life." Yannas, 395 Mass. at 711.

That there were improvements in the mother's quality of life is evident from the findings. They reflect that, upon her remarriage, "the Mother's financial situation greatly improved." She was able to discontinue the private music lessons that had resulted in a schedule the mother "found stressful and impacted her time with the child." The mother's one-hour commute to and from work was reduced to five minutes. She enjoyed access to the city's cultural offerings. These facts incontrovertibly establish the positive improvements resulting from the mother's move to Providence . That, as the judge found, "[h]er decision to move was her lifestyle choice," does not dictate the conclusion that the benefits of the move to the mother would not also be experienced by the child particularly where, as here, the mother had been the child's primary custodian.(15)

(b) Effect of move on child's association with noncustodial parent. No findings were made that specifically address the effect on Caleb of a possible "curtailment of the child's association with the noncustodial parent," in the event of relocation. Id. at 711. In light of the fact that the distance between Northborough and Providence is but fifty-five miles and has not precluded significant access to both parents, it is likely that by living in Providence the effect on Caleb's association with the father would be no greater than the effect on the child's association with the mother if he were to remain in Northborough.

(c) Effect of move on child's emotional, physical, or developmental needs. The probate judge's findings reflect some consideration of "the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child." Yannas, supra at 711. Hale v. Hale, supra at 817-820. Caleb was found to be a "physically and emotionally healthy" boy whose "frequent, continuing and equal interaction . . . with each parent is most beneficial to him." "Both parents serve as equally important guides for this child's continued healthy development." "The Court finds the minor child's life is enriched by each parent's equal participation in his up-bringing." These findings would not support a decision denying removal. However, the probate judge's findings reflect consideration of other circumstances affecting Caleb's development and emotional well-being that, in the judge's view, tipped the balance in favor of Caleb remaining in Massachusetts .

The first was that, since the entry of the August 25 order, "the joint legal and physical custody arrangement has been carried out successfully by each parent," and the judge announced herself satisfied with Caleb's adjustment to it. Caleb was found to be doing well in school, where he had made friends and excelled academically. However, there are no findings, and no evidence suggesting, that Caleb would not continue to do well emotionally, physically, and developmentally if the removal were allowed. There are, to the contrary, findings that the order denying removal and changing custody from the mother was disruptive to the child.(16)

A second factor that appears important to the judge's conclusion that removal is not in Caleb's best interest is his close relationship with his grandparents and other members of his extended family living in or near Northborough. While we recognize that a child may have important relationships extending beyond those of his immediate family members that deserve protection, Youmans v. Ramos, 429 Mass. 774, 782-784 (1999); E.N.O. v. L.L.M., 429 Mass. 824, 828-829 (1999), there is nothing in the record to indicate that, here, those relationships are so important to Caleb's emotional well-being that they deserve primacy over his relationship with his mother, who had been the primary custodial parent throughout Caleb's life. In any case, the evidence is clear that the mother has continued, even after the change in custody, to assure Caleb's ongoing contact with extended family members, that she is close to her family, and would continue to foster contact with them and with members of the father's family.

2. Interests of custodial parent. There are no findings that indicate consideration of the interests of the mother in maintaining both her close relationship with Caleb, and in living with her new husband in the city in which he and the mother both work. The denial of the mother's request to relocate, and the order changing custody because she made that request, left the mother with the choice of living with her husband and suffering separation from her child, or living with Caleb and suffering separation from her husband. The probate judge "did not appear to give much weight to the quality of life of the custodial parent by reason of the separations enforced on her," Signorelli v. Albano, 21 Mass. App. Ct. at 940, as a consequence of her decisions.

3. Interests of noncustodial parent. The court must consider "the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent." Yannas, 395 Mass. at 711. In this context, "[t]he reasonableness of alternative visitation arrangements should be assessed. The fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling." Ibid. There is nothing in the evidence to suggest that a relocation to Providence , fifty-five miles from Northborough, would preclude the father (whose work schedule was found to be "flexible") from having contact with Caleb in a manner significantly different from that provided by the original divorce judgment.

That there would be some impact we infer from the fact that the father generally picks Caleb up from his after school day care program and the fact that Caleb is involved in "a variety of programs," including gymnastics and swimming lessons and soccer. By all accounts he is an attentive and loving father, and we assume that he participates in these activities by his attendance. But the test is not whether there is no impact on the father's association, but whether reasonable "alternative visitation arrangements" might achieve ongoing and meaningful contact appropriate to the circumstances. There were no findings that such visits could not be arranged. Transporting Caleb on a weekly basis pursuant to the current visitation schedule was found by the judge to be accomplished "with ease," and with little burden on the mother.(17) That it might work a somewhat greater burden on the father, who works full-time, is not dispositive. The fact that both the mother and her husband perform with the Rhode Island Philharmonic Orchestra on many Saturdays and some Sundays during the October through May season suggests a weekend visitation schedule that is eminently workable. "From what we can ascertain, the judge recognized the importance of the 'frequent and continuing contact' of the child with both its parents . . . and entered [her] judgment prohibiting removal on the basis that the move would make visitation more difficult. We consider that factor not in itself conclusive." Hale v. Hale, 12 Mass. App. Ct. at 815 (citations omitted).

Conclusion. Based on this record, "[a] remand for findings of fact to support the judge's order is unnecessary, because the evidence, weighed under the relevant factors . . . convincingly establishes that the plaintiff's request should have been allowed." Gridley v. Beausoleil, 16 Mass. App. Ct. 1005, 1006- 1007 (1983). The judgment denying removal and awarding custody to the father is reversed. We remand for the entry of a judgment that the custody of the parties' minor child remain with the mother, that she may relocate with the child to Rhode Island , "and for such further proceedings

consistent with this opinion relative to time and conditions of visitation." Haas v. Puchalski, 9 Mass. App. Ct. at 558. In the absence of agreement, the Probate Court may consider whether it is in Caleb's best interest to conclude the current school term in Northborough and to begin the next school term in Providence , or transfer to a new school in Providence forthwith.(18)

So ordered.

Footnotes

(1) The guardian ad litem filed her first report on September 30, 1997 , and an updated report on September 11, 1998 , shortly before the first day of trial. In her findings, the probate judge refers to the guardian ad litem's updated report as unauthorized. General Laws c. 215, § 56A, which authorizes the appointment of a guardian ad litem to undertake the kind of investigation here ordered, requires that, "[s]aid guardian ad litem shall, before final judgment or decree in such proceeding [relating to the care, custody, or maintenance of minor children], report in writing to the court the results of the investigation. . . ." Over a year had passed since the guardian ad litem was first appointed on July 28, 1997 , to report to the court on the removal and custody issues. There is nothing in the order of appointment to suggest that the role of the guardian ad litem was limited to a single report, or limited to providing information to the probate judge in connection with any request for a temporary change in custody. Since both reports were filed subsequent to the judge's August 25, 1997 , temporary order changing custody, neither was considered in connection with that order. Both reports of the guardian ad litem were correctly admitted in evidence.

(2) On September 23, 1998, the court granted leave to the father to file an amended counterclaim, in which he alleges as changed circumstances that the child (1) resides with him from "Monday after school through Friday delivery to school and with the mother from Friday after school through Monday delivery to school"; and (2) is enrolled in the Northborough school system.

(3) Unless the parties agree to the temporary change in physical custody, a judicially imposed change in custody is governed by G. L. c. 208, § 28A. There is nothing in the record to indicate that the father (who had not, in his "Motion For Further Temporary Order," requested a change in custody) presented claims warranting the judge's action. The appropriate course would have been to conduct a hearing on the father's request for temporary order and, absent a demonstration of the requisite "injury, harm or damage," to make no change in custody. An evidentiary hearing on the merits of the claims for custody and removal should then have been scheduled on an expedited basis.

(4) See also Richards, Children's Rights v. Parents Rights: A Proposed Solution to the Custodial Relocation Conundrum, 29 N.M. L. Rev. 245, 246 (1999)("[r]elocation . . . often precipitates a petition to change custody").

(5) The father argues in his brief, without citation to relevant authority or to the record, that the findings "are replete with evidence of a material change in circumstances since the time of the original decree. That the mother has remarried and moved to Providence , Rhode Island with her new husband would implicitly seem to be a change of circumstances that would be natural, especially with its impact on the child." There is nothing in the findings to support the contention that the mother's remarriage had a detrimental impact on Caleb. Delmolino v. Nance, supra at 211. The only direct reference touching on Rosenthal's relationship with Caleb is the finding that he gives Caleb cello lessons. The findings that "[b]oth parents have safe and secure homes. . . . The minor child is comfortable and has his own bedroom in each party's house," indirectly support the conclusion that the mother's remarriage has had no detrimental impact on Caleb.

(6) The mother's rehearsal and performance schedule during the October through May performance season of the Rhode Island Philharmonic Orchestra remains as it was during the marriage. The

mother gives a total of sixteen to seventeen performances during the season, all in Providence . This includes seven subscription concerts, most performed on Saturday evenings, for which she rehearses four times during the week preceding the performance, from 7:30 P.M. to 10:00 P.M.; three Pops concerts, also performed on Saturdays, requiring only two rehearsals prior to each performance; and four family concerts on Sunday afternoons, for which rehearsal takes place earlier on the day of the performance. Occasional early morning concerts at local schools make up the total.

(7) Based on the evidence, Caleb started seeing his paternal grandmother on a daily basis when he began to reside primarily with his father, who since the separation has lived in an apartment attached to his parents' home. Caleb saw his maternal grandmother on a regular basis both during the marriage and after the divorce while the mother still had custody. Since the change in custody, the father's relationship with the maternal grandparents has grown cool. The mother and Caleb visit the mother's family in Northborough every Friday, when she picks Caleb up for her weekend visits. The mother brings Caleb either to her parents' home, or to visit her siblings (she has seven siblings, most of whom live in or near Northborough; one lives with his wife in Rhode Island). She has also brought Caleb to visit members of the father's family. The father (and Caleb) have dinner with the father's girlfriend once a week, his sister's family twice during the week, and his parents once during the week.

(8) We note that, under the original custody arrangement, the father could continue to spend time with his parents and siblings during scheduled weekend and vacation visits with Caleb. Further, in light of the fact that "the mother has a good relationship with her parents and siblings who live in Massachusetts ," and her practice of weekly contact with them, it is likely that she would continue to maintain these relationships.

(9) The uncontested evidence also indicates that the mother has maintained her close relationship with the child, driving from Providence to Northborough every Friday to pick Caleb up for the weekend, and on Monday morning to return him to school, as well as at the beginning and end of vacation periods when Caleb is with her one-half the time. She has continued, as she did during the marriage, to communicate with Caleb's teachers, and to volunteer regularly in his classroom. Caleb enjoys living in Providence , has a good relationship with his stepfather, and has friends in the neighborhood. In addition, we note that Caleb expressed to the guardian ad litem at the outset of the investigation his preference to reside primarily with his mother, and he reiterated this preference at the conclusion of the investigation, shortly before trial. Although not dispositive of the custody issue, Ardizoni v. Raymond, 40 Mass. App. Ct. 734, 738-739 (1996), these factors, at the very least, suggest that Caleb might quickly readjust to living with his mother during the week, and visiting his father on weekends and during part of each school vacation.

(10) A minor child of divorced parents "shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders." G. L. c. 208, § 30.

(11) General Laws c. 208, § 30, was previously considered ancillary to the court's continuing jurisdiction to modify divorce judgments as to the care and custody of children. Hersey v. Hersey , 271 Mass. at 549. See Gallup v. Gallup, 271 Mass. 252, 257-258 (1930) ("We regard the exercise of prohibition of removal from Massachusetts as properly incident to the performance of the duty with which the court is charged of securing the care, custody, education and maintenance of the child.") With the enactment of State and Federal statutes enlarging the court's jurisdictional reach to parents and children moving beyond the borders of the Commonwealth, there was no longer a compelling need to prevent removal of children in order to maintain ongoing jurisdiction over issues relative to their care and custody, see, e.g., G. L. c. 209B, § 2 (Massachusetts Child Custody Jurisdiction Act); G. L. c. 209D, § 2-205 (Uniform Interstate Family Support Act); 28 U.S.C. § 1738A (1994) (Parental Kidnapping Prevention Act); G. L. c. 223A, §§ 3(g) & (h) (long-arm statute), and our courts have interpreted the language, "upon cause shown," as permitting removal if in the best interests of the

child. Rubin v. Rubin, 370 Mass. 857 (1976). The criteria for determining such best interests were set out in Hale v. Hale, supra, and Yannas, supra.

(12) "The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together 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." Hale v. Hale, 12 Mass. App. Ct. at 818 (citation omitted).

(13) Rosenthal, like the mother, is a musician performing with the Rhode Island Philharmonic Orchestra. He is also an account executive at AT&T, and his office is located in downtown Providence . The mother and Rosenthal live five minutes from where they perform with the orchestra.

(14) Finding no. 52: "Caleb has stability in his life. He has adapted well to the routine where he spends the school week at the Father's rural home and the weekends at the Mother's home in Providence ." Finding no. 53: "Caleb is flourishing in the Northboro school system. He is a well-adjusted, bright, and happy child." Finding no. 54: "Removal . . . would pose as an unnecessary interruption to this child's otherwise steady and promising education."

(15) That there were improvements in Caleb's quality of life as a result of the move is amply supported by the uncontroverted evidence. While living in Shrewsbury the mother worked at several part-time jobs to make ends meet, in addition to commuting one hour each way to Rhode Island . This impaired the amount of time she had to spend with Caleb. Caleb lived with his mother in a small basement apartment in an apartment complex in Shrewsbury that had no playground and few children of Caleb's age. Caleb had no friends in the complex. The judge found that on April 20, 1997 , the apartment was broken into, causing the mother to feel unsafe and frightened of staying there.

By contrast, the move to Rhode Island reduced the mother's commute to five minutes and she was able to quit most of her part-time jobs, giving her more time to spend with Caleb. The mother's three-story duplex in Rhode Island is in a well-to-do neighborhood of primarily owner-occupied residences. There are several parks, playgrounds, schools, bike paths, and a Jewish Community Center nearby. Caleb plays with several children his age who live in the neighborhood.

(16) The judge found that Caleb "[went] through a transition period when temporary joint custody was awarded to the parties and the Mother moved to Rhode Island . At that time, the child had in fact experienced some changes in his behavior, mostly consisting of instances of aggression or passivity."

(17) Finding no. 55: "The Court finds that the Mother can continue to drive to Massachusetts to pick up the minor child for her parenting time with relative ease. The Mother has managed to travel for eight (8) years back and forth from Massachusetts to Rhode Island . The Mother traveled weekly to Rhode Island during the parties' marriage. After the parties divorced, the Mother traveled regularly to Rhode Island to work. When the Mother moved to Rhode Island , she then traveled weekly to Massachusetts to pick up and drop off Caleb without any significant burden. The travel time of one hour each way is not unreasonable under the current custody schedule. Also, the Mother's traveling to Massachusetts is not unreasonable given the fact that the maternal grandparents and various other maternal relatives reside in Massachusetts ."

(18) We do not preclude, if warranted by the circumstances and upon the filing of an appropriate complaint, consideration of any relevant material and substantial changes in the parties' circumstances occurring since the date of the judgments appealed from. Ardizoni v. Raymond, 40 Mass. App. Ct. at 741.

Michigan Relocation

The answer to the question above, really depends on what the party is asking. This question most frequently comes up when the custodial parent wishes to move, even a short distance, but out of the State of Michigan. Many times even a short move by the custodial parent can impair the relationship of the non-custodial parent. Some states restrict moving by statute, while others, including Michigan permit it only with written permission of the Court. Every divorce judgment contains a paragraph that states: "The custodial parent will not remove the residence/ domicile of the minor children out of this state without the prior written permission of the judge, or his successor".

Michigan Courts, following a New Jersey case's holding, use a method for examining the proposed move. There are 4 factors that determine whether the court will give permission for the move. Meeting the criteria allows the move, but if you don't, the judge will deny your request.

The first thing that the Court looks at is whether the prospective move has the capacity to improve the quality of the life for both the custodial parent and the child. The court looks to see if the quality of life for the child and the parent is going to increase. For example, if the parent is going to receive a raise in pay, the court will favor the move, because the family will benefit from the extra money. It is obvious that a judge will not allow a parent to subject a child to a non-beneficial economic environment compared to the one to which they already have.

The second factor that the Court takes a look at is whether the move is inspired by the custodial parent's desire to defeat or frustrate visitation by the non-custodial parent? With this factor the history of the custodial parent becomes very important. If the custodial parent has been cooperative, not withholding visitation, the Court will be more likely to favor the move. Cooperating early in the process, can help the custodial parent out when they are in need of relief allowing such a move later on.

The third factor that the Court takes a look at is the extent to which the non-custodial parent resists the move by the desire to secure a financial advantage in respect of continuing support obligation. The important thing is that the support obligation will never be canceled, but it may be modified for the costs of travel for parenting time.

The last factor that the Court will consider is the degree to which the court is satisfies that there will be a realistic opportunity for parenting time in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the non-custodial parent if removal is allowed. The Courts generally do not like to allow the custodial parent to move and shorten the non-custodial parent's visitation. The important thing to remember is that if you are the custodial parent and are moving, plan to allow more visitation time to the non-custodial parent; usually most, if not all of the summer school vacation. Also if the distance is too far, the custodial parent should offer to pay the travel expense, because the non-custodial parent, did not have that travel expense before the move. Although there is much availability to travel, cost is always a factor, no matter which method of transportation you choose.

It must be shown through all of this that the custodial parent is improving his or her life and that of the child, that the move is not harming and may be improving the relationship of the child with the non-custodial parent and there is no bomb dropped into the non-custodial parent's budget.
Rules of moving out of state have changed over the years and will continue to change. The courts believe the idea that a dad is just as important as a mother. If by moving, either of those relationships is substantially jeopardized, the Court is very likely to deny the move. Cooperation of parties for the benefit of both the custodial and non-custodial parent and the well being of the child are factors to which the Court looks to in deciding to allow or deny the request to move. Courts also look at the

educational systems in both places, the cost of living, the crime rates and whether either party has family ties in the proposed new location.

The Michigan Supreme Court has just granted leave to appeal in a case involving the relocation issue and the D'Onofrio standards in June 2000.

Minnesota Relocation

Generally, minor geographic changes are not considered significant. Yet, even seemingly minor changes can diminish a parent's role in a child's upbringing and make transportation for parenting difficult. The most common reasons cited include new jobs, new spouses or fiancés, or improved environmental conditions. It is the slippery slope that can result in a cascade of later events that eventually make that parent little more than a post card and letter or an occasional visit in the child's upbringing.

Just what is considered a minor relocation may be a subject of dispute. In some states a relocation out of the county is significant. In others it is a relocation of a specified number of miles (50 to 150) away from the other parent. For example, in Wisconsin, a relocation of 150 miles or more requires notice to the other parent and potentially a hearing on custody issues. In yet other states, the laws are inconceivably inconsistent. A good example is the State of Minnesota. In Minnesota, a relocation within the state requires no advance notice or permission. That could mean a relocation of as much as eight hours one way from base to tip is acceptable. Meanwhile, a relocation of one mile to a bordering state would require the other parent's consent or a court order.

I. Legal and Physical Custody.

In Minnesota, custody is defined in terms of legal custody and physical custody.
A. Legal Custody. Legal custody is defined as "the right to determine the child's upbringing, including education, health care, and religious training." Most of the time, parties to a divorce are awarded joint legal custody, which means that "both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." In deciding whether to award joint legal custody, the Court considers the following factors:

The ability of the parties to cooperate in the rearing of the children.

Methods of resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods.

Whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing.

Whether domestic abuse has occurred between the parties.

If either party requests joint legal custody, then it is presumed that joint legal custody is appropriate, and joint legal custody will be granted unless the other party is able to prove that joint legal custody would not be in the child's best interests. (This presumption does not apply if the Court finds that domestic abuse has occurred between the parties).

The Court will almost always award joint legal custody, unless there are strong reasons not to, such as a very serious inability to cooperate or communicate, or serious parental disfunction on the part of one parent, e.g., serious alcohol or drug addiction, physical or sexual abusiveness, or a long history of a lack of involvement in the children's parenting.

B. Physical Custody.

Physical custody is defined as "the routine daily care and control and the residence of the child." In practical terms, it generally refers to who maintains the "home base" for the children, and who has the children most of the time, particularly during school. Like legal custody, physical custody can be sole or joint. Joint physical custody means that "the routine daily care and control and the residence of the child is structured between the parties." Unlike joint legal custody, joint physical custody is uncommon, and is generally only granted if both parties agree to it.

Major consequences can result depending on whether parties to divorce share joint physical custody, or instead have sole physical custody with one parent and visitation with the other. The most important of these has to do with child support, and the standard for removal of the children from the state.

When one party has sole physical custody, he or she is entitled to child support from the non-custodial parent pursuant to the Minnesota Child Support Guidelines (see Calculating Child Support Obligation in Minnesota, by Eric C. Nelson). When the parties share joint physical custody, child support is typically calculated using a "cross-support" method. Under this method, child support is determined by first calculating what each party would owe the other if the other were sole physical custodian. Then each party's child support obligation is off-set by the percentage of time that party has the child in his or her care. The difference between these amounts is paid by the person with the greater obligation.

So for example, in a situation where the mother has net income of $5,000 per month, the father has net income of $3,000 per month, and there is only one child, who resides with the mother for 60% of the days of the year, and with the father for the other 40%, child support is calculated as follows:

If the mother has sole physical custody, and the father has visitation, then father would owe $750 per month in child support ($3,000 x 25%) (25% being the Guideline amount of child support for one child).

However, if the parties share joint physical custody, then the father would owe $450 per month in child support ($750 x 60%), and the mother would owe $500 per month [($5,000 x 25%) x 40%], resulting in a net obligation from the mother in the amount of $50 per month child support payable to the father.

The other important implication arising out of the determination of sole versus joint physical custody has to do with the standard to be applied when a parent seeks to move the residence of the child out of the state of Minnesota. Regardless of who has custody, a parent may not move the residence of the child outside the state of Minnesota without the Court's approval.

If one parent has sole physical custody, however, it is presumed that the out-of-state move is appropriate and should be granted. In order to overcome this presumption and prevent the move, the non-custodial parent bears the burden of proving by a preponderance of the evidence that the proposed move is intended to interfere with visitation, or that the proposed move is not in the best interests of the child and would endanger the child. Proving that a proposed move is intended to interfere with visitation is almost impossible to do. With respect to the endangerment standard, while it is arguable that this standard only applies in cases which would otherwise necessitate a change of custody because the custodial parent has no choice but to move, there is no clear precedent specifically so holding. In sum, when one parent has sole physical custody and seeks permission of the Court to move the children out of state, it is extremely difficult to prevent it.

In contrast, when the parties share joint physical custody, there is no presumption that the move should occur, and the Court simply applies the "best interests of the child" standard in determining whether to permit the move.

II. Standard for Determining Physical Custody.

As in many areas of family law, the standard applied by the Court in making an initial award of physical custody is the so-called "best interest of the child" standard. This standard requires findings by the Court with respect to all relevant factors, including the following factors enumerated by statute:

the wishes of the child's parent or parents as to custody;

the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

the child's primary caretaker (i.e., who provided the day-to-day physical, emotional, and intellectual care for the child, including such parental functions as the following: preparing and planning of meals; bathing, grooming and dressing; purchasing, cleaning, and care of clothes; medical care, including nursing and trips to physicians; arranging for social interaction among peers after school, e.e., transporting to freinds' houses or , for example to Girl Scout or Boy Scout meetings; arranging alternative care, i.e., babysitting, daycare, etc.; putting child to bed at night, attending to child in the middle of the night, waking child in the morning; disciplining, i.e., teaching general manners and toilet training; educating, i.e., religious, cultural, social, etc.; and teaching elementary skills, i.e., reading, writing, and arithmetic);

the intimacy of the relationship between each parent and the child;

the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;

the child's adjustment to home, school, and community;

the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

the permanence, as a family unit, of the existing or proposed custodial home;

the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;

the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;

the child's cultural background;

the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

III. The Importance of Temporary Custody.

In cases where the issue of custody is contested, there is typically an initial hearing where the Court decides issues of custody, visitation, child support, spousal maintenance, occupancy of the homestead, etc. on a temporary basis, pending issuance of the final Judgment & Decree or Divorce--which can be several months or even a year or more in contested custody cases.

The general rule is that no testimony is taken at the temporary relief hearing. Rather, the Court decides the issues of temporary custody, etc., on the basis of parties' respective motions and affidavits, and on the arguments of counsel made at the hearing. It is extremely important to take the time at this stage to get affidavits and documentation from as many people as possible who have relevant knowledge.

Legally, the fact that one party or the other is granted temporary custody has no bearing on which party should ultimately be awarded permanent custody in the final Judgment and Decree of Divorce. However, it is important to understand that the temporary custody order represents the Court's best initial guess as to which parent is the more suitable custodian, and it sets the tone throughout the proceedings.

NOTE: If you intend to seek custody, it is critically important that at the time of separation you do not leave the children in the care of the other party in the marital home. If you do so, it is very likely that the parent who is left in the marital home will be awarded temporary custody of the children simply to maintain continuity.

IV. Modification of Physical Custody.

A Court may not change physical custody from one parent to the other unless the change is in the best interests of the child.

Furthermore, even if the change of custody is in the best interests of the child, the Court cannot order a change of custody unless:

a) both parties agree to the change; OR

b) the child has been integrated into the family of the non-custodial parent with the consent of the custodial parent; OR

c) the child's present environment with the custodial parent endangers the child's physical or emotional health or impairs the child's emotional development, and the benefits of a change of custody outweigh the harm.

Where the parties do not agree to a change of custody, and the child has not been consentingly integrated into the family of the non-custodial parent, a change of custody can only be accomplished by proving that the child is "endangered" in the current custodial environment. In practice, this means that there must be strong evidence in favor of the change of custody, such as a child's strong desire to live with the non-custodial parent, physical, sexual or emotional abuse by the custodial parent, very poor discipline in the custodial home that adversely affects a child's grades or behavior, etc.

Missouri Relocation

The Missouri Supreme Court has recently (10 April 2001) cast aside the decade-old four-point test for determining if relocation of a child's principal residence will be allowed.
In Stowe v. Spence, 41 S. W. 3d 468 (Mo. 2001), the Court said that the 1998 revisions to the statute gave us a new test, which has 3 points:

(a) is relocation in the child's best interests;

(b) is it made in good faith; and, if ordered,

(c) does relocation follow the mandate of the statute (regarding change in parenting plan and what must be contemplated by the change in parenting plan).

The Court has also very recently (29 May 2001) granted transfer in a WD Court of Appeals (Kansas City) case, Kelling v. Kelling, possibly for remand in light of the Court's decision in Stowe.

Relocation has been a hot issue in Missouri for the last decade, and the Court's brief opinion in Stowe doesn't exactly tell us as much as we might like to hear regarding how trial courts are to decide the cases they are considering. However, all trial counsel should review their pending cases -- and all parents should take their own circumstances into consideration -- in light of this development.

A recent [June 26, 2001] Western District case follows the newly announced standard in determining relocation. In that case, Romanetto v. Romanetto, which is not yet final due to a pending motion for rehearing, the Western District Court of appeals affirmed a Macon County decision allowing relocation. The language in the case is quite favorable on the issue of "good faith" reason for moving and seems to tie those "good faith" reasons into the second prong, that is, "best interests", where the custodial parent has performed the role of "custodial parent" to the child's benefit.

Relocation-Four Factors Test Abrogated by Missouri Supreme Court

The 4-factor test set forth in Michel v. Michel, 834 SW 2d 773,777(Mo. App. 1992) for determining the best interests of children in the event of a proposed relocation has abrogated by the Missouri Supreme court in light of the 1998 amendment to Section 452.377.10(2). Prior to the 1998 amendment to section 452.377, the courts approved a relocation if it was in the best interests of the child. The child's best interests were measured by a four-part test set out in Michel. In lieu of this test, Section 452.377 now requires the court to determine that the relocation 1) is in the best interests of the child, (2) is made in good faith, and (3) if ordered, complies with the requirements of subsection 10. Michel's four part test is inconsistent with these statutory requirements and shall not be used in determining the child's best interests. Stowe v. Spence, 41 SW 3d 468 (Mo. banc April 10, 2001).

--Relocation was denied, and the trial court was affirmed, in, 50 SW 3d 864 (EDMo May 29, 2001), in which it was held that section 452.377 RSMo (2000) has broadened the inquiry in a relocation case to any substantial evidence bearing on the good faith of the custodial parent and/or the best interests of the child. Section 452.377.9 RSMo. The trial court found that the mother acted in good faith seeking the relocation, but that the move was not in the best interests of the child.
--Relocation was allowed, and the trial court was affirmed, in Siegfried v. Remaklus. In this case, the court's decision was framed in terms of the Michel 4-part test. The court of appeals held this was not fatal to the court's ultimate disposition of the relocation issue. The four Michel factors are now simply evidence, rather than a test, because the test is in the statute. In its judgment issued four months before the Stowe decision, the trial court made specific findings with reference to the four factors. However, the trial court's use of the Michel test does not require the appellate court to reverse if the court's judgment does not violate the statute and properly considers all relevant factors. Here, the trial

court specifically found that relocation was in the best interests of the child. Siegfried v. Remaklus, ED Mo slip op. no. 78949, filed November 20, 2001.

Change in circumstances of non-custodial parent

The trial court erred when it modified a joint custody judgment by awarding sole custody to the father, based upon father's motion to modify. His motion alleged the existence of a change in the circumstances of the non-custodial mother as a basis for his requested modification. The plain language of Section 452.410 RSMo requires the change to be in the circumstances of the child or his custodian, and not the non-custodial parent, to warrant a modification of child custody. Cause was reversed and remanded for reconsideration. In its opinion, the court of appeals suggested to the movant that, to the extent the change in the mother's circumstances operated to change the circumstances of the child, the cause could be recast as a change in the circumstances of the child on remand. Mallett v. Mallett, EDMo slip op. no. 79271, filed 12/11/01.

Montana Relocation

Relocation and the Constitution

The United States Supreme Court has recognized that the right of an individual to travel freely throughout the country is protected by the Constitution. E.g., Jones v. Helms, 452 U.S. 412 (1981); Shapiro v. Thompson, 394 U.S. 618 (1969). As the Montana Supreme Court recognized in a relocation case, the fundamental right to travel interstate can be restricted only in furtherance of a compelling state interest. In re Marriage of Cole, 224 Mont. 207, 729 P.2d 1276 (1986) (citing Shapiro v. Thompson, supra).

Some courts have side-stepped the constitutional issue by pointing out that a denial of relocation does not affect the parent's right to travel alone. As the Indiana Court of Appeals explained, "The straightforward answer to [the wife's constitutional] argument is that the court's order does not impose any necessary burden whatever upon her right to travel. She remains free to go wherever she may choose. It is the children who must be returned to Indiana." Clark v. Atkins, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986).

Other courts have decided the constitutional issue head-on. These courts note that if a parent who seeks to travel must pay for that right by giving up custody of the children--which is itself a constitutionally protected right, see Santosky v. Kramer, 455 U.S. 745 (1982)--the right to travel has indeed been infringed. The inquiry then becomes whether that infringement is justified by a compelling state interest.

Most courts deciding this issue have held, as did the Montana Supreme Court in In re Marriage of Cole, supra, that "furtherance of the best interests of a child, by assuring the maximum oportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate." 729 P.2d at 1280-81 (1986). Therefore, in relocation cases courts must engage in a "delicate balancing," on the one side the child's best interests, and on the other side the custodial parent's fundamental right to travel, which is "qualified by the special obligations of custody . . . and the competing interests of the noncustodial parent." Id.

In most cases, therefore, the courts have balanced the custodial parent's right to travel against the compelling state interest in protecting the child's best interests. See, e.g., In re Marriage of Cole, supra; Zwerneman v. Kenny, 236 N.J. Super. 1, 563 A.2d 1139 (App. Div. 1989); In re Marriage of Sheley, ___ Wash. App. 2d ___, 895 P.2d 850 (1995), review denied, 128 Wash. 2d 1007, 910 P.2d 481 (1996). In some cases, however, the courts have used the child's best interests to "trump" the

parent's constitutional right. See, e.g., Ziegler v. Ziegler, 107 Idaho 527, 691 P.2d 773 (Ct. App. 1985) (child's best interests take priority over parent's right to travel); Everett v. Everett, 660 So. 2d 599 (Ala. Civ. App. 1995) (following Ziegler). This approach reflects a poor understanding of and an insufficient regard for the fact that the parent's right is fundamental constitutional one.

Sometimes a custodian will seek permission to relocate in order to advance his or her education and/or to obtain professional training. Courts generally consider this reason a valid one, especially if the education or training will enhance the custodian's earning capacity and a comparable program is unavailable locally. In Boudreaux v. Boudreaux, 657 So. 2d 459 (La. Ct. App. 1995), a divorcing mother who sought custody revealed her intention to relocate to California to complete her college education and to obtain a teaching certificate. She planned to live with her parents while attending school to save money. The trial court awarded primary physical custody to the father, but the Louisiana Court of Appeal reversed. The court believed that the child's best interests clearly required an award of primary physical custody to the mother. In addition to being a superior candidate for custody generally, the mother had excellent reasons for desiring to relocate. See also In re Marriage of Francis, 1996 WL 288755 (Colo. June 3, 1996) (mother with sole custody sought relocation to New York to attend two-year physician's assistant's program; transfer of custody to father was reversed and case was remanded for application of correct standard); Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. Dist. Ct. App. 1994) (divorcing mother sought custody and relocation to Massachusetts to live with family and attend school; trial court's residential restriction was reversed and case was remanded for reconsideration under new standard).

In at least one case, permission to relocate for this reason was denied. In In re Marriage of Elser, ___ Mont. ___, 895 P.2d 619 (1995), a mother with primary physical custody sought to relocate to Kansas to attend a radiology technician's program. She had applied to a similar program offered in the state but had not been accepted. The father opposed the move and sought a custody transfer if the mother relocated. The trial court denied the mother's petition and granted the father's motion. In affirming, the Montana Supreme Court noted that although the mother's reason for relocation was legitimate, adequate alternate visitation could not be worked out in this case because of the father's work schedule. The father performed seasonal highway construction work from April through November, typically working 12-18 hours a day five or six days a week. Thus, scheduling extended blocks of visitation during the summer, when the children were out of school, would be impossible.

Nebraska Relocation

State of Nebraska on behalf of Angel F. Janda, a minor child, appellee,
v. Steven J. Janda, defendant and third-party plaintiff, appellant,
and Tina D. Moore-Sigler, third-party defendant, appellee.

State on behalf of Janda v. Janda

Filed December 27, 2005. No. A-05-386.

Appeal from the District Court for Douglas County: Gerald E. Moran, Judge. Affirmed.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellant.

John S. Slowiaczek and Willow T. Head, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee Tina D. Moore-Sigler.

Inbody, Chief Judge, and Carlson and Cassel, Judges.

Carlson, Judge.

I. INTRODUCTION

Steven J. Janda appeals from an order of the district court for Douglas County denying his request to relocate with his minor child, Angel F. Janda, to Florida and awarding him and Tina D. Moore-Sigler joint legal custody of Angel. Based on the reasons that follow, we affirm.

II. BACKGROUND

Tina gave birth to Angel on June 30, 2001. On April 2, 2003, a decree of paternity was entered in the district court for Douglas County determining that Steven was the biological father of Angel. The decree awarded Steven custody of Angel, subject to specific rights of visitation by Tina. At the time the decree was entered, Steven lived in Nodaway, Iowa, and Tina lived in Elkhorn, Nebraska.

On October 16, 2003, the trial court entered an order increasing Tina's visitation time because she had completed a chemical dependency evaluation and complied with the recommendations contained therein, as the guardian ad litem had recommended. She was awarded visitation that consisted of 6 p.m. Wednesday to 7 p.m. Sunday every other week and visitation from 6 p.m. Wednesday to 7 p.m. Thursday on the weeks in between. She also had 2 weeks of extended visitation to be used at any time during the year.

On June 29, 2004, Steven filed an application to modify the decree of paternity, asking the court to modify Tina's visitation schedule based on his intention to relocate with Angel to Florida and also asking the court to address travel expenses for purposes of visitation. Tina filed a response and cross-application requesting that Steven's application to modify be denied and asking the court to award her physical custody of Angel.

Steven subsequently filed a motion to dismiss Tina's cross-application, alleging that the court lacked subject matter jurisdiction because Angel had resided with Steven in the State of Iowa since April 2003. Following a hearing on the motion, the trial court overruled Steven's motion to dismiss.

On December 10, 2004, trial was held on Steven's application to modify and Tina's cross-application to modify. Steven testified that when he was awarded custody of Angel, he was living in Nodaway, Iowa, which is about 65 miles from the Omaha, Nebraska, area. He testified that he continued to live in Iowa until August 2004, when he moved to Florida with Angel. He testified that he was subsequently ordered by the court to return to Iowa. Steven testified that in November 2004, he sold his house in Iowa, and that at the time of trial, he and Angel were living with his sister in Ralston, Nebraska.

Steven testified that he wants to move to Florida with Angel because he and his father plan to purchase a business in Clearwater, Florida, called Kyle's Clock Shop. Steven testified that in February 2004, the owners of Kyle's Clock Shop contacted him and his father and asked if they would be interested in buying the business. Steven testified that he and his father had been negotiating with the owners of Kyle's Clock Shop, but that there were still details that needed to be worked out. Steven testified that his father was going to buy the business and be the sole owner initially and that Steven would work for his father as a salaried employee and would gradually buy shares of the business from his father. Steven testified that he and his father estimated that Steven would receive a yearly salary of $40,000. He did not know how much he would pay his father for the shares in the business.

Steven testified that his father owns a retail and clock repair store in Omaha called Chimes & Time Clock Shop (Chimes & Time). Steven testified that he does subcontract labor for his father, repairing and servicing clocks that come into the store. Steven testified that he has worked in the clock repair

business for the past 15 years. He testified that he has also worked on the retail side of his father's store in the past. Steven testified that he will be the one primarily running the business in Florida and will do both retail sales and repairs.

Steven testified that the estimated $40,000 salary he would earn in Florida is more income than he made in Nebraska in 2003. Steven's 2003 income tax return was entered into evidence, showing that he earned $33,304 in commission from his father for his subcontract labor.

Steven testified that his father is trying to sell Chimes & Time and that a sale was pending at the time of trial. Steven testified that his father offered to sell him Chimes & Time, but that he did not want to purchase it. Steven testified that it is possible that he and his father could work out a similar arrangement with Chimes & Time as that planned for the Florida business, whereby his father would pay him a salary to do retail sales and repair and Steven could gradually buy out Chimes & Time from his father.

Steven testified that in August 2004, he put a deposit down on a two-bedroom apartment in Florida, located in a "[h]igh income, gated community." When asked about schools in the area, Steven responded that he has considered enrolling Angel in a Catholic school. He testified that his parents also intend to move to Clearwater, Florida, and that Angel has a very good relationship with them.

Steven testified that if allowed to move, he is proposing that Tina's visitation consist of 2 weeks during the summer, alternating holidays, and some time around Christmas. He also testified that he would pay for travel expenses.

Steven's father testified that he and his wife want to move to Florida because his wife has health issues and because he wants to retire. He testified that purchasing Kyle's Clock Shop would allow him to work part time and gradually work out of the business and that Steven would work full time, be paid a salary, and would eventually be the sole owner of the business. Steven's father testified that he and Steven had discussed Steven's buying Chimes & Time from him but that Steven was not interested. Steven's father testified that it would be possible for Steven to assume more responsibilities at Chimes & Time and that Steven's father could, in turn, pay him a salary.

Steven's father testified that he and his wife have a close relationship with Angel and that if Steven is not allowed to move to Florida with Angel, he and his wife will likely not move either.

Tina acknowledged that she had a drug addiction problem in the past which led to Steven's being awarded custody of Angel in April 2003. Tina testified that since April 2003, she has not used any illegal drugs and has not used any alcohol. Tina testified that in her effort to become drug free, she has completed an outpatient program and a relapse prevention program, has attended and continues to attend Alcoholics Anonymous (AA) meetings, has an AA sponsor, attends a women's support group, and attends church regularly.

Tina testified that she has a close relationship with Angel. Tina testified that Steven, however, does not support her relationship with Angel. Tina testified regarding a time in January 2004 when Angel, while in Tina's care, was admitted to the hospital because she was ill and when Steven arrived, he requested that Tina be removed from the hospital. She testified that Steven agreed to let her stay until the end of her scheduled visitation time and allowed her to come back the next day for a 2-hour visit. Tina also testified that Steven had never discussed with her his intention to move to Florida and that when he moved to Florida in August 2004, he left a message on her answering machine in which he stated that he and Angel were now living in Florida and gave Tina their new address. Tina testified that she and Steven do not communicate well with each other.

Tina testified that if Steven were allowed to move to Florida with Angel, Tina would not be able to maintain the same type of relationship with Angel that she currently enjoys. She testified that the visitation time proposed by Steven is significantly less than the visitation time she has now.

Tina's psychiatrist testified that she began treating Tina in December 2002 and that she has continued treating her since that time. She testified that she has seen "marked improvement" in Tina, in that she has maintained abstinence, completed her chemical dependency program, continues to go to AA meetings, and never misses meetings with her psychiatrist. She believes Tina has abstained from alcohol and illegal drugs since April 2003.

On March 10, 2005, the trial court entered an order denying Steven's application to modify Tina's visitation, denying Tina's cross-application for physical custody, and awarding the parties joint legal custody of Angel. On April 1, the trial court entered an order nunc pro tunc, ordering that Steven was not to remove Angel to Florida on a permanent basis.

III. ASSIGNMENTS OF ERROR

Steven assigns that the trial court erred in (1) denying his motion to dismiss Tina's cross-application for lack of subject matter jurisdiction, (2) denying his application to modify Tina's visitation to accommodate his and Angel's move to Florida, (3) entering an order nunc pro tunc prohibiting him from removing Angel to Florida on a permanent basis, and (4) awarding the parties joint legal custody.

IV. STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. Heistand v. Heistand, 267 Neb. 300, 673 N.W.2d 541 (2004); Kugler Co. v. Growth Products Ltd., 265 Neb. 505, 658 N.W.2d 40 (2003).

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion. McLaughlin v. McLaughlin, 264 Neb. 232, 647 N.W.2d 577 (2002); Wild v. Wild, 13 Neb. App. 495, 696 N.W.2d 886 (2005).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. McLaughlin v. McLaughlin, supra; Wild v. Wild, supra.

V. ANALYSIS

1. Subject Matter Jurisdiction

Steven first assigns that the trial court erred in denying his motion to dismiss Tina's cross-application in which she sought a change in the physical custody of Angel, finding that it had subject matter jurisdiction to entertain the cross-application. Steven's contention in regard to jurisdiction over the subject matter is based on the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004), which establishes the requirements for jurisdiction when not all of the parties are residents of the same state. The applicable provision in the present case, § 43-1239, states as follows:

(a) Except as otherwise provided in section 43-1241, a court of this state which has made a child custody determination consistent with section 43-1238 or 43-1240 has exclusive, continuing jurisdiction over the determination until:

(1) a court of this state determines that neither the child, nor the child and one parent . . . have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

Section 43-1227(3) defines "child custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order."

The district court for Douglas County made a child custody determination when it entered the paternity decree and gave custody of Angel to Steven. Steven argues that the trial court did not have exclusive, continuing subject matter jurisdiction to modify the decree of paternity, because he and Angel have not lived in Nebraska since the decree was entered in April 2003. We disagree.

We conclude that in the instant case, § 43-1239 does not preclude the district court from having exclusive, continuing subject matter jurisdiction to modify its decree. Angel was born in Nebraska and lived in Nebraska with Tina until the decree of paternity was entered in April 2003. Since the decree was entered, Tina has continued to live in Nebraska. Given Tina's visitation schedule, Angel spends significant amounts of time in Nebraska. Angel's paternal grandparents, with whom she has a close relationship, also live in Nebraska. The fact that the district court entered the initial paternity decree and modified it in October 2003 when it modified Tina's visitation time is also a substantial connection to Nebraska. See Range v. Range, 232 Neb. 410, 440 N.W.2d 691 (1989) (noting that one substantial contact with Nebraska was fact that Nebraska court had been involved in case since initial dissolution decree). Thus, the record shows that Tina resides in Nebraska, that Angel has significant connections with Nebraska, and that substantial evidence relating to Angel is available in this state. Having concluded that the district court had subject matter jurisdiction to modify the decree of paternity, Steven's first assignment of error is without merit.

2. Removal of Angel to Florida

Steven next assigns that the trial court erred in denying his application to modify Tina's visitation to accommodate his and Angel's move to Florida and assigns that the trial court erred in entering an order nunc pro tunc prohibiting him from removing Angel on a permanent basis to Florida. Steven takes issue with the trial court's treating his application to modify Tina's visitation as an application to remove Angel to Florida. Steven argues that he does not need approval from a Nebraska court to remove Angel to another state, because he and Angel are not Nebraska residents. However, as previously discussed, the trial court had exclusive and continuing jurisdiction over its child custody determination regarding Angel. Accordingly, Steven needed approval from the district court to permanently move Angel to Florida. Nebraska requires court approval before a minor child over which it has jurisdiction can be removed to another state by the custodial parent. See, Farnsworth v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999); Harder v. Harder, 246 Neb. 945, 524 N.W.2d 325 (1994).

It is also apparent from the record that Steven knew he needed permission from the district court to remove Angel to Florida. For instance, when Steven was testifying, his counsel asked him, "Now you are here today asking the Court to give you permission to remove your daughter from Iowa to where?" Steven responded, "To Clearwater, Florida." Thus, Steven's application, although labeled as a request to modify visitation, was an application to remove Angel from Iowa to Florida, and the trial court properly treated it as such.

In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. McLaughlin v. McLaughlin, 264 Neb. 232, 647 N.W.2d 577 (2002); Wild v. Wild, 13 Neb. App. 495, 696 N.W.2d 886 (2005). At trial, Steven presented evidence as to why he wants to move to Florida, but presented very little evidence regarding Angel's best interests. The trial court found that Steven failed to prove that a material change of circumstances exists to warrant removal of Angel to Florida and found that removal is not in Angel's best interests. Under our de novo review, we will address whether Steven has a legitimate reason for moving to Florida and whether removal is in Angel's best interests.

(a) Legitimate Reason to Leave State

Steven's asserted reason for moving to Florida was because of an employment opportunity. Previous cases in Nebraska have recognized that legitimate employment opportunities for the custodial parent may constitute a legitimate reason for leaving the state. See, Brown v. Brown, 260 Neb. 954, 621 N.W.2d 70 (2000); Jack v. Clinton, 259 Neb. 198, 609 N.W.2d 328 (2000); Farnsworth v. Farnsworth, supra; Carraher v. Carraher, 9 Neb. App. 23, 607 N.W.2d 547 (2000). However, the Nebraska Supreme Court has specifically held that such legitimate employment opportunities may constitute a legitimate reason "where there is a 'reasonable expectation of improvement in the career or occupation of the custodial parent.'" Farnsworth v. Farnsworth, 257 Neb. at 252, 597 N.W.2d at 600, quoting Gerber v. Gerber, 225 Neb. 611, 407 N.W.2d 497 (1987). Similarly, such legitimate employment opportunities may constitute a legitimate reason "where the custodial parent's new job included increased potential for salary advancement." Jack v. Clinton, 259 Neb. at 205, 609 N.W.2d at 333.

The trial court found that Steven failed to prove a material change of circumstances exists to warrant removal of Angel to Florida, or stated differently, that Steven did not have a legitimate reason to move to Florida. Steven's stated reason for moving was that his father was going to buy a clock shop in Clearwater, Florida, and Steven was going to work for his father on a salary basis and would gradually buy the business from his father. Thus, Steven claims that his reason for moving is for an employment opportunity. However, it is clear that Steven's request to move to Florida is due to his father's desire to retire in Florida, rather than to further Steven's career in the clock repair business. The employment opportunity is dependent on his parents' moving to Florida and his father's buying the store there. If not for his parents' wanting to move to Florida, the employment opportunity would not exist and he would not want to move. Further, Steven and his father both testified that Steven's father offered to sell Steven Chimes & Time in Omaha, but that Steven was not interested. In addition, Steven and his father both testified that it was possible that they could work out a similar arrangement for Chimes & Time as they had planned for the store in Florida. Thus, Steven had a similar employment opportunity in Nebraska to that in Florida.

Upon our de novo review, we conclude that Steven failed to carry his burden to demonstrate that the employment opportunity in Florida was a legitimate reason to move Angel to Florida. Accordingly, the trial court did not abuse its discretion in so finding.

(b) Best Interests of Child

Having found that Steven did not meet the threshold requirement of demonstrating a legitimate reason for the removal, we could stop our removal analysis there. However, for the sake of completeness, we further consider whether Steven met his burden to prove that removal to Florida is in Angel's best interests.

In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child. Jack v. Clinton, 259 Neb. 198, 609 N.W.2d 328 (2000); Farnsworth v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999). In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. McLaughlin v. McLaughlin, 264 Neb. 232, 647 N.W.2d 577 (2002); Wild v. Wild, 13 Neb. App. 495, 696 N.W.2d 886 (2005).

As previously stated, Steven presented little evidence regarding how the removal would be in Angel's best interests. The trial court did not elaborate on any of the best interests factors, but gave several reasons why it was not in Angel's best interests to be removed to Florida. We find that the evidence supports the trial court's conclusion.

(i) Each Parent's Motives

The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. McLaughlin v. McLaughlin, supra; Wild v. Wild, supra. Based on our review of the record, neither Steven nor Tina was seeking to frustrate or manipulate the custodial rights of the other or was otherwise acting in bad faith. Steven is seeking removal so he can operate a business with his father and continue to live close to his parents. Tina's resistance to removal is based on her desire to continue to have regular contact with Angel and her concern about the effect such move will have on her and Angel's relationship. Both parties have valid reasons for taking their respective positions on the removal of Angel to Florida. As such, Steven's and Tina's motives do not weigh in favor of or against relocation.

(ii) Quality of Life

In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. McLaughlin v. McLaughlin, supra; Wild v. Wild, supra. This list should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. Id.

With respect to the first factor, the emotional, physical, and developmental needs of the child, there is little evidence that goes to this factor. However, there was no evidence presented to suggest that either party is incapable or deficient in any way in providing for Angel's emotional, physical, and developmental needs. As such, this consideration is equally balanced and does not weigh in favor of removal.

The second factor allows a court to consider a child's preference as to where to live. There is no evidence regarding Angel's preference, as would be expected given Angel's age of 3 years old at the time of trial. This factor does not weigh in favor of or against allowing the removal.

As to the third factor, enhancement of income or employment, the record does not demonstrate that the move will result in an enhancement of Steven's income or employment. His estimated salary in Florida is more than he was making in Nebraska, but the salary was only speculative. Further, Steven presented no evidence of the cost-of-living difference between Nebraska/Iowa and Florida. Steven also testified that he would pay for the travel costs associated with Tina's visitation. This consideration does not weigh in favor of removal.

As to the fourth and fifth factors, there is no evidence that the housing or living conditions would be improved or that the move to Florida would offer educational advantages. Steven testified that he had put a deposit down on a two-bedroom apartment located in a "[h]igh income, gated community." However, there is no evidence of what the housing situation had been in Iowa, other than the fact that Steven had owned a house there, and no evidence to indicate that the housing or living conditions in Florida would be better than in Iowa or would provide any benefit to Angel's best interests. Likewise, Steven failed to adduce any evidence which would suggest that the schools in Florida would offer Angel any educational advantage. These two factors do not weigh in favor of relocation.

With regard to the sixth factor, the quality of the relationship between the child and each parent, again there is little evidence that relates to this factor. It appears that both parties have a good relationship with Angel, and there was no evidence that Angel has a stronger relationship with either parent. The removal will affect Angel's relationship with Tina to the extent there will be a reduction in time spent together and in the frequency of Angel and Tina's contact with each other. There is no evidence to indicate that removal will have any impact on Angel's relationship with Steven. This consideration does not weigh in favor of removal.

As to the seventh factor, the strength of the child's ties to the present community and extended family there, given Angel's age, there is no evidence of ties to the present community. With regard to family, Steven's parents live in Omaha, but may be moving to Florida. Angel also has a half sister who, at the time of trial, lived with Tina in Elkhorn. However, Angel's half sister was expected to graduate from high school in May 2005 and planned to go to college. Angel also has a half brother who was 19 at the time of trial and was in the Nebraska Job Corps and no longer living with Tina. This consideration does not weigh in favor of or against removal.

With regard to the eighth and final factor, hostilities between parties, we are unable to tell whether the removal would antagonize the relationship between the parties. The record indicates that the parties do not get along and do not communicate well with each other. We find no reason to presume that the hostility between them would get any worse if Steven was allowed to remove Angel. This consideration, therefore, is a neutral factor.

After considering all of the above factors in our de novo review, we conclude that Angel's quality of life would not be enhanced by the move to Florida. Based on the evidence presented, or the lack thereof, the considerations almost uniformly fail to weigh in favor of removal. Because Steven failed to adduce sufficient evidence to support a finding that Angel's quality of life would be enhanced, we find that this factor weighs against removal.

(iii) Impact of Move on Contact Between
Child and Noncustodial Parent

The final consideration in the best interests of the child analysis is the effect of the relocation upon Tina's ability to maintain a meaningful parent-child relationship with Angel. This effect must be viewed in light of the court's ability to devise reasonable visitation arrangements. McLaughlin v. McLaughlin, 264 Neb. 232, 647 N.W.2d 577 (2002). See Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and

fostering a child's relationship with the noncustodial parent. Farnsworth v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999).

It cannot be questioned that the removal to Florida would allow Tina significantly less contact with Angel than she currently has. Since October 2003, Tina has had visitation every other week from 6 p.m. Wednesday to 7 p.m. Sunday and from 6 p.m. Wednesday to 7 p.m. Thursday on the weeks in between. Given the distance between Nebraska and Florida, the frequency of Tina's visitation will necessarily be diminished.

We further note that the evidence shows that Steven is not supportive of Tina's relationship with Angel and that he does not respect Tina's parenting rights. Steven's past conduct is indicative of the minimal importance he would place on Tina's visitation rights and her role as Angel's mother in the future if Steven is allowed to move to Florida with Angel.

Accordingly, we conclude that the evidence fails to support a finding that Tina's parent-child relationship with Angel will not be adversely impacted by granting the removal. Thus, this final best interests factor weighs against removal.

(iv) Best Interests--Conclusion

Upon our de novo review of the record, we conclude that it is not in Angel's best interests to permit Steven to remove Angel to Florida. Steven failed to adduce evidence to demonstrate that the factors to be considered in evaluating Angel's best interests weigh in favor of allowing removal. Therefore, we conclude that the trial court did not abuse its discretion in denying Steven's request to remove Angel to Florida. Steven's second and third assignments of error are without merit.

3. Joint Legal Custody

Finally, Steven assigns that the trial court erred in awarding the parties joint legal custody of Angel. Steven argues that legal custody was not specifically made an issue in any pleading filed by Steven or Tina and that therefore, the parties did not have notice that legal custody was at issue and did not have an opportunity to be heard on the matter. The Nebraska Supreme Court has previously stated that a trial court has no authority to modify a decree of dissolution with regard to custody without notice to the parties and an opportunity to be heard. See, Tautfest v. Tautfest, 215 Neb. 233, 338 N.W.2d 49 (1983); Francis v. Francis, 195 Neb. 417, 238 N.W.2d 468 (1976). Although the present case involves a modification of a paternity decree rather than a decree of dissolution, the above proposition equally applies in the instant case.

Although legal custody was not specifically raised in the pleadings or by the parties at the modification hearing, Tina raised the issue of physical custody in her cross-application. Thus, custody was an issue before the court. Steven argues that Tina sought only physical custody and proposed leaving legal custody with Steven. Our review of Tina's pleading shows that Tina sought full custody, and therefore, joint custody is within the scope of Tina's requested change. Each party had an opportunity to testify as to why he or she should be granted or should retain custody of Angel.

The trial court stated that it was awarding joint legal custody to the parties due to Tina's successful efforts in her drug rehabilitation program and her increased visitation time with Angel which began in October 2003, and which she has consistently exercised. The trial court further concluded that it was in Angel's best interests to award the parties joint legal custody. We find that both parties were on notice that custody was a matter in dispute, that the parties had an opportunity to put on any and all evidence about the custodial arrangement, and that the trial court's decision to award the parties joint custody is supported by the evidence. See Schnell v. Schnell, 12 Neb. App. 321, 673 N.W.2d 578 (2003). Therefore, Steven's last assignment of error is without merit.

VI. CONCLUSION

We conclude that the trial court had subject matter jurisdiction to modify the paternity decree and, thus, properly exercised jurisdiction in the instant case. We further conclude that the trial court did not err in denying Steven's application to modify Tina's visitation to accommodate his move to Florida and in entering the order nunc pro tunc prohibiting Steven from removing Angel on a permanent basis to Florida. Finally, we conclude that the trial court did not err in awarding the parties joint legal custody of Angel. Accordingly, the trial court's March 10, 2005, order of modification and its April 1, 2005, order nunc pro tunc are affirmed.

Nevada Relocation

Does Nevada's relocation statute, NRS 125C.200, violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution? The Nevada Supreme Court recently answered that question: NO. In Reel v. Harrison, 118 Nev. Adv. Op. No. 89, decided on December 26, 2002, the Supreme Court overturned the portion of a district court order which held that the relocation statute is an unconstitutional restriction of a custodial parent's fundamental right to travel.

Richard Reel and Kathryn Harrison were divorced in 1990. Kathryn was awarded primary physical custody of the parties' child (the Opinion does not state the child's gender or name), with Richard having his child two days each week and occasionally for longer periods. In 2000, Kathryn petitioned to remove the child under NRS 125C.200 to the State of New Jersey, where she had a better job prospect and living arrangements. New Jersey also offered the child better opportunities both educationally and culturally.

The district court reasoned that the relocation statute violates the Equal Protection Clause because the law does not treat each party equally. If Richard wanted to move to New Jersey nothing could stop him, as the non-custodial parent has no legal obligation to obtain permission to leave the state. However, unless Kathryn gained Richard's or the court's consent, the statute prevented her from moving away with the child, and thus impeded her right to travel. The district court also concluded that the state's interest in fostering and encouraging child rearing by both parents is not a compelling governmental interest.

On appeal the Nevada Supreme Court found the lower court's reasoning to be specious. Although the U.S. Supreme Court held that "a classification that has the effect of imposing a penalty on the exercise of the right to travel violates the Equal Protection Clause 'unless shown to be necessary to promote a compelling governmental interest.'" Id. at 8, 9, quoting Saenz v. Roe, 526 U.S. 489, 499 (1999), equal protection ensures that "no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances." Reel at 9, quoting Allen v. State Public Employees Retirement Board, 100 Nev. 130, 135, 676 P.2d 792 (1984). However, as long as the law treats all similarly situated people the same, a statutory classification between individuals is not unconstitutional.

Because the purpose of NRS 125C.200 is "to preserve the rights and familial relationship of the noncustodial parent with respect to his or her child, " Reel at10, citing Schwartz v. Schwartz, 107 Nev. 378, 381,382, 812 p.2d 1268 (1991), the Nevada Supreme Court determined that custodial parents and non-custodial parents are not similarly situated. Therefore, it was error for the district court to undertake an equal protection analysis.

When analyzing a petition to relocate, a court must balance 'the custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the State's interest in protecting the best interests of the child, and the competing interests of the noncustodial parent.' A custodial parent's

freedom of movement is qualified to the extent that moving the child from Nevada may adversely affect the noncustodial parent's visitation rights or might otherwise not be in the child's best interest. Obviously, the responsibilities and obligations of custodial and noncustodial parents are so different that the parties cannot be considered similarly situated. Reel at 11.

Although the district court's constitutional holding was struck down, its alternative analysis that if NRS 125C.200 were constitutional, removal was appropriate, met the Supreme Court's approval. Citing Schwartz as the controlling case, the Supreme Court iterated with approval the Schwartz guidelines for relocation. First, a custodial parent asking a court to move must "satisfy the threshold criteria that (1) moving will create a real advantage for both the children and the custodial parent, and (2) the custodial parent has 'a sensible good faith reason for the move.'" Reel at 13.

If the threshold is met, the court must then weigh the following factors:

(1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the non custodial parent. Id. at 13, 14.

When weighing the Schwartz factors, the court must also consider an inexhaustible list of sub factors, including:

(1) whether positive family care and support, including that of the extended family, will be enhanced; (2) whether housing and environmental living conditions will be improved; (3) whether educational advantages for the children will result; (4) whether the custodial parent's employment and income will improve; (5) whether special needs of a child, medical or otherwise, will be better served; and (6) whether, in the child's opinion, circumstances and relationships will be improved. Reel at 15.

The Supreme Court upheld the district court's conclusion that Kathryn could meet the Schwartz criteria and permitted her relocation. Not only did Kathryn have better career opportunities in New Jersey, the child had better educational prospects there. Extended family would be near by, Richard could enjoy reasonable visitation and Kathryn's motivations were honorable.

One complexity of relocation cases which has not been adequately addressed by the Supreme Court is the fact that a move will forever alter the child's relationship with the parent who is left behind. Richard Reel, a man who spent two days or more each week with his child and who actively participated in his child's upbringing, will never again have that meaningful interaction with his child. Worse, the child will forever lose his/her father's daily presence and guidance. Eight weeks in the summer and one week during Christmas and Spring breaks do not allow Richard Reel to be the same parent he was when his child lived near him in Carson City. He cannot meaningfully participate in the upbringing of his child when his child lives 3,000 miles away in New Jersey. Telephone calls, letters and email are not the same as sitting on dad's lap reading a book or hunkering over homework at the kitchen table.

Relocation essentially forces children to grow up without one parent. Studies indicate that children whose divorced parents both actively participate in their upbringing and who strive to work cooperatively for the benefit of the children, grow up happy and healthy and do better than children who live in unhappy two-parent households.

New Hampshire Relocation

During or after a divorce, one parent may want to relocate to a new state to be closer to family or supportive friends or for better job opportunities. Moving with or away from the children may have a significant impact on the final custodial arrangements. Before moving, you must be sure to be in compliance with relocation considerations stipulated in your final divorce order. If the divorce is not final, you should be sure to get court permission for the move and to include relocation considerations in the final order of the custody agreement. Otherwise, you may be charged with interference of custody (see below).

With few exceptions, if one parent moves, the original court maintains jurisdiction over the case as long as at least one of the parties remains in New Hampshire.

RELOCATION BECAUSE OF VIOLENCE & ABUSE

With court permission or as stipulated in a final custodial agreement, a parent may relocate with the children because of domestic violence or child abuse. In this instance, procedures allow the parent to register custody orders with the new state while keeping the family's location secret, if that is necessary. The original court still will determine custody. However, if you meet certain requirements, you may be able to have the court transfer the case to the new state. If New Hampshire is the "new state," you will need to find a lawyer familiar with the UNIFORM CHILD CUSTODY JURISDICTION ACT (UCCJA), the law that governs interstate custody disputes. The lawyer also should be familiar with the FEDERAL PARENTAL KIDNAPPING ACT (see below).

Be sure to discuss with your lawyer ways to protect your confidentiality, if your partner is abusive, while still fulfilling UCCJA requirements. Otherwise, when you file information, in accordance with UCCJA requirements, your current address will be put on public record. This means that your partner has access to finding out your new location.

PARENTAL KIDNAPPING

Any parent who does not have legal custody of a child and conceals the location of that child is committing parental kidnapping, a federal offense under the FEDERAL PARENTAL KIDNAPPING ACT. The act provides a federal parent locator service as well as penalties for kidnapping and provisions for states to enforce custody decisions of other states. If your ex-spouse has taken your child illegally, you should contact the police and then your lawyer immediately. The police will contact a U.S. Attorney in your federal district to begin the process of finding the child and, when found, prosecuting the parent. See below for more information on the steps to take for parental kidnapping.

IN-STATE AND INTERSTATE ABDUCTION

New Hampshire law also protects children from parental kidnapping. A non-custodial parent who moves to a new state and takes the children without the court's permission is committing the crime of interference with custody (RSA 633:4). Additionally, one parent may not conceal the location of the children from the other parent who has been awarded full physical custody or physical custodial rights, including visitation.

NOTE: IF A PARENT INTERFERES WITH CUSTODY IN ORDER TO PROTECT THE CHILD FROM REAL OR IMMINENT DANGER, THE COURT MAY CONSIDER THIS A DEFENSE, BUT ONLY IF GOOD FAITH IS EVIDENT. IN ORDER TO SHOW SUCH GOOD FAITH, THE PARENT MUST FILE A PETITION WITH THE COURTS THAT DOCUMENTS THE DANGER TO THE CHILD AND REQUESTS A MODIFICATION OF THE CUSTODY DECREE WITHIN SEVENTY-TWO (72) HOURS

(THREE (3) DAYS) OF FLEEING WITH THE CHILDREN. THIS DEFENSE IS NOT AVAILABLE TO A PARENT WHO LEAVES THE STATE WITH THE CHILDREN WITHOUT THE COURT'S PERMISSION.

INTERNATIONAL CHILD ABDUCTION

If your ex-spouse is a native of another country, you may be faced with the risk of your ex-spouse violating a custody order by taking the children back to his or her home country. Legal provisions may help to protect your children from international child abduction.

Under federal law, both parents are required to execute any passport application for a child under the age of fourteen (14). Send a copy of your custody order to the U.S. DEPARTMENT OF STATE, OFFICE OF CHILDREN'S ISSUES (202-736-7000) and the office will alert you if a passport application is filed for the children.
If passports were issued for the children prior to the divorce, you should stipulate in the final custody order that the court hold the passports and that a parent may not remove the children from the country without permission from the court or the other parent.
Children of parents from other countries, whether or not the children are U.S. citizens, are protected under the HAGUE CONVENTION OF 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION. The Convention, signed by the U.S. and fifty-two (52) other countries, establishes procedures to return children to their home country if wrongfully removed. Contact a family law attorney, preferably one with experience in parental kidnapping, for more information.

PREVENTING AND RESPONDING TO ABDUCTION

Some simple steps may help to protect your children from parental abduction.

Make copies of your final divorce decree and custody order, and keep them in a safe place for easy access.

Provide a copy of the custody order to the children's school, daycare, and after school programs. Be sure to tell staff that the children are not to be picked up by anyone but yourself.

Provide a copy of the custody order to the U.S. DEPARTMENT OF STATE to prevent or flag the issuance of passports for the children. If your ex-spouse is a native of another country, provide a copy of the custody order to the embassy that country.

Make sure to have recent photos of the children on hand, along with copies of birth certificates and other important identification documentation.
Keep a list of current addresses and phone numbers of your ex-spouse's relatives and friends, including those who live in another state or country.

If you have been awarded full or partial physical custody, including visitation rights, and you suspect that your ex-spouse has abducted or may be attempting to abduct your children, you should take the following steps, recommended by the AMERICAN BAR ASSOCIATION and the NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN.

IF YOUR DIVORCE OR CUSTODY CASE IS STILL PENDING OR HAS NOT YET BEEN FILED, and the other parent leaves the state or country with the children:

Go to court for an ex parte order (emergency) to have the children returned. You must show the court that the other parent is in violation of a temporary custody order or that the removal of the children will

cause them irreparable harm. If granted, the order is usually issued the same day and is enforceable by police and federal officials.
IF YOUR DIVORCE AND CUSTODY ORDERS HAVE BEEN FINALIZED, and the other parent leaves the state or country with the children in violation of the custody order:

Call the police at 9-1-1 to request the issue of a warrant for the arrest of the kidnapping parent.

Insist that the police file a missing person's report and that it be posted immediately on National Crime Information Center (NCIC) and Interpol computers. Local police departments may tell you that they need to see a final custody order before issuing a missing child report or that a waiting period is required. This is no longer true. The NATIONAL CHILD SEARCH ASSISTANCE ACT requires law enforcement to immediately enter a missing child report into the (NCIC) database.

Contact the local FBI office at 617-742-5533. If the FBI tells you that you first need a state warrant, point out that the 1993 INTERNATIONAL PARENTAL KIDNAPPING CRIME ACT ended that requirement.

Contact the NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE at 603-271-3658. Ask that the office request the local U.S. Attorney to issue a federal Unauthorized Flight to Avoid Prosecution (UFAP) arrest warrant. In addition, if this is an international abduction, request that the U.S. Attorney's Office revoke the passport of the kidnapping parent.

You will need to provide authorities with copies of your final custody order, along with recent photos of the children and current contact information of the kidnapping parent's family and friends.

Other resources available to you include:

THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AT 800-THE LOST OR 703-235-3900. The center maintains a missing children's database and publishes a booklet on preventing and responding to abduction.
THE STATE DEPARTMENT, OFFICE OF CHILDREN'S ISSUES at 202-736-7000. Request the Department's booklet, "International Parental Child Abduction," outlining what you should do and what the office can do for you if you are faced with this situation.

SUPERVISED VISITATION

In custody cases where there is a fear of abduction, a concern of physical or emotional abuse to the child, or a history of domestic violence, the court may order supervised visitation. New Hampshire has a number of visitation centers for families who need assistance with the following services:

Fully supervised on-site visits;

Semi-supervised on-site visits; and

A supervised exchange of the children.

There is a cost for services, so be sure the court order includes specific information about who will pay for the visits or exchanges.

Not all centers provide the same services, and not all centers can accommodate non-English speaking persons. Call the center first to be sure it can accommodate the specific services you require.

New Jersey Relocation

New Jersey places strict limits upon the ability of a custodial parent to relocate with children outside of its jurisdiction. In fact, the "removal" statute, N.J.S.A. 9:2-2, prohibits the removal of children of divorced or separated parents from the State of New Jersey without Court authorization unless both parents consent, or the children themselves consent if they are deemed old enough.

The Superior Court of New Jersey will have jurisdiction over a "removal" case when the children are natives of this state or have resided here for more than five years. However, even if the children are not natives of New Jersey and have not resided here for five years, the Superior Court may have jurisdiction to decide an application for removal under N.J.S.A. 2A:34-23, which authorizes the Court, after a judgment of divorce, to make such orders as to the care, custody, education, and maintenance of the children as the circumstances of the parties and the nature of the case shall render fit, reasonable, and just.

Additionally, under the Uniform Child Custody Jurisdiction Act, where a child has called the State of New Jersey "home" for a period of more than six months, New Jersey is considered the child's home state. Thus, the New Jersey Courts would have jurisdiction to make custody determinations or modifications that may permit or deny removal. While the "removal" statute provides that a child can consent to his or her own removal from this state upon being "of suitable age," the statute does not define "suitable age."

However, case law in New Jersey provides some guidance in this regard. The Courts have determined that an 8-year-old is not of suitable age, but that attaining the age of 14 is a starting point upon which a child can provide consent. When a child, who is deemed of suitable age, consents to relocation outside of the State of New Jersey, it is not necessary for the Court to make a decision on the issue, thereby obviating the need for a plenary hearing.

At that time, the only determination the Court will be called upon to make is whether the consent of the child is informed, voluntarily given, and without duress or coercion. In the event that the circumstances surrounding the child's consent are questionable, the Court must conduct an interview with the child and hold a plenary hearing. Otherwise, the child will be permitted to leave the state with his or her parent. Similarly, if both parents consent to the removal of the child from New Jersey, the Court is not required to hold a hearing.

However, in the event the non-custodial parent objects to the removal of the child from New Jersey, the Court must hold a plenary hearing, otherwise known as a Holder hearing. The hearing was so coined in light of the Court's ruling in the seminal "removal" case, Holder v. Polanski. In that case, the Court set forth the criteria upon which a custodial parent's application for relocation would be granted.

As a threshold matter, the Court must first determine whether the custodial parent has a good-faith reason to move with the children. Any sincere, good-faith reason will suffice. For instance, moving to live near relatives, seeking new or higher paying employment, or the custodial parent's remarriage will each satisfy the good-faith requirement. It is only when the custodial parent's motive is to thwart or frustrate the non-custodial parent's visitation rights that the Court will deem the custodial parent's request to be in bad faith. Once the Court finds that the custodial parent wants to move for a good-faith reason, it must then consider whether the move will be in the best interest of the children or whether the relocation will adversely affect the visitation rights of the non-custodial parent.

The non-custodial parent has the burden of proving that the effect of removal upon visitation with the children will be harmful to the children. Absent an adverse effect on the children's best interest or the non-custodial parent's visitation rights, the Holder Court held that the custodial parent should enjoy the same freedom of movement as the non-custodial parent.

Previously, the custodial parent was required to show that there would be a real advantage to the move. However, this now comes into play only if the move requires substantial changes in the non-custodial parent's visitation schedule. If the proposed relocation will hinder the current visitation schedule, the custodial parent will then be required to provide proofs concerning the prospective advantages of the move, in conjunction with his or her continued good faith.

It must be noted that not every change in a visitation schedule will adversely affect the non-custodial parent's rights. In fact, the trial court must make findings as to parenting time alternatives which might mitigate against any adverse effect resulting from the inability to maintain exactly the same visitation schedule. For instance, a non-custodial parent may be compensated for missed visitation by enjoying extended visitation with the children during school vacations and the summer.

A custodial parent(s) may only relocate if he/she has the consent of the former spouse. Alternatively, the relocating spouse must obtain a court order to permit the move. The purpose of the statute is to preserve the rights of the non-custodial parent and the child to maintain and develop their familial relationship. This mutual right of the child and the non-custodial parent is usually achieved by means of a parenting plan. Because the removal of the child from the state may seriously affect the parenting schedule of the non-custodial parent, the courts require the custodial parent to show why the move should be permitted.

The custodial parent must show both good faith in making the move and that the relocation will not be contrary to the child's interest. Our Supreme Court has delineated twelve factors that must be considered to determine whether the custodial parent has proven good faith and that the move will not adversely affect the child's interest:

1. The reasons given for the move;

2. The reasons given for the opposition;

3. The past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move;

4. Whether the child will receive educational, health and leisure opportunities at least equal to what is available here;

5. Any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location, and

6. Whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child;

7. The likelihood that the custodial parent will continue to foster the child's relationship with the non-custodial parent if the move is allowed;

8. The effect of the move on extended family relationships here and in the new location;
If the child is of age, his or her preference;

9. Whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent;

10. Whether the non-custodial parent has the ability to relocate; and

11. Any other factor bearing on the child's interest.

The Law

A. The Removal Statute: The removal of children from New Jersey is governed by N.J.S.A. 9:2-2. Minor children who are “natives” of New Jersey, or have resided here for five years, cannot be removed from the State without “the consent of both parents, unless the court, upon cause shown, shall otherwise order”.

B. The Custody Statute: Every removal case necessarily implicates the same issues that are likely to arise in a child custody setting. This being the case, the litigator should examine and address the custody factors set forth in the statute (N.J.S.A. 9:2-4):

1. The parents’ ability to agree, communicate and cooperate in matters relating to the child;

2. The parents’ willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;

3. The interaction and relationship of the child with its parents and siblings;

4. The history of domestic violence, if any;

5. The safety of the child and the safety of either parent from physical abuse by the other parent;

6. The preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;

7. The needs of the child;

8. The stability of the home environment offered;

9. The quality and continuity of the child’s education;

10. The fitness of the parents;

11. The geographical proximity of the parents’ homes;

12. The extent and quality of the time spent with the child prior to or subsequent to the separation;

13. The parents’ employment responsibility; and

14. The age and number of the children.

C. The Case Law: The controlling decision is Holder v. Polanski, 111 N.J. 344 (1988). The essence of Holder is the following:

“A custodial parent may move with the children of the marriage to another state as long as the move does not interfere with the best interests of the children or the visitation rights of the non-custodial parent.” (111 N.J. at 349)

Until Holder, the standard was a requirement that a custodial parent establish, among other things, a “real advantage” for the move (Cooper v. Cooper, 99 N.J. 42 (1984)). While the Cooper showing is still relevant, it is no longer the controlling criterion. The moving parent need only show a sincere and

good faith reason for the move. Numerous other cases have examined these criteria since Holder, and they require careful analysis by the prudent practitioner. See, e.g., Cerminara v. Cerminara, 286 N.J. Super. 448 (App. Div. 1996); Rampolla v. Rampolla, 269 N.J. Super. 300 (App. Div. 1993); Winer v. Winer, 241 N.J. Super. 510 (App. Div. 1990).

D. The Court Rules: While several of the Rules of Court for practice in the Family Part will undoubtedly arise in the usual removal litigation, the following warrant particular scrutiny: Rule 5:3-3(a) (the appointment of psychological and other experts), Rule 5:8-1 (custody investigations and visitation plans), Rule 5:8-6 (judicial interviews of children), Rule 5:8A (appointment of counsel for the child) and Rule 5:8B (appointment of a guardian ad litem for the child).

Facts, Strategies and Evidence

There is literally no limit to the issues and facts which bear on the "best interests" of a child. In effect, the only limitations are practical considerations of time, money and the resourcefulness of the client and the attorney. In addition to the statutory child custody factors listed above, the following 25 questions are not intended to be all-inclusive, but rather a beginning point for further development.

1. What is the present and past mental and physical health of the child? What would health care providers testify about the proposed move?

2. To what extent do the children have special or extraordinary medical or physical or educational needs and to what extent can those needs be met and accommodated in the event of removal?

3. What is the preference of the child regarding the move? Is the court likely to consider testimony from the child? Typically, a four year old's alleged preference will not be considered; typically, a fifteen year old's preference will be.

4. What is the actual history of the prior parenting schedule? Have there been prior motions and proceedings pertaining to parenting disputes? To what extent do the parents have a present and past relationship which is otherwise reasonable or amicable, as opposed to hostile or dysfunctional?

5. Is there a prior parenting agreement or a court order? What are the designated guidelines and limitations, if any?

6. Does the child have extended family either in New Jersey or in the intended removal state? What is the nature of the relationship with the extended family?

7. To what extent does the child have relationships with playmates, friends and neighbors? To what extent can these relationships be continued or replicated in the event of relocation?

8. What are the child's educational needs and interests? What are the differences between the existing and the intended schools? What are the child's academic performance records? What would the child's teachers testify about the proposed move?

9. What are the child's after-school activities and interests, such as teams, sports, clubs, hobbies, and scouting? To what extent can these activities be continued in the relocation state?

10. What is the "sincere, good faith" reason for the parent's move? Is there more than one such reason?

11. What is the reason for the opposition to the move? Is there more than one such reason?

12. What is the existing parenting schedule, and how would that schedule be changed by the move? How have holidays, vacations and school recesses been handled in the past?

13. If the move were granted, to what extent could additional parenting time be structured in favor of the parent opposing the move?

14. What are the current employment and other economic circumstances of each parent? How would those circumstances be impacted in the event of removal?

15. What is the cost of living in New Jersey compared with the relocation state?

16. What are the increased travel costs (if any) compared to the (presumed) decreased weekly parenting expenses to the nonrelocating parent?

17. To what extent has the nonrelocating parent fulfilled or failed to fulfill her or his child support or alimony obligations?

18. What is the distance between New Jersey and the removal state?

19. What is the recommendation of the guardian ad litem? 20. What are the recommendations of any court-appointed or privately retained mental health experts?

21. What is the testimony of treating mental health practitioners, whether of the parties or of the child?

22. What are the tangible and intangible factors (such as lifestyle, climate, standard of living, environmental, congestion, crime, etc.) that make up the “quality of life” in New Jersey as compared with the proposed relocation state?

23. Has either parent remarried, or to what extent does either parent have a relationship with another intended life partner? To what extent does such a relationship impact upon the child’s present and future?

24. To what extent has religion played a factor in the child’s prior upbringing?

25. Would it be feasible or practical for the nonrelocating parent to also move to the intended relocation state?

Summaries of New Jersey Removal Cases and Their Decisions:

NEW JERSEY DIVORCE CUSTODY : IN-STATE MOVE

Order permitting the mother to move from Montgomery Township to Manalapan Township and increasing the father's visitation by a weekend per month is affirmed. The parties' children attended Montgomery Township schools, and the mother, who was the parent of primary residence, sought to move closer to her family. The trial court's analysis of the Baures factors was "unassailable," even though it exceeded what was legally required because the move was in-state. Under Schulze, the Baures factors had to be considered to determine whether custody and parenting time should be modified. The trial court correctly concluded that the father should have additional visitation. Vetri v. Vetri, New Jersey App. Div., December 1, 2005

New Jersey Child Removal

Reversing the denial of the New Jersey father's petition for the return of his child from the United States to Australia under the Hague Convention, the appellate court holds that it was error to find that the father consented to the removal or retention of the child under article 13(a) of the Convention, thereby defeating his claim for return. Baxter v. Baxter, United States Court of Appeals, 3d. Cir., September 16, 2005

Hague Convention

Federal courts won't usually hear New Jersey divorce matters, so this case was initially rejected. However, this was a mistake. Here, the facts involved federal statutes under the international Hague Convention. Because these claims were not raised in the pending New Jersey state court custody action, the federal court's involvement would not have interfered with the state court proceedings. Since federal courts are explicitly granted jurisdiction to determine custody disputes under the Hague Convention, the lower court's dismissal is reversed. Yang v. Tsui, ___ F.3d.___ ,(3d Cir. 2005), August 2, 2005.

Sealing The Record

The mother wants to relocate with the children from New Jersey to live with her parents in South Carolina. The father claims that excessive drinking by his wife's family puts the children at risk. Balancing the public interest in an open judicial system and the need to protect private interests, the Court finds good cause has not been shown and denies the motion brought by the grandparents, requesting that the case be sealed pursuant to Rule 5:3-2(b) because the allegations of the defendant, their son-in-law, might harm their reputations. Smith v. Smith, ___N.J. Super.___ (Ch. Div 2005); Chancery Div. Mercer Cy. (Sabatino, J.S.C.), June 18, 2005

New Jersey Divorce : International Child Abduction

In determining a child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction, a court should first inquire into the shared intent of the parents to fix the child's residence, and then inquire whether the evidence unequivocally establishes that the child has acclimatized to the new location. Gitter v. Gitter, ___F. 3d___ (2d Cir. 2005)

New York Relocation

Relocation Checklist: New York

Professionals in the legal field often believe that cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunity are too complicated to be handled within any uniform method. Each relocation request should be considered on its own merits with due consideration of all the relevant facts and circumstances and with an emphasis on what outcome is most likely to serve the bests interests of the child.

New York Court of Appeals, Tropea v. Tropea

In what circumstances may a custodial parent relocate to another state and take the children?

The courts in New York regulate such moves carefully. The factors that the courts consider are numerous and unlimited. They include:

* The reasons for the proposed move, e.g.

- Economic reasons

- Health reasons
- Remarriage
- Fresh start
- Other family members.

* The effect of the proposed move on parental visitation.

* Whether visitation can be suitably revised.

* Any provisions in a separation agreement concerning relocation.

* The disruption of relationships in the event of a move.

* The involvement of each parent and others in the child's life.

* The distance and required travel arrangements involved in the move.

* The living conditions and the educational, recreational, medical and other facilities available in the new location.

* The results of any home studies regarding the parties' current circumstances and the proposed new location.

* The likely psychiatric impact upon the parties and the child if there is a move or change in custody.

* Any violation of prior court orders.

* The impact of the relocation on the noncustodial parent.

* The possibility of transferring custody to the noncustodial parent in order to allow the custodial parent to move.

* The feasibility of a parallel move by the noncustodial parent.

* The good faith of the parent requesting the move.

* The child's attachments to each parent.

* The lifestyle of the child in each location, including emotional, educational, and economic factors.

* The effect of hostility between the parents in each location.

* The effect on grandparent and other extended family relationships.

* The safety of the child and the safety of either parent from physical abuse by the other parent.

* The preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision.

* The needs of the child.

* The stability of the home environment offered.

* The quality and continuity of the child's education.

* The fitness of the parents.

* The geographical proximity of the parents' homes.

* The extent and quality of the time spent with the child prior to or subsequent to the separation.

* The parents' employment responsibilities.

Jacqueline Scott Sheid had been a typical mother on the Upper East Side of Manhattan. Divorced and with a young daughter, she quickly remarried, gave birth to a son, and interrupted her career to stay home with the children while her husband, Xavier Sheid, worked on Wall Street.

Last year, Xavier Sheid lost his job and felt his only career option was in California. But Jacqueline Sheid's ex-husband, who shares joint legal custody of their daughter, refused to allow the girl to move away. So Jacqueline Sheid has spent most of the past year using JetBlue to shuttle between her son and husband on the West Coast and her daughter (and ex) on the East.

She hoped the New York court system would help her family resolve the problem, but it has cost her tens of thousands of dollars in fees for court-appointed experts, she said, and it has helped to prolong the process by objecting to her choice of lawyers.

Worst, she added, "they are making me choose between my children."

She is caught up in what legal experts and social scientists say may be the most debated and fastest-growing kind of custody litigation in the country today: relocation cases. Also termed “move-aways,” these involve a parent who wants to move with a child regardless of the other parent's objections.

Mostly fathers (who now have a greater impact on their children’s daily lives than in earlier decades) are refusing to allow their children to move out of town. This forces mothers -- who have physical custody of children about 80 percent of the time -- to remain in the same city. It is mainly mothers who are fighting back with legal means.

Relocation "is the hottest issue in the divorce courts at the moment," said Judith S. Wallerstein, a leading expert on divorce from Marin County, Calif., who is in favor of the rights of mothers to move.

There are no reliable statistics on these cases, but the highest courts in at least seven states have taken on relocation cases in the past three years, and lawyers say they represent just a small part of the custody issue.

"We tell people, the best parent is both parents, and it's hard to be a long-distance parent," said David L. Levy, president of the Children's Rights Council, a proponent for fathers' rights and joint custody. "There are 15 million noncustodial fathers in this country, and 3 million noncustodial mothers. They shouldn't be marginalized."

The United States is a highly mobile society; a 2000 Census Bureau survey found that in a 12-month period, 43.4 million people changed residences. Americans have become more likely to move longer distances, the survey found, and divorced people are far more likely to move than those who are married.

Relocation cases are resolved in favor of "the best interests of the child," but what that exactly means is debated. In many states, including New York, judges have a list of factors to consider, but no clear way to weigh their importance.

Laws on relocation differ state by state, though judges hearing such cases usually begin in a traditional way, weighing whether one parent is more fit than the other. Then the judge has to assess the motives for the proposed moves and for the objections. Does the parent who wants to move have a compelling reason, or is she just trying to keep the child away from the father? Does the parent who opposes the move really want to be involved with the child, or is he just trying to control his ex-wife? Is parental alienation syndrome involved? All of these factors will be considered.

In New York, the High court, the Court of Appeals, has held in the Troppea(1) Case that the right of a custodial parent to relocate is determined based upon a "best interest of the child" approach; an approach that has proven itself enormously worthwhile in so many other arenas involving custody. Each relocation request must be considered on its own, with consideration of all the relevant facts and circumstances and with predominant emphasis on what outcome is most likely to serve the best interests of the child. While the rights of the parents are significant factors that must be considered, the rights and needs of the children must be accorded the greatest weight. The relationship between parent and child is different after a divorce and our High Court has stated that "...it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit." In some cases, the interests of the child might be better served if the court grants visitation which maximizes "... the noncustodial parent's opportunity to maintain a positive nurturing relationship while enabling the custodial parent ... to go forward with his or her life."

These factors the court will consider include, but are not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. Even where the move would leave the noncustodial parent without what may be considered "meaningful access," relocation may still be allowed by weighing the effect of the quantitative and qualitative losses that will result against such factors as the custodial parent's reasons for wanting to relocate and the benefits that the child may enjoy or the harm that may ensue if the move is or is not permitted. While economic or health reasons continue to provide a basis for permitting the relocation, a second marriage of the custodial parent or opportunity to improve her or his economic situation, is now also a valid reason for permitting the relocation if the overall impact on the child would be beneficial. The custodial spouse's remarriage or wish for a "fresh start" can suffice to justify a distant move because of the value to the children that strengthening and stabilizing the new, post-divorce family unit can have.

The Court of Appeals suggested that where the non-custodial parent is interested in securing custody, and a child's ties to the noncustodial parent and to the community are so strong as to make a long-distance move undesirable, the availability of a transfer of custody, as an alternative to forcing the custodial parent to remain "may have a significant impact on the outcome." Unsympathetic tones toward the plight of the non-custodial parent are voiced by the Court however, when it offers that, "where the custodial parent's reasons for moving are deemed valid and sound, the court in a proper case might consider the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent's mobility."

Other factors enumerated by the Court of Appeals, which appear to have been systematically developed with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life are:
1. the good faith of the parents in requesting or opposing the move;

2. the child's respective attachments to the custodial and noncustodial parent;

3. the possibility of devising a visitation schedule that will enable the noncustodial parent to maintain a meaningful parent-child relationship:

4. the quality of the lifestyle that the child would have if the proposed move were permitted or denied;

5. the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents;

6. the effect that the move may have on any extended-family relationships; and

7. any other facts or circumstances that have a bearing on the parties' situation.(1)

(1) The court stated that a geographical relocation restriction agreed to by the parties and included in their separation agreement might be an additional factor relevant to a court's best interests determination.

Oklahoma Relocation

Relocation Notification of Children: Definitions and Requirements

1. "Change of residence address" means a change in the primary residence of an adult;

2. "Child" means a child under the age of eighteen (18) who has not been judicially emancipated;

3. "Person entitled to custody of or visitation with a child" means a person so entitled by virtue of a court order or by an express agreement that is subject to court enforcement;

4. "Principal residence of a child" means:

a. the location designated by a court to be the primary residence of the child,

b. in the absence of a court order, the location at which the parties have expressly agreed that the child will primarily reside, or

c. in the absence of a court order or an express agreement, the location, if any, at which the child, preceding the time involved, lived with the child’s parents, a parent, or a person acting as parent for at least six (6) consecutive months and, in the case of a child less than six (6) months old, the location at which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period; and

5. "Relocation" means a change in the principal residence of a child over seventy-five (75) miles from the child's principal residence for a period of sixty (60) days or more, but does not include a temporary absence from the principal residence.

B. 1. Except as otherwise provided by this section, a person who has the right to establish the principal residence of the child shall notify every other person entitled to visitation with the child of a proposed relocation of the child's principal residence as required by this section.

2. Except as otherwise provided by this section, an adult entitled to visitation with a child shall notify every other person entitled to custody of or visitation with the child of an intended change in the primary residence address of the adult as required by this section.

C. 1. Except as provided by this section, notice of a proposed relocation of the principal residence of a child or notice of an intended change of the primary residence address of an adult must be given:

a. by mail to the last-known address of the person to be notified, and

b. no later than:

(1) the sixtieth day before the date of the intended move or proposed relocation, or

(2) the tenth day after the date that the person knows the information required to be furnished pursuant to this subsection, if the person did not know and could not reasonably have known the information in sufficient time to comply with the sixty-day notice, and it is not reasonably possible to extend the time for relocation of the child.

2. Except as provided by this section, the following information, if available, must be included with the notice of intended relocation of the child or change of primary residence of an adult:

a. the intended new residence, including the specific address, if known,

b. the mailing address, if not the same,

c. the home telephone number, if known,

d. the date of the intended move or proposed relocation,

e. a brief statement of the specific reasons for the proposed relocation of a child, if applicable,

f. a proposal for a revised schedule of visitation with the child, if any, and

g. a warning to the nonrelocating parent that an objection to the relocation must be made within thirty (30) days or the relocation will be permitted.

3. A person required to give notice of a proposed relocation or change of residence address under this subsection has a continuing duty to provide a change in or addition to the information required by this subsection as that information becomes known.

D. After the effective date of this act, an order issued by a court directed to a person entitled to custody of or visitation with a child shall include the following or substantially similar terms:
"You, as a party in this action, are ordered to notify every other party to this action of a proposed relocation of the child, change of your primary residence address, and the following information:

1. The intended new residence, including the specific address, if known;

2. The mailing address, if not the same;

3. The home telephone number, if known;

4. The date of the intended move or proposed relocation;

5. A brief statement of the specific reasons for the proposed relocation of a child, if applicable; and

6. A proposal for a revised schedule of visitation with the child, if any.

You are further ordered to give notice of the proposed relocation or change of residence address on or before the sixtieth day before a proposed change. If you do not know and could not have reasonably known of the change in sufficient time to provide a sixty-day notice, you are ordered to give notice of the change on or before the tenth day after the date that you know of the change.

Your obligation to furnish this information to every other party continues as long as you, or any other person, by virtue of this order, are entitled to custody of or visitation with a child covered by this order.

Your failure to obey the order of this court to provide every other party with notice of information regarding the proposed relocation or change of residence address may result in further litigation to enforce the order, including contempt of court.

In addition, your failure to notify of a relocation of the child may be taken into account in a modification of custody of, visitation with, possession of or access to the child. Reasonable costs and attorney fees also may be assessed against you if you fail to give the required notice.

If you, as the nonrelocating parent, do not file a proceeding seeking a temporary or permanent order to prevent the relocation within thirty (30) days after receipt of notice of the intent of the other party to relocate the residence of the child, relocation is authorized."

E. 1. On a finding by the court that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation of the child or change of residence of an adult, the court may order that:

a. the specific residence address and telephone number of the child or of the adult and other identifying information shall not be disclosed in the pleadings, other documents filed in the proceeding, or the final order, except for an in camera disclosure,

b. the notice requirements provided by this article be waived to the extent necessary to protect confidentiality and the health, safety or liberty of a person or child, and

c. any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the best interest of the child.

2. If appropriate, the court may conduct an ex parte hearing pursuant to this subsection.

F. 1. The court may consider a failure to provide notice of a proposed relocation of a child as provided by this section as:

a. a factor in making its determination regarding the relocation of a child,

b. a factor in determining whether custody or visitation should be modified,

c. a basis for ordering the return of the child if the relocation has taken place without notice, and

d. sufficient cause to order the person seeking to relocate the child to pay reasonable expenses and attorney fees incurred by the person objecting to the relocation.

2. In addition to the sanctions provided by this subsection, the court may make a finding of contempt if a party violates the notice requirement required by this section and may impose the sanctions authorized for contempt of a court order.

G. 1. The person entitled to custody of a child may relocate the principal residence of a child after providing notice as provided by this section unless a parent entitled to notice files a proceeding seeking a temporary or permanent order to prevent the relocation within thirty (30) days after receipt of the notice.

2. A parent entitled by court order or written agreement to visitation with a child may file a proceeding objecting to a proposed relocation of the principal residence of a child and seek a temporary or permanent order to prevent the relocation.

3. If relocation of the child is proposed, a nonparent entitled by court order or written agreement to visitation with a child may file a proceeding to obtain a revised schedule of visitation, but may not object to the proposed relocation or seek a temporary or permanent order to prevent the relocation.

4. A proceeding filed pursuant to this subsection must be filed within thirty (30) days of receipt of notice of a proposed relocation.

H. 1. The court may grant a temporary order restraining the relocation of a child, or ordering return of the child if a relocation has previously taken place, if the court finds:

a. the required notice of a proposed relocation of a child as provided by this section was not provided in a timely manner and the parties have not presented an agreed-upon revised schedule for visitation with the child for the court's approval,

b. the child already has been relocated without notice, agreement of the parties, or court approval, or

c. from an examination of the evidence presented at the temporary hearing there is a likelihood that on final hearing the court will not approve the relocation of the primary residence of the child.

2. The court may grant a temporary order permitting the relocation of the child pending final hearing if the court:

a. finds that the required notice of a proposed relocation of a child as provided by this section was provided in a timely manner and issues an order for a revised schedule for temporary visitation with the child, and

b. finds from an examination of the evidence presented at the temporary hearing there is a likelihood that on final hearing the court will approve the relocation of the primary residence of the child.

I. A proposed relocation of a child may be a factor in considering a change of custody.

J. 1. In reaching its decision regarding a proposed relocation, the court shall consider the following factors:

a. the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person, siblings, and other significant persons in the child's life,

b. the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child,

c. the feasibility of preserving the relationship between the nonrelocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties,

d. the child's preference, taking into consideration the age and maturity of the child,

e. whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating person,

f. whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity,

g. the reasons of each person for seeking or opposing the relocation, and

h. any other factor affecting the best interest of the child.

2. The court may not:

a. give undue weight to the temporary relocation as a factor in reaching its final decision, if the court has issued a temporary order authorizing a party seeking to relocate a child to move before final judgment is issued, or

b. consider whether the person seeking relocation of the child has declared that he or she will not relocate if relocation of the child is denied.

K. The relocating person has the burden of proof that the proposed relocation is made in good faith. If that burden of proof is met, the burden shifts to the nonrelocating person to show that the proposed relocation is not in the best interest of the child.

L. 1. After notice and a reasonable opportunity to respond, the court may impose a sanction on a person proposing a relocation of the child or objecting to a proposed relocation of a child if it determines that the proposal was made or the objection was filed:

a. to harass a person or to cause unnecessary delay or needless increase in the cost of litigation,

b. without being warranted by existing law or was based on frivolous argument, or

c. based on allegations and other factual contentions which had no evidentiary support or, if specifically so identified, could not have been reasonably believed to be likely to have evidentiary support after further investigation.

2. A sanction imposed under this subsection shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The sanction may include directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the other party of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

M. If the issue of relocation is presented at the initial hearing to determine custody of and visitation with a child, the court shall apply the factors set forth in this section in making its initial determination.

N. 1. The provisions of this section apply to an order regarding custody of or visitation with a child issued:

a. after the effective date of this act, and

b. before the effective date of this act, if the existing custody order or enforceable agreement does not expressly govern the relocation of the child or there is a change in the primary residence address of an adult affected by the order.

2. To the extent that a provision of this section conflicts with an existing custody order or enforceable agreement, this section does not apply to the terms of that order or agreement that govern relocation of the child or a change in the primary residence address of an adult.

43 O.S. §112.3

Preference of Child Considered in Custody or Visitation Actions

A. In any action or proceeding in which a court must determine custody or limits of or period of visitation, the child may express a preference as to which of its parents the child wishes to have custody.

B. 1. The court shall determine whether the best interest of the child will be served by the child's expression of preference as to which parent should have custody or limits of or period of visitation rights of either parent. If the court so finds, the child may express such preference or give other testimony.

2. If the child is of a sufficient age to form an intelligent preference, the court shall consider the expression of preference or other testimony of the child in determining custody or limits of or period of visitation. The court shall not be bound by the child's choice and may take other facts into consideration in awarding custody or limits of or period of visitation. However, if the child is of a sufficient age to form an intelligent preference and the court does not follow the expression of preference of the child as to custody, or limits of visitation, the court shall make specific findings of fact supporting such action if requested by either party.

3. There shall be a rebuttable presumption that a child who is twelve (12) years of age or older is of a sufficient age to form an intelligent preference.

C. If the child expresses a preference or gives testimony, such preference or testimony may be taken by the court in chambers without the parents or other parties present. If attorneys are not allowed to be present, the court shall state, for the record, the reasons for their exclusion. At the request of either party, a record shall be made of any such proceeding in chambers.

43 O.S. §113

Oregon Relocation

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

JASON WAYNE COOKSEY,

Respondent,

and

CHRISTY J. COOKSEY,

Appellant.

02DM0133; A123987

Appeal from Circuit Court, Coos County.

Richard Barron, Judge.

Argued and submitted April 25, 2005.

Robert S. Hamilton argued the cause for appellant. With him on the briefs was deSchweinitz & Hamilton.

David A. Dorsey argued the cause and filed the brief for respondent.

Before Landau, Presiding Judge, and Armstrong, Judge, and Breithaupt, Judge pro tempore.

LANDAU, P. J.

Affirmed.

LANDAU, P. J.

At issue in this case is whether it is in the best interests of the child to modify a parenting plan to permit mother to move with the child from North Bend to Klamath Falls. The trial court found that it is not in the best interests of the child to permit the relocation. Mother appeals, advancing three assignments of error: (1) the court erred in failing to determine whether the proposed move presented a substantial change of circumstances; (2) the trial court erred in concluding that it is not in the best interests of the child to permit the relocation; and (3) the court's failure to permit the modification of the parenting plan violates her "constitutional rights to travel and selection of abode." We conclude that (1) under ORS 107.102(3)(f), parenting plan modifications expressly are to be based solely on the best interests of the child and require no showing of a substantial change of circumstances; (2) on de novo review, ORS 19.415(3), the trial court did not err in finding that it is not in the best interests of the child to permit the relocation; and (3) mother's constitutional contentions are not preserved. We therefore affirm.

In 1998, mother and father married in Klamath Falls. They were 20 years of age. Mother had custody of a four-year-old child from a previous relationship. Mother's extended family resided in the Klamath Falls area, while father's extended family resided in the Coos Bay area. At the time of the marriage, father was working full time as an apprentice plumber. Mother was enrolled at the Oregon Institute of Technology, where she was studying to be an x-ray technician.

In 2000, the parties moved to the Coos Bay area so that mother could begin an externship. Their child, TC, was born in February the following year. Mother completed her bachelor's degree, and, in November 2001, she passed her national registration examination. She then began working full time.

The parties separated in January 2002, and the marriage was dissolved by stipulated judgment of dissolution in July of that year. Under the terms of the judgment, mother was awarded legal custody of TC, and father was awarded parenting time. The parenting plan detailed in the judgment provided that father was to have parenting time with TC every other weekend from Friday evening to Sunday evening, three hours every other Wednesday evening, and additional time during various holidays and vacation periods.

Sometime in 2003, mother decided that she wanted to move with TC to Klamath Falls "to be close to my family, school friends, church friends, and that is where I was born and raised." She said that, in addition, she wanted to be better able to offer support for her own mother, who had been diagnosed with multiple sclerosis some years earlier and whose quality of life was expected to be adversely affected at some point in the future. Mother informed father of her intentions in August 2003. Father then moved for an order to show cause why he should not be granted sole custody of TC, subject to a revised parenting plan. Mother responded that, although she opposed a change of custody, she did not oppose a change in the parenting plan in light of her planned move to Klamath Falls. The trial court issued a show cause order. In the meantime, father remarried. His current wife has a son and a daughter from a previous marriage; at the time of trial they were, respectively, seven and five years old.

The parties agreed to a custody evaluation. The evaluation was performed by Mazza, a licensed clinical social worker with approximately 13 years of private practice experience performing custody and parenting plan evaluations. Mazza has extensive experience as an expert witness in custody matters and has prepared approximately 140 evaluations. In this case, his evaluation included interviews with and observations of mother, TC, mother's (by then) nine-year-old daughter from the previous relationship, father, father's new wife, and the latter's two children. Mazza also administered various psychological tests to the parties, reviewed the parties' answers to written questions, and contacted references provided by the parties. We discuss the details of the evaluation when we reach the testimony adduced at trial. At this juncture, suffice it to say that Mazza concluded that it is in the best interests of the child for the status quo to be maintained, that is, that mother should retain custody of TC, but that she also should not move with TC to Klamath Falls. In response to the evaluation, father withdrew his motion for a change of custody, and the case proceeded to trial on the sole question whether it is in the best interests of the child to move with mother to Klamath Falls.

Mother testified at trial that she grew up in Klamath Falls and that, when she was choosing locations for her externship, she requested Klamath Falls but was unable to obtain a position there. She testified that she wanted to move back to Klamath Falls because her mother's health was failing. She explained that her desire to move was not based on any objection to or dissatisfaction with father's current parenting time. Mother testified that she had enrolled her daughter in school there and had sold her residence in the Coos Bay area. Mother agreed that, if she were permitted to move to Klamath Falls, father could have TC for one week per month or every other week from Thursday through Sunday, as well as for other occasions such as school events. She also agreed to cooperate in transporting TC for his visits, including meeting father halfway between Coos Bay and Klamath Falls. Nothing in mother's testimony, however, addressed how she thought the move would affect TC or how she thought the move would be better for the child. Likewise, she offered no testimony as to how the proposed move would affect her own parenting, whether she thought that the move would enable her to offer better care for TC, or whether remaining in North Bend would in some way adversely affect her ability to care for the child.

As pertinent here, father testified regarding TC's activities during visits to father's home and TC's relationship with father's new wife, stepchildren, and extended family members. He also testified regarding his own experiences of having an absent father while growing up. Father testified that having to travel to Klamath Falls to pick up TC on Thursday nights would have a negative impact on his employment.

The parties stipulated to the admission of Mazza's evaluation. In relevant part, Mazza's report stated that mother and father are

"two biological parents living in close proximity to each other, co-parenting their child successfully during a challenging time in their lives. The parents are decent people who love and cherish [TC] very much. No data resulting from this investigation militate strongly against either parent * * *. Each parent has adequate resources both financial and psychological. In terms of those factors which relate to the likely future happiness of [TC] such as security, stability, continuity of care, love, family unity, tolerance, and ultimately, support of independence, these parents are currently providing what could be considered stable circumstances for [TC] while in the midst of difficult legal proceedings.

"* * * * *

"Both parents have demonstrated a strong commitment to help [TC] grow up physically and emotionally healthy. They have provided a continuity of relationship that is both warm and nurturing. They have provided opportunities for the development of individuality and facilitated social and emotional competence in [TC].

"[Father] demonstrates a number of qualities that would make a good parent. He possesses an ongoing relationship and continuity of involvement with his son from infancy onward, and demonstrated his motivation and ability to provide physical care, guidance, and affection. While he has been clearly less involved than mother in the day to day upbringing of the child, he has nonetheless been actively involved in [TC's] care, contributed much to his successful upbringing thus far, and is a central part of his life. The data also indicate that [TC] has the capacity to utilize and positively profit from the combination of characteristics father has to offer. The bond that exists between father and [TC] speaks strongly for the importance of maintaining the continuity of their relationship which is valuable to each of them. Maintaining this relationship in a healthy context will be important to [TC's] psychological development.

"While both parents have a deep psychological bond with [TC], the data indicate that [mother] has established her role as the primary parent to the child. She has demonstrated a consistent nurturing history with [TC]."

As we have noted, Mazza's report included a recommendation that custody of TC remain with mother. Mazza's report, however, concluded that that recommendation should not suggest that relocation to Klamath Falls is in TC's best interest:

"In this particular case it would be an error for the child's relocation to be solely predicated upon or automatically follow from an award of custody. The interests of the child would be better served if the custody and relocation issues are explored as distinct variables deserving of discrete consideration and judgment.

"[TC] clearly needs his mother at this point in his life and she emerges as the best candidate for primary custodian yet she has expressed a strong commitment to relocate the child, an act that would diminish the opportunities available to him and eclipse his best interests."

Mazza's report noted that mother's primary reason for wanting to return to Klamath Falls was to "return to a supportive family of origin and other support networks" in that city and, secondarily, to assist her mother. The report questioned "whether mother's purpose for moving is substantially achievable without moving," however.

Mazza's report noted the possibility that not permitting mother to relocate could cause her to be a less effective parent in the Coos Bay area. It nevertheless concluded that "the data do not suggest that [mother] would be psychologically impaired if she were unable to relocate at this time."

In addition, Mazza's report considered the possibility that a move to Klamath Falls would be better for TC. The report concluded, however, that "[t]he data do not support that there would be a substantial improvement in the overall quality of life for [TC] with such a move." To the contrary, Mazza's report concluded:

"The data indicate the impetus for [mother's] move is more closely related to her own interests than to the best interests of [TC]. A strong, consistent theme running through the literature on divorce and child custody emphasizes that the best interests of children are served by parenting time plans and custody arrangements that promote frequent and continuous contact with both parents. Mother's rationale for moving does not rise to a level of significance which would outweigh the costs to [TC] of compromising a close, healthy relationship he currently has with his father where he experiences and benefits from father's ongoing involvement in the child's life. A move of this magnitude runs counter to a parenting time plan that promotes a close and continuing relationship with both parents, particularly as [TC] moves into subsequent developmental stages where educational, social and recreational activities become increasingly important. With a move, [TC] would potentially be required to travel a minimum of nine hours over the course of father's every other weekend parenting time. Mother stated, 'although the travel time may be long, it would be the same as if [father] had custody and I lived in Klamath Falls. I understand that it would be ideal if both of us stayed in the same town, but I don't think the traveling time is detrimental to [TC].' In addition, the data suggest that the child has established ties in the Coos Bay/North Bend area with a variety of family members. A distant move would significantly reduce [TC's] exposure to the resources found in father's kinship system."

Mazza also testified at trial. He explained that a child's development is enhanced by a "close and continuing" relationship with both parents. He also testified that he believed that, for younger children, more frequent visits--such as midweek visits rather than visits of one week per month--are especially important. Mazza characterized the bond between father and TC as an "above-average, positive emotional bond" and testified that TC has a "significant" emotional bond with father that "needs to be maintained. That's important for him." Mazza testified that the extent of a child's integration into a noncustodial parent's home could be indicative of the impact that relocation might have on the child and that TC's integration into father's home and family--for example in respect to toys, clothing, and other items maintained there for his visits-- was "above average." However, he also testified that, although it was "preferable" that mother remain in the North Bend area, it was "not a wide margin" and that, if mother and TC moved to Klamath Falls, TC was "not going to be psychologically harmed." Finally, as pertinent here, Mazza opined that mother's plan to move reflected her own needs more than those of TC.

The trial court found that it is not in TC's best interest to move to Klamath Falls and ordered mother not to relocate the child. In a detailed, six-page, single-spaced letter opinion, the court explained the basis for its decision. The court noted that, among other things, it was "very impressed with the evaluation done by Mazza. It was very comprehensive and thoughtful. The court finds both his report and his testimony credible." The court noted that it was particularly impressed with descriptions from all witnesses regarding father's relationship with TC; the court found that "father has a very strong bond with the child and has developed the bond because he has been and is an involved and good father."

As we have noted, mother advances three assignments of error on appeal. Her first assignment is that the trial court erred in evaluating whether it is in the best interests of TC to move to Klamath Falls without first determining that there has been a substantial change in circumstances. Father responds that the change of circumstances "rule" applies to determinations whether to change custody, but not to parenting plans. According to father, under ORS 107.101 and ORS 107.102, the ability of a parent to relocate is an aspect of a parenting plan, the standard for which is the best interests of the child. ORS 107.101(5); ORS 107.102(3)(f), (4)(b).

Father is correct. ORS 107.102 provides that, in any proceeding to modify a judgment providing for parenting time, there must be developed and filed with the court a general or detailed parenting plan. A "detailed" parenting plan may include, among other things, provisions relating to residential schedules; holiday, birthday, and vacation schedules; and "relocation of parents." ORS 107.102(3)(f). The parties can agree to such a detailed parenting plan, or the court may be called upon to develop one if requested by the parties or if the parties are unable to agree. ORS 107.102(4). In developing such a parenting plan--which expressly includes provisions relating to the relocation of parents--"the court may consider only the best interests of the child and the safety of the parties." ORS 107.102(4)(b) (emphasis added).

Thus, a party who seeks to prevent a custodial parent from relocating--thereby necessitating a change in the applicable parenting plan--without seeking a change in custody of the child need not demonstrate that there has been a substantial change in circumstances since entry of the original judgment. See Cole v. Wyatt, 201 Or App 1, 7, 116 P3d 919 (2005) ("[T]he modification of parenting time does not require a showing of a substantial change in circumstances."); Meader and Meader, 194 Or App 31, 45, 94 P3d 123, rev den, 337 Or 555 (2004) ("Our case law establishes that changes in visitation between parents are governed by an assessment of the best interests of the child, without requiring a showing of change of circumstances."(Emphasis omitted.)); see also Smith and Smith, 290 Or 567, 571, 624 P2d 114 (1981) (same); Compton and Compton, 177 Or App 68, 74, 33 P3d 369 (2001) (same). The trial court did not err.

Mother's second assignment of error is that the trial court erred in evaluating the best interests of the child, TC. It bears noting that mother's argument does not actually address whether, in fact, it is in the best interests of TC to move to Klamath Falls. Instead, mother's argument is that parents should be permitted to relocate unless the opposing party has established that relocation would be harmful to the child. As mother states in her brief: "Our society in Oregon, as well as the entire nation, is an increasingly mobile society. The courts, including Oregon courts, have generally allowed moves by the custodial parent unless detriment to the child can be proven."

Father responds, in effect, that mother's entire argument proceeds from a false premise, namely, that the law permits custodial parents to take children where they please in the absence of proof that moving would actually harm the children. According to father, while that certainly is the law in some--a minority--of states, it is not the law in Oregon. Citing ORS 107.102(4)(c) and Willey and Willey, 155 Or App 352, 963 P2d 141 (1998), among other cases, father contends that the law in Oregon is that relocation is authorized only when it is shown that such a move is better for the child than the status quo. Father argues that there is, as the trial court found, no evidence that moving TC to Klamath Falls is better for the child than remaining in the Coos Bay area.

We begin with an examination of the relevant legal principles. A custodial parent does not have the authority unilaterally to relocate with a child more than 60 miles away from the noncustodial parent. ORS 107.159(1) provides that dissolution judgments must include "a provision requiring that neither parent may move to a residence more than 60 miles further distant from the other parent without giving the other parent reasonable notice of the change of residence and providing a copy of such

notice to the court." That notice enables the noncustodial parent to obtain a "status quo" order under ORS 107.138 pending a hearing on whether the court should approve the relocation.

As we have noted, under ORS 107.102(4)(b), when a trial court is charged with determining whether to approve a relocation, "the court may consider only the best interests of the child and the safety of the parties." In this case, there appears to be no issue concerning the safety of any party; the sole matter in dispute is whether it is in TC's best interests to move with mother to Klamath Falls.

ORS 107.137 lists various factors that the court must consider in determining the best interests of a child in custody cases. We know of no reason why those same factors would not be relevant to a determination of the best interests of a child in a case involving relocation only. See Compton, 177 Or App at 74 (citing ORS 107.137 factors in evaluating dispute over relocation of child). Among the factors listed in the statute are the emotional ties between the child and other family members, the interest of the parties in and attitude toward the child, the desirability of continuing an existing relationship, the preference for the primary caregiver of the child, and the willingness and ability of each parent to facilitate a close and continuing relationship between the other parent and the child. ORS 107.137(1).

Also relevant is the legislative injunction that in establishing a parenting plan, the court "shall recognize the value of close contact with both parents and encourage, when practicable, joint responsibility for the welfare of [the] children and extensive contact between the minor children of the divided marriage and the parties." ORS 107.105(1)(b); see also Cole, 201 Or App at 8 ("Generally, courts attempt to promote a strong relationship between children and their noncustodial parents."); Sundberg and Sundberg, 150 Or App 349, 355, 946 P2d 296 (1997), rev den, 326 Or 464 (1998) (same).

A number of decisions of the Supreme Court and our own court have applied the "best interests of the child" standard in the context of relocation disputes, and a review of those decisions may serve to give helpful content to its demands. Meier and Meier, 286 Or 437, 595 P2d 474 (1979), is usually regarded as the starting point for a discussion of the issue, and, because it established several analytical benchmarks that continue to be employed to this day, we devote some detailed attention to the decision.

In Meier, the mother had been awarded custody of the parties' child. She moved for a modification of the dissolution judgment allowing her to take the child with her to Ontario, Canada. The mother explained to the court that job opportunities in Oregon were limited in her particular field and that she had been offered a lucrative position in Ontario. The mother had strong family ties in Canada and felt that the influence of her extended family would be beneficial for the child. She explained that the child had a reading disability and that special tutoring would be available in Ontario. Id. at 439-41. The father opposed the motion, contending that he and the child had a very good and warm relationship that would be adversely affected by the proposed relocation. Id. at 441. The trial court granted the mother's motion, and the father appealed. Id. at 441-42.

This court affirmed, holding that custodial parents should be permitted to relocate with their children as they choose, so long as the relocation poses no danger to the children. In that particular case, we explained, "This child is capable of adjustment and Canada is a civilized nation in which it appears from afar that children are able to live wholesome lives. The prospective move poses no danger to the health or safety of the child which requires judicial anticipation." Meier and Meier, 36 Or App 685, 690, 585 P2d 713 (1978).

The Supreme Court reversed. The court began by declaring that, in determining whether a parent may relocate with a child outside of the state, the "paramount consideration" is "the best interests of the child." Meier, 286 Or at 445 (emphasis in original). The court then elaborated that "[i]t is also well-

settled in Oregon that in making the determination of the best interests of the child, the trial judge is in a far better position to weigh the various factors which enter into the problem, and his [or her] decision should not lightly be disturbed by a court on appeal." Id. at 446. Quoting an earlier decision, Perly and Perly, 220 Or 399, 401, 349 P2d 663 (1960), the court stated that the decision of a trial court in such cases, "'when tested by appeal, comes here weighted with the presumption that the court has properly exercised its judicial discretion in determining what is for the best interest of the child.'" Meier, 286 Or at 446.

Turning to the decision of this court, the Supreme Court concluded that we had erred by applying the wrong standard. The court explained that our opinion had inappropriately focused on the "right" (the Supreme Court's quotation marks) of a custodial parent to move, when we should have focused on whether the move was best for the child. "The Court of Appeals," the court observed, "did not make a determination that the interests of the child would be better served by permitting his removal to Canada than by refusing permission for such a move." Id. at 447-48 (emphasis in original). In so doing, the court held, we had "misse[d] the mark." Id. at 448.

Two years later, in Smith and Smith, 290 Or 567, 624 P2d 114 (1981), the Supreme Court confronted another relocation dispute. In that case, the trial court had determined that the mother's request to relocate the children to California was not in the children's best interests. The court had concluded that, although the mother had done "an excellent job with the children," they were also doing well with the father during his parenting times. Id. at 571. A custody evaluator had recommended against the move. Id. at 571-72. The mother appealed, and we affirmed without opinion. The Supreme Court affirmed. Its analysis, in its entirety, is as follows: "[W]hen we hear a case upon petition from review from the Court of Appeals we regard the decision of the trial court on the issue of what is in the best interests of the child as highly persuasive. We, therefore, affirm the decision of the Court of Appeals." Id. at 572 (citation omitted).

In Willey, we relied on the foregoing case law in determining whether it was in the best interests of the child to move with the mother to Massachusetts. The mother had been awarded custody of the child. Before the dissolution judgment had been signed, however, the mother informed the father that she wished to move with the child to the East Coast. The trial court entered a supplemental judgment restraining the mother from taking the child out of state. On appeal, the mother argued that the trial court had erred in imposing the restriction. Willey, 155 Or App at 354.

Citing Meier, we stated that the controlling inquiry is whether the move to Massachusetts was in the best interests of the child. Willey, 155 Or App at 354. We then explained:

"Determining whether to impose a restriction is addressed to the sound discretion of the trial court.

"On our de novo review, we do not disturb the court's determination here that the restriction is in the child's best interest. At trial, wife took the position that her daughter would benefit from living near her extended family in Massachusetts, but we agree with the trial court that wife's family could not replace the important contact that child has with husband. We need not detail the evidence that demonstrates that husband has been actively involved in the care of his daughter and is a central part of her life. The testimony of the examining professionals showed that [the child] is equally attached to both parents and needs frequent contact with each. Wife does not demonstrate how the child's best interests are served by her plans for the move[.]"

Id. at 354-55 (citations omitted).

Notwithstanding the rather broad and deferential language of the cases, we do not simply rubber-stamp trial court decisions as to the best interests of the child in relocation cases. In Colson and Peil, 183 Or App 12, 51 P3d 607 (2002), we reversed a trial court's decision to modify custody from the

custodial parent, who desired to move with the children to Missouri, to the noncustodial parent, who desired to remain in Oregon. We concluded that the trial court had erred because the move had been contemplated at the time of the original dissolution and was not an unanticipated change in circumstances. Id. at 22. Albeit in dictum, we added that, even if the proposed move had constituted a change in circumstances, we would have concluded that the move was in the best interests of the children. Id. at 24. The record in that case demonstrated that both children would benefit from the move and, in particular, that school programs in Missouri would better meet the special needs and interests of the children than programs in Oregon. The son, for example, had a learning disability and was faring poorly in Oregon; his teacher acknowledged that he needed a "change in academic focus" and that a new environment might be beneficial. Likewise, the daughter had a special interest in ballet, which the record showed could be better fostered in Missouri. The record further demonstrated that the mother had a strong support network in Missouri, that the father's own family lived there as well, and that the father was willing, although reluctant, to move to Missouri. Id. at 23.

More recently, in Hamilton-Waller and Waller, 202 Or App 498, ___ P3d ___ (2005), we reversed a decision of the trial court that, if the mother moved with her fiancé to Holland, custody of the children would be awarded to the father in Oregon. We explained that, for several reasons, we differed with the trial court's conclusion that it was in the best interests of the children to remain in Oregon with the father. To begin with, we emphasized that the children had special needs and that the mother had considerable experience as the primary caregiver in meeting those needs. There was a troubling lack of evidence, we noted, that the father could meet those needs; if anything, we observed, the record suggested that the father had had "poor follow-through" in dealing with the children's needs. 202 Or App at 513-17. In addition, we noted that the record suggested that the mother's ability to care for the children would be enhanced by the move and that enhanced educational opportunities in Holland would benefit both of the children. Id. at 518. Finally, we explained that the custody evaluator who had recommended against the move to Holland was relatively inexperienced, having conducted custody evaluations for only five months at that time, and that her conclusions were based on a relatively limited exposure to the family. Id. at 520-21.

From the foregoing case law, we take the following guidelines. First, the focus is solely on the best interests of the children. More specifically--as the Meier, Smith, and Willey decisions make explicit--the focus is on the question whether the children are "better served" by relocating. Meier, 286 Or at 447-48 (emphasis in original). Thus, we reject mother's contention that the law permits her to move the children unless there is evidence that doing so will harm the children. Mother's argument, in fact, is precisely what we held in Meier--and precisely what, in reversing our decision, the Supreme Court said had "misse[d] the mark." Meier, 286 Or at 448.

Second, in evaluating the best interests of the children, we examine the factors identified in ORS 107.137(1), along with the legislative directive to promote strong relationships between children and their noncustodial parents. Cole, 201 Or App at 8.

Third, we review the trial court's best interests determinations de novo. ORS 19.415(3). There is, to be sure, some very strong phrasing in the cases concerning the "discretion" of trial courts to make such determinations. See, e.g., Meier, 286 Or at 446 (relocation decisions are "weighted with the presumption that the court has properly exercised its judicial discretion in determining what is for the best interest of the child"); Willey, 155 Or App at 355 ("Determining whether to impose a [relocation] restriction is addressed to the sound discretion of the trial court."). Giving such phrasing literal import, however, cannot be reconciled with the statute that controls our standard of review. Instead, we understand the case law to reflect the well-settled principle that, in reviewing trial court decisions that so often involve considerations of credibility and demeanor, we do so cautiously, reversing only for clearly articulable reasons.

With those principles in mind, we return to the record in this case. That record shows that both parents are loving and intimately involved with the care and upbringing of the child. Mother is indeed the "primary caregiver" but, as the custody evaluator reported and the trial court also found, father is especially close to TC and has been continuously involved with the child's upbringing from infancy onward. Mazza also testified that, particularly at TC's age, it is important for his close relationship with his father to continue uninterrupted. Mazza expressed special concern with the loss of mid-week parenting time that would result from the proposed move to Klamath Falls. To be sure, Klamath Falls is not a great distance from North Bend. But, as father and Mazza testified, it is far enough away to significantly--and adversely--alter the nature of father's contacts and, hence, his relationship with TC.

Perhaps most important, as Mazza testified, there is a complete absence of evidence that the move to Klamath Falls would benefit TC in any way. Unlike the circumstances in Colson and Hamilton-Waller--where the records affirmatively demonstrated that the proposed moves would benefit the children--in this case there is nothing at all about the effect on TC of relocating to Klamath Falls or about the effect that the proposed move would have on mother's ability to care for him. The record shows only that mother wishes to move to Klamath Falls so that she can be closer to her family.

In that regard, the facts of this case are materially indistinguishable from those in Willey. As we noted, in that case, both parents were loving and actively involved in the upbringing of their child. The child, in turn, was closely attached to both parents. The mother wished to relocate to be close to her own family. The father objected that the move would adversely affect his relationship with the child. We concluded that there was no evidence showing that the child would actually benefit from the proposed move and, on that ground, affirmed the trial court's decision to restrain mother from relocating with the child. 155 Or App at 355 ("Wife does not demonstrate how the child's best interests are served by her plans for the move[.]").

Again, in this case as well, both parents are loving and actively involved in the upbringing of the child, and the child is closely attached to both parents. Mother wishes to move to Klamath Falls to be close to her own family, but father objects that such a move would adversely affect his relationship with the child. Mother offers no testimony as to how the proposed move will benefit TC or how it will improve her ability to care for him. Under the circumstances, just as in Willey, we cannot say in this case that the trial court erred in concluding that the mother simply did not demonstrate that it is in the best interests of the child to move to Klamath Falls.

Mother's final assignment of error is that prohibiting her from moving to Klamath Falls with her child violates her constitutional rights to travel and select a home, which she contends are protected by the Fifth and Fourteenth Amendments to the United States Constitution. Mother, however, did not advance that argument to the trial court, and we will not entertain it for the first time on appeal.

Affirmed.

Pennsylvania Relocation

Relocation cases in Pennsylvania are generally difficult cases to resolve out of court, especially if the distance that one parent is moving to is more than several hours away. Historically, a parent who wanted to relocate with a child or children had to ask the Court for permission. The parent who is moving away had to prove that the move was in the best interest of the minor and that the parent who was moving away was doing so for "pure" reasons and not solely to frustrate the custodial rights of the parent who was not moving.

The cases have changed to a degree recently, although permission by the Court is still required. Now, the Courts have begun to hold that since the minor child has lived with the custodial parent all along, the child would probably be more comfortable moving with the custodial parent and as long as the

reason the parent wants to move is a good reason, the court is more inclined than it used to be to permit the move. A relocation of more than several hours will have a substantial impact upon custody time that the minor child will have with the non-custodial parent since the "every other weekend" norm will be impossible.

The trial of a relocation case, as with any custody trial, is often a very expensive and time consuming task.

Tennessee Relocation

Consistent with the theories espoused in the American Academy proposed Relocation Act, the Tennessee Courts have held that custodial parents cannot be prevented from moving, provided that reasonable visitation is established for the non-custodial parent. When addressing the relocation issue, the Tennessee Courts have held that the burden of proof falls on the parent who files a petition for relief. In the event the non-custodial parent is seeking relief, that parent must show by a preponderance of evidence that removal is adverse to the best interest of the child in order to prevent a move. In the event the custodial parent brings a petition, that parent has the burden of proving that removal is in the best interest of the child, which can be shifted by a prima facie showing of a sincere, good faith reason for the move and that the move is consistent with the child's best interest. Taylor v. Taylor, 849 S.W.2nd 319 (Tenn. 1993). In the Taylor case, the Tennessee Supreme Court reviewed its own law and that of other jurisdictions, in a well written and reasoned overview. As a result, the Court ultimately looked to the best interest of the child to determine whether relocation should be allowed.

Relocation in Tennessee Divorce Law

Tennessee Code Annotated §36-6-108, known as the "Parent Relocation Statute," sets out the course of action for divorced parents when one parent wishes to relocate the child (or children) outside the state or more than one hundred (100) miles from the other parent within the state. The relocating parent is required to send written notice to the non-relocating parent no later than sixty (60) days prior to the move. The non-relocating parent then has thirty (30) days after receiving the notice to object to the court. If the non-relocating parent does not object within thirty (30) days, he or she may not be able to object later.

The statute differentiates between parents who spend substantially equal amounts of time with the child and those who do not. The statute does not require for the time spent with the child to be exactly equal between the parents, only for it to be substantially equal. The Tennessee Court of Appeals, in Monroe v. Robinson, held that the parents spent substantially equal amounts of time with the child when the father had possession of the child for approximately 43% of the time and the mother had possession of the child for approximately 57% of the time. The court, however, concluded in Connell v. Connell, that the parents did not spend substantially equal amount of time with the child when the father had the child for approximately 40% of the time. These decisions demonstrate the individuality of the circumstances in each case. Because neither the statute nor Tennessee case law specifically set out what constitutes substantially equal intervals of time, the court must examine the particularities of the case to determine whether the parents spend substantially equal amounts of time with the child.

If the court finds that the parents spend substantially equal amounts of time with the child, no presumption in favor or against the request for relocation shall arise. Instead, the court determines whether or not to permit relocation of the child based upon the child's best interests. The statute sets out a list of factors which can be used to determine whether the relocation would be in the child's best interest. Some of these factors are: the extent to which visitation rights have been allowed and exercised; whether the primary residential parent, once out of the jurisdiction, is likely to comply with

any new visitation arrangement; the love, affection and emotional ties existing between the parents and child; the stability of the family unit of the parents.

The statute, however, designates a different procedure for parents who do not spend substantially equal amounts of time with the child. If the parent proposing the relocation spends the greater amount of time with the child, the relocation will not be prevented unless it does not have a reasonable purpose; it would pose a threat of serious or specific harm to the child; or the relocating parent's motive for relocating the child is vindictive as in to defeat the non-relocating parent's right to visitation. The non-relocating parent has the burden of proving that one of these three factors exists. If one of the three listed factors is present, the court will determine whether the relocation is in the child's best interest. The court will consult the factors listed in the previous paragraph to ascertain what is in the child's best interest.

The intent behind the "Parent Relocation Statute" is to prevent one parent from packing up and moving the child without the consent of the non-relocating parent and the court. The statute aims to keep the child's best interest as the most important priority when determining whether relocation is appropriate. The relocation of one of the parents may affect child support and may lead the court to assess the costs of transporting the child for visitation.

The "Parent Relocation Statute," T.C.A. § 36-6-108 (2004), reads as follows:

(a) If a parent who is spending intervals of time with a child desires to relocate outside the state or more than one hundred (100) miles from the other parent within the state, the 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;

(2) Location of proposed new residence;

(3) Reasons for proposed relocation; and

(4) Statement that the other parent may file a petition in opposition to the move within thirty (30) days of receipt of the notice.

(b) Unless the parents can agree on a new visitation schedule, the relocating parent shall file a petition seeking to alter visitation. The court shall consider all relevant factors, including those factors enumerated within subsection (d). The court shall also consider the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. The court shall assess the costs of transporting the child for visitation 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 for visitation.

(c) 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 other 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 consider all relevant factors including the following where applicable:

(1) The extent to which visitation rights have been allowed and exercised;

(2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;

(3) The love, affection and emotional ties existing between the parents and child;

(4) The 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;

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

(6) The stability of the family unit of the parents;

(7) The mental and physical health of the parents;

(8) The home, school and community record of the child;

(9) 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;

(10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and

(11) 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.

(d) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:

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

(2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or

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

Specific and serious harm to the child includes, 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 custodial parent is emotionally disturbed or dependent such that the custodial parent 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 visitation rights of non-custodial 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.

(e) If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interests of the child to relocate as defined herein, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors including the following where applicable:

(1) The extent to which visitation rights have been allowed and exercised;

(2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;

(3) The love, affection and emotional ties existing between the parents and child;

(4) The 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;

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

(6) The stability of the family unit of the parents;

(7) The mental and physical health of the parents;

(8) The home, school and community record of the child;

(9) 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;

(10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and

(11) 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.

The court shall consider the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. The court shall assess the costs of transporting the child for visitation, 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 for visitation.

(f) Nothing in this section shall prohibit either parent from petitioning the court at any time to address issues, (such as, but not limited to visitation), other than a change of custody related to the move. In the event no petition in opposition to a proposed relocation is filed within thirty (30) days of receipt of the notice, the parent proposing to relocate with the child shall be permitted to do so.

(g) It is the legislative intent that 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.

Tennessee Relocation Case Study:

IN THE COURT OF APPEALS OF TENNESSEE

AT JACKSON

November 27, 2000 Session

ELPIDIO PETE PLACENCIA v. LAUREN ROCHELLE PLACENCIA

A Direct Appeal from the Circuit Court for Shelby County

No. 138164 R.D. The Honorable George H. Brown, Jr., Judge

No. W1999-01812-COA-R3-CV - Filed December 27, 2000

This is a post-divorce action involving custody and relocation of the parties' minor child. Father, primary custodial parent, filed a petition to relocate, and Mother filed a petition for change of custody. The trial court awarded custody of the child to Mother, and Father appealed. This Court reversed the custody award and remanded the case to the trial court. Pending application for permission to appeal to the Supreme Court, Mother filed a petition for stay of execution and a temporary injunction and also requested a change of custody based on changed circumstances. After the Supreme Court denied the application for permission to appeal, the trial court entered its order denying Mother's request for a hearing on her petition and denying other relief sought. Mother has appealed to this Court.

Tenn.R.App.P. 3; Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

W. Frank Crawford, P.J., W.S., delivered the opinion of the court, in which David R. Farmer, J. joined, and Holly Kirby Lillard, J. joined with separate concurring opinion

Robert A. Talley, Memphis, For Appellant, Lauren Rochelle Placencia

Edward M. Bearman, James M. Allen, Memphis, For Appellee, Elpidio Pete Placencia

OPINION

Elpidio Pete Placencia ("Father") and Lauren Rochelle Placencia ("Mother") were divorced in May of 1992. The parties marital dissolution agreement, which was later incorporated into the final divorce decree, provided that Father would have custody of the parties' minor child, Megan Placencia ("Megan"), and that Mother would have reasonable visitation with the child. Five years later, Father filed a petition seeking to relocate to Georgia to accept a better-paying job. At that time, Mother filed a petition to prevent Father from removing the child from Tennessee, and seeking a change in custody. The trial court granted Mother custody of Megan, finding a change in material circumstances, and Father appealed. This Court reversed the trial court1, and on September 13, 1999, the Tennessee Supreme Court denied Mother's application for permission to appeal.

Following Placencia I, Mother filed the instant action in Shelby County Circuit Court, alleging additional changes in circumstances warranting modification of custody, and seeking a hearing on Father's intention to relocate with Megan. The trial court denied Mother's petition, finding that the court "took into consideration all issues and factors in the Court's original ruling and the Court of Appeals has spoken to those issues." During the three years the parties pursued legal action in this matter, Megan resided with her mother pursuant to court order.

The parties raise two issues on appeal: (1) Whether the trial court erred in refusing to grant Mother a hearing on her petition to modify custody; and (2) Whether the trial court erred in refusing to grant a hearing on the issue of the removal of the minor child. For the reasons below, we find that the trial court erred in denying Mother a hearing on both petitions.

The trial court's denial of Mother's request for a hearing is a question of law. As such, our review of the trial court order is de novo upon the record with no presumption of correctness accompanying the trial court's conclusions of law. See Tenn. R. App. P. 13(d); Waldron v. Delffs, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998); Sims v. Stewart, 973 S.W.2d 597, 599-600 (Tenn. Ct. App. 1998).

Our Supreme Court has said, "Every man has a right to his day in Court, that is to have a hearing after due notice. . . ." Real Estate Comm'n v. McLemore, 306 S.W.2d 683, 686 (Tenn. 1957). Additionally, the "Open Courts" section of the Tennessee Constitution provides:

That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

Tenn. Const. art. 1, § 17. The Tennessee Constitution also provides:

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Tenn. Const. art. 1, § 8.

Tennessee has long recognized that a parent's right to custody is a fundamental liberty interest which may not be abridged absent due process of law. See, e.g., In re Knott, 197 S.W. 1097, 1098 (Tenn. 1917); State ex rel. Bethell v. Kilvington, 45 S.W. 433, 434 (Tenn. 1898); Neely v. Neely, 737 S.W.2d 539, 542 (Tenn. Ct. App. 1987). Under the authorities cited above, therefore, it would be a violation of Mother's rights if she were denied her day in court on either the petition to modify or the original petition to relocate in this matter. We must, therefore, determine if Mother has been afforded an opportunity to be heard on the petitions which are the subject of this appeal.

We first address the original Petition to Modify Final Decree of Divorce which Mother filed on March 12, 1997 in response to Father's Petition to Relocate. Mother argues that, in its initial ruling on which parent should have custody of Megan, the trial court and this Court pretermitted the issue of

relocation. Mother explains that she has a right to be heard on the issue of whether relocation is appropriate in this case. We agree.

T.C.A. § 36-6-108(d) governs the issue of relocation in a situation where one parent spends greater time with the child than the other parent. That section provides, in relevant part:

(d) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:

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

(2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or

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

Specific and serious harm to the child includes, 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 custodial parent is emotionally disturbed or dependent such that the custodial parent 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 visitation rights of non-custodial 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.

T.C.A. § 36-6-108(d) (Supp. 2000)(emphasis added).

In Placenia I, neither the trial court nor this Court based their rulings on the issue of the propriety of Father's relocation, but disposed of the case on the custody issue of changed circumstances. See 3 S.W.3d at 502-503. Father argues that both courts addressed the relocation by implication in addressing the issue of custody. While, at first glance, this argument has appeal, we feel that the issues involved in allowing a custodial parent to relocate with a child are too important to leave to "implication."

The statute governing relocation specifically sets out three considerations which factor into a court's decision to allow the custodial parent to relocate: (1) a reasonable purpose for the relocation; (2) whether the relocation would pose a threat of specific and serious harm to the child; and (3) whether the parent's motive for the relocation is vindictive. See T.C.A. § 36-6-108(d). The only issue this Court addressed in Placencia I was whether Father's motive for relocating was vindictive. See 3 S.W.3d at 500. This Court noted that it was not. Id.

T.C.A. § 36-6-108(d) does not appear to require specific findings as to the three elements listed above, and we have found no Tennessee case which directly addresses whether such findings are required. However, given the fundamental nature of the interests involved, we hold that the trial court ruling should at least have addressed the issues of "reasonable purpose" and "specific and serious harm" in its opinion in this matter.

Further, we hold that, even if the trial court had addressed all three prongs of the applicable statute, Mother's second Petition to Modify, dated May 25, 1999, should be considered as an amendment to her original response to Father's Petition to Relocate. Mother has alleged certain facts, specifically: (1) that Husband has left his job in Georgia and is attending law school in Topeka, Kansas;2 and (2) that, for the past two years, Megan has resided with her Mother in Tennessee. Whether the proof under these allegations has a bearing on Father's right to relocate is a matter for the trial court to determine. We hold only that Mother should be allowed an evidentiary hearing on Father's proposed relocation.

Even assuming, arguendo, that Mother has had her day in court on the issue of relocation, we hold that the trial court erred in denying her request for a hearing pursuant to her Petition to Modify filed May 25, 1999. As we noted, that petition alleges a material change in circumstances warranting modification of custody. This is a new petition, and alleges new facts which the trial court must consider under T.C.A. § 36-6-101(a)(1)(Supp. 2000), which provides that the issue of custody "shall remain within the control of the court and be subject to such changes or modifications as the exigencies of the case may require." Id. As we noted in Placencia I:

When considering a petition to modify custody, the threshold issue is whether there has been a material change in circumstances occurring subsequent to the initial custody determination. If the trial court determines that there has, in fact, been a material change in circumstances, the court then seeks to devise a custody arrangement that is in the best interests of the child. Absent a material change in circumstances, however, the petition to modify custody must be denied.

3 S.W.3d at 499 (citations omitted). Again, we do not hold that Mother's allegations amount to a material change in circumstances warranting modification of the original decree. We only hold that Mother has a right to present evidence in support of her petition.

Accordingly, the order of the trial court is vacated and the case is remanded to the trial court for an evidentiary hearing on the issue of Father's relocation and on the issue of custody because of changed circumstances subsequent to the date of the Court of Appeals Opinion. Costs of the appeal are assessed to appellee, Elpidio Pete Placencia.

Texas Relocation

Many states have enacted statutes to provide guidance to the trial court in resolving relocation disputes, while others states have left the matter solely to the developing body of case law. States with statutory enactments include California, Illinois, Nevada and Texas.i California's statute permits a custodial parent to relocate with a child so long as the move does not prejudice the rights or welfare of the child. The Illinois statute places upon the relocating party the burden of proving that relocation is in the best interest of the child. Texas takes a somewhat different approach and penalizes the relocating

parent who moves more than 100 miles from the noncustodial parent's home by requiring the custodial parent to pick up and drop off the child at the noncustodial parent's home. The courts in Connecticut do not have the benefit of a clear statutory enactment outlining such things as who has the burden of proof and what factors should be considered by the court in reaching a decision in a relocation case. Moreover, neither the Connecticut Supreme Court nor the Appellate Court has spoken on the issue of post-dissolution relocation. Thus, family law practitioners throughout the state have instead been handling their cases on an ad hoc case by case basis.ii Furthermore, without any Connecticut appellate authority on the subject, the Superior Court has frequently turned for guidance to cases from other jurisdictions. In 1996 alone, the highest courts in California, Colorado, Florida, New York and Tennessee have issued significant decisions in relocation cases.

After separation, many times in a fight, an angry spouse will threaten legal action to remove a child from the parent who has custody. This is an unfortunate choice, which usually leads only to hurt feelings, fear on the part of either the child or the spouse, and continued instability in the household. When faced with this threat, do not give in to fear. Doing so will only produce the exact result the threatening spouse desires to achieve. Rest assured that only if it is in the best interest of the child would a Texas court turn the child over to a noncustodial parent.

Regardless of how hollow the threat may sound initially, it is vitally important to obtain an attorney if the noncustodial spouse files a suit to modify where the child resides. A judge looks at many factors to determine with whom the child should reside. Some of the factors are:

1. Where the child will benefit most psychologically, physically, developmentally, and emotionally;

2. Which parent makes the welfare of the child first priority and can work with the other parent;

3. Which parent will best foster a positive attitude towards the other parent;

4. Which parent spent the most time rearing the child prior to separation;

5. Where do the parents live in proximity to one another; and

6. Where does the child want to live (if 14 or older).

This is not an exclusive list. Any other factor that is relevant to what is in the best interest of the child may be considered by the court in making such a determination. Many times noncustodial parents will threaten to tell the judge bad things about the character of the custodial parent that would tend to persuade the judge abuse or neglect of the child is taking place. Mere accusations of abuse or neglect of a child are not enough for a judge to remove a child from his or her home. However, if credible evidence of abuse or neglect is actually admitted, then the judge has a duty to remove the child from the home. Credible evidence may come in the form of the noncustodial parent’s testimony, but that testimony may be countered by a custodial parent’s own testimony as well. If a custodial parent is well prepared and gives organized, believable testimony that it is in the best interest of the child for him or her to retain custody, a judge is likely to allow the child to remain at home.

Rarely is it in the best interest of a child to be uprooted from a stable home environment (especially if they just got settled from the parents' separation), and judges in Texas are reluctant to move children unless compelling reasons exist to do so. But any action by a noncustodial parent to do so must be taken seriously and acted upon quickly.

1. Relevant Texas Family Code Sections & Leading Case Law

A. Texas Family Code

• §153.001(a)(1) - Public Policy of Frequent and Continuing Contact - The public policy of the Sate of Texas is to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child.
• §153.137 - Standard Possession Order is Presumptive Minimum - The Standard Possession Order under the Texas Family Code constitutes a presumptive minimum amount of time for possession of a child by a parent named as a joint managing conservator who is not awarded the exclusive right to designate the primary residence of the child.
• §153.002 - Best Interest of the Child is Primary Consideration - The best interests of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.
• §105.002 - Jury Issues - Not all family law trial issues may be submitted to the jury. With regard to relocation, in a jury trial:

(1) a party is entitled to a verdict b the jury and the court may not contravene a jury verdict on the issues of:

(D) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;
(E) the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and
(F) if a restrict descried by Paragraph (E) is imposed, the determination of the geographic area in which a joint managing conservator must designate the child primary residence;

B. Significant Texas Family Law Cases

Lenz v. Lenz, 79 S.W 3d 10, German nationals; Jury verdict supported by legally sufficient evidence to meet statutory requirements for modification (positive improvement and in best interest) permitting the mother to have the sole right to determine the primary residence of the child; Courts have recently reassessed the standards for relocation, moving away from a relatively strict presumption against relocation toward a more fluid balancing test (due to increasing geographic mobility and the availability of easier, faster and cheaper communication; Used to be "real advantage" to the parent--now, "good-faith" reason plus child will not suffer from move; Reasons for and against the move, comparison of education, health and opportunities, special needs of children, effect on extended family, effect on visitation and communication with non-custodial parent, unrealistic to assume that divorced parents will permanently remain in same location/each case evaluated on its own unique facts, child's age/community ties, close link between the best interests of the custodial parent and the children/custodial parent's mental state directly impacts on quality of child's life, and possibility and feasibility of parallel move by committed, non-custodial parent

2. Who decides the primary residence of the child?

The parent appointed as the sole managing conservator or the primary joint managing conservator usually has the exclusive right to determine the primary residence of the child. However, Section 153.133 of the Texas Family Code requires parents who reach an agreement for joint managing conservatorship (or the court under Section 153.134(b) when there is no agreement between the parents) to establish the primary residence of the child and either

(1) establish a geographic area for the residence or
(2) specify that the managing conservator may determine the residence without regard to geographic location.

In other words, the managing conservator in many cases does not have free reign in determining the residence of the child without regard to a geographical restriction. For example, the primary residence of the child can be restricted to the county of suit and contiguous counties; or to the State of Texas; or to a specific city in some instances.

3. What is the Texas legislature's general view on relocation?

In general, the Texas legislature encourages frequent contact between parent and child. Section 153.001(a) of the Texas Family Code states:

(a) The public policy of this state is to:

1.) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child;
2.) provide a safe, stable, and nonviolent environment for the child; and
3.) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

4. Who bears the cost of relocation?

Section 156.103 of the Texas Family Code expressly allows the court to allocate increased expenses resulting from relocation "on a fair and equitable basis, taking into account the cause of the increased expense and the best interest of the child." The statute creates a rebuttable presumption that the increased expenses should be paid by the party who is relocating.

5. How do I change my final order or decree to remove the geographical residence restriction?

Many parents file a "motion to modify" requesting the court's permission to move their children to a new location outside of the geographically restricted area. Since the Texas Family Code does not contain specific requirements, guidelines, or statutes applicable to geographic residence restrictions, the issue of relocation will be approached on a case-by case basis after considering the Texas public policy, relevant case law, and social science literature. For further information on the standard requirements to file a "motion to modify", please click here (link to modification issue #5).

6. What factors will the court consider on a case-by-case basis when deciding the relocation issue?

The primary guidelines in determining all relocation cases are the best interest of the child and the existence of a positive improvement for the child taking into consideration the following factors:

* Reasons for and against the move, i.e. does the parent have a vindictive motive such as parental alienation from the other parent, or a good faith motive such as a career opportunity.
* The effect of relocation on the extended family relationships and community ties.
* The effect on visitation and communication with the other parent, i.e. can the other parent maintain a full and continuous relationship with the child.
* Comparison of economic, education, emotional and leisure opportunities for both child and the moving parent.
* The nature of the child's existing contact with both parents.
* Whether the special needs or talents of the child can be accommodated.
* Whether the nonmoving parent has the ability to relocate.

7. What factors will the attorney concentrate on when representing the parent desiring to relocate?

* The other parent's lack of interest in the child.

* Prior connections with the new location, including family, friends, previous residence.
* Alternative visitation schedule possibly increasing contact between the child and the nonmoving parent.
* The benefits to the child, including educational and emotional benefits.
* Your ability to pay the added travel expenses and accompany the child on flights. * Reasons for the move.
* Lastly, it is always important for the client to acknowledge the importance of the relationship between the child and the nonmoving parent as well as their intent to continue to foster that relationship.

8. What factors will the attorney concentrate on when representing the parent trying to prevent the relocation?

The quality of your relationship with the child, including involvement in school and extracurricular activities.

* The detrimental impact on the parent-child relationship.
* Lack of the moving parent's and child's contacts with the new location.
* The reason's for the move, including any vindictive motive of the other parent or the other parent's lack of efforts to find work in the area where the parents already reside since most moves are job-related.
* The stress of the move and fear of travel on the child.
* Lastly, one of the most effective strategies is to show that the other's parent is placing his/her personal desires above that of the parent-child relationship.

9. What happens if I move in violation of the geographical restriction?

Several actions may result in the event a parent violates the geographic restriction. The nonmoving parent may file a "Petition for Writ of Habeas Corpus to Return Child" commanding you or a peace officer to present the child in court. Further, removing a child outside of the geographically restricted area without approval by the court or other parent may be grounds for modifying custody. Lastly, you may be found in contempt of court for violating the geographical restriction and subject to a variety of court-ordered punishment.

Vermont Relocation

In the case of deBeaumont v. Goodrich, 644 A.2nd 843 (Vt. 1994), the Court was faced with a situation relatively similar to that in the Carr case. In both cases, the parents shared parental responsibilities in a joint custodial arrangement. In deBeaumont, the mother sought to remove the children from Vermont, and in fact changed her residence prior to a court determination. Furthermore, the original Divorce Decree provided a provision stating that a parent's move of more than 50 miles from the home state shall constitute a change of circumstance so that the family court may reconsider existing parental responsibilities and visitation. In reviewing the issue of relocation, the Court looked to the best interest of the children and what affect the move would have, prior to upholding the modification by the trial court. In this case, the self-effectuating language was important, as was the parent's co-parenting relationship and the non-custodial parent's strong role in the lives of the children. However, the deBeaumont opinion points out the significance of a relocation clause, since the Court held that relocation is not a significant factor in and of itself which would warrant a change of custody.

Washington State Relocation

The Washington State Legislature has recently passed specific laws concerning the relocation of a child in Washington State. There are now specific guidelines about the process when notice must be given regarding an intent to relocatea child, how one may object to the relocation and how the court will decide if the relocation should be permitted. The non-residential party often desires to place a provision in the final parenting plan that would restrict when and if a child could be moved.

The new relocations laws passed provide a more uniform approach for the courts to follow.

Initiating the process of relocation

Normally, the parent with whom the child resides must give 60 days notice to the other party whenever there is an intention to move the child to another school district. However, if the residential parent could not have known of move within this time, they must give 5 days notice.

The duty to properly object to a notice of intent to relocate

One is required by state law to object within 30 days of the intended move. In all practicality, the sooner the objection is made the better as the other parent and the child may become more committed to the new location.

Emergency exceptions to the notice provisions of the relocation law

An emergency could always be a basis for avoiding many of the requirements of the relocation law. Furthermore, Washington law allows for a delay of 21 days if the relocating person is entering a domestic violence shelter or is moving to avoid a clear, immediate and unreasonable risk to one's health and safety. However, the due process requirements of Washington Courts will evetually require a hearing on the matter before a permant change is permitted.

General provisions

Depending on the facts present, a court may grant or deny a parent's wish to relocate during the objection period, the decision is largely in the discretion of the court. Generally, the relocation action in some respects is nearly as complex as a dissolution action. Temporary orders may be entered, ex parte and emergency orders may be granted as well depending on the circumstance.

In many ways, the new relocation act is very rigid requiring strict compliance with numerous deadlines. At the same time, the procedures involved are very similar to those present in any other modification or dissolution action. One attempting to relocate a child or defend against an attempt should remember the implications of the final orders entered in the divorce and the applicable legal procedures covering family law issues in court in Washington.

Wisconsin Relocation

NOTICE OF RELOCATION

Under Wisconsin Statutes, when a parent seeks to relocate out of the state with a minor child or within the state of Wisconsin at a distance greater than 149 miles from the non-moving parent that parent must first provide NOTICE TO OTHER PARENT. If the existing court order grants periods of physical placement to more than one parent, it shall order a parent with legal custody of and physical placement rights to a child to provide not less than 60 days written notice to the other parent, with a copy to the court, of his or her intent to establish his or her legal residence with the child at any location outside the state.

OBJECTION TO RELOCATION

The other parent then must file an OBJECTION to the relocation within 15 days after receiving the notice of the move. The OBJECTION should be served on the other parent and filed with the court.

STANDARDS FOR ALLOWING OR DISALLOWING MOVE

If the relocation is contested, the Court is bound by certain STANDARDS by which it must decide whether to allow the relocation. There are different standards depending on the facts of the case.

One Parent Has Child Greater Period of Time. If the parent proposing the move or removal has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move or removal may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if the court finds all of the following:
The modification is in the best interest of the child.
The move or removal will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

There is a rebuttable presumption that continuing the current allocation of decision making under an existing legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome only by a showing that the move or removal is unreasonable and not in the best interest of the child. A change in the economic circumstances or marital status of either party alone is not sufficient to meet the standards for modification. Remember, under the statute, the burden of proof is on the parent objecting to the move or removal.

Some FACTORS USED IN COURT'S DETERMINATION include:

(a) Whether the purpose of the proposed action is reasonable.

(b) The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

(c) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

Parent's Share Time Equally. However, if the parents have joint legal custody and have substantially equal periods of physical placement, the matter is litigated under Wis. Stats. §767.327(3)(b), Stats. In such an instance, the parent planning the move does not have the benefit of that presumption against modification. The Court often appoints a custody evaluator and/or a Guardian Ad Litem to help determine what is, in fact, in the best interests of the child. The analysis may look into how much planning has gone into the relocation, the nature of the schools that the child will attend and or the stability of the proposed housing in the new state contrasting those facts with the current situation or the situation that is presented by a change in physical placement.
HOW TO PREPARE

Any request to relocate should be supported by documentation demonstrating that you have though the matter through and that the relocation is in the child's best interest. To prepare, you may wish to include the following:

· NEIGHBORHOOD & SCHOOL. Know where you will be living and describe the benefits of the neighborhood and the schools the child will attend (photos are helpful);

· DAYCARE. Research any daycare facilities that you intend to use and include as part of your motion a brochure or contract from the provider;

· EMPLOYMENT. If you are moving to improve yourself financially, include information regarding your new job or your planned education including any employment contracts or offers, benefit information or brochures.

· HEALTH. If there are any health considerations regarding the move, include those as part of your motion. For example, if you are moving to a warmer climate that benefits asthma (yours or the child's) include that in your motion.

If the Court allows the relocation, it often requires the party moving to pay more of the transportation costs related to visitation.

There is no "standard" visitation schedule when the visitation must occur at a distance. Often, however, the courts grant the non-custodial parent extended access times for fall breaks, spring breaks, Christmas breaks and summer months.

Wisconsin Bill to Change Removal Law:

On Nov. 9, 2005, the Wisconsin Assembly passed a bill by a 57-38 vote that would substantially change Wisconsin’s removal law, greatly restricting a parent’s ability to move with a minor child.

The proposed legislation, AB 400, now goes to the state Senate. Given the wide margin by which it passed the Assembly, absent prompt attention by the Family Law Section of the State Bar of Wisconsin, there is a significant chance that this bill could become the law in Wisconsin.

Under the proposed bill, the “trigger” for notice of removal would be reduced from a proposed move of 150 miles or more from the other parent within the state to 20 miles from the other parent if the parties already live within 20 miles of each other. This “trigger” is in effect regardless of whether the proposed move would affect the placement schedule or not. As a result, there will need to be substantially more removal actions filed with the court (or more likely, many parents in violation of the law).

The proposed law would require a court to find a moving parent in contempt and to pay costs and attorney’s fees if the parent moves with the child without obtaining a temporary order allowing such a move. While current law gives the court discretion as to whether to make these orders, the proposed law would take discretion out of the hands of the court and make a contempt finding mandatory.

The proposed law would also change the burden of proof for removal where the moving parent has the child for the greater period of time, by defining the “greater period of time” to mean physical placement for at least 90 percent of the time. The proposed bill does not define how “90 percent of the time” is calculated.

The bill also makes substantial changes in Wisconsin law where the parents have joint legal custody and substantial equal periods of physical placement. Once again, the proposed bill would make it substantially more difficult for a parent to move with a child, by reallocating the burden of proof in most instances.

In addition, the proposed bill requires that, if the court does not prohibit the move or removal, the court must order that the parent moving pay any additional transportation costs that the other parent will incur as a result of exercising periods of physical placement. Once again, the proposed bill would allow no discretion on behalf of the court.

Removal is a highly-charged issue in family court. On the one hand, we have a highly mobile society and many parents in intact families move constantly. To prohibit a removal may prohibit educational or employment opportunities and leave a parent feeling trapped far away from family and friends.

On one hand, any removal law must also be careful not to violate a right to travel under the constitution. On the other hand, allowing removal may cause an involved, loving parent to become an occasional visitor to a child. Given a lack of financial resources, it can make an involved parent into a distant relative and deprive a child of a loving, caring parent.

As a result, courts need to have a great deal of discretion in these cases. Factors such as the reasons for a proposed removal, the effect on the children and the effect on each parent vary so widely from one case to another that efforts to limit the discretion of the court, such as AB 400 would do, is unduly restrictive on courts. As the Oregon Court of Appeals stated in a recent decision: “We note at the outset that ‘relocation cases’ such as this are among the most difficult cases that the courts are called upon to decide. This is true both factually and legally. It is difficult to formulate a legal test to govern when it is appropriate to allow a custodial parent to move with a child. It is also hard to apply a standard formula to this type of case because there are numerous competing interests and issues and so many variations in particular circumstances.” Hamilton-Waller v. Waller, A120424, Nov. 9, 2005.